REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Misc Appli 134 of 2004

IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS AND IN THE MATTER OF LAND ADJUDICATION ACT CAP.284 LAWS OF KENYA

IN THE MATTER: REPUBLIC ……...……...…..……. APPLICANT

VERSUS

GERALD MUTHEE…….……..… 1ST RESPONDENT

BERNARD MAKEMBO ……..…....… 2ND RESPONDENT

MINISTER FOR LANDS & SETTLEMENT ……..…….....3RD RESPONDENT

DISTRICT LAND ADJUDICATION OFFICER-THARAKA.....4TH RESPONDENT

KITHAKA KIRAGACHA …….….....…….. APPLICANT

RULING

The 1st and 2nd respondent have raised a preliminary objection to the application brought by way of Notice of Motion for judicial review on the following grounds;

(i) That the application is incorrectly instituted

(ii) That it offends the provisions or Order 53 rule 4 of the Civil Procedure Rules.

(iii) That the application is incompetent for failing to cite the provisions of the Law Reform Act.

(iv) That the application is brought under non-existent provisions of the law.

(v) That the dispute having been determined by the Minister's decision was final in terms of Section 29 of the Land Adjudication Act.

Arguing these grounds before me learned counsel for the respondent submitted that the application is bad in law as it seeks judicial review orders against individuals. He reiterated the other grounds and cited two authorities in support of those grounds.

Responding to those submissions, learned counsel for the applicant stated that the objection lacks merit as the application for judicial review was instituted in the name of the Republic. That the individual naming

of the 1st and 2nd respondent was erroneous and does not render the application incompetent.

Further, he went on, failing to cite the relevant provisions of the law is a minor typographical error. Finally he submitted that the minister's decision is subject to the supervisory power of the High Court. Learned counsel for the 3rd and 4th respondents concurred with these submissions.

I have considered these submissions as well as the two authorities of this court (Lenaola,J in R.V.Rael Kirigo Makathimo, H.C.Misc.Appl.No.162 of 2004 and Sitati J, in Joyce Kanja Rinthara & Another V.Marion Kanja and Others, HC.Misc.Civil Application No.169 of 2004.

This being a notice of preliminary objection the stricture laid down in the off-cited case Mukisa Biscuit Manufacturing Co.ltd V.West End Distributors Ltd(1969) EA 696,must be satisfied. Those conditions have been the subject of a long line of cases that I find no point of setting them out here. The first point raised in objection to this application is that the application is incurably defective as it is not in the name of the Republic and also for seeking orders against individuals. I need not state what is obvious that judicial review proceedings are only available against public bodies or tribunals or courts inferior to the High Court. It is not available to individuals as individuals.

The instant motion is headed thus:……..

IN THE MATTER OF: REPUBLIC …….…….. APPLICANT

VERSUS

GERALD MUCHEE …….. 1ST RESPONDENT

BERNARD MUCHEE MAKEMBO ……..……... 2ND RESPONDENT

MINISTER FOR LANDS AND SETTLEMENT …….....….. 3RD RESPONDENT

DISTRICT LAND ADJUDICATION OFFICER-THARAKA.....4TH DEFENDANT

AND

KITHAKA KIRAGACHA ……..…….....…….. APPLICANT

That is not the proper manner of entitulment of pleadings in judicial review proceedings. A number of decisions have dealt with this subject, yet it is apparent, from the number of objections raised in this regard, that the problem persists. It is not a new problem since as early as 1957 the courts endeavoured to solve it by providing the correct guidelines on the proper format. For instance in the case of MOHAMMED AHMED V REPUBLIC (1957) EA 523 this problem was raised. The court in that case observed that:

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realize that prerogative orders, like the old prerogative writs, are issued in the name of the Crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be instituted and served accordingly. The Crown cannot be both applicant and respondent in the same matter"

Farmers Bus Service & Others V Transport Licensing Appeal Tribunal, (1957) EA 779 went a step further by outlining the proper form of heading judicial review applications. But the problems persists on as demonstrated by this application nearly 50 years after the above decisions and several other subsequent decisions. Not even the striking out of such applications as in the two authorities cited has sent any signal. It is this persistence of the problem that the Court of Appeal recently recommended in the case

Republic V Charles Lutta Kasamani T/A Kasamani & Co. Advocates, Civil Appeal (application) No. 281 of 2005 (U.R) that ;

"It is evident, however that the problem still persists in our courts fifty years after a solution was made available but it is not for want of authoritative precedent. Perhaps it is a matter that might have to be revisited by the Rules Committee to iron out the creases for the benefit of legal practitioners"

Before the Rules Committee does something the requirement must be complied with. In the instant case, the applicant in the motion is shown as the republic. The problem is with the 1st and 2nd respondents. The two cannot be impleaded in this application. However a reading of the rest of the application clearly brings out their capacity in the matter. They are and ought to have been` shown as interested parties. In addition to this anomaly Kithaka Kiragacha is shown as the applicant instead of *exparte* applicant as the republic is already the applicant. Do these anomalies render the application incompetent or fatally defective? The two authorities cited and several others have held that failure to comply with the format in the Farmers Bus Service Case is fantal. This position is not in tendem with the holding in the Farmers Bus Service Case, Mohammed Ahmed Case, Shah Case or the Lutta Kasamani case in which the court delivered itself thus;

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment. This court said so in Dipak Panachod Shah & Another V The Resident Magistrate, Nairobi and the Attorney General, Civil Application Nai.81/00(UR)".

It must be emphasized that these decisions are not a panacea to the problem as practitioners will still be required to comply with the correct form. Of course each case must be decided on its peculiar circumstances and will depend on the anomaly in question. In the instant matter I find that the applicant has substantially complied with the guidelines set out in the Farmers Bus Service case, except for a misjoinder of the 1st and 2nd respondents.

The second, third and fourth objections deal with the provisions under which the application is brought. At the hearing of this objection we more or less agreed that the citation at the heading of the application, LIIII cannot be correct. Learned counsel for the respondent explained that it was a typographical error, and that must be the correct position. But if that is not sufficient then I will borrow from the case of Postal Corporation V.Inamdar & 2 others, Civil Appeal No.189 of 2001 in which the court was dealing with a matter in which wrong provisions of the law were cited. It was held that citation of a wrong Order or Rule is not necessarily fatal to an application.

The error in this application has not caused failure of justice or prejudice to the respondents. The final ground is in respect of the Minister's powers under Section 29 of the Land Adjudication Act, which allows any person aggrieved by the determination of an objection under the Act to appeal to the Minister whose decision is final. That provision does not preclude any party dissatisfied with the Minister's decision from seeking to quash it by way of judicial review.

For the reasons stated the preliminary objection must fail and the same is dismissed with costs.

Dated and delivered at Meru this 2nd Day of March,2007.

W. OUKO

JUDGE