



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC APPL. 168 OF 2006

JUDICIAL REVIEW

v Civil Procedure Rules Order LIII rule 1

v Application for leave not properly intituled

v Consequences of non-compliance with Civil Procedure Rules Orders LIII rule 1 Application incompetent.

REPUBLIC.....APPLICANT

V E R S U S

DISTRICT LAND ADJUDICATION OFFICER

MERU NORTH & 25 OTHERS.....RESPONDENTS

STANLEY KABERENGE MATHIU.....EXPARTE APPLICANT

R U L I N G

By a Notice of Motion dated 29th September 2006, and filed on 2/10/2006, the Applicant, one Stanley Kaberenge Mathiu sought leave of the court under Order LIII rule 1 (i) 4, and 5 of the Civil Procedure Rules to bring Judicial Review Proceedings against the decision of the Land Adjudication Officer, Meru North District made on 27th July 2006 in respect of various parcels of land specified in the said Motion, and against 25 other persons described as Respondents in the said Motion.

Leave was granted by this court on 9th October 2006. Following the grant of leave the applicant filed the principal motion on 30th October 2006. On 8.11.2006 the firm of Charles Kariuki & Co. Advocates

entered Appearance on behalf of the 2nd - 8th Respondents, and 20.2.2004 the said firm filed a notice of a Preliminary Objection on a Point of Law on four grounds namely-

- 1) The application is materially defective in form and substance and the Respondents named will apply for the same to be struck out;
- 2) The application is incompetent as the same was filed out of time stipulated by the law and procedure;
- 3) The provisions of the Law Reform Act (Cap 26 laws of Kenya) are not cited contrary to the procedure;
- 4) The application for leave was also incompetent, and defective in form;

The Preliminary Objection on point of law was the subject of written submissions by counsel for the Respondent (2nd, 3rd, 5th, 9th, 16th & 19th dated 16.2.2008 and filed on 7.3.2006 and by also written submissions by Ayub K. Anampiu & Co dated and filed on 27.03.2008. The objection was urged before me on 2.04.2008 by Mr Ondari for Ayub K. Anampiu for the Applicants, Miss Mbiu State Counsel for the 1st Respondent the Land Adjudication Officer whilst Mr. C. Kariuki argued for the 2nd 3rd 5th 9th, 16th and 19th Interested Parties called Respondents. Mr. Ondari told the court that he relied entirely on the Applicants' written submissions of 28.2.2008 Mr. C. Kariuki relied on his written submissions aforesaid which he highlighted and to which submissions Miss Mbiu learned State Counsel associated herself with.

Mr. Kariuki submitted **firstly** that the application for leave was defective because it was lodged by a Notice of Motion contrary to Order LIII Rule 1(2) of the Civil Procedure Rules. **Secondly** the Notice was lodged without a Statement and Affidavit Verifying the Facts contrary to Order LIII rule 1(3). **Thirdly** the person seeking leave was the Republic so no leave to bring Judicial Review proceedings was availed to the Applicant. **Fourthly** leave was granted on 5.10.2006, and the Motion ought to have been filed within 21 days from that date. The motion was filed on 30.10.2006 after the expiry of the 21 days contrary to Order LIII rule 3. **Fifthly** the Motion does not cite the provisions of Section 8 & 9 of the Law Reform Act (Cap 26 Laws of Kenya) **sixthly** the Motion is defective in referring to the Interested Parties as "**Respondents**".

Because those errors and omissions Counsel submitted go to the root of the matter, the Preliminary Objection dated 20.2.2007 and filed on 22.2.2007 be allowed.

There was no response from Mr. Ondari on Mr. C. Kariuki's submissions. He left it all to the court. The following is therefore the court's view and conclusion that the Preliminary Objection on point of Law raised by Mr. C. Kariuki and supported by Miss Mbiu learned State Counsel be allowed. These are the reasons for that conclusion.

Firstly the Jurisdiction for Judicial Review in Kenya is derived from Sections 8 and 9 of the Law Reform Act (Cap 26 Laws of Kenya) **Part VI of that Act is entitled MANDAMUS PROHIBITION AND CERTIORARI** and Section 8(1) thereof says-

8(1) The High Court shall not whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus prohibition or certiorari."

And Sections 9 (1) thereof which donates power to make rules of court to provide for matters relating to procedure of civil courts include power to make rules of court-

- (a) Prescribing the procedure and fees payable on documents filed or issued in cases where an order of mandamus prohibition or certiorari is sought,
- (b) Requiring except in cases specified in the rules that leave shall be obtained before an application is

made for any such order,

(c) Requiring that where leave is obtained, no relief shall be granted and no ground relied upon, except with leave of the court, other than the relief and grounds specified when the application for leave was made;

The **first** point to note therefore is that Order LIII of the Civil Procedure is not a creation of Section 81 of the Civil Procedure Act (Cap 21 Laws of Kenya) but section 9(1) of the Law Reform Act aforesaid. That is the reason why it is customary in well-structured or good pleadings in judicial review to refer to these provisions of the Law Reform Act. In my respectful opinion, however, an application is not so defeated or rendered defective by non-express reference to that Act **provided** the applicant discloses in clear terms, as in this case, that the application relates to, or is one of Judicial Review.

Turning therefore to the substance of the objection, the application by Stanley Kaberenge Mathiu is incompetent for procedural impropriety. Although Notice was given to the Deputy Registrar as is required in Order LIII rule 1(3) of the Civil Procedure Rules, the said notice did not comply with all the requirements of that rule. Such notice is to include copies of the statement and Affidavits. The Notice dated and filed on 22.9.2006 did not contain any such documents. Instead the statement and verifying Affidavit were filed separately on 2.10.2006 together with an equally incompetent Notice of Motion dated 20.9.2006 in which the Applicant sought in the name of the Republic leave to bring Judicial Review proceedings for the order of certiorari to call and quash the decision of the Land Adjudication Officer and that such leave if granted to operate as a stay of the Adjudication Officer's decision.

Secondly an application for leave to bring judicial review proceedings is made **ex parte** to a judge in Chambers, and the Application is required to be accompanied by a **statement** setting out four essential matters, (1) the name and description of the applicant (2) the relief sought and (3) the grounds on which it is (the relief) is sought and (4) affidavits verifying the facts relied on.

In this matter apart from failure to include the said essential matters in the notice to the Deputy Registrar, the Application was purportedly made **ex parte**, in the name of the Republic. The Republic cannot seek leave to review the decisions of its own officers, servants or agencies. The Republic is not the aggrieved party. The aggrieved party is the Applicant, Stanley Kaberenge Mathiu. He is the person seeking leave of court to commence Judicial Review proceedings, not the Republic. To the extent that the Application for leave was made in the name of the Republic the same was incompetent and cannot stand.

For a short but very useful practice note and discussion on this subject, see the case of **FARMERS BUS SERVICE AND ANOTHER VS THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 279** where the Court of Appeal for East Africa held that prerogative orders (now renamed judicial review orders, even in England under the Administration of Justice Act 1938), (See s. 8(11) of the Law Reform Act) are **issued in the name of the crown** (... the Republic) and **application for such orders must be correctly intituled.**" The early Court of Appeal decision in **Mohamed Ahmed vs R. [1957] E.A. 523 (CA)** was followed.

Thirdly Mr. C. Kariuki was also correct in his submission that the substantive motion was filed out of time that is, the 21 days from the date of leave, and date of filing the substantive motion. Leave having been granted on 5.10.2006 the 21 days within which to file the motion for Judicial Review began to run on 6.10.2006, and expired on 26.10.2006, and the last day of filing the Application was 26th October 2006, and not 30.10.2006. The failure to file the substantive motion within the 21 days was also in breach of Order LIII rule 3(1) which says that 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. This too made the application incompetent.

Fourthly and in relation to the form of application for leave Order LIII rule 1(2) requires that such application be made **exparte** to a judge in chambers. In other words it can only be made by a Chamber Summons which by its name is usually heard in Chambers. To the extent that the application for leave was made by a notice of motion, it is also incompetent.

Fifthly, the decision which was to be challenged was only made by one person the Land Adjudication Officer. He is the only respondent. The persons referred to in the application for leave, and the substantive motion as Respondents are not Respondents in law. They made no decision to be quashed. Under Order LIII rule 3(2) they are called **persons directly affected** with the decision being challenged. In our practice in Kenya, we call or refer to them as **interested parties** and not Respondents. To that extent again the Motion violates the said rule, and renders the motion equally incompetent.

For all those reasons the Preliminary Objection on point of Law raised by C. Kariuki is a true point of law. It disposes the matter entirety. It was said so by Sir Charles Newbold – in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs west End Distributors Ltd [1969] E.A. 696 at 701**. The Motion dated and filed on 30.10.2006 is therefore struck out with costs to the 2nd, 3rd 5th 9th 16th and 19th Respondents interested (affected parties) only. There shall be orders accordingly.

Dated, delivered and signed this 2nd day of May 2008

M. J. Anyara Emukule

JUDGE.