



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Misc Civ Appli 34 of 2005

IN THE MATTER OF:THE LAND DISPUTES TRIBUNAL ACT 1990

(N0. 18 of 1990)

AND

IN THE MATTER OF:THE LAND REGISTRATION ACT

CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF:AN APPLICATION TO INSTITUTE

JUDICIAL REVIEW PROCEEDINGS FOR

ORDERS OF CERTIORARI AND

PROHIBITION AGAINST THE LAND

DISPUTES TRIBUNAL MALINDI

ATTEMPTING TO ADJUDICATE OVER

ISSUES TOUCHING ON THE

INTERPRETATION OF THE LAW AND

CANCELLANTION OF TITLES

DEEDS/RECTIFICATION OF THE

REGISTER OF CHEMBE/KIBABAMSHE/398

IN MALINDI DISPUTES LAND TRIBUNAL

NO. 40 OF 2005.

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

LA MARINA LIMITED.....1ST RESPONDENT/EX-PARTE APPLICANT

PHILIP NDOLO.....2ND RESPONDENT/EX-PARTE APPLICANT

AND

MALINDI LAND DISPUTES TRIBUNAL.....1ST INTERESTED PARTY

SHADRACK NDUNDI.....2ND INTERESTED PARTY

RULING

An objection has been raised in this matter principally on one ground, namely that the prerogative orders for which leave granted are not the same ones which were sought by the motion. That leave sought was for certiorari and prohibition yet when the notice of motion was filed pursuant to that leave it now sought an additional relief, of mandamus for which leave had not been sought or granted.

In reply to the objection it was argued that the appearance of the word mandamus in the motion was due to typo graphical error. That looking at the body of the application the prayers sought and the annexures, would reveal that the applicant has not sought relief of mandamus. Learned counsel further confirmed that he will mandamus. He urged the court to exercise its discretion under Section 3A to excuse the error. He cited the case of **Magnate Ventures Ltd & Others V R Exparte Adopt-A-Light Ltd.**

Misc. Civil Application No. 1406 of 2004.

I need also to add that learned counsel for the respondent referred to the authority of **Commissioner General, KRA V Silvano Oneam Owaki T/A Maranga Filling Station**, Civil Appeal No. 45 of 2000.

I have considered these submissions. First, a preliminary objection must meet the conditions laid down by the oft-cited case of **Mukisa Biscuit V West End Distributors** which we are all familiar with.

Leave granted to the applicant on 25th July, 2005 permitted him to bring a substantive application for certiorari and prohibition. But the Notice of Motion that was subsequently filed on 8th August, 2005 sought orders of certiorari, prohibition and mandamus, a clear departure from the leave granted. In the supporting affidavit there is similar averment that leave was granted for the institution of judicial review proceedings for orders of certiorari, prohibition and mandamus. The statement also reflects in the title and body that the nature of the claim is certiorari, prohibition and mandamus.

As a matter of fact this mix-up is not disputed. It is attributed to a mistake of a typist. Does the court have jurisdiction or discretion to ignore the glaring mistake? Learned counsel for the applicant has urged the court to invoke its inherent jurisdiction under Section 3A of the Civil Procedure Rules. Yet both counsel are in agreement, on authority of the Court of Appeal decision in the Commissioner of Lands V Kunste Hotel Ltd, Civil Appeal No. 234 of 1995 that judicial review proceedings are neither criminal nor civil.

That they are special proceedings. It has been further held by Ringera, J. (as he then was) in **Joram Mulati Walamondi V The Chairman, Electoral Commission of Kenya**, (2002) 1 KLR 486, that judicial review proceedings being special, it is incompetent to invoke the provisions of Section 3A of the Civil Procedure Rules, a finding a two High Court Judge bench (Aluoch, Visram JJ) disagreed with in the Adopt-A-Light Case (Supra), where it was stated that it is inappropriate to summarily dismiss judicial review application for having cited a wrong provision of the procedures.

It is common ground that the two decisions are only persuasive as far as this court, being of concurrent jurisdiction, is concerned. When it is said that the court in entertaining judicial review proceedings is exercising a special jurisdiction, all that means is that judicial proceedings are a creation of an independent statute, the Law Reform Act, Cap 26 of the laws of Kenya. The basis of the rules governing judicial review proceedings under Order 53 trace their source from the Law Reform Act. That is why in my view Section 3A of the Civil Procedure Act is inapplicable.

The applicant has brought an application seeking reliefs not covered by the leave granted. The answer to that can only be found in the Law Reform Act. Section 9 provides for power to make rules. Section 9(1) (C) of the Law Reform Act specifically provides that power to make rules will include power to make rules of court

“(C) requiring that, where leave is obtained no relief shall be granted and no ground relied upon except with the leave of the court, other than the relief and grounds, Specified when the application for leave was made”

The applicant has repeated made reference to mandamus which was not part of the leave obtained in clear contravention of the above express provision.

Although Order 53 rule 4(2) of the Civil Procedure Rules allow amendment to the statement and filing of further affidavit, the error in question goes against the substantive law.

For the reasons stated I find this application incompetent and order that it be and is hereby struck out with costs.

Dated and delivered at Malindi this 20th day of July 2006.

W.OUKO

JUDGE

20.7.06

Coram

W. Ouko. J

Mr.Kiarie for interested party

Mr.Odhiambo holding brief

Mr.Maroro

N/a for Mr.Wameyo

Ruling delivered.

W.OUKO

JUDGE