



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT MACHAKOS**

**CIVIL MISCELLANEOUS APPLICATION 97 OF 2008**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF SAMMY NZIOKI  
AND JOSEPH KYALO KAVYATI**

**AND**

**IN THE MATTER OF PROVINCIAL APPEAL COMMITTEE APPEAL NO. 100 OF 2006**

**AND**

**IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT MAKUENI**

**BEING LTD NO.2005**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE MAKUENI DISTRICT LAND DISPUTES TRIBUNAL..... 1<sup>ST</sup> RESPONDENT**

**THE EMBU PROVINCIAL LAND APPEAL COMMITTEE .... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH KYALO KAVYATI ..... INTERESTED PARTY**

**AND**

**SAMMY NZIOKI ..... EX-PARTE APPLICANT**

**RULING ON A PRELIMINARY OBJECTION**

1. The objection by the Interested Party is that the Notice of Motion dated 10/6/2008 is defective and should be struck off because it is in breach of Order LIII Rule 3 (i) of the Civil Procedure Rules in that it was filed out of time. A peripheral question is that the Motion is also wrongly intituled as the Republic is

not the Applicant.

2. Both issues are conceded but it is argued that on the first, leave to extend time under Order XLIX of the Civil Procedure Rules can be granted and on the second, leave to file a fresh and/or amended motion can be granted under Section 3A of the Civil Procedure Rules.

3. Sadly, the Motion before me cannot be saved by either of the proposed methods. Neither section 3A of the Civil Procedure Act nor Order XLIX of the Civil Procedure Rules apply to matters instituted under the special procedure set out in Order LIII of the Civil Procedure Rules as the latter Rules are made specially and pursuant to section 8 as read with section 9 of the Law Reform Act.

4. Rule 3 (1) of Order LIII aforesaid provides as follows:-

**“When leave has been granted to apply for an order of mandamus, prohibition or 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.”** *(emphasis added)*

5. In this case I granted leave pursuant to Order LIII Rule 1 (1) on 20/5/2008. The Motion to be filed under Rule 3 (1) should have been filed on or before 12/6/2008. The Motion under attack was filed on 17/6/2008, 5 days outside time and it is therefore not properly before court.

6. Since the issue is conceded, the Notice of Motion dated 10/6/2008 and filed on 17/6/2008 is struck off with costs to the Interested Party.

7. Orders accordingly.

Dated and delivered at Machakos this 27<sup>th</sup> day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Miss Gichuki for Applicant**

**Mrs Nduva for Respondent**

ISAAC LENAOLA

JUDGE