



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

JUDICIAL REVIEW NO. 42 OF 2010

**IN THE MATTER OF AN APPLICATION BY SOSPETER KAMBOGO
MWANGI FOR ORDERS OF JUDICIAL REVIEW FOR ORDERS OF
CERTIORARI AND PROHIBITION AND IN THE MATTER OF THE LAND
DISPUTES TRIBUNAL ACT (ACT NO. 18 OF 1990)**

REPUBLIC.....APPLICANT

VERSUS

**KAHURO LAND DISPUTES TRIBUNAL.....1ST RESPONDENT
THE CHIEF MAGISTRATE'S COURT, MURANGA.....2ND RESPONDENT**

EXPARTE SOSPETER KAMBOGO MWANGI

RULING

On 1st November 2010, this court dismissed the Notice of Motion dated 12th July 2010 for want of attendance on the part of the exparte Applicant and his counsel. The exparte applicant is now before this court seeking for the dismissal order to be set aside vide the Notice of Motion dated 12th November 2010. The aforesaid Motion is supported by the affidavit of Geoffrey Maina sworn on the date of the application. When the Motion came up for interpartes hearing, Mr. Wairoma, learned litigation counsel, was permitted to oppose the Motion on the basis of oral submissions without the filing of grounds of opposition or a replying affidavit.

I have considered the grounds set out on the face of the Motion dated 12th November 2010 and the facts deponed in the supporting affidavit plus the oral submissions presented by learned counsels from both sides. It is important to outline the background of the substantive matter in this dispute. The exparte Applicant herein, **Sospeter Kambogo Mwangi**, took out the Motion dated 12th July 2010 in which he sought for the following orders:

1. That this Honourable Court do issue an order of Certiorari to remove and quash the proceedings and Order issued by the Kahuro Land Disputes Tribunal in Kahuro Land Disputes Tribunal case No. 25 of 2010 eth Wambui Kamunya -vs- Nyeri Gitonga.

2. That this Honourable Court do issue an Order of Prohibition to prohibit the chief Magistrates Court Muranga from proceedings with Muranga Land Dispute tribunal No. 39 of 2010, emanating from Kahuro Land Disputes Tribunal Case No. 25 of 2010 or adopting the said decision/order in Kahuro land Disputes Tribunal Case No. 25 as a Judgment of the Court.

3. That the costs of this Motion be provided for.

The aforesaid Motion was fixed for interpartes hearing on 1st November 2010. On that date the Motion was dismissed when the Exparte Applicant and his counsel failed to turn up for the hearing of the application. It is Mr. Wairoma, learned litigation counsel, who prompted this court to dismiss the Motion for want of attendance on the part of the Applicant. The exparte Applicant is now before this court beseeching it to set aside the dismissal order in exercise of its inherent power. The main reason which the Applicant presented to this court for their failure to attend court is that the exparte applicant's counsel had sent his file to the firm of Waweru Macharia & co. Advocates to hold his brief in arguing the Motion but the same did not reach the offices of Macharia Waweru & Co. Advocates in time. It is said the aforesaid file arrived in the aforesaid offices at 11.00 a.m. on 1st November 2010 by which time the Motion had been called out for hearing and subsequently dismissed for want of attendance. This court was implored to set aside the dismissal order to give the exparte applicant a chance to be heard.

Mr. Wairoma opposed the Motion solely on the ground that this court is barred from going back to the Motion under *Section 8 (3)* of the Law Reform Act (Cap 26 Laws of Kenya). Under the aforesaid Section, the law is quite explicit that when the court has made an order in respect of mandamus, prohibition and certiorari, no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal under *Section 8 (5)* of the same Act. I have anxiously considered the ground argued by Mr. Wairoma. With respect, I do not think this court's discretion to deal with the matter is taken away in the circumstances of this case. There is no doubt that the Motion was dismissed on the basis that the Exparte Applicant and his counsel were not in court to prosecute the same. In other words the Motion was not dismissed on its merits after a hearing. *Section 8 (3)* of the Law Reform Act comes into play only when the Motion is heard and determined on its merits. The Exparte Applicant's Motion is therefore competently before this court. The question is whether the Applicant has given plausible reasons to benefit from this discretion. I have looked at the reason advanced by the Applicant's counsel and I am convinced the same is plausible. It is deponed in the affidavit of Geoffrey Maina that the file he sent reached the offices of Waweru Macharia & co. Advocates at 11.00 a.m. on 1st November 2010. By that time, the Motion dated 12th July 2010 had been dismissed for want of attendance on the Applicant's part. In exercise of my inherent power, I hereby set aside the order dismissing the Motion dated 12th July 2010 given on 1st November 2010. Consequently, the Motion dated 12th July 2010 is reinstated. The same to be fixed for interpartes hearing on priority basis. Costs of this Motion to abide the outcome of the substantive Motion.

Dated and delivered at Nyeri this 3rd day of June 2011.

J. K. SERGON
JUDGE

In open court in the presence of Chweya holding brief Makome for Applicant. No appearance for Wairoma for State.