



JUDICIAL REVIEW

- An applicant is not entitled to apply for judicial review orders without leave of court.
- Applicant cannot obtain judicial review orders over matters relating to other parties not in the action.
- Where insufficient court fee is paid for the Notice of Motion cannot be considered.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
JUDICIAL REVIEW MISC. 42 OF 2009

IN THE MATTER OF

**AN APPLICATION FOR LEAVE TO APPLY FOR
ORDERS OF CERTIORARI**

AND

IN THE MATTER OF

**SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26,
LAWS OF KENYA**

AND

IN THE MATTER OF

GIITHU ADJUDICATION SECTION

AND

IN THE MATTER OF

**PARCEL NOS. 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988,
2989, 2991, 4035, 4101, 4040, 4058, 3985, 3175, 3176, 2290, 4041 AND 4042**

AND

IN THE MATTER OF

**THE LAND ADJUDICATION ACT CAP 284, LAWS OF
KENYA**

REPUBLIC APPLICANT

VRS.

THE LAND ADJUDICATION COMMITTEE
GIITHU ADJUDICATION SECTION 1ST RESPONDNT
DISTRICT COMMISSIONER
TIGANIA EAST DISTRICT 2ND RESPONDENT
ZACHARY BAARIU M'KAUNGA 3RD INTERESTED PARTY
PETER ETHARIA EX PARTE

RULING

The *ex parte* applicant Peter Etharia approached this court on 17th June 2009 with a Chamber Summons seeking leave to file for judicial review order of *certiorari* to remove to this court for purpose of quashing the decision of the Land Adjudication Committee Giithu Adjudication Section. On that day, the court granted the following orders:-

1. ***That leave is granted to the applicant to institute judicial review proceedings for an order of certiorari to remove to this honourable court for the purposes of being quashed the decision of the Land Adjudication Committee Giithu Adjudication section dated 8/4/2009.***
2. ***That leave granted do operate as the stay of the implementation of the decision of Land Adjudication Committee Giithu Adjudication section dated 8/4/2009.***
3. ***That the leave hereby and consequential orders do lapse unless substantive motion is filed and served within 21 days.***

Particular attention should be given to order No. 3. The 21st day as per order number 3 fell on 8th July 2009. The *ex parte* applicant filed a substantive notice of motion on 7th July 2009. That was within the 21 days period as ordered in order number 3 above. The 1st respondent was served with the substantive Notice of Motion on 10th July 2009. The 2nd respondent was served on 18th August 2009. The interested party was served on 25th July 2009. On 22nd February 2011, the interested party raised preliminary objection on points of law against this action. Firstly it was argued that the Notice of Motion filed by the *ex parte* applicant on 7th July 2009 was fatally defective because it sought for leave to file for orders of judicial review which leave was granted by the court on 17th June 2009. The interested party submitted that leave cannot be granted again having been granted on 17th June 2009. Secondly, it was submitted by the interested party that the service of the substantive Notice of Motion was outside the period set by the order number 3 above of 17th June 2009. The interested party submitted on the 3rd objection that the *ex parte* applicant had brought this action seeking judicial review orders to quash proceedings relating to other persons who are not parties in the case. The preliminary objections were supported by the learned state counsel Mr. Maroro on behalf of 1st and 2nd respondents. The Notice of Motion filed by the *ex parte* applicants on 7th July 2009 is indeed incompetent for seeking leave when leave had already been granted by the court on 17th June 2009. Order 53 Rule 3 (1) of the Civil Procedure Rules 2010 provides as follows:-

“3 (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”

It is clear from that rule that once a party is granted leave as per order 53 rule 1 (1) such a party should file a Notice of Motion seeking the orders for which leave had been granted. As correctly stated on behalf of the *ex parte* applicant, there is on record an application by way of Chamber Summons dated 19th October 2009 seeking leave to amend the Notice of Motion. The amendment which is sought by that applicant is the cancellation of the prayer seeking leave and replacing the same with the prayer seeking orders for judicial review. The Chamber Summons seeking leave to amend the Notice of Motion although filed on 21st October 2009 has not been to date been prosecuted. Even when the matter appeared before court on 18th January 2011 the *ex parte* applicant's counsel was not ready to proceed and sought an adjournment of that application on the basis that he had misplaced a copy of that application from his file. As at now what is on record is the Notice of Motion filed on 7th July 2009. That Notice of Motion wrongly seeks leave to file judicial review orders. I therefore uphold the first limb of the preliminary objection. On the 2nd limb, the 1st and 2nd respondent and the interested party were served with the substantive Notice of Motion on dates set above in this ruling. By the order of this court of 17th June 2009 which is wholly reproduced in this ruling, the *ex parte* applicant was ordered to file and serve the substantive Notice of Motion within 21 days of that order. As said before, the 21st day fell on 8th July 2009. It therefore can be seen that all the parties were served beyond the twenty first day and after 8th July 2009. The effect of that late service as per the court order of 17th June 2009 is that the leave granted to

file judicial review and all consequential orders lapsed. Just for clarity, I will again reproduce order 3 which was made on 17th June 2009 which stated:-

3. That the leave hereby and consequential orders do lapse unless substantive motion is filed and served within 21 days.

The interested party therefore also succeeds on the 2nd limb of the preliminary objection. It succeeded to the effect that since the *ex parte* applicant failed to serve the Notice of Motion within 21 days of the order of 17th June 2009 the leave granted to him and the stay of implementation of the decision of the Land Adjudication Committee Giithu adjudication section of 8th April 2009 lapsed. That is, the orders of leave and of stay were vacated by that failure. On the 3rd limb of the preliminary objection the only reference of other parties being involved in these proceedings is to be found in the *ex parte* applicant's verifying affidavit. That affidavit sworn on 10th June 2009 at paragraph 8 provides is in the following terms:-

8. That sometimes in the year 2008 the process of demarcation started in the area Giithu Adjudication Section when the following parcels were demarcated in my name and that of my children:- 2981,2982, 2983,2984, 2985, 2986, 2987, 2988, 2989, 2991, 4035, 4101, 4040, 4058, 2989, 2991, 4035, 4101, 4040, 4058, 3985, 3175, 3176, 2290, 4041 and 4042.

In the Chamber Summons where the *ex parte* applicant sought leave to file for judicial review orders he stated that he was seeking to quash the proceedings in regard to all the parcels quoted in paragraph 8 of his verifying affidavit. It does therefore seem that the *ex parte* applicant in seeking leave sought it in regard to parcels belonging to other people who are not parties in this action. To that extent, the notice of motion is incompetent. On my own perusal of this action, I found that the court on 17th June 2009 gave leave to the *ex parte* applicant to file for orders of *certiorari* to quash the decision of the Land Adjudication Committee. There was no leave that was granted by the court for the *ex parte* applicant to seek any other judicial review orders. When the *ex parte* applicant however filed the Notice of Motion on 7th July 2009, he sought for orders of *certiorari* and prohibition. No leave was granted to him to seek an order of prohibition. Even in the proposed amended Notice of Motion, the *ex parte* applicant seeks to include the prayer for prohibition order. Order 53 rule 1 (1) provides as follows:-

“53 1 (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”

The *ex parte* applicant is not entitled to file for order of prohibition in the substantive Notice of Motion when leave was not granted to him to seek that order as required by order 53 rule 1 (1). As I considered this matter, I came to the view that there indeed was no ‘redemption’ for the *ex parte* applicant because not only did he fail to do the things that are highlighted in this ruling above but he also failed to pay the correct fee for the Notice of Motion. The “*Guide on Assessment Fees (revised edition 1995)*” provides that for every order of judicial review a party should pay Kshs. 6,000/=. In other words, the *ex parte* applicant should have paid the fee of Kshs. 6,000/= for the prayer of *certiorari* and Kshs. 6,000/= for the prayer for prohibition. The *ex parte* applicant as can be seen from the receipt dated 7th July 2009 only paid Kshs. 560/=. That means that the Notice of Motion on record cannot be considered by the court because the wrong fee has been paid. Section 71 of the Interpretation and General Provisions Act Cap 2 provides as follows:-

“71. (1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.”

It is clear from that section that the court cannot consider the Notice of Motion because the correct fee has not been paid. The Court of Appeal in the case **South Nyanza Sugar Company Limited vs. Samwel**

Osewe Ochillo P/A Ochillo & Co. Advocates Civil Appeal No. 127 of 2003 stated that a plaint was invalid if the fees was not paid for it. The court stated as follows:-

“The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.

Dealing with a similar situation in the Ugandan case of Unta Exports Ltd Vs Customs [1971] EA 648, Goudie, J. stated as follows at page 649 letters E to F:-

I have no doubt whatsoever that both as a mater of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate form which authority has been given to deduct court fees.....”

With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with.”

It therefore becomes clear that the Notice of Motion fails because of non payment of the prescribed court fees. I therefore make the following orders:-

- 1. This case is hereby dismissed for the reasons set above with costs being awarded to the two respondents and the interested parties.***
- 2. The stay of implementation of land adjudication committee Giithu Adjudication Section dated 8th April 2009 is hereby vacated.***

Dated, signed and delivered at Meru this 13th day of April 2011.

MARY KASANGO
JUDGE