REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CIV. APPLI. 112 OF 2008

DICKSON MIRICHO MURIUKI………………..…….…..….APPLICANT

VERSUS

CENTRAL PROVINCIAL LAND DISPUTES APPEAL

COMMITTEE & 6 OTHERS…......................................RESPONDENTS

R U L I N G

Dickson Miricho Muriuki, hereinafter referred to as "*the applicant*" applied for leave to commence Judicial Review Proceedings seeking for an order of certiorari directed at Provincial Land Disputes Appeals Committee, Central Province, hereinafter referred to as "*the 1st respondent*" to quash its award made on 14th June, 2007 in which it ordered the subdivision of L.R. **No.Ruguru/Gachika/83** into seven equal portions and transfer of six portions thereof to the 2nd to 7th respondents. Such leave was indeed granted by this court sitting in Nairobi on 2nd July, 2007. The applicant was thereafter granted 21 days within which to file and serve the substantive motion. The said substantive Notice of Motion was subsequently filed on 20th July, 2007. On 4th March, 2008 however, this matter was by consent of the parties transferred from the High Court of Kenya at Nairobi to this court for hearing and final determination.

By an application dated 14th October, 208 and filed in this court the following day, the applicant sought to amend the substantive motion in terms of the draft amended Notice of Motion annexed to the application. That application was necessitated by the fact that the motion was wrongly intituled, that the Chief Magistrate's Court, Nyeri was a necessary party and ought to be enjoined in the proceedings to enable the court to effectually and completely adjudicate over the issues in controversy and finally that no prejudice would be occasioned to the respondents and the interested parties if the proposed amendments are effected.

In support of the application, the applicant deponed that:-

"**2. That I instituted the instant proceedings on 20th July, 2007 vide a notice of motion application dated 18th July, 2007.**

3. That at the time of the said application I was not aware that the award made in Nyeri claims No.6 of 2004 which is the subject matter hereof had been adopted on 12th July, 2007 vide NYERI CM.C.AWARD CASE NO.12 OF 2004.

4. That by the time the award was adopted as judgment of the Chief Magistrate's court, there was in existence an order of the High Court vide Nairobi HC.MISC.CIVIL APPL.NO.676 OF 2007 staying execution of the award made on 14th June, 2007.

5. That I am advised by my current advocate, Mr. Gakuhi Chege that there is need to join the chief Magistrate's court as a respondent in this case to enable the decree passed in Nyeri CM.C. AWARD CASE NO.12 OF 2004 to be challenged in the instant proceedings.

6. That I am also advised by my said advocate that the heading of the instant proceedings ought to be corrected in line with the requirements of the law relating to judicial review proceedings."

The application was opposed. **Timothy Kagondu Muriuki**, swore a replying affidavit on behalf of the 2nd, 4th and 5th respondents. In the main he deponed that:-

"**5. That I am further advised by my said advocate that orders sought in the said application are not capable of being granted.**

6. **That I am further advised by my said advocate which advice I verily believe to be true that the chief Magistrate's Court cannot be enjoined at this stage.**

7. That I am further advised by my said advocate which advice I verily believe to be true that even the application sought to be amended in defective and the said defects cannot be amended by this instant application.

8. That I am further advised by my said advocate that the application for judicial review is already time barred."

When the application came up for interpartes hearing, **Mr. Githinji,** learned counsel for the respondents took up a preliminary objection to the application. He contended that there was no provision for amending judicial review applications under order 53 rule 4 of the Civil Procedure Rules. That the only pleadings that can be amended are affidavits and statements of facts. Secondly, counsel submitted that the initial leave granted did not apply to the Chief Magistrate's Court, Nyeri as a party. And in any event time to challenge the decision of the Chief Magistrate's Court by way of certiorari had long expired. To buttress his arguments counsel referred this court to the case of **Gerald Murungi & 10 others V Commissioner of Lands & 9 Others, Misc.App.No.85 of 1996** *(Unreported).*

Mr. Chege, learned counsel for the applicant responded thus; that the preliminary objection was misconceived. That there was nothing under order 53 precluding this court from invoking the provisions of the civil procedure Act and rules made thereunder so as to allow the application. Counsel drew inspiration from the decision of the court of appeal in the case of **Farmers Bus Service and others V The Transport Licensing Appeal Tribunal (1959) E.A.779,** Maintaining that wrong intitulement of a notice of motion was not fatal to the application.

I have carefully considered the pleadings herein, the preliminary objection raised and the oral submissions made in support and in opposition thereof. I think that the preliminary objection was well taken. There are several court of appeal and High Court decisions dwelling on the applicability of the provisions of the Civil Procedure Act and the rules made thereunder in Judicial Review Proceedings. In **Commissioner of Lands V Kunste Hotel Ltd (2006) KLR 249**, the court of appeal held that judicial review is a jurisdiction which is sui generis (*it is neither criminal or civil*). Accordingly Civil Procedure Act and the rules made thereunder were inapplicable. In **Ndete V Chairman Land Disputes Tribunal & Anor. (2002) KLR 392**, **Ringera J.** (*as he then was*) stated that under the civil Procedure rules, order LIII is a special jurisdiction as the rules therein are not made under the Civil Procedure Act but under the provisions of section 9 of the Law Reform Act and in that regard order VI rule 12 of the Civil Procedure rules that had been cited in the course of arguing the application was not applicable in arguing the proceedings brought under Order LIII which is promulgated in pursuance of the provisions of *section 9* of

the Law Reform Act. **Ringera** again reaffirmed this position in **Welamondi V The Chairman Electoral Commission of Kenya (200) 1 KLR 486** by holding that in exercising powers under order LIII, the court is neither exercising civil or criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction sui generis. It therefore followed that it was incompetent to invoke section 3A and order 1 rule 8 of the Civil Procedure Rules and *sections 42, 79 and 80* of the Constitution of Kenya.

Bearing all the foregoing in mind I am of the persuasion that the Civil Procedure Act and the rules made thereunder are inapplicable to judicial review proceedings instituted pursuant to order LIII of the Civil Procedure Rules. The reasons being that order LIII is a special jurisdiction that is neither criminal nor civil to attract the invocation of the Criminal Procedure Code, Penal Code, Civil Procedure Act and or the Civil Procedure Rules. Indeed the rules of procedure in judicial review proceedings are descendants of *section 9* of the Law Reform Act and not any other piece of legislation or practice.

Having said so, does the applicant's application have any legs left to stand on? I do not think so. The application is expressed to be brought under order 1 rule 10 (1) & (2), VIA rule 3(1), 4, 5 (1) & 8 of the Civil Procedure Rules and any other enabling provisions of the Law. Those provisions of the Civil Procedure Rules or indeed any other provisions as I have already held are inapplicable to judicial review proceedings. Accordingly this application is incompetent and bad in law. I am further fortified in this holding by order LIII rule 4(2) of the Civil Procedure Rules. This order and rule aforesaid specifically state that the only document amenable to amendment is the statement of facts. If it was the intention of the framers of order LIII that all the pleadings in judicial review applications were amenable to amendments at any stage pursuant to the relevant provisions of the Civil Procedure Act and the rules made thereunder, why couldn't they have specifically said so. In the converse, why did the framers of that order and rule specifically mention only the statement of facts as being the only document that can be amended and no other document! There must have been a reason. Indeed if the civil procedure act and the rules made thereunder were applicable to judicial review proceedings, there would have been no reason or need to pinpoint only the statement of facts as being the only document that can be amended. Afterall there is order VIA of the Civil Procedure Rules that deals with amendments of pleadings generally. If that order was applicable, I do not think that there would have been the necessity of picking out only on the statutory statement as being amendable. To my mind this was as a result of the realization that the Civil Procedure Act does not apply to judicial review proceedings much as order LIII is found within the Civil Procedure Act.

The initial leave granted did not involve the Chief Magistrate's Court, Nyeri then. Leave was thus not granted in respect of the judicial review proceedings against the Chief Magistrate's Court Nyeri. The Chief Magistrate's Court is being dragged into the proceedings now by virtue of the decision it made on 12th July, 2007 adopting the award as a judgment of the court. The applicant wishes to have that decision quashed by an order of certiorari. Certiorari proceedings can only be initiated and or commenced and successfully mounted within six months of the making of the decision sought to be quashed and or impugned. Accordingly, time to challenge the order of the court complained of has long since expired. As stated by **Justice Kasanga Mulwa** (*as he then was*) in the case of **Gerald Murungi & 10 others** (supra)

"…**..The court of appeal in Kimanzi Mboo V David Mulwa, CA. No.233 of 1996 held that under the law reform act as well as under order 53 rule 2 of the Civil Procedure Rules no application for leave can be entertained unless it is made within six months of the date of the award or order."**

Indeed even extension of time cannot be contemplated nor entertained. It was so held in the case of **Wilson Osolo V John Ojiambo & Anor (1996) eKLR.** The court of appeal in considering an appeal wherein the High Court had wrongly allowed an application for extension of time to apply for an order of certiorari beyond the statutory six months held in the above case that the six months period for an order of certiorari could not be extended as it was a creature of the law reform Act. In the premises even if I was to allow the application, the applicant will still have to contend with this hurdle.

In the end I have come to the conclusion that the preliminary objection must succeed. Accordingly, I sustain the preliminary objection with the consequence that the application dated 14th October, 2008 is

dismissed with costs to the 2nd, 3rd 4th, 5th and 6th respondents.

Dated and delivered at Nyeri this 20th day of November, 2008.

M.S.A. MAKHANDIA

JUDGE