**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**MISC APPLI 112 OF 2006**

**IN THE MATTER OF AN APPLICATION BY JEREMIAH LUCHOMBO TO APPLY FOR ORDERS OF JUDICIAL REVIEW**

**A N D**

**IN THE MATTER OF THE KABRAS LAND DISPUTES TRIBUNAL CASE NO.01 OF 2006 IN RESPECT OF L.R. NO. SOUTH KABRAS/SAMITSI/528**

**A N D**

**IN THE MATTER OF REGISTERED LAND ACT AND THE LAND DISPUTES TRIBUNAL ACT**

**A N D**

**IN THE MATTER OF KAKAMEGA CHIEF MAGISTRATE'S MISC. CIVIL APPLICATION NO. 55 OF 2006 – SIMIYU MWANJIA VERSUS JEREMIAH LUCHOMBO**

**BETWEEN**

**REPUBLIC …….……. APPLICANT**

**VERSUS**

**THE CHAIRMAN, KABRAS LAND DISPUTES TRIBUNAL .....RESPONDENT**

**AND**

**SIMIYU MWANJIA ……..…….....….. INTERESTED PARTY**

**RULING**

I have perused the ex-parte applicant's Notice of Motion dated 9.11.2006, the Statement and the Verifying affidavit filed pursuant to under Order LIII Rule 1(2) of the Civil Procedure Rules. I have also perused the replying affidavit of the interested party.

When the Notice of Motion came up for hearing, Mr. Mukavale, learned counsel for the ex-parte applicant, Jeremiah Luchombo, urged the court to grant the order of certiorari to bring into this court for quashing the decision of the Kabras Land Disputes Tribunal made on 9-2-06 in that Tribunal's case No. 01 of 2001 affecting land title No. South Kabras/Samitsi/528 on the ground that the Tribunal sought to give specific performance in its decision which fell outside the plenitude of its powers under S. 3 of Act 18 of 1990. He contended that the order sought was the only remedy available to the ex-parte applicant to check the administrative action.

Mr. Shitsama, learned counsel for the Respondent, whose client, the interested party, had filed a replying affidavit sworn on 15-5-2007 attacked the Notice of Motion and contended that leave under Order LIII Rule 1(1) was irregularly given as the Notice to the Registrar under Order LIII Rule 1 (3) was filed on the same day on which leave was sought and obtained. He contended that under S. 8 (1) of the Law Reform Act Cap 26 the High Court is enjoined not to issue the prerogative writ of certiorari. Moreover, he said, the motion was filed in the same file as the file in which leave was granted and this rendered it incompetent because it was filed in a file which was spent after the grant of leave. In any case, he contended, Act 18 of 1990 has provisions for redress under section 8 (1) which provides for an appeal to the Appeals Committee. Act 18 of 1990, he submitted, paves way to the High

Court only after the process of appeal. It was his contention that the ex-parte applicant was abusing the process of the court by coming to the High Court before exhausting the process of appeal which is provided for under the said Act. These defects and flaws, he submitted, rendered the Notice of Motion incurably defective.

The issues raised are important and of legal nicety. They are two. Firstly, does the Motion become incompetent if it is filed in the same court file as the application for leave? Secondly, can a party who is aggrieved by the decision of the Land Disputes Tribunal and who has a right of appeal under the Act (No.18 of 1990) but has not exercised it resort to judicial review under Order LIII of the Civil Procedure Rules?

On the first point, nowhere in Order LIII do the rules require that the Motion filed under rule 3(1) of Order LIII be filed as a separate matter distinct from the leave or in a file other than the file in which leave is granted. Rule 1(2) of Order LIII clearly requires that the application for leave must be accompanied by a statutory statement and affidavits verifying the facts relied on. These are the documents that support the Notice of Motion filed under rule 3 (1). Indeed, under rule 4 (1) of Order LIII, copies of the Statement accompanying the application for leave are required to be served with the notice of motion and copies of any affidavits accompanying the application for leave are required to be supplied on demand. Moreover, under rule 4 (2) of Order LIII,

the court may on the hearing of the notice of motion allow the statutory statement filed with the application for leave to be amended and may allow further affidavits. Considering that under rule 3 (1) of Order LIII once leave is granted under Rule 1 of Order LIII an applicant is required under rule 3 (1) of the order to file only a Notice of Motion, it becomes quite clear that it makes sense to have the motion filed in the same file as the application for leave.

I observe that the grant of leave itself may involve imposition of terms as to security for costs on the motion. It cannot be correct to say therefore that the grant of leave brings the matter in which leave is granted to an end. Leave heralds the judicial review proceedings and the documents filed with the application form part and parcel of the Notice of Motion. Indeed, the notice of motion is a continuation of the process commenced by the grant of leave. This is why under rule 1 (4) of Order LIII "***the grant of leave operates as a stay of the proceedings until the determination of the notice of motion or until the judge orders otherwise.***"

I further observe that leave can be challenged during the hearing of the notice of motion. Isn't such exercise more conveniently carried out where the notice of motion is filed in the same file as the application for leave? I am not persuaded that a notice of motion filed in the same file as the application for leave

is incompetent. That is where it should be filed. That is where it belongs.

On the second point, I am unable to agree that a party cannot resort to judicial review in this court before exhausting his right of appeal under Act 18 of 1990. The right of appeal in Act 18/90 relates to decision made within the plenitude of the jurisdiction conferred by section 3 (1) of the said Act but which the party appealing may be aggrieved by. Where the party entitled to appeal considers the decision to be in excess of the Tribunal's jurisdiction, or to have been made in such manner or circumstances as to render it amenable to judicial review, such party can come to this court under Order LIII not withstanding the right of appeal vested in such party to appeal to the Appeals Committee. It is only where the reasons and grounds for attacking the decision appertain to the question whether the Tribunal was right without more and where such reasons and grounds do not give rise to a case for judicial review that such person cannot be allowed to come to this court because no appeal lies to this court directly from the Land Disputes Tribunal and this court would not entertain an appeal disguised as judicial review. It is axiomatic that judicial review is not concerned with whether the decision was sound or not if the right procedure in reaching it was followed by the tribunal and if the Tribunal had jurisdiction to make such decision under the law. The Constitution has vested in this court with the power of oversight to supervise

the exercise of power by statutory bodies and public officers so as to ensure that the rights of the individual are not violated and that the constitution and other law is complied with. Section 123 (8) of the constitution makes it clear that no law can validly provide for the exclusion of this court from exercising jurisdiction in judicial review in relation to any question whether a person or authority has exercised any function under the constitution or under any other law. I am unable to agree with Mr. Shitsama's submission that where a party has failed to appeal under Act 18 of 1990, he cannot resort to judicial review even where judicial review is appropriate.

It was pointed out that where another remedy like appeal was available, then judicial review could not be had regard to. It is preferable that where another remedy is available that such remedy be pursued. But failure to pursue it does not disentitle the party from resorting to judicial review where there are grounds for seeking judicial review orders. In ***Re Fazal Kassam (mills) Ltd. (1960) EA 1002, Sir Ralph Windham*** the then Chief Justice of Tanganyika, now Tanzania, held that "***the applicants in that case were not precluded from seeking relief by way of mandamus even though they had a right of appeal to the Minister against the respondent's refusal to issue them with a coffee exporter's Licence and it would be a judicial exercise of the discretion vested in the court to allow the applicants to pursue their remedy by way of mandamus."***

The other point raised by Mr. Shitsama was that the Notice to the Registrar under rule 1(3) of Order LIII was not given at least one day before the application for leave was made as required by the rule. I have perused the record and have ascertained that the notice was dated 16.10.2006 and given on 17.10.2006 when it was stamped by the registry of the court and a receipt No.1083375 for filing fees issued. The Chamber Summons application was dated and lodged in the court registry on 18.10.2006 when it was stamped and a receipt No.1083423 issued. I find no merit n this submission.

In view of the above, and as the averments in the affidavit verifying the facts have not been controverted by the Respondent, or any other party, it is my finding that the Kabras Land Disputes Tribunal exceeded its jurisdiction in its decision dated 9-2-2006 when it purported to order specific performance in respect of land title No. Kabras/Samitsi/528. The tribunal's decision was null and void. In the result I allow the Notice of Motion and quash the said decision in terms of prayer 1 of the Notice of Motion herein. The Respondent shall bear the ex-parte Applicant's costs in these proceedings. It is so ordered.

***Dated at Kakamega this 27th day of September, 2007.***

**G. B. M. KARIUKI**

**J U D G E**