



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Judicial Review 21 of 2009

REPUBLIC.....APPLICANT

VERSUS

DISTRICT COMMISSIONER – NYANDO
ANDREW MATOKA OKOKO.....RESPONDENTS
RULING

On the 24th of July, 2009 this court granted leave to the ex parte applicant to move the court for orders of certiorari mandamus and prohibition. The said leave was to operate as a stay of proceedings, in that the Minister and or the Director of Land Adjudication or any other persons under him not to proceed to prepare a final register for NYANDO WAWIDHI 'A' 1 Adjudication Section pending hearing of the substantive motion which was to be filed within 21 days of the order.

Pursuant to the said leave the ex parte applicant filed the substantive application by way of notice of motion on the 12th of August, 2009. Pursuant to order 53 Rule 31(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

In the motion the ex parte applicant seeks for the following orders:-

1. That this Honourable court be pleased to issue an order of certiorari to remove into the High Court the decision of the Minister in Case No. 399 of 1996 dated the 26th May, 2009, **Boaz Odhiambo Chumbe VS Andrew Matoko Okoko** in respect of Parcel No. 2429 NYANDO WAWIDHI 'A' 1 Adjudication and adopted in Tamu RMC MISC. CC. NO. 1 OF 2009 for purposes of being quashed.
2. That Honourable court be pleased to issue an order of mandamus to compel the Minister to award the land in dispute NO. 2429 WAWIDHI 'A' 1 Adjudication Section to ex parte applicant.
3. That costs be awarded to the ex parte applicant.

In response to the substantive motion, the interested party filed a notice of preliminary objection on points of law dated the 24th of November, 2009 raising several grounds as follows:-

- i) The application, the Chamber Summons preceding it and indeed all the documents filed in support thereof offend Section 30 of the Land Adjudication Act Chapter 284 of the Laws of Kenya.
- ii) The notice of motion offends the mandatory provisions of Order LIII Rules 3(1) of which require the motion to be filed in a separate Miscellaneous Application from the one in which leave was obtained.
- iii) That by his own admission at paragraph 2 & 3 of his replying affidavit, the ex parte lacks legal locus standi to bring this application (sic).
- iv) That the prayer for certiorari cannot obtain as:-
 - a) The applicant has not complied with the mandatory requirements of order LIII rule 7(1).
 - b) The grant of such an order will be of no practical effect as the Minister simply upheld the decision of the District Land Adjudication Officer which in any event will remain unaffected and binding on the parties even if the Minister's decision is quashed, courts of law do not act in vain.
- v) That the prayer for mandamus cannot obtain because:-
 - a) After the proceedings are quashed, such an order will have no foundation and/or,
 - b) If certiorari is refused then the court cannot substitute its own decision for that of the Minister while at the same upholding its proceedings (Sic).

In considering the issues raised, the court will be guided by the notable case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED VS WEST END DISTRIBUTORS LIMITED**. (1969) E. A at 696 where Sir Charles Newbold set out what can be considered as a preliminary point, he stated in part:-

“ --- A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Does the chamber summons and the notice of motion offend S. 30 of the Land Adjudication Act?

The interested party contends that no consent was sought as required under S. 30 of Chapter 284 of the Land Adjudication Officer, the ex parte applicant contends that they sought the consent which was denied. They referred the court to the verifying affidavit. This in my view is not strictly a preliminary point if the court has to ascertain whether or not the consent was sought.

Secondly is this a civil matter? S. 30 of Chapter 284 provides:-

“30 (1) except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication register for that adjudication section has become final in all respects under S. 29 (3) of the Act.”

Judicial review proceedings are neither civil nor criminal. In exercising its powers under judicial review, the court discharges a special jurisdiction as donated to it by Sections 8(2) and 9(3) of the Law Reforms Act, Chapter 26 of the Laws of Kenya. This was observed in the case of **Commissioner for Lands VS Kunste Hotel**, Civil Appeal No. 234 of 1995 and **Welomondi VS Chairman Electoral Commission of Kenya (2002)** KLR at 486 where Ringera J. held in part:-

“In exercising powers under order 53, the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction suis generis. It therefore follows that it is incompetent to invoke the provisions of Section 3A and Order L Rule 8 of the Civil Procedure Act and Rules and Sections 42, 79 and 80 of the Constitution of Kenya.”

Likewise in this matter S. 30 is not applicable as this is not a civil matter as the court is not exercising its civil jurisdiction and this ground therefore fails.

i) **Does the notice of motion offend the mandatory provision of Order LIII rules 3(1)?**

“The said order provides when leave has been granted to apply for an order of mandamus, prohibition and certiorari. The application shall be made within 21 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.”

Counsel for the interested party contends that the notice of motion ought to be filed in a different Miscellaneous Application. He cited the case of **R -VS- FUNYULA LAND DISTRICT TRIBUNAL (2004)** 1 KLR at 585.

The ex parte applicant on the other hand submitted that the procedure is to file the notice of motion under the same cause. Order LIII Rule 3(1) does not spell out that the notice of motion be filed in a new cause altogether but that after leave, the substantive application will be filed within 21 days. I do agree with the ex parte applicant's counsel that practice is that the notice of motion is filed in the same Miscellaneous cause as the chamber summons seeking leave.

In this regard, the preliminary objection also fails.

ii) **does the ex parte applicant have locus standi to bring this application?**

It is not disputed see paragraph 2 of the verifying affidavit. The ex parte applicant stated:

“2 I am the eldest son of Alex Chumbe though I have not obtained letters of administration herein since the area chief in order to frustrate me, he refused to give me a letter for the court to process the grant saying the Minister's decision is final the consent to file this present suit has in the same breath been maliciously declined ---“

Locus standi is defined in Blacks Law Dictionary, 8th Edition as **“The right to bring an action or to be heard in a given forum.”**

Does the applicant have a right to bring this matter before court?

Order 53 states when the court will grant leave and this is where the applicant has sufficient interest in the matter. This is the only requirement in a judicial review matter. In the case of **Njau VS City Council of Nairobi (1983)** KLR at 625 **Hancox J. A** quoted with approval the case of **Inland Revenue Commissioners VS National Federation of Self Employed and Small Business Ltd (1981)** 2 ALL ER at 93. **in that case the court held:**

“The question whether and the purposes of RSC Order 53 Rule 3(2) an application for judicial review had a sufficient interest in the matter to which the application relates was not except in simple cases where it was obvious that the applicant had no sufficient interest, a matter to be determined as a jurisdictional or preliminary issue in isolation on the applicant's ex parte application for leave to apply. Instead it was proper to be treated as a possible reason for the exercise of the court's direction to refuse the application when the application itself had been heard and the evidence of both parties presented ----“

The question for consideration is whether apart from being an offspring of Alex Chumbe the applicant has sufficient interest in the land subject matter of this suit. This in my view is better placed to be considered at the hearing of the substantive application and again is not a matter for preliminary objection.

Did the ex parte applicant comply with the mandatory requirement of Order LIII Rule 7(1).

Order LIII Rule 7(1) provides:-

“In the case of an application for an order of certiorari to remove any proceedings for the purposes of their being quashed, the applicant shall not question the validity of any order, warrant commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verifying affidavit with the Registrar or accounts for his failure to do so to the satisfaction for the High Court.”

From the court record it is clear that on the 23rd of July, 2009 lodged with the Registrar the application for leave pursuant to Order LIII Rule (3) however there is no indication that the ex parte applicant complied the mandatory requirement of Order LIII Rule 7(1) and to extend the preliminary objection succeeds.

It is my view that grounds IV (a) will need to be ascertained by considering the facts of the matter and cannot form a basis for preliminary point.

The net effect for the ruling is that the preliminary objection succeeds on account of ground IV (a) since the first ground of the

said notice of motion fails, the court cannot grant prayer II of the same.
The application is therefore dismissed with costs.

DATED AND DELIVERED IN KISUMU ON 23.04.2010.

ALI-ARONI

JUDGE

In the presence of:

Mr. Nyanga Advocate present for plaintiff

N/A for defendants.

AAA/hao