REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Misc Appli 134B of 2008

REPUBLIC …..……..……..… APPLICANT

VERSUS

THE CHAIRMAN, KAHURI LAND DISPUTES TRIBUNAL……1ST RESPONDENT

AGNES WAMBUI MWANGI …...…….....2ND RESPONDENT

JUDGMENT

The applicant KIMANI DISHON MUTUGU alias DISHON MUTUGU has filed a notice of motion dated 27th June 2008 brought under Order LIII Rule 3(1) of the Civil Procedure Rules. He seeks order that an order of certiorari do issue to move to the High Court the award of Kahuro Land Disputes Tribunal made on 19th September 2007 for the purpose of quashing the same. Before that application was heard the 2nd respondent Agnes Wambui Mwangi filed preliminary objection in the following terms:-

1. That the application for leave to file a notice of motion for an order of certiorari was filed after the expiry of the six months period contrary to law.

2. That the copies of the statement and affidavit accompanying the application for leave to file the notice of motion has not been served along with the notice of motion dated 27/6/08 as required by law.

3. That the notice of motion dated 27/6/08 is incompetent and misconceived as it quotes the republic as the applicant therein thereby differing with the order given on 16/6/08 and thereby being contrary to the law.

4. That the application is for leave to file notice of motion was filed on 19/3/08 and was prosecuted on 16/6/08 i.e. within a period of 3 months as opposed to the one day notice required by law. This was irregular and improper.

5. And the 2nd respondent prays that the notice of motion dated 27/6/08 be struck out and/or expunged from record."

It should be noted that in argument before this court counsel for the 2nd respondent did not advance objection No. 3 and for that purpose the court in this ruling will assume that the objection in No. 3 was abandoned. It is necessary first to set out the procedure that up to recent times had been adopted at the High Court at Nyeri. In relation to judicial review matters when a party approached the court for leave to file the substantive application that was done on a miscellaneous file. Once leave was granted under Rule 1(2) the substantive application was filed on a new file. Consequently when one would file that an applicant in the substantive application would state at the heading of certain application that leave was

granted. The present application was filed under that system. It therefore follows that the details that were before court when the court considered the application for leave are not before me in this matter. At this stage I shall remind myself of the authority of MUKISA BISCUIT CO. vs WEST END DISTRIBUTORS 1969 EA 696. That authority shows that a preliminary objection raises pure points of law. Law JA observed at 700 that:

"***So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."***

And Newbold P at 701 observed that:

"***The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues."***

Bearing in mind that authority and the system I outline before which related to the filing of judicial review matters I find that I am unable from the material before me to ascertain when the application for leave was filed. As can be seen from objection No. 4 the second respondent stated that the application for leave was filed on 19th March 2008. Bearing in mind that the Land Disputes Tribunal decision was delivered on 19th September 2007 the applicant's application for leave going by the date given by the 2nd respondent was filed on the last day of the 6th Month in compliance with Order LIII Rule 2. That rule requires that the application for leave be made within 6 months. It is immaterial as far as that rule is concerned when the application is actually argued before court what matters is the date it was filed. In this case it was stated that it was argued on 16th June 2008. As stated there is no irregularity in the same being argued a period that is beyond the 6 six months. In respect of objection no. 2 the second respondent argued that she was not served with the statement and affidavit accompany the application. In raising that objection the 2nd respondent is inviting this court to engage in inquiry on what was or was not served on her. Such an objection cannot be raised as a preliminary objection. To allow it to be raised will go contrary to the case of Mukisa Biscuit (supra). It needs to be repeated that in that case Newbold P stated:-

"***It (preliminary objection) cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

That is what the 2nd respondent is asking this court to do. The court declines that invitation and accordingly that objection fails. The counsel for the 2nd respondent raised two other objections that were not contained in the filed objections. He argued that the decision of the tribunal annexed to the application was not verified. In response I will state that LIII does not require the judgment order and decree be verified. The second respondent failed to provide an authority that there is such requirement. That objection also fails. The other objection raised orally before court was that the registrar had not been given one day's notice before the application for leave was heard. In this regard the 2nd respondent relied on the provisions or Order LIII Rule 3 of the Civil Procedure Rules. The 2nd respondent argued that such failure was fatal to the application before court. The applicant in response stated that such failure was not fatal and relied on the Court of Appeal Case Civil Appeal No. 11 of 2003 REPUBLIC vs ISAAC THEURI GITHAE & ANOTHER where the court of appeal had this to say:-

"***Order LIII Rule 1(3), states thus:***

'***The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits;***

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown.'

The rules are silent on the mischief the rule is meant to cure. In England this requirement is only necessary if the application relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein. (See O. 53 Rule 5(3) 1999 Edition Vol. 1 of the Supreme Court Practice – P. 895). In the absence of any explanatory notes for requiring the notice of the application for judicial review being lodged with the registrar, we can only possibly guess what the rules making authority had in mind. It cannot possibly be to warn the Attorney General of the proposed application because had that been so express words would have been used. The object might possibly be to enable the registrar to organize for a judge to hear the application as such an application is always regarded as being urgent. Whatever the object of the provision we are unable to hold that it is mandatory. In our view a failure to comply with that sub-rule is only an irregularity which is curable. The rule is merely directory. That would explain why the rule has a proviso empowering the court either to extend the time within which to comply with the sub-rule or to excuse the failure to comply with it. The power of the court under that rule is discretionary and hence the use of the phraseology "the court may …." The court will be inclined to strike out a suit if the failure to comply with the provision is or would be prejudicial either to the respondent or any party likely to be affected by an order in the application. No such prejudice can be discerned in this matter."

The second respondent did not set out the prejudice she suffered for failing of service on the Registrar. It follows that the objection raised by the 2nd respondent in respect of service on the Registrar fails. The end result is that the objections raised by the 2nd respondent are hereby dismissed with costs being awarded to the applicant.

Dated and delivered this 26th day of January 2009.

MARY KASANGO

JUDGE