



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**JUDICIAL REVIEW NO. 59 OF 2011**

**JOSEPH MUTUNGU NJUGUNA.....APPLICANTS**

**VERSUS**

**MUNICIPAL COUNCIL OF KARATINA.....RESPONDENT**

**RULING**

The Applicant filed an ex parte chamber summons under certificate of urgency on 2<sup>nd</sup> November 2011 and on the same day the same was placed before this court which certified the same urgent granting leave to the applicant to seek by way of judicial review for an order of prohibition, prohibiting the respondents or any other person acting under their behest directions and authority from canceling the applicant's business permit. The court thereafter ordered that the leave operate as stay of proceedings pending the hearing inter partes on 11<sup>th</sup> November 2011 on the issue of stay.

When the matter came up for hearing before me on 11<sup>th</sup> November 2011, Mr. Kioni learned counsel for the applicant raised preliminary objection on the ground that the respondent had filed ground of opposition whereas order 53 does not make provisions for the filing of grounds of opposition and has urged the court to strike out the grounds of opposition filed by the Respondent.

Mr. Wahome counsel for the Respondent opposed the same and has submitted that the applicant by invoking section 3A of the Civil Procedure Act opened the way for him to also invoke the provisions of order 51. Mr. Wahome was of the view that even the applicant should have applied strictly order 53.

Mr. Kioni in support of his objection relied on the authority of Justice R. Wendo in Republic v Kyalo & another ex parte Kyalo reported in [2004] eKLR wherein she held that:-

***“order 53 Civil Procedure Rules does not make any provisions for the filing of grounds of opposition in proceedings for Judicial Review under the said order. All that order 53 rules 4 & 3 provide is that one can file as many affidavits as are necessary to prove his case provided they are served on the other party.”***

In the case of the COMMISSIONER OF LANDS vs KUNSTE HOTEL LTD CA 234/95 the Court of Appeal held that section 8(2) of the Law Reform Act denied the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising civil or criminal jurisdiction. What that means is that the court is neither exercising civil nor criminal jurisdiction under order 53. It would be exercising special jurisdiction”. She therefore upheld the preliminary objection on the same.

I have also had the advantage of looking at the Holding of Justice GBN Kariuki in Republic v Chairman Land Dispute Tribunal & 2 others exparte SHIUMA JACOB MUKALAMA reported in (2006) eKLR wherein the court said:

***“Order 53 of the Civil Procedure Rules which governs the procedure in Judicial Review proceedings does not contain provisions for grounds of opposition. A party to judicial review proceedings must file an affidavit. The provisions for grounds of opposition in order 50 Rule (36)(1) of the Civil Procedure apply to Civil Litigation but not to judicial review which is a special jurisdiction under part VI of the Law Reform Act Chapter 26 of the Laws of Kenya. Although order 53 of the Civil procedure Rules is bond with the Civil Procedure Rules, this is done due to convenience as it applies exclusively to judicial review and ought to be self contained”***

For the above reasons the judge struck out the grounds of opposition.

In Republic v Commissioner of Co-operatives exparte Francis N. Kubia & another reported in (2005) eKLR Nyamu J as he then was quoted with approval NDETE V CHAIRMAN LAND DISPUTE TRIBUNAL & ANOTHER reported in (2002)IKLR 392 wherein Ringera J as he then was held that Civil Procedure Rule 53 is a special jurisdiction as the rules therein are not made under Civil Procedure Act but under provision of section 9 of the Law Reform Act and in that regard order 6 rule 12 of the Civil Procedure Rules that had been cited in the course of arguing the application was not applicable to the proceedings brought under order 55 then which is promulgated in pursuance of the provisions of section 9 of the Law Reform Act and further in WELAMONDI v THE CHAIRMAN ELECTORAL COMMISSION reported in (2002)1KLR 486 Ringera J as he then was held that in exercising the powers under order 53 the court was exercising neither civil nor criminal jurisdiction in the strict sense of the word but was exercising jurisdiction sui generis.

All the above cited authorities are in support of Mr. Kioni’s contention that the grounds of opposition filed by the Respondent are not properly before the court. But there is the issue raised by Mr. Wahome that by invoking section 3A of the Act, the applicant had brought himself to the provision of civil procedure and therefore the respondent had a right under order 51 to file grounds?

To answer this question the court has had the benefit of looking at the holding of Nyamu J as he then was in Republic v Permanent Secretary Ministry Planning & National Development exparte Mwangi S. Kimengi reported in (2006) eKLR wherein he stated.

***That although the applicant has invoked section 3A which is not applicable he has also invoked order 53 rule 4(2) combining them is not fatal because the two are severable”***.

The net effect of the above authority is that I do uphold the preliminary objection by the applicant. The grounds of opposition are hereby struck off with cost, but for the end of justice to be met the respondent is granted leave to file and serve replying affidavits upon the applicant within the next 7 days from the date herein.

Dated and delivered at Nyeri this 25<sup>th</sup> day of November 2011.

J. WAKIAGA  
JUDGE