



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**Misc Appli 3 of 2002**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**A N D**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**B E T W E E N**

**REPUBLIC .....APPICANT**

**V E R S U S**

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

**A N D**

**DANIEL MUSAMALA MUKALAMA .....1<sup>ST</sup>  
 INTERESTED PARTY**

**LOICE WANYITIKHA MUKALAMA .....2<sup>ND</sup>  
 INTERESTED PARTY**

**(EXPARTE – SHIUMA JACOB MUKALAMA)**

**R U L I N G**

The Notice of Motion dated 11/1/2002 sought an order of certiorari in terms of prayer 1 thereof. It was made (filed) on 11/1/2002. It was accompanied by an affidavit sworn on that date by the ex-parte applicant to which (affidavit) were attached annextures.

On 20.12.2001, this court (The Hon. Mr. Justice Waweru) had given leave to the applicant to apply for the order of certiorari and had ordered that the leave so granted would operate as a stay. The chamber summons application for leave was made on 18/12/01 and the Notice to the Registrar required by Order 53 Rule 1(3) of the Civil Procedure Rules was also filed on 18/12/01. It seems the applicant had also filed on 15/12/01 under a certificate of urgency a Notice of Motion dated 14/12/01 seeking leave to apply for the order of certiorari accompanied by a statement but without a verifying affidavit. There is no record of what happened to that Notice of Motion.

It was on the chamber summons dated 14/12/01 that the court granted the leave under Order 53 Rule 1(1) & (2) of the Civil Procedure Rules. A statement and affidavit verifying the facts relied on in terms of

Rule 1(2) of Order 53 did not accompany the chamber summons for leave. Nor was the Notice to the Registrar given in compliance with Rule 1 (3) of Order 53. It was filed in court contemporaneously with the chamber summons on 18/12/02. No order was obtained under the proviso to Rule 1 (3) of Order 53 to extend the period of filing of the notice.

When the application came up before me for hearing on 20.6.05, Mr. Momanyi, learned counsel for the ex parte applicant, urged the court to grant the orders sought and quash the decision of Kabras Land Disputes Tribunal as prayed in prayer 1 of the Motion.

Mr. Samba, learned counsel for the Interested Party, opposed the application and in doing so relied on Grounds of Opposition dated 14/10/02. Order 53 of the Civil Procedure Rules which governs the procedure in judicial review proceedings does not contain provision for grounds of opposition. A party to judicial review proceedings must file an affidavit. The provisions for grounds of opposition in Order 50 Rule 16(1) of the Civil Procedure Rules apply to civil litigation but not to judicial review which is a special jurisdiction under Part VI of the Law Reform Act, Chapter 26 of the Laws of Kenya. Although Order 53 of the Civil Procedure Rules is bound with the Civil Procedure Rules, this is done for convenience as it applies exclusively to Judicial Review and ought to be self contained. For these reasons, I hereby strike out the grounds of opposition.

The motion stands therefore unopposed. But is it competent? Mr. Samba urged the court to strike it out not only because leave was irregularly obtained, but also because the Notice to the Registrar was not given in compliance with Rule 1(3) of Order 53. He contended that the Notice of Motion was therefore bad in law.

I have perused the Notice of Motion dated 11/1/2002 which was accompanied by an affidavit sworn on the same date by the ex parte applicant. The motion was filed pursuant to Rule 3(1) of Order 53. Rule 3(1) of Order 53 does not permit the filing of an affidavit along with the motion. One does not have far to seek to see why this should be the case. At the leave stage, the Applicant ought to have made out his case by filing a statement setting out, inter alia, the relief sought and the grounds on which such relief is sought as well as an affidavit or affidavits verifying the facts relied on in the statement. Leave is given on the basis of that material. Affidavits in judicial review are filed pursuant to Rule 1(2) and Rule 4(2) of Order 53. The affidavit accompanying the Notice of Motion sworn 11/1/2002 by Shiuma Jacob Mukalama was misplaced and it is hereby struck out for those reasons.

The application for leave was not preceded by a Notice to the Registrar in terms of Rule 1(3) of Order 53. Although a statement was filed, there was no affidavit to verify the facts relied on as required by Rule 1(2) of Order 53.

It is my finding that leave was irregularly obtained. It is also my finding that, as shown above, Order 53 was not complied with and the Notice of Motion was not supported by any evidence as required.

It is for these reasons that I hereby dismiss the Notice of Motion with costs. It is so ordered.

***Dated, signed and delivered at Kakamega this 5<sup>th</sup> day of May 2006***

**G. B. M. KARIUKI**

**J U D G E**