



REPUBLIC OF KENYA
HIGH COURT AT NAKURU
JUDICIAL REVIEW 53 OF 2008

REPUBLIC.....APPLICANT

VERSUS

THE DIVISIONAL LAND DISPUTE TRIBUNAL

NORTH KINANGOP.....1ST RESPONDENT

THE PRINCIPAL MAGISTRATE NYAHURURU LAW COURTS.....2ND RESPONDENT

RUTH W. KAHUNGI.....INTERESTED PARTY

EX-PARTE

NAHASHON MUKUNDI NGUNYI.....APPLICANT/SUBJECT

RULING

This motion was filed in the Constitutional and Judicial Review Division of the High Court at Nairobi on 10th November 2006 and transferred to this court on 17th October 2009, in view of the fact that the suit land is situate in Nyandarua District which falls under this court’s jurisdiction.

Leave to take out these Judicial Review proceedings was granted on 14th November 2006 with an order that such leave do operate as a stay of all proceedings before the Principal Magistrate’s Court, Nyahuruu and any other subordinate tribunal relating to land parcel No.s NYANDARUA/OLARAGWAI/2306 and NYANDARWA/OLARAGWAI/2117, until the determination of the motion. The court also ordered that service of the motion, once filed, together with the stay order, be effected upon the respondents and the Interested Party, after which the parties would then take directions in regard to the hearing and determination of the substantive motion.

On 20th March 2007 the court specifically ordered that the Attorney General be served with all the pleadings within seven days and that the matter be mentioned on 24th April 2007. The same having not been done, the court, at the said mention, extended the time for service by a further 30 days but that did not happen.

When the applicants attended before court (Nyamu J) for directions on 9th April 2008, they intimated to court that they had duly effected service of process upon the 1st and 2nd respondents as well as the Interested Party. They relied on an affidavit of service filed on that date which clearly shows that a mention and a notice of change of advocates had been served on the Interested Party, The District Officer

– Kinangop Division and the Principal Magistrate, Nyahururu (*through the Executive Officer*) on 25th, 26th and 27th March 2008 respectively. Relying on the said affidavit as the evidence of service, the court proceeded to issue directions that all parties do file and serve their respective written arguments and list of authorities within 14 days.

After the file herein was transferred to this court, the applicant appointed fresh counsel who took a mention date for the purposes of filing written arguments as previously ordered. They were allowed a mention on 9th March 2009, a notice of which they served upon the advocates for the Interested Party, the District Officer Kinangop and the Principal Magistrate Nyahururu. An affidavit to that effect was filed on the mention date and directions thereby obtained, to wit: that written arguments be filed on or before 16th March 2009. On 18th May 2009 the applicant alone attended court to take a date for the court’s ruling, stating that the applicant’s written arguments had been filed and the court should proceed to rule on the matter on the basis of those arguments alone, on the presumption that the respondents and the Interested Party had refused to take part in the proceedings despite being put on notice.

As in every case where the court is asked to proceed ex parte, the issue of due notice is of paramount importance. I took time to peruse the entire record to satisfy myself of the fact that the two respondents had deliberately declined to file their written arguments as directed by the court on 9th April 2008 and whether the Attorney General had been served with the record of all pleadings as ordered on 20th March 2007.

The 1st and 2nd respondents are Government officers who, in the matter before court, acted in their respective capacities as servants of the Government and on its behalf. The mode of service on the Government is provided for under **Order V rule 9A** which provides as follows:

“9A(1) The provisions of this order (Order V-Service of summons) shall have effect subject to section 13 of the Government proceedings Act, which provides for the service of documents on the Government for the purposes of or in connection with civil proceedings by or against the Government.” (additions by this court)

Under **rule 2(a) and (b)** such service is to be effected upon the Attorney General in the manner prescribed. **Rule 3** states that personal service is not a prerequisite to the service of documents upon the Government for the purposes of or in connection with any civil proceedings, which documents are defined in rule 4 as including ***“writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.”***

From the evidence on record there is nothing to show that the orders of 20th March 2007 as to service were ever complied with. Clearly the subsequent service of process upon the respondents being contrary to law is not proper and is hereby deemed to be of no effect. I therefore decline to rule on the motion and direct that the applicant do serve the Attorney General as appropriate. This should be done within the next 7 days failing which the stay granted herein shall be lifted and will ipso facto lapse.

Orders accordingly.

Dated, signed and delivered at Nakuru this 25th day of September 2009

M. G. MUGO

JUDGE