



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

Misc Civ Appli 38 of 2006

REPUBLICAPPLICANT

VERSUS

MAKUENI DISTRICT LAND DISPUTES TRIBUNAL

LUKE M. MUTIO

RESIDENT MAGISTRATE, NUNGUNI

DISTRICT COMMISSIONER, MAKUENI

DISTRICT OFFICER, KILOME

THE ATTORNEY GENERAL.....RESPONDENTS

EXPERTE:

MWAANI ENTERPRISES LIMITED

MWAANI INVESTMENT LIMITED.....APPLICANTS

RULING

The applicants who are both limited companies, by a Chamber Summons dated 4.4.2006, sought among other prayers, leave to file a Notice of Motion seeking the superior Orders of Certiorari, Mandamus and Prohibition. A careful perusal of the records reveal that the Summons were filed in court on 5.4.2006 because this is the date appearing in the court “**Received**” rubber stamp. A similar first page of the Summons which however do not carry the heading “**Chamber Summons**” and which do not indeed carry the prayers page, appears in the file record carrying the relevant supporting affidavit and annexures. It was apparently filed in triplicate and was court- stamped 6.4.2006. It is not clear why this whole application was received by the court registry over two working days with two different “**receive**” dates.

Whatever was the case, the application dated 5.6.06 was placed before me on 6.6.2006, with Mr. Ondieki, the learned counsel representing the applicants, prosecuting the application exparte. He succeeded in getting the leave to file a Notice of Motion seeking the orders of Certiorari, Mandamus and Prohibition against the Makueni District Land Disputes Tribunal, the then Makueni Resident Magistrate and other relevant parties. The Notice of Motion concerned the decision made or to be made concerning certain pieces of land named in the prayers. Arguing that the pieces of land in question needed to be

protected until the intended Notice of Motion is argued, Mr. Ondieki also obtained an order making said the leave granted to operate as a stay of further proceeding by the Land Tribunal and the Court.

The record further shows that a Notice of Intention to raise Preliminary Points of Law dated 5.6.06 was filed in this court by Amollo and Company Advocates on behalf of the 2nd respondent on 6.6.06. The notice raised the following points:-

1. That the proceeding filed by the exparte applicants are incompetent by reason of non-compliance with the mandatory requirements of Order 53 rule 1 (3) of the Civil Procedure Rules.
2. That the reliefs set out in paragraphs B(k),(1) (m) and (n) of the Statement of Facts are misconceived and do not fall within the contemplation and purview of Sections 8 and 9 of the Law Reform Act as read with Order LIII of Civil Procedure Rules.
3. That the application(s) by the exparte applicants, are a blatant and naked manipulation of the court process and administrative procedures.

The Preliminary Points of law above were argued by Mr. Amollo and defended by Mr. Ondieki on 18.7.06.

Mr. Amollo for the 2nd respondents argued that any application for leave under Order 53 rule 1, has a specific procedure to be followed and must be followed. He said that the application must be by Chamber Summons and must be accompanied by a Statement of Facts, a Verifying affidavit and a Notice to the Registrar of the High Court. The latter has to be served upon the Registrar at least one day before the application is placed before a Judge in Chambers for hearing.

Mr. Amollo argued that the Notice in this application had been filed on 5.4.2006 together with the Chamber Summons which he argued, violated Order 53 rule 1 sub- rule (3). He also however argued that the Chamber Summons bundle served on his law firm, bore two dates of filing of the Chamber Summons, that is to say, the 5.4.2006 and the 6.4.2006. The court understood Mr. Amollo to be arguing that to file a Chamber Summons for leave under Order 53 rule 1, an applicant has first to serve notice to the Registrar of the High Court at least a day before the application is filed.

The second argument raised by Mr. Amollo was that the two applicants who are Limited Companies, are different from the parties who appear before the Land Disputes Tribunal. They therefore, he argued, have no locus standi before the tribunal and should not interfere with the proceedings before the tribunal. Similarly, he continued, they have no locus standi before this court to obtain orders of this court to interfere with the proceedings before the Tribunal where they are not party. On that basis the court understood Mr. Amollo to argue that the applicants in this application were not entitled to seek or obtain the leave which they obtained nor have they a right to proceed with the filed Notice of Motion seeking the Orders of Certiorari, Mandamus and Prohibition which therefore should be struck out for lack of competency.

The third and final point of objection raised by Mr. Amollo is that the applicants among other reliefs sought, seek for declarations. He argued that declarations are not within the purview of Order 53 or section 8 or 9 of the Law Reform Act. His point therefore is that since the relief of declaration sought is not available under O.53 of Civil Procedure Rules, then the Notice of Motion should be ruled incompetent and be liable for striking out.

The positions taken by Mr. Amollo were supported by Mr. Kamau, State Counsel, who represented the 1st Respondent. Mr. Kamau added that where a law lays down a procedure as to how something should be done, then whoever wishes to benefit from the laws' operation, must follow the laid down procedure.

Mr. Ondieki responded to the points raised by Mr. Amollo. He replied that the Notice required to be served upon the Registrar under Order 53 rule 1(3) was properly served on 5.4.06 a day before the application for leave, was placed before the Judge for hearing. He further argued, if the court understood

him properly, that if the notice was not served properly or within the time prescribed, the court can excuse the default and look instead at the substance of the issue before it. The court understood Mr. Ondieki to be saying that where a notice has been served too late and has therefore not given at least a day before the hearing, the court has discretion to accept less notice, if only to hear the application on merit.

As touching the issue of the application being incompetent because the parties before the court were not parties before the Tribunal targeted by this court's orders and because they had no locus standi therefore, Mr. Ondieki argued that the parties are properly before this court. He said further that the ex-parte applicants are the registered owners of the properties in respect of which orders were issued to protect. That way, Mr. Ondieki opined, they had an interest and therefore a locus standi. He concluded the point by stating that under Order 53 of Civil Procedure Rules, any party who feels aggrieved over an issue filed in court under the order, can always apply to be joined, to protect the perceived interest or right and will not be shut out.

Mr. Ondieki, whether deliberately or inadvertently, did not respond to the third point raised by Mr. Amollo – that declarations as a relief, will not be granted under Order 53 of Civil Procedure Rules.

I have carefully considered each of the three points of objection in point of law raised by Mr. Amollo and I will deal with them one by one.

The way the court understands Order 53 of Civil Procedure Rules is that no application for the superior Orders of Certiorari, Mandamus or Prohibition, shall be made without the leave of court. To get the leave an applicant will seek it through a Chamber Summons made to the Judge in Chambers. The application is usually made ex parte and shall be accompanied by a Statement of Facts and a Verifying Affidavit. Sometimes the verifying affidavit is accompanied by a regular affidavit, especially, to carry annexures or other exhibits. The verifying affidavits verifies the facts relied on. The Statement of Facts sets out the name and description of the applicant, the relief sought, and the grounds on which it is sought.

Mr. Amollo thought that the applicant must first serve a notice to the Registrar of the court of his intention to file the application for leave at least a day before filing the Chamber Summons. He spiritedly argued that failure to do so, disentitles the applicant the right and the propriety to file the application for leave. That is not the way this court understands Order 53 Rule I. In the court's view and finding an applicant will first file in the court Registry the Chamber Summons accompanied by a Statement of Facts and a Verifying Affidavit. Usually the notice to be served upon the Registrar accompanies the Chamber Summons all of which are court and date stamped at the same time in duplicate or more bundles, each of them being the complete application. Having paid for the filing, the applicant then has an obligation under rule 1, sub-rule (3), to serve the notice, accompanied by copies of the Statement of Facts and the Verifying affidavit, upon the Registrar. In the Court's further understanding, such service can be done the same day of filing or any other day thereafter within a reasonable period. What is important and imperative about the service of the notice upon the Registrar, is that in the earliest, it must be done at least a day before the application is placed before the Judge in Chambers for a hearing. In the courts understanding and finding therefore, the hearing of the Chamber Summons for leave can validly come on any working day after the day of service. The underlying reason for allowing at least a day's delay before the hearing, is to give the Attorney General who represents the Republic, and on whose behalf the Registrar receives the Notice, to receive awareness or information of the applicant's intention to pursue the reliefs intended to be sought. The purpose for this ancient process is to open up for the Republic (originally, the Crown) in whose name the application is mandatorily brought, to decide whether to take over the application from the ex parte applicant and pursue the same, in the public interest. In this court's view accordingly, the notice upon the Registrar on behalf of the Attorney-General for the Republic, is to draw Republic's (Attorney-General's) attention of the application already filed in court and therefore in existency as opposed to an un-filed or merely intended application for leave.

In this case before me, the ex parte applicants filed their Chamber Summons dated 4.4.2006, on 5.4.2006. The documents were apparently paid for under an official receipt No. 0493304 dated 5.4.2006 for Kshs. 645/= which includes an application fee of Kshs. 150/= . There is another receipt No. 0493337 for Kshs. 250/= for some application dated 6.4.06 but in the court's view it may not have much to do with the date

of filing of the application which otherwise appears to have been properly filed on 5.4.2006.

The court also notices that a Notice to the Registrar was received and properly signed by or for the Registrar under his official rubber-stamp on 5.4.06 at 2.55pm. It is not clear why the applicants found it necessary to file and court-stamp several other copies of the application found in the file. What is of importance to the court however is the fact that an application in the form of Chamber Summons and seeking leave to file a Notice of Motion to ventilate for the review orders, was filed on the 5.4.2006 and placed before the Judge on 6.4.2006, a day after the service of the prescribed and required notice to the Registrar.

The conclusion this court reaches then, is that the notice to the Registrar aforementioned was validly and effectively served. This disposes Mr. Amollo first objection.

The second issue raised by Mr. Amollo was that the applicants had no locus standi to bring the application and obtain the leave. There was no denial that the applicants are not parties in the case now before the Makueni District Land Disputes Tribunal, being Case No. 61 of 2005. There was some evidence that the applicants herein, in January, 2006, had purported to file a Memorandum of Appearance in the Tribunal Case through their advocates M/S Ondieki & Ondieki Advocates and despite the fact that advocates have no right of audience. The said memorandum of appearance shows that the advocates were representing one Sila Ndolo, not the limited companies who are the applicants herein. The Statement of Facts and the Verifying Affidavit expressly deny any link between the exparte applicants and Sila Ndolo who is the respondent in Tribunal case, as both categorically state that **“Sila Ndolo is not an employee, servant or agent of the applicants”**. So on their own sworn admission, Sila Ndolo’s interest which is the subject of contention before the Tribunal below, is not the interest of the applicants herein. How then, asked Mr. Amollo and Mr. Kamau who raised these objections, can the applicants appear in this court to obtain orders to protect the interest in the pieces of lands being disputed between Sila Ndolo and Luke Mutio before the Land Disputes Tribunal?

This court has considered this issue and accepts the applicants view maintained by the two applicant companies that they have no link or relation with Sila Ndolo, the respondent in the case before the Land Tribunal. Under these circumstances, neither can be expected to represent the other either before this court or before the Tribunal except and until a relevant and/or legal link is established and declared so.

In the above circumstances, this court finds it legally untenable for the applicants to have come before this court to seek orders to stay legal proceedings between two strangers before the Land Tribunal. It would be legally possible, nay necessary, for the applicants to apply to be joined as parties in the Tribunal suit if the applicants felt they had an interest to protect. Indeed the applicants claim to be the registered proprietors of the pieces of Land L.R. Nos. 1756/8, 1756/9 and 1757/5 which they claim are the same subject of claim in the Tribunal case which was filed far back in 2005. Yet there was no evidence before this court that they had bothered to be joined as parties with a view to be in a position to protect their claimed interest. Instead, they filed this application for Judicial Review Orders in this court while at the same time denying any link with the parties before the Land Tribunal. This court is conscious of the fact that even a slight interest might give a right to a citizen to be joined as a party under Order 53 rule 6 of the Civil Procedure Rules. It is also aware that a citizen even one with a very slight interest to be protected should not be denied access to the court of law to agitate for such right.

In this matter before me, the applicants swear that they have interest in the aforementioned titles. They annexed copies of the registered titles in their names which they claim are the same properties being disputed between different parties before the Tribunal and feel they prove and protect their interest in the pieces of land. Although they have been slow to apply to be joined as parties before the Tribunal, they nevertheless, should not be denied the right to agitate for such rights in Court through the Judicial Review applications now before this court. In any case, the Judicial Review application through a Notice of Motion dated 24.4.2006 but filed in court on 27.4.2006, was so filed with the leave of this court, after the court was satisfied at the time that the applicants had a possible prima facie case to ventilate. If for reasonable cause the Respondents would wish to challenge the said leave, practice may allow such challenge to come before the Notice of Motion comes up for a hearing and the Court has discretion under

Order 53 Rule 1 (4) to modify or discharge the stay.

This court in that respect has had ample opportunity and time to study the material upon which the leave to file the Judicial Review application was granted. As pointed out the applicants in their Statement of Facts and Verifying Affidavits deny any relationship between them and the respondent, **Sila Ndolo**. They do not even state that the latter is their director. They therefore on the face of things and without more, assert that they are nothing more or less than strangers vis-a-vis to the suit number. 61 of 2005 of the Makueni District Land Dispute Tribunal. It is the view of this court therefore that they should stop meddling with the proceedings of the said Tribunal unless or until they prove that they have an interest to protect there. This court happened to peruse the grounds advanced by the applicants to this court in persuading it to allow the leave granted to operate as stay until the Notice of Motion for the Judicial Review is heard and determined. Mr. Ondieki had argued that unless the leave was made to operate as stay, the applicants would lose the interest in the pieces of land, the subject of dispute before the Tribunal. Since this court has concluded that the applicants are strangers before the tribunal, in which also they had all along shown little interest of being joined as parties, there appears no reasonable ground upon which to maintain those orders of stay of the lower tribunal's proceeding's. This court is accordingly convinced that the order to operate as stay should no longer be let to continue.

The last objection to consider is whether or not this court has power to grant declarations under Order 53 of the Civil Procedure Rules as sought by the applicants in their prayers Nos. 11, 12, 13 and 14. While Order 53 is clearly a special provision based on the Law Reform Act Cap 8 and inserted in the Civil Procedure Rules because the reliefs under the said Order would more practically and conveniently be supervised and prescribed under the Civil Procedure Rules, the Order might be said to be unambiguous as to the reliefs that would be invoked under it. However this in the Court's view is an issue that ought to go to a full hearing for a proper determination.

The orders that commend themselves to the court as a result of the conclusions reached above, are therefore as follows:-

ORDERS

1. The Preliminary objection and prayer to strike out the leave earlier granted to file a Notice of Motion for Judicial Review Orders of Certiorari Mandamus and Prohibition, is hereby rejected.
2. The prayers to strike out the Notice of Motion dated 24.4.2006 seeking Judicial Review Orders, is also refused at this stage with liberty to the party to reply at the full hearing.
3. The orders to operate the leave earlier granted as stay of proceedings in the Makueni District Land Disputes Tribunal Case No. 61 of 2005 or the Resident Magistrate's Court is or is hereby lifted and discharged.

Dated and delivered at Machakos this **30th** day of **January, 2007**.

D.A. ONYANCHA

JUDGE