



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

Civil Appli 178 of 2003

1. MWALA LAND DISPUTES TRIBUNAL

**2. MACHAKOS CHIEF MAGISTRATE
COURTRESPONDENTS**

AND

1. KIILU MATHUVA

2. MUKUI MUTHUVA

3. MWANGANGI MUTHUVA

4. MBITHE

MALUINTERESTED PARTIES

EX – PARTE KYENGO MATHUVAAPPLICANT

R U L I N G

The Ex Parte applicant filed a Notice of Motion dated 24/11/2003. In it he sought issue of an order of Certiorari to bring into this court the proceedings and an award of the Mwala Land Disputes Tribunal dated 17/6/2000, which was read by the Machakos Chief Magistrate's Court on 29/8/2003 and all the subsequent proceedings and orders before the said subordinate court. He secondly, sought that the issued order of certiorari operate as a stay of the said proceedings in SPMCC Misc. Application No. 89 of 2003 and in Tribunal Case No. 154 of 2001 until the hearing and determination of the intended application for certiorari. The applicant finally sought costs.

In Preliminary Points of Law filed by Makau & Company advocates on behalf of the 1st Interested Party Kiilu Mathuva, the advocates raised the following points:

1. That the ex parte Chamber Summons dated 31/10/2003 and the Notice of Motion dated 24/11/2003, offend the provisions of Order LIII Rule 3 and 4 (1) and Order L Rule 3 of Civil Procedure Rules and that the applications are therefore bad in law and fatally defective.
2. That the Notice of Motion dated 24/11/2003 is fatally defective as it is not supported by an affidavit and cannot stand in its present form for want of evidence by affidavit.
3. That the format adopted in bringing up the application for the Judicial Review is fatally defective.

The 1st Interested Party accordingly sought that the Notice of Motion before the court, be struck out and be dismissed.

In his arguments in objection to the application, Mr Makau J.A, stated that in obtaining leave to file this Notice of Motion for a certiorari, the Ex Parte applicant had not given notice to the Registrar of this court. He had just filed the application at the Registry and that when it came for hearing, the Registrar had no notice of it. But leave was granted on 12/11/2003 and J.N. states that, that was wrong in law.

Secondly, Mr Makau J.A. stated that when the Ex parte applicant finally filed this Notice of Motion, the same was not, as is normally done, accompanied and supported by a verifying affidavit and a Statement of Facts. What the ex parte applicant did, Makau J.A. argued, was to just annex the documents forming the earlier application for leave to this Notice of Motion and leave it at that. That is to say, that the Notice of Motion before court was not independently and separately, accompanied by an affidavit or a Statement of Facts.

Thirdly, argued J.A. Makau, the headings on the Notice of Motion, was wrongly intituled in so far as it showed that the applicant was any other party than the Republic. He also argued that the titles on the Notice of Motion were different from those in the application for leave brought earlier. In the Chamber Summons Khengo Muthuva was the applicant while Republic is the applicant in the Notice of Motion.

Mr J.A. Makau, also argued that the parties who appeared before the Land Disputes Tribunal are not the same as those who appear in the Notice of Motion. That to introduce in the Notice of Motion new names, not appearing also in the earlier Chamber Summons is purporting to amend the Chamber Summons in the Notice of Motion.

And finally, that the Chamber Summons itself was incurably defective for being brought in the name of any person other than the Republic.

To all that is argued above, Mr Makau O.N said the following:

- a) That the Notice of Motion before the court, is filed through the Republic as required under Order 53 (1).
- b) That no fresh Statement of Facts and no fresh of verifying or other affidavit are required when filing the Notice of Motion apart from the leave application together with its affidavits and Statement of Facts.
- c) That the ex parte applicant was indeed going by another name at the Land Disputes Tribunal but that was so because he was sued by such other name which was his nick-name.
- d) That the person who got leave, is the person who applied and obtained leave and who as well, filed the Notice of Motion.
- e) That it was not necessary to serve the Notice intended to be given to the Registrar a day before the hearing, since it was enough notice to just file the application at the court registry.

The above then are the facts and arguments placed before me which I have carefully considered. There is no denial and the reading of the Chamber Summons for leave dated 31/10/2003 confirms, that the applicant therein was one Kyengo Muthuva. That application was supposed to be brought by the Republic with the present applicant being shown as the ex parte applicant. It is not in dispute that such applications are brought ex parte and are not exposed to challenge at that stage. They are in practice brought under scrutiny only during the hearing of the Notice of Motion which is later filed with the leave earlier obtained ex parte. If the court notices any substantive defects, which, had they been brought to the attention of the court granting leave, could have prevented the court from granting the leave, then this court cannot in my view, ignore those defects. It will act on the defects and rule that the leave upon which this Notice of Motion was based, was defective.

I have carefully examined the manner the application for leave is drawn. The application is intituled:-

“In the matter of an application by Kyengo Muthuva”, who is then named as the “applicant”. After reading the case of Farmers Bus versus Transport Licensing E.A (1959), 779 I am of the view that the case stresses the now accepted principle or practice that applications brought seeking Review Orders, are brought by the Republic on behalf of other people. Any aggrieved part therefore, who wishes to file an application for leave has to move that court only through the Republic. In the said case the following format was suggested and assuming that the aggrieved party is the ex parte applicant –Kyengo Muthuva, the title would look as follows:-

“IN THE MATTER OF AN APPLICATION BY KYENGO MUTHUVA FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF MWALA LAND DISPUTE TRIBUNAL CASE NO. 154 OF 2001 AND MACHAKOS CHIEF MAGISTRATE’S COURT MISCELLANEOUS APPLICATION NO. 89 OF 2003”

It is important to notice the way the Ex Parte applicant had done it:-

“IN THE MATTER OF AN APPLICATION BY

KYENGO MUTHUVA APPLICANT

FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI

AGAINST

MWALA LAND DISPUTES TRIBUNAL 1ST RESPONDENT

MACHAKOS CHIEF MAGISTRATE’S COURT

..... 2ND RESPONDENT

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL 154 OF 2001 AND CHIEF MAGISTRATE’S COURT MISCELLANEOUS APPLICATION NO. 89 OF 2003 AT MACHAKOS”

It is possible to easily think that the two formats above are not different. But careful examination will reveal that the format given by the Court of Appeal in the Farmers Bus Case (Ibid) only shows that the ex parte application is brought by Kyengo Muthuva as is required by practice. In the format used by the firm of Makau, Isika and Company, however, Kyengo Muthuva is specifically shown to be the “applicant” thus replacing the “Republic” as the proper applicant.

Having carefully considered this issue of format, I am satisfied that the ex parte applicant contravened the format approved in the case of Farmers Bus versus Transport Licensing, cited earlier. In my view, had the defect in format been brought to the attention of the court that granted leave to file this Notice of Motion, the same will not have granted the leave in the first instance.

It was also argued that the leave should, in any case, have not been granted because the notice required to be served upon the Registrar of this Court, was not served. Mr. Makau O. N. does not deny the fact that he did not serve the notice. His argument is simply that the notice is not supposed to be served upon the Registrar but to be merely given to him. He then argued that the fact of filing the Chamber Summons in

the High Court Registry, was sufficient notice to the Registrar. Order 53 Rule 1 (3) provides thus:-

“The applicant shall give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statements and affidavits....”

The issue that arises is this – is filing the application at the Registry of the High Court equivalent to giving the Registrar notice as required under the sub-rule (3) above? I was faced with a similar question in the case of Republic versus Minister for Local Government & Another, Ex Parte Mwahima, (2002) 2 KLR, 557 at 567. Therein I stated,

“The notice of the application should then be served upon the Registrar so that the Registrar gets it at least a day before the application is placed before the Judge for hearing. I understand this to mean that the service of the notice and other documents must be served the latest on the preceding day.”

It will be noticed that as far as I saw it, giving notice to the Registrar means, serving the notice on the Registrar himself or his authorized agent. The purpose of giving the notice in my understanding is to notify the Registrar that there is such an application soon to take off. The Registrar receives it on behalf of the Attorney-General who represents the Republic on whose name and behalf the application is brought. It is important in those circumstances to notify the Attorney-General through the Registrar, so that, in case it is an application which might be of interest to the state, the Attorney-General might step into prosecuting the application himself. That is why in my opinion, the giving to and receiving of the notice by the Registrar, should be a conscious act. That is why also, the mere filing of the notice at the High Court registry, does not amount to giving the Registrar the required notice. The ex parte applicant must, therefore, give the notice to the Registrar personally or through an authorized official agent. In this case the ex parte applicant did no more than file the application and the notice at the court registry. In my view such act failed to bring notice of the application to the Registrar. He thus failed to comply with Order 53 Rule (1) (3) of the Civil Procedure Rules. Since failure to comply with Order 53, except where excused by the Order, is fatal, applicant's failure to give the required notice is fatal to that application for leave. The effect of the default in my opinion, is to nullify the granted leave.

Thirdly, the ex parte applicant had filed the Notice of Motion before this court without accompanying it with a Statement of Facts and Affidavit. The relevant provision is Order 53 Rule 1 (4). It requires the ex parte applicant to file the application by Notice of Motion within 21 days. The question which arises then is whether filing such Notice of Motion without specifically supporting it with any independent affidavit was proper. In my view, a Notice of Motion is not a Notice of Motion unless it complies with Order 50 Rule 3 which states:

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

A notice of motion then, as is shown by the side note next to the above rule, which states “contents of notice”, is only a notice of motion, if it is properly supported by an independent affidavit.

In this case the respondent filed no such independent affidavit in support of the motion despite the fact that he knew he needed it to give the court the evidence he needed to prove his case. This means that even if he were allowed to prosecute his application, he would have no evidence to prove it. A motion without a supporting affidavit, as has been ruled by the courts many times, is incurably defective. This application before me must also be found to be incurably defective and liable for striking out. In my view, a Notice of Motion seeking any of the review orders must be accompanied not only by a Statement of Facts but also an affidavit of support carrying a complete set of the application for leave with an extracted order of court which granted leave filing of the Notice of Motion.

There was also the issue that the Notice of Motion was filed by a different party. I have examined the

Chamber Summons. They were filed by Kyengo Muthuva as the ex parte applicant. The Notice of Motion was later filed by Kyengo Mathuva. Mr Makau N.O admitted that Mathuva is a different name from Muthuva although he tried to excuse the difference by saying that one was a nick name of the other and that the two different names referred to the one and same person. I have considered the arguments. It is my view and decision that a party who applies for leave and obtains, it is the only person who can file the Notice of Motion seeking the relief in respect of which he was granted the leave. No other person is entitled to seek such relief.

In this case, the applicant of the Notice of Motion is Kyengo Muthuva while the one who sought leave is Kyengo Mathuva. It was admitted that these are recognized different names which might belong to two different persons. Under these circumstances Kyengo Mathuva had no leave of court to file this Notice of Motion which therefore stands liable for striking out.

For the various reasons canvassed in this ruling, the points of law raised and argued preliminarily, have merit. This Notice of Motion, for the several independent grounds above, is struck out and dismissed with costs to the Respondents. It is so ordered.

Dated and delivered at Machakos this 17th day of March, 2006.

D.A. ONYANCHA

JUDGE