



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. (JR) APPL. NO. 5 OF 2011

**IN THE MATTER OF AN APPLICATION BY HELLEN JEMAIYO MARUS TO FILE A
MOTION ON JUDICIAL REVIEW**

FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT (NO. 18 OF 1990)

AND

IN THE MATTER OF LAND CONTROL ACT CAP 302 LAWS OF KENYA

AND

IN THE MATTER OF CIVIL PROCEDURE ACT AND RULES (CAP 21 LAWS OF KENYA)

AND

IN THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF PARCEL OF LAND KAPSARET/LEMOOK CHEPKATET BOCK 1

AND

IN THE MATTER OF UASIN GISHU DISTRICT DISPUTES TRIBUNAL

AND

IN THE MATTER OF ELDORET CHIEF MAGISTRATE'S COURT AWARD NO. 5 OF 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP. 26 LAWS OF KENYA

B E T W E E N

REPUBLIC..... APPLICANT

VERSUS

CHAIRMAN UASIN GISHU LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JACOB CHEPTARUS CHEBII1ST INTERESTED PARTY

MARTIN CHEPKALUM KAMUREN.....2ND INTERESTED PARTY

HELLEN JEMAIYO MARUS.....EX-PARTE APPLICANT

R U L I N G

By a Notice of Motion dated 15th February 2011 filed by the ex-parte applicant, orders of **Certiorari**, **Prohibition** and **Mandamus** are sought to remove into the High Court and quash the proceedings of the Uasin Gishu District Land Disputes Tribunal and the subsequent judgment entered in terms of the award in Eldoret CMCC. No. 5 of 2010, to prohibit the Chief Magistrate's Court at Eldoret from executing application forms for consent to transfer and to sub-divide land parcel **No. Kapsaret/Lemook & Chepkatet Block 1 (Inder) 56** and the Kesses/Kapsaret land control Board consenting to sub-divide and transfer of the said parcel of land and also to prohibit the District Surveyor and/or planting any beacons or boundaries on the same parcel and further to prohibit the District Land Registrar, Uasin Gishu District, from registering the terms of the said award filed in court on the 28th July 2010 and adopted on the 7th September 2010. The order of mandamus is sought to compel the District Land Registrar, Uasin Gishu District, to delete any entries relating to parcel No. Kapsaret/Lemook & Chepkatet Block 1 (Inder)/56 which might have been entered in consequence of the award in Eldoret CMCC. Award No. 5 of 2010.

Apparently, the application was for final orders yet prayer (4) of the same was for the leave granted to operate as stay pending the hearing and determination of the main motion. It is not therefore clear whether the application was for leave or that it was for final orders after the grant of leave. Be that as it may, the application was fixed for hearing on 10th May 2011 on which date the applicant appeared through the learned counsel, **Mr. Mitei**. Interestingly, learned counsel, **Mr. Kipnyekwei**, appeared through **Mr. Keter** for the first interested party while the learned litigation counsel, **Mr. Ngumbi**, appeared for the respondent. It was only the second interested party who was not present on that day.

The quorum was a clear indication that the application was to be heard inter – parties meaning that it was not an application for leave to file judicial review proceedings for the orders sought. Applications for leave are normally made ex-parte (see, Order 53 Rule (1) of the Civil Procedure Rules).

What transpired on that 12th May 2011 as per the court record is that the application was not heard and was instead stood over to 28th June 2011. Mr. Mitei indicated that he required more time as he had just been served with a replying affidavit. He therefore applied for an adjournment and also for leave to file a further affidavit.

The court granted the application. The court also granted the respondent the liberty to file and serve a replying affidavit within 30 days. In sum, the court granted all the parties leave to file further affidavits. It must be noted that the leave granted by the court was for purposes of filing replying and further affidavits to the substantive application. It was not leave to institute an application for orders of certiorari, prohibition and mandamus as required by Order 53 Rule 1 (I) of the Civil Procedure Rules which provides that;-

“No application for an order of Mandamus, Prohibition or Certiorari shall be made unless leave therefore has been granted in accordance with this rule.”

In that regard, even prior to considering this present application on the merits, the question that begs for an answer is whether the applicant herein sought and was granted leave to file the application?

There is nothing in the court record to show that leave was granted. The application therefore proceeded on the 28th June, 2011 on the assumption that the pre-requisite leave had already been granted. However, there having been no leave and neither was it sought prior to the filing of the application, it would follow that the application was null and void “ab-initio” and ought not have been heard on the 28th June 2011. A party moving the court in exercise of its special jurisdiction under Order 53 of the Civil Procedure Rules must first and foremost obtain the necessary leave. This is a mandatory requirement and failure to adhere to it renders an application incurably defective. Whereas, order 53 of the Civil Procedure Rules provides the procedural law for judicial review applications, the Law Reform Act provides the substantive law for the same.

Under section 9(1) of the said Law Reform Act, leave of the court is necessary before any application is made for an order of judicial review (see, **Republic v.s. Communication Commission of Kenya (2001)KLR 82.**

So, if leave is not first obtained, the whole process becomes anullity.

The present application is a nullity for want of the pre-requisite leave. It is therefore dismissed with costs to the respondent and interested parties.

J.R. KARANJA

JUDGE

(Read and signed this 5th day of July 2011).