



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MISC CIV APPLI 182 OF 2006**

**REPUBLIC.....APPLICANT**

**VERSUS**

**RESIDENT MAGISTRATE MILIMANI COMMERCIAL COURT.....RESPONDENT**

**JUSTUS M. NJOKA.....1<sup>ST</sup> INTERESTED PARTY**

**DANIEL MAGU NGAIRE.....2<sup>ND</sup> INTERESTED PARTY**

**LAWRENCE M. RUTERE T/A GIANT AUCTIONEERS.....3<sup>RD</sup> INTERESTED PARTY**

**JOHN M. WAMBUGU.....EXPARTE APPLICANT**

**RULING**

By Notice of Motion dated 21/5/2007 the 2<sup>nd</sup> interested party has challenged the order issued by this court granted the Exparte applicant leave to file Notice of Motion in Judicial Review under the provisions of Order 53 Civil Procedure Rules. The application is grounded on the fact that the Chamber Summons for leave is headed in the name of Republic instead of the Applicant. This is submitted to be a fatal defect affective the leave granted and the Notice of Motion filed. The applicant has filed a list of authorities:-

1. In the decision of court of Appeal reported in [1957] E.A Page 52 regarding proceedings incorrectly instituted under Law Reform (Misc provisions ordinance 1953 Section 18 (5) (u)) that as prerogative orders are issued in the name of crown, the appeal was wrongly instituted in that it joined Crown as respondent. This was a matter of forum where the appellant first obtained exparte leave to apply for an order before a Judge of High Court .....His application for leave was correctly instituted. The court proceeded to lay out the forum as used by the appellant therein and said the prerogative orders are issued in the name of the crown at the instance of the applicant directed to the person or persons who are to comply therewith. The crown cannot be both applicant and respondent.
2. Farmers Bus Service & others vs The Transport Licensing Appeal Tribunal Court of Appeal [1959] E.A 779. It was in this case that the court of Appeal after Holding that prerogative orders are issued in the name of the Crown and that Applicants for such orders must be correctly instituted. The court of appeal set out the method of correctly drawn both the Chamber Summons for leave and Notice of Motion. However the court permitted amendment of the documents to comply with the forum.
3. High Court decision in the case of Welamondi vs Chairman Electral Commission of Kenya [2002]

(copy provided) in which the court held “**that objections in ..... may be taken at the commencement of the hearing unless those are predicated on disputed facts or call upon the court exercise of discretion**”

In the present case the application was served on 2<sup>nd</sup> of May and by the date fixed for hearing no opposition was filed.

Upon considering the said decisions of the court and upon hearing the submissions of counsel in absence of counsel for Applicant. I am of the view that at this stage in time the court ought to maintain the correct procedures. I therefore allow the application and grant orders sought.

Dated this 30<sup>th</sup> July, 2007.

**J. N. KHAMINWA**

**JUDGE**

**30/7/2007**

Khaminwa – Judge

Njue – Clerk

**M/s Thungu HB for Nyakiangana**

Ruling read in open court.

**J. N. KHAMINWA**

**JUDGE**