



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Misc Appli 166 of 2003

1. REPUBLIC.....
.....RESPONDENT

Versus

1. MUKURWEINI DISTRICT LAND DISPUTE TRIBUNAL

2. CENTRAL PROVINCE PROVINCIAL LAND DISPUTES APPEALS COMMITTEE.....
RESPONDENTS

3. CHIEF MAGISTRATE'S COURT - NYERI

4. KARUNGARI NGUNJIRI

5. JOHN GUNJIRI WANJAU.....
.....APPLICANT_

RULING

It was during the hearing of a Chamber Summons dated 14th January, 2005 filed by the Applicant John Ngunjiri Wanjau herein that Mr. Kiminda, Counsel for the Fourth Respondent, raised a preliminary objection to the entire suit and application a notice of which he had filed and served. It is apparent Mr. M. C. Kamwenji the Advocate who filed the Chamber Summons for the Applicant did not intend the Chamber Summons to be served upon the three Respondents and therefore the Chamber Summons was served upon the Fourth Respondent only. He is Karungari Ngunjiri.

The said Chamber Summons is filed under section 3 A of the Civil Procedure Act and Order XXXIX Rule 1 of the Civil Procedure Rules and seeks restraining orders against the fourth Respondent with respect to his activities on the suit parcel of land NO.GITHI/KIREREMA/9.

The Chamber Summons is filed in proceedings instituted by a Notice of Motion dated 25th August, 2003 seeking orders of Certiorari and Prohibition and that Notice of Motion is therefore filed under Order LIII Rule 3 of the Civil Procedure Rules for Judicial Review.

For reasons not known to the court, Mr. M. C. Kamwenje failed completely to appear before me to prosecute the Chamber Summons and deal with Mr. Kiminda's Preliminary Objection despite the fact that the first hearing date of 15th May, 2006 had been taken by the two parties at the Court Registry by

consent and therefore Mr. Kamwenje's client was in court waiting for Mr. Kamwenje on that day and I had to adjourn hearing on that day to 18th May 2006 because Mr. Kamwenje had completely failed to show up.

His client went away to tell him hearing had been stood over to 18th May, 2006 to allow him be present and Mr. Kiminda added to that by serving m/s M. C. Kamwenji & Co. Advocates with hearing notice for 18th May, 2006. But again Mr. M. C. Kamwenji, without any information to the court, Mr. Kiminda or even his client the Applicant, failed to appear in court and his client had to conduct the prosecution of the Chamber Summons in person and to face the task of handling Mr. Kiminda's Preliminary Objection which seemed to be too technical for the applicant John Ngunjiri Wanjau to adequately comprehend.

The objection was based on three grounds: firstly, that the proceedings herein for judicial review were filed without leave to file them as required by Order LIII Rule 1 (1), (2), (3) of the Civil Procedure Rules; secondly, that if any leave was granted, (which is not evidenced) the same was granted contrary to Order LIII Rule 2 of the Civil procedure Rules and that in any case Rule 1 (4) of Order LIII was not complied with when service of the Notice of Motion was effected upon the Fourth Respondent; and thirdly, that the application does not disclose that the Chief Magistrate's Award case number in which the Chief Magistrate is to be prohibited.

As I have indicated, the Applicant John Ngunjiri Wanjau was not able to sufficiently answer those issues. Instead he was taking the court into what happened between him and the Fourth Respondent and therefore what Mr. Kiminda said remained unchallenged; among them, a very fundamental one in that there was no leave to file these proceedings for Judicial Review.

Without that leave, these proceedings become incompetent and Mr. Kamwenji and his client must have been aware of this, at least when they were served with the Fourth Respondent's Notice of Preliminary Objection. Yet to date they have endeavoured to bring no evidence to counter that claim which therefore remains and I must accept it.

If there was no leave, then any service of the Notice of Motion herein could not be satisfactory and those additional defaults therefore made the situation worse and a chamber summons filed in incompetent proceedings even if by itself could have been competent, also became incompetent.

But in this particular situation, that chamber summons could not have been competent even if the proceedings for judicial review in which it was filed were competent because once the proceedings are for judicial review under Order LIII of the Civil Procedure Rules, no other provisions of the Civil Procedure Rules will apply and section 3A of the Civil Procedure Act will not also apply because that is a specialised area under the Law Reform Act.

From what I have said above therefore, Mr. Kiminda's preliminary objection is upheld as I find that the Notice of Motion dated 25th August, 2003 as well as the Chamber Summons dated 14 January, 2005 are each bad in law, incompetent and unmaintainable. Each is hereby dismissed with costs of each to the Fourth Respondent.

Dated this 15th day of June, 2006.

J. M. KHAMONI

JUDGE