



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE**

**Miscellaneous Civil Application 111 of 2001**

**REPUBLIC.....APPLICANT.**

**VERSUS**

**SABOTI LAND DISPUTE TRIBUNAL COMPRISING OF:-**

**NDIWA KAPKARA**

**SIMON MAKANI**

**WELLINGTON SIMIYU ..... RESPONDENT.**

**SOMOTWO CHEPTENGET**

**SIMON W. WASUSWA**

**MOSES SIMIYU PETRO ..... EX-PARTE.**

**R U L I N G.**

By a Notice of Motion dated 15<sup>th</sup> June, 2001, pursuant to the provisions of Order LIII pursuant to the leave of the court issued on 22<sup>nd</sup> March, 2001, the applicant sought orders:-

1. That the honourable court be pleased to grant to the applicant on order of certiorari/judicial review to remove into this court and quash the decision of the Saboti Land Disputes Tribunal of 30<sup>th</sup> October, 2000 which was read and adopted as the court's judgment in Kitale SPMC's land case No. 8/2001 on 28<sup>th</sup> March, 2001.

2. Costs of this application be provided for.

The application is based on the grounds:

(a) THAT, the applicant was not served with summary claim as provided for in the relevant Act, since none was filed by the 2<sup>nd</sup> respondent.

(b) THAT, the Tribunal did not have jurisdiction to grant the orders of specific performance of the alleged sale as they purported to do in their award.

(c) THAT, the Tribunal had no powers to determine a land dispute where a title deed has already been issued.

(d) THAT, the Tribunal had no powers to decide on a land dispute where there was already a caution.

(e) THAT, the Tribunal did not have power to order specific performance when the 2<sup>nd</sup> respondent has already breached the sale agreement by not paying the full purchase price.

(f) Other grounds are contained in the annexed affidavit of the applicant Moses Simiyu Petro.

By amended Notice of Motion dated 6<sup>th</sup> April, 2006 the applicant, pursuant to the leave of the court granted on 25<sup>th</sup> May, 2001, sought the orders as per the Notice of Motion dated 15<sup>th</sup> June, 2001.

By way of a notice of preliminary objection dated 28<sup>th</sup> November, 2006 the applicant contended:-

1. That the amended Notice of Motion goes beyond the parameters of the leave granted by the court.
2. That the amended Notice of Motion offends the mandatory provisions of order LIII Rule 4 (1) of the Civil Procedure Rules by reason of being accompanied by a new statement of the applicant dated 6<sup>th</sup> April, 2006.
3. That the amended Notice of Motion offends the mandatory provisions of order LIII Rules 7 (1) of the Civil Procedure Rules.
4. That the amended Notice of Motion offends the mandatory provisions of order L Rule 15 (2) of the Civil Procedure Rules.

By a Chamber Summons dated 23<sup>rd</sup> May, 2005, pursuant to section 100 of the Civil Procedure Act and Order VIA Rule 5 and Order LIII Rule 4 (2) of the Civil Procedure Rules, the applicant sought orders that.

1. The applicant be granted leave to amend its Notice of Motion dated 15<sup>th</sup> June, 2001 by including the provisions of Sections 8 and 9 of the Law Reform Act to which this application has been instituted.
2. Costs of the application be in the cause.

The application is based on the grounds:-

- (a) That the amendment is necessary for the purposes of determining the real issues in controversy between the parties.
- (b) That the respondents and the interested party will not be prejudiced.
- (c) It is now established that an application for Judicial Review can be amended.

At the hearing Mr. Kiarie for the second respondent, argued that the Notice of Motion dated 15<sup>th</sup> June, 2001 is incompetent in that:-

1. The order sought is an amendment to the Notice of Motion to the application for Judicial Review. The original Judicial Review application is dated 15<sup>th</sup> June, 2001. To the said amended Notice of Motion has been annexed a new set of statements of facts and verifying affidavit which are new ones. In effect there are two sets of statements: The new verifying affidavit was sworn on 6<sup>th</sup> April, 2006 and the statement of facts is also dated 6<sup>th</sup> April, 2006.

Under Rule 4 of Order LIII, the original statements and verifying affidavit is not part of amended Notice of Motion. That, I was urged, goes against the grain. No leave was neither sought nor obtained to put in a different set of statement or verifying affidavit.

By reason of the foregoing, I was urged to expunge the new statement and the new verifying affidavit. If that is done, it will only leave bear the application which is not contemplated by the provisions of order LIII. The application should therefore be struck out.

Mr. Barongo, for the applicant argued that as matters stand, there is a new statement dated 6<sup>th</sup> April, 2006. Equally, there is a now verifying affidavit sworn on 6<sup>th</sup> April, 2008.

The original statement was dated 15<sup>th</sup> June, 2001 while the original verifying affidavit accompanying it was dated 15<sup>th</sup> June, 2001.

I have carefully analysed the application herein. It is not disputed by the applicant that there is a new statement dated 6<sup>th</sup> April, 2006 and a new verifying affidavit sworn on 6<sup>th</sup> April, 2006. That being the case there are two sets of statement and two sets of verifying affidavit dated and sworn on diverse dates in support of the application. That cannot be.

Accordingly, I order that the new statement dated 6<sup>th</sup> April, 2006 and the new verifying affidavit of even date be are hereby expunged from the records by reason of the fact that under rule 4 of the order LIII, the original statement and verifying affidavit is not part of the cancelled Notice of Motion. No leave was sought or obtained to put a new set of statement or verifying affidavit.

Having struck out the new set of statement and new verifying affidavit, the application is left with no statement in support or verifying affidavit in support. As it were the application as left bare. In the foregoing circumstances the application dated 15<sup>th</sup> June, 2001 is for striking out, which I hereby do.

Dated and delivered at Kitale this 29<sup>th</sup> day of June, 2009.

**N.R.O. OMBIJA.**

**JUDGE.**

Ingosi for 2<sup>nd</sup> Respondent.

N/A for Applicant.