



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 690 of 2005**

**IN THE MATTER OF: AN APPLICATION BY LEPAPA OLE KISOTU**

**FOR ORDERS OF CERTIORARI**

**AND**

**NTULELE GROUP RANCH..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT COMMISSIONER NAROK.....2<sup>ND</sup> RESPONDENT**

**AND**

**IN THE MATTER OF: AN APPLICATION TO SET ASIDE AND OR DISCHARGE THE  
ORDERS DATED 02.07.1998 AND 12.05.1999 AND ALL OTHER CONSEQUENTIAL ORDERS**

**BY**

- 1. SANKALE OLE KISOTU**
- 2. SALAU OLE KILUSU**
- 3. SALASH OLE MATINDA SILAU**
- 4. KOSIOM OLOLOISONGA KISOTU**
- 5. KAPALE OLE SIMIREN**
- 6. OLANGASHAR OLE PUNYUA**
- 7. KIPAYIAN OLE SHONKO**
- 8. NTARI OLE SHONKO**
- 9. KONTEA OLE KILUSU**
- 10. SITONIK OLE KALIKI**
- 11. PARSAPIYO OLE KILUSU ..... APPLICANTS**

**R U L I N G**

This Ruling relates to a Preliminary Objection raised by Lepapa Ole Kisotu as Applicant through the firm of Arusei & Co. Advocates dated 9<sup>th</sup> March, 2007 and filed on the same day, asking the court, on a matter of law, to strike out the Respondent's that is **NTULELE** Group, represented by eleven affected persons led by one Sankale Ole Kisotu, Notice of Motion dated 1<sup>st</sup> March 2007 seeking the Court's leave to Amend their Notice of Motion first filed in December, 2003.

The principal grounds argued by Mr. Arusei before me on 14<sup>th</sup> March, 2007 were that:-

- (1) the said application did not fall within the ambit of the provisions of order LIII rule 4 (2) of the Civil Procedure Rules;**
- (2) the Applicants had not invoked the relevant jurisdiction of the Court,**
- (3) by the order of 2<sup>nd</sup> July, 1996 the Court concluded the judicial review and the remedy to any person aggrieved lies in an appeal,**
- (4) the applicants have a right of appeal pursuant to Order XLII, rule 4 (ee) of the Civil Procedure Rules, and that no useful purpose would be served by the grant of the amendment sought as the Applicants were enjoined on 5<sup>th</sup> May, 2004.**
- (5) in law you cannot amend a nullity and no amount of amendment can cure the same.**
- (6) in judicial review, the High Court's jurisdiction is neither civil nor criminal but exercising a special jurisdiction where the rules that ordinarily apply to civil or criminal suits do not apply.**
- (7) the notice of motion sought to be amended is not a pleading as defined under the interpretation section of the Civil Procedure Act, (Cap 21, Laws of Kenya**  
**is therefore incapable of amendment.**

Those in essence were the grounds canvassed by Mr. Arusei before me on 14-03-2007. In support of his contentions, the Applicant's Counsel relied upon the case of *Kunste Hotel Ltd. -Vs- The Commissioner of Lands* for the proposition that the High Court's jurisdiction in judicial review is neither civil nor criminal, and the case of *Lawrence Nginyo Kariuki -Vs- County Council of Kiambu & Another to the same effect.*

For those reasons Counsel submitted that the Notice of Motion be struck out.

In their submissions Mr. Ogunde assisted by Mr. Sankale submitted that-

- (1) the definition of a pleading under the Civil Procedure Act does not apply to judicial review proceedings which are by their nature special proceedings,**
- (2) Rule 4 (2) of Order LIII does not apply to the Respondents Application as it applies to an amendment of the Statement,**
- (3) the judicial review proceedings were irregularly conducted because the notice of motion was fatally defective,**
- (4) the applicants/Respondents were never served as Group Representatives are a wide group,**
- (5) the Applicant's Notice of Motion was defective and the orders were granted irregularly and should be set aside *ex debito justitiae.***
- (6) the Respondents application is not a nullity,**

(7) although there is a right of appeal the proper procedure is to apply for setting aside of such irregular order.

Those were the submissions of learned Counsel for the respective parties. The issue is whether there is a basis for upholding the preliminary point raised by Mr. Arusei learned Counsel for the Applicant.

The classic authority on Preliminary objections is **MUKISA BISCUIT CO. LTD. –VS- WEST END DISTRIBUTORS LTD [1969] E.A. 696** where Sir Charles Newbold at page 700 said-

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

Indeed I share and endorse the words of my brother Ibrahim J. in the case of **MOMBASA DUTY FREE LTD. –VS- THE KENYA PORTS AUTHORITY** (H.C. Misc. Application No. 759 of 2004) where he said at page 17 of his judgement.

***“The purpose of objection of a Preliminary Objection must not be academic, hypothetical or speculative. Its primary function is to prevent delay or protraction in litigation. It is intended to save precious judicial time. The point or points of law must be of such a nature that if successful or are upheld will result in the determination and/or termination of the entire action or proceedings . In other words, there would be no purpose for the Court to go into the entire case proceedings or trial when at the end of the day, the said point of law will still be raised and it has the real potential of determining the matters in its entirety.”***

What is the situation here? Does this Preliminary Objection meet the test or threshold laid down in the case of **Mukisa Biscuits Manufacturing Co. Ltd. -Vs- West Distributors Co. Ltd.?** Are all the facts agreed or the facts are disputed and are therefore to be ascertained?

If the answer to any of those question is in the negative, then this Preliminary Objection does not meet the threshold or test in the **Mukisa Biscuit –Vs- West End Case.**

Mr. Arusei argued that if the Applicants/Respondents were unhappy with the previous orders, their remedy is an appeal. Again my brother, Ibrahim J. answered this point in his judgement in the **Mombassa Sea Port Duty Free Ltd –Vs- The Kenya Ports Authority**, (above cited) where he said at page 16.

***“..... It is my view that an appeal is a suitable remedy only where a party had participated in the proceedings under challenge. Where orders are given ex parte for any reason including that of procedure as in Order LIII, the correct and proper procedure is to apply to set aside if the exceptional circumstances exist or to challenge the order at the hearing of the substantive application if there are no exceptional grounds to set aside or one has the luxury or patience to wait for such a hearing.”***

Exceptional circumstances include where questions of lack of jurisdiction arise or that an application was statute-barred.

There are clear indications in this matter that the substantive motion in which the orders were granted against the Respondents including the District Commissioner Narok was filed well outside the time allowed by law, and was therefore statute barred. There are disputed facts as to whether all the Respondents or some of them were served, and there are therefore allegations of the breach of the rules of natural justice in that the Respondents were not heard. There are orders made by a Deputy Registrar relating to the survey of the disputed lands where clearly the Deputy Registrar had no jurisdiction. Such orders smack off not merely irregularity but outright illegality as such Deputy Registrar had no jurisdiction over the matter. There is need for a proper inquiry by the Court into the true nature of the Group Ranch and its management from inception to the point where the orders under challenge were

made, and from the date of those orders to the present. I believe it is not for naught that the Applicants who should properly be referred to as the Interested or Affected Parties have doggedly pursued this matter since the time they learnt of their threatened eviction from the lands they have always occupied and shared with their flocks of cattle, sheep and goats.

For those reasons, I think the Applicant's Preliminary Objection on a point of law if at all, and appears to me to want even if, unintentionally, to wrap up and keep away the ugly skeletons in this matter, namely, the lack of affording the Applicants a hearing on the important issue of their lands and the clear violation of the statute by filing the Notice of Motion well outside the statutorily prescribed period.

For those reasons the Notice of Preliminary Objection on a point of law brought up by one Lepapa Ole Kisotu dated and filed on 9<sup>th</sup> March, 2007 is hereby dismissed with costs. I direct that the Respondents Notice of Motion dated 1<sup>st</sup> March, 2007, and filed on 5<sup>th</sup> March, 2007 be heard on a date acceptable to the parties and convenient to the Court.

There shall be orders accordingly.

Dated and delivered a Nairobi this 17<sup>th</sup> day of May, 2007.

**ANYARA EMUKULE**

**JUDGE.**