THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
MISC. CIVIL APPLICATION NO. 178 OF 2008

IN THE MATTER OF LAND DISPUTES ACT

AND
IN THE MATTER OF RIGOMA LAND DISPUTES TRIBUNAL
AND
IN THE MATTER OF KEROKA RESIDENT MAGISTRATE COURT
AND
IN THE MATTER OF AN APPLICATION BY PETER ISABOKE OBAO FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

PETER ISABOKE OBAO …….……. APPLICANT

AND

RIGOMA DIVISIONAL LAND DISPUTES TRIBUNAL ….1ST RESPONDENT
S.R.M'S COURT KEROKA ……...…… 2ND RESPONDENT

AND

MICHAEL NYAMWEYA ONDICHO ……..……. INTERESTED PARTY

RULING

On or about the 4th December, 2008, **Peter Isaboke Obao** obtained leave of court to commence judicial review proceedings in the nature of certiorari to remove into this court and quash the proceedings and award of Rigoma Land Disputes Tribunal, "***the 1st respondent***" dated 5th August, 2008 in land disputes tribunal case no. 4 of 2008, **Michael Nyamweya Ondicho** V **Peter Isaboke Obao**. He also prayed that leave be granted for an order of certiorari to remove into this court and quash the proceedings in Keroka

SRM's court ***"2nd respondent***" being **Misc. application No. 16 of 2008** that adopted the award as a judgment and decree of the court. Finally, he prayed that he be granted leave to apply for an order of prohibition to prohibit the 2nd respondent from issuing a decree or enforcing or executing any such decree.

The uncontested facts leading to the application were that sometimes in the year 2008, **Michael Nyamweya Ondicho**, ***"the interested party"***, lodged a claim against the applicant, his own brother with the 1st respondent claiming that he had blocked a pathway that he used to access the road. As a result of the acts of the applicant aforesaid, the interested party and his entire family had been left without access to the main road. He was thus seeking the assistance of the 1st respondent to compel the applicant to reopen the pathway for him and his family use.

In response, the applicant denied having blocked the pathway. All that he had done was to utilize his land for crops.

The 1st respondent having heard and considered the evidence adduced reached the verdict thus:-
"1. The disputed pathway to be set aside and left free for people to pass and ferry items to and from the claimants and the respondent's homes ……:

The applicant was not happy with this outcome. Accordingly he came to this court seeking judicial review orders in terms already stated elsewhere in this ruling.

Once leave was granted, the applicant moved with speed and filed the substantive notice of motion and served the same on the respondents and interested party. However, only the interested party responded by filing a replying affidavit. Where important he deponed that he was the absolute registered proprietor of land parcel **East Kitutu/Bonyamondo/11/71**whereas the applicant was the registered proprietor of **East Kitutu/Bonyamondo/11/639**. The two parcels of land share a common boundary. That the two parcels of land formed part of their fathers' land who before he passed on had subdivided the same between the two of them and established a common path for their use. It is this path that led to a dispute before the 1st respondent which was resolved in his favour. As far as he was concerned the 1st respondent did not order for the survey of the applicant's land but only confirmed that a path of access existed between the applicants and his land. By the 1st respondent confirming the existence of a road it did not order the creation of a path through the applicant's land. The tribunal therefore did not in any way act in excess of its jurisdiction. By commencing those proceedings the applicant was merely seeking to have the interested party and his family landlocked without access to the main road and the market.

When the substantive application came up for interpartes hearing before me on 21st May 2010 **Mr. Gichana** for the applicant and **Mr. Minda** for the interested party, both learned counsel agreed to canvass the application by way of written submissions. They later filed and exchanged the said written submissions which I have carefully read and considered.

However, this application is bound to fail not on the merits but on a technicality. The technicality was alluded to in the submissions of the interested party in these terms ***"……The application is incurably defective. Once leave to commence judicial review has been granted a substantial application is filed in the name of the Republic at the instance of the private person as the applicant. In the instance (sic) application the applicant is not the Republic but one Peter Isaboke Obao ….."***

Though the issue was raised by the interested party as aforesaid, there was no reaction to the same from the applicant. If anything he seems to have given it a wide berth in his submissions. It may be that he had no response to the same which strictly is a point of law. It is trite law that initially, proceedings for judicial review are commenced by the applicant personally when he applies for leave to apply for prerogative orders. Once leave has been obtained the Republic comes on board as the applicant in the substantive motion. After all judicial review orders are made in the name of the Republic and not the individual. So that once leave has been granted, the intitulment must change at the Substantive Notice of

Motion stage. At this stage, the applicant must be indicated as the Republic. The matter of form was the subject of the court of appeal decision in the case of **Farmers Bus Service V Transport Licensing Appeals Tribunal (1959) E.A 779.** The court observed ***"……. There is no material difference between the rules relating to prerogative writs in force in Uganda and those in force in Kenya. The ruling in Mohammed Ahmed case therefore applied in Kenya ……"*** In the **Mohammed Ahmed** case the principles governing the form to be used were set out by **Sir Newham Worley** as follows:

"…… This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners offices and in some registries of the High Court. The appellant's advocates appears to have failed entirely to realize that prerogative orders like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the persons who are to comply therewith. Applications for such orders must be instituted and served accordingly. The crown cannot be both the applicant and respondent in the same matter ….." See also ***District Commissioner, Kiambu V. R. Ex-parte Njan (1960) E.A 109 at pg 114F…".***

The foregoing is exactly what has happened in this application. After the leave was granted, instead of the applicant indicating that the application was being made in the name of the Republic, he maintained himself as the applicant thereby making the Republic both the applicant and respondent or not even a party to the application at all. That is not permissible. That omission on the part of the applicant as correctly pointed out by the interested party was incurably defective. One may be tempted to argue that perhaps this should be a fit and proper case which the ***"oxygen principle"*** and or ***"O_2"*** should be invoked for purposes of substantive justice. However, my reaction to that proposition would be that judicial review is a special jurisdiction that is neither criminal nor civil. Accordingly the Civil Procedure rules and rules made thereunder are inapplicable. Neither is the criminal procedure code. So that the oxygen principle may not come in handy.

The end result of the foregoing is that I find the application to be incompetent and incurably defective. Accordingly it is struck out with costs to the interested party.

Ruling dated, signed and **delivered** at Kisii on this 30th June, 2010.

ASIKE-MAKHANDIA

JUDGE