



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MISC. CIVIL APPLICATION NO. 37 OF 2010**

**SOSPETER NJIRU MBITI.....APPLICANT**

**VERSUS**

**MINISTRY OF LANDS & HOUSING.....RESPONDENT**

**R U L I N G**

By a chamber summons dated 30<sup>th</sup> April 2007, one Sospeter Njiru Mbiti moved the court for orders *inter alia*;

***“That this Honourable court be pleased to grant leave to the Applicant, Sospeter Njiru Mbiti to apply for the order of certiorari to quash and set aside the decision or action of the District Commissioner, Mbeere dated 21.3.2003.”***

That Application was premised on order LIII Rules 1, 2 and 4 of the Civil Procedure Rules, Section 3 of the Civil Procedure Act, Law Reform Act Cap 26 of the Laws of Kenya and all other enabling provisions of the law.

That application landed before my sister Wendoh J. who granted leave sought in terms of the above prayer.

The issue of the lawfulness of that leave has been raised by the other counsels in their submissions herein. The said issue is of primary importance in these proceedings because if the court makes a finding that there is no valid leave on record – then the rest of the pleadings must come down like a house of dominos. That is why I feel it is imperative for me to determine that issue before going into the merits of the rest of the motion if that will be necessary.

I wish to point out that in revisiting the orders for leave, I am not in any way sitting on appeal over the orders of a court of concurrent jurisdiction. All I am doing is remedying an error that is apparent on the face of the record. First and foremost I must agree with counsel for the interested party that the Application was badly drafted. It is not properly intituled and it fails to meet the basic parameters as set out in the case of **FARMERS BUS SERVICE & OTHERS VS THE TRANSPORT LICENSING APPEAL TRIBUNAL**.

The Application was for all intents and purposes irredeemably defective and it ought to have been struck out. In fact it did not even have an applicant or Respondent. That was nonetheless not my concern. My concern is the issue raised by counsel for the interested party that the court had no power to extend leave and if there was any extension, then the same was void. I fully agree with that proposition of the law. When I asked counsel for the *ex parte* applicant in court to address me on that issue, she said she was relying on the case of **MAHAJA VS KHUTWALO**. I did inform her that the said case was overturned by the Court of Appeal and undertook to cite the relevant case.

The decision of the Court of Appeal that overturned the Mahaja case is **AKO VS SPECIAL DISTRICT**

**COMMISSIONER KISUMU & ANOTHER (1989) KLR 163** where the Court of Appeal explicitly held;

***“It is plain that under sub-section (3) of Section 9 of the Law Reform Act Cap 26 leave shall not be granted unless the application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically Order 49 Rule 5 which permits for enlargement of time.....We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of sub-section (3) of Section 9 of the Law Reform Act.”***

The Application for leave was filed more than 3 years after the contested decision. That decision however irregular or unprocedural was not amenable to Judicial Review.

The provisions of the Civil Procedure Rules under Section 9 of the Law Reform Act cannot defeat the clear provisions of the sub-section 3 of the same section which imposes an absolute period of limitation.

**(see also RE AN APPLICATION BY GEDEON WAWERU GATHUNGURI (Supreme Court of Kenya at Nairobi) 1962 EA 520).**

The proceedings of 11.5.07 when the said leave was granted clearly shows that the Judge did not address this issue. The order she gave did not have the sanction of the law. It was issued *per incuriam* and I am convinced that in the circumstances the law allows me to set it aside.

The pith and substance of all this is that there was no valid leave granted upon which the notice of motion for quashing of the decision in question could be grounded. On that ground alone, my finding is that there is no competent motion before me which calls for a decision on merit. The Notice of motion dated 30<sup>th</sup> May 2007 is hereby dismissed with costs to the interested party.

**W. KARANJA**

**JUDGE**

Delivered, dated and signed at Embu this 23<sup>rd</sup> day of November 2010

**In presence of:- Mr. Okello or Respondent & Ms. Ndongoro for Ms. Kamau for Applicant.**