



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 183 of 2004

THE REPUBLIC.....PLAINTIFF

V E R S U S

MERU CENTRAL DISTRICT LAND

DISPUTES TRIBUNAL.....1ST RESPONDENT

PATRICK GITONGA KIRIMI.....2ND RESPONDENT

EXPARTE APPLICANT: JUCUBU M'MIRITI M'AMUNDI

JUDICIAL REVIEW

- q Notice to the Registrar to be lodged at least a day before filing of application for leave.**
- q Notice to the Registrar to be accompanied by copies of the statement and affidavits.**
- q Application for leave to be accompanied by statement and affidavits**
- q Incompetent to call an interested party a Respondent Order LIII rules 1(2), (3), of the Civil Procedure Rules.**

R U L I N G

This Ruling relates to a Preliminary Point of law taken out by Charles Kariuki & Co. Advocates, learned counsel for the Second Respondent, Patric Gitonga Kirimi against the exparte Applicant's Motion dated 13th September 2004. The Objection dated 25th March 2008 is founded upon five grounds namely:-

1. There is no valid leave to anchor the Motion dated 13.9.2004.
2. The Statement of Facts and Verifying Affidavit were not lodged as required by the law.
3. notice to the Registrar was never issued and served as required by the law.
4. the application for leave and substantive motion are wrongly intituled.

5. the application is an abuse of the court process and ought to be dismissed with costs”.

In his short written submissions counsel for the second Respondent contends that the Motion dated 13th September 2004 and purportedly filed on 14th September 2004 is fatally defective and is bad in form and is anchored on leave which is a nullity principally on the above captioned grounds and that the application having breached the provisions of Order LIII of the Civil Procedure Rules, is null and void and ought to be struck out with costs.

The arguments by Mr. Kiogora learned counsel for the ex parte applicant will be considered in the discussion on the second Respondents counsel’s Preliminary Objection.

1.0. of Notice to the Registrar

The record shows that the Notice to the Registrar dated 25th August 2004 was lodged on 25th August 2004. Together with notice was lodged a Statement of Facts containing the four essential elements in a statement namely-

- (a) the name and description of the Applicant,
- (b) the facts relied upon,
- (c) the relief sought,
- (d) the grounds on which the relief is sought.

Together with the notice to the Registrar was also attached apart from the Statement of Facts, the Affidavit Verrifying the Facts (wrongly dubbed “Verifying Affidavit in support of an application for Judicial Review) together with annexures thereto, marked “JMMI & JMM2”

Order LIII rules (2) and (3) requires that an Applicant seeking leave to bring judicial Review proceedings must give notice to the Registrar not later than the preceding day, and shall at the same time lodge with the Registrar copies of the statement and affidavits. As noted above, the ex-parte Applicant complied substantially with the requirements of the said provisions. The contention that neither the Statement of Facts nor the Affidavit Verifying the Facts were lodged with the Registrar together with the Notice is not correct.

The Applicant did not however comply with the requirement that the Application for leave be made in the name of the Applicant not the Republic. It is only after leave has been granted that the motion under rule 3(1) of Order LIII, is brought or made in the name of the Republic. The history behind this requirement is explained in the case of FARMERS BUS SERVICE AND ANOTHER VS TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 779, that certiorari, mandamus and prohibition were prerogative orders, and until the power to grant them was ceded by the crown or monarch to Judiciary, they were the preserve of, and only the Crown could grant any of them. In our situation the Crown has been replaced by the Republic, which by the Motion begs its subjects in the High Court of Justice, to remedy those occasions which any of its civil or other servants have acted contrary to law or in excess of the power conferred upon them by the law.

To the extent that the application for leave was sought in the name of the Republic or was incorrectly intituled the same was incompetent and ought not to have been granted. However, once an application for leave has been dealt, whatever the decision, the application is itself spent, any person aggrieved with the decision to grant leave may apply under the court’s inherent jurisdiction to set aside the leave, to the judge who granted leave or if the judge who granted leave is no longer at the station or Division, then the judge in the station or in the Division. There being no application to set aside such leave, this court has no jurisdiction and cannot therefore go behind the decision granting leave.

So the answer to the Second Respondent’s first part of attack against the Motion is that once leave is

granted and is not set aside, the same remains the basis of the motion, the subject of preliminary objection. In other words the Second Respondent's 1st, 2nd and 3rd grounds of the preliminary objection fail, and I so hold.

The last ground of the Preliminary Objection was that the motion cites the Interested Party as a Respondent.

This is a valid ground of attack. In the context of judicial review, a respondent is a person, natural or juridical who made or was part of the body which made the decision, being sought to be quashed (by order of certiorari) or to be prohibited (by order of prohibition if it is done in the future or sought to be compelled to make a decision (by order of mandamus). The person who may be affected, or interested in such decision and therefore the Application (both at the leave stage and the substantive Motion) are referred to as "all persons affected" in respect of judicial review proceedings (rule 3(2) of Order LIII). It is therefore a violation of the said rule to refer to the affected person or persons as a Respondent or Respondents. It makes the motion incompetent as well.

However taking into account that the Applicant substantially complied with requirements of Order LIII at the leave stage, and that the motion is properly intitled and taking into account, the nature of the Application itself a challenge of the decision of the Meru Central Land Disputes Tribunal which goes to the root and therefore the legality of that body's jurisdiction, the court may be perpetuating an illegality if it struck out the Applicant's Motion at this stage.

I would therefore disallow the preliminary objection, and direct that the Motion be heard and determined on its merits. I direct that each party shall bear its own costs at this stage. There shall be orders accordingly.

Dated delivered and signed at Meru this 30th day of June 2008.

M. +J. ANYARA EMUKULE

JUDGE.