

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Misc Appli 54 of 2002

SAMUEL MASHIYA

MUKALIAPPLICANT

VERSUS

SHINYALU

L.D.T.....RESPONDENT

AND

**SISIKO MUHATI SHIVONJEINTERESTED
PARTY**

RULING

The Notice of Motion dated 4.2.2002 was filed by the ex parte applicant following leave granted on 18.1.2002 to apply for an order of certiorari to remove into this court for quashing the decision of Shinyalu Land Disputes Tribunal adopted on 3.9.2001 in Kakamega C.M. Court Misc. Civil case no. 204 of 2001.

When the Notice of Motion came up for hearing on 24.1.2005, Mr. Samba, learned counsel for the Interested Party, raised a Preliminary Objection to the effect that the Motion was incompetent and requested that it be struck out. He contended that the Motion was shown as having been filed under Order 52 instead of Order 53 of the Civil Procedure Rules. Further, he contended that as the leave granted to file the Motion was irregularly granted, the Motion was bad in law. His reason for that proposition was that no Notice to the Registrar had been made in compliance with Rule 1(3) of Order 53 prior to the making of the application for leave on 18.1.2002. Finally, he submitted that no affidavit had been filed by the ex parte applicant pursuant to Order 53 Rule 3 (3) of the Civil Procedure Rules. Rule 3(3) of Order 53 requires that an affidavit shall be filed before the Motion is set down for hearing and such affidavit shall give the names and addresses, places and dates of service on all person who have been served with the Notice of Motion. The rule further provides that if any person who ought to be served has not been served, the affidavit shall state that fact and the reason why service has not been effected. The Rule also requires the affidavit to be before the court on the hearing of the Motion.

Mr. Athunga, learned counsel for the ex parte Applicant, contended in reply to Mr. Samba's objection that it was not a proper Preliminary Objection on a point of law and submitted that the grant of leave could not be challenged otherwise than through a substantive application. The grounds of objection, he said, did not constitute a Notice of Preliminary Objection. He contended that leave was properly granted following compliance with Rule 1(3) of Order 53.

As regards reference to Order 52, Mr. Athunga submitted that the court should look at the body of the application and allow amendment as the Motion clearly shows that the application was made under Order 53.

I have given due consideration to the objection raised by Mr. Samba and the arguments advanced by him. I have also duly considered the submissions made by Mr. Athunga.

A Preliminary Objection is supposed to raise a pure point of law and "is argued on the assumption that all the facts pleaded by the other side are correct", see MUKISA BISCUITS Co. versus WEST END DISTRIBUTORS (1969) CA 696 at page 701 letter B). "It cannot be raised if any fact has to be

ascertained or if what is sought is the exercise of judicial discretion.” It is desirable in civil litigation that before a Preliminary Objection is raised, a formal Notice to this effect is filed and served on the other party. Such Notice should contain the grounds intended to be argued so that the other party is not ambushed or taken by surprise. Both parties require to have sufficient time to prepare before the hearing of the objection. A preliminary Objection that relies on facts that are in dispute or which require evidence to be established is not a Preliminary Objection. In Judicial review, there is no provision for the filing of grounds of opposition. Order 50 Rule 16 does not apply to proceedings for judicial review under Order 53 any more than the other orders do for the simple reason that the Civil Procedure Rules do not apply to judicial review. The filing of grounds of objection in judicial review is misplaced. A Statement of Grounds of opposition cannot form the basis for a Preliminary Objection unless there is a court order for it to be treated as such. It is important to point out that the Rules that govern judicial review are made pursuant to section 9(1) of the Law Reform Act, Chapter 26 of the Laws of Kenya and where there is paucity, the rules can be augmented by decisions of the court. Non-compliance with Rule 3(3) of Order 53 does not render the Motion filed under Rule 2 of Order 53 incompetent. Rule 3(3) of Order 53 is merely intended to ensure that all the Interested Parties have been served before the commencement of the hearing. Its non-compliance would result in postponement of the hearing. It would not render the Motion incompetent.

As regards leave, I have perused the file and it is clear a notice to the Registrar pursuant to Rule 1(3), was given on 18.1.2004 as is evidenced by the court file copy and official receipt No. 581895 dated 18.12.01 for shs. 75/-

The Motion is expressed to be under Order 52, which clearly has no application. I would hesitate to strike out the Motion on this ground because while rules of practice are important and must be complied with, the court does not lose sight of the fact that they are handmaidens of justice and where there is mishap resulting in non-compliance, too much rigidity as would sacrifice justice at the altar of procedural technicalities ought to be avoided. In any case, the court has discretion to permit amendment. In the circumstances, the objection is dismissed.

The Applicant is ordered to effect within 14 days from the date hereof a correction of the order under which the Motion is made failing which the Motion shall stand struck out.

Dated at Kakamega this 10th day of February 2005

G.B.M. KARIUKI

J U D G E