



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Application 1145 of 2002**

**REPUBLIC. .... APPLICANT**

**VERSUS**

**THE LANDS DISPUTE TRIBUNAL**

**MARAGUA DISTRICT. .... 1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATE COURT, KIGUMO. .... 2<sup>ND</sup> RESPONDENT**

**EXPARTE: WAINAINA MBAYA**

**INTERESTED PARTIES: RAPHAEL WAWERU WAINAINA**

**R U L I N G**

The application before the court is dated 13<sup>th</sup> July, 2009 and is brought by a party who was the Ex Parte applicant in a Judicial Review Application seeking an order of certiorari to recall to the High Court for quashing, a ruling or an award relating to a piece of land.

The facts as the court understands them are that on 10<sup>th</sup> June, 2004 the Judicial Review Application was dismissed by this court on the ground that the applicant's advocate failed to prosecute the application due to persistent failure to serve the Respondents or interested parties.

The applicant further claims that his advocate then acting in this matter, failed to attend court on the material day. He also claims that when the Notice of Motion was dismissed for failure to effect service, his said advocates Wangari & Co. Advocates failed to pass the information of dismissal to him

I have carefully perused the application and the file record. The correct position is that on 10<sup>th</sup> June, 2004 when the Notice of Motion was dismissed, a Mr. Nyakundi appeared for the Ex Parte applicant as he held brief for Wangari Advocate who was his advocate. Mr. Nyakundi sought adjournment on behalf of Wangari who was unable to come to court. Ms Ungu for the Respondent, however explained to that court that the Ex parte applicant had failed to serve the relevant parties as ordered by Ransley, J in the suit. Ransley, J. had stipulated that in default of the service by the next date, the suit would stand dismissed. When Mr. Nyakundi for Wangari could not satisfy the court

otherwise, the court proceeded to dismiss the Notice of Motion.

In my view therefore the matter was not merely dismissed ex parte as argued by the applicant herein because both sides were represented in court.

In these circumstances, the Notice of Motion dismissed on 19<sup>th</sup> June, 2004 was not dismissed ex parte. It cannot therefore be set aside, under any setting aside rules. The applicant must have recognized such a problem because he chose to approach this court under Section 3A of the Civil Procedure Act without as much as mentioning Order IXB Rule 8 of the Civil Procedure Rules which provides for the procedure of setting aside.

On the other hand, this is a matter concerning Judicial Review whose jurisdiction is a special one under Order 53. The applicant needed to convince this court that the court has jurisdiction to revisit an order made under Order 53 aforementioned, to set it aside. Counsel for the applicant chose to say nothing about such jurisdiction. The court has no business saying anything more. Service it by saying that this court has doubt that it has jurisdiction to revisit any final order of dismissal or any other similar order, for that matter, made under Order 53 of the Civil Procedure Rules.

For the above reasons, it is the court's view that this application has no merit and is hereby dismissed without any order of costs.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of February, 2010.

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**D A ONYANCHA**  
**JUDGE**