



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL MISCELLANEOUS APPLICATION 90 OF 2003**

**MOTOKAA NTHAUTHO.....APPLICANT**

*Versus*

**JOSEPH NJERU**

**BENARD NJAGI**

**MINISTER FOR LAND AND SETTLEMENT**

**SPECIAL DISTRICT COMMISSIONER .....RESPONDENTS**

**RULING**

This is an application by Notice of Motion dated 9<sup>th</sup> May 2003 the main two prayers being for orders:-

**“1. THAT this Honourable court may be pleased to grant the applicant herein an extension of time for him to file an Application for leave to apply for certiorari and Prohibition for the quashing of the decision and orders made in Land Appeal Case Nos 55/79 and 279/74 by the Special District Commissioner, Mbeere in May 1999.**

**2. THAT the order(s) herein do apply as a stay of execution of the orders made in the said cases pending finalisation hereof.”**

Before moving far, let me point out here that the legal effect of

the order granting prayers herein above would not be the same as the legal effect of the order granting prayers in the application which was filed by the Applicant in the case of **AGA KHAN EDUCATION-SERVICE KENYA – Vs – REPUBLIC THROUGH ALI SELF AND OTHERS** cited by counsel for the Respondent as seen at page 199 which states:

**“3. Leave be granted to the applicants to apply for an order of CERTIORARI to remove into the High Court and quash the Order/directive by the Minister for Education (“the Minister’s order”) that the school be managed by the Aga Khan Education Service Kenya (“the AKESK”)**

**4. The grant of leave herein do operate as a stay of the Minister’s order.”**

In prayer 3 in the Aga Khan case leave is sought to file the application for an order of Certiorari – while in prayer one in this application before me, leave is sought to file an application for leave to file a second application for an order of Certiorari. It means that while in the Aga Khan case the Applicant was within the limitation period of six months and was therefore seeking leave in the normal manner under *Order LIII* of the Civil Procedure Rules and *Section 9(3)* of the Law Reform Act, in the instant case the Applicant has come after the limitation period of six months has expired and is therefore first applying for the expired limitation period of six months to be extended to enable him file an application for leave under *Order LIII* Civil Procedure Rules and *Section 9(3)* Law Reform Act to apply for certiorari.

In the Aga Khan case therefore, it was proper for the Applicant to state in prayer 4 that the grant of leave in the application do operate as a stay of the Minister’s order which I presume had not been executed. In the instant application before me, however, it is improper to ask for such a stay because under the Law the Applicant will only be entitled to ask for such a stay at the time he will be applying, under *Order LIII* of the Civil Procedure rules and *Section 9(3)* of the Law Reform Act, for leave to apply for certiorari. Outside those provisions, the Applicant is not entitled to apply for such a stay.

As I do not intend to write a long ruling, what I am saying leads me to the first reason why I am dismissing the Applicant’s application herein dated 9<sup>th</sup> May 2003 with costs to the Respondent; and that is that Judicial Review proceedings are proceedings of a specialized nature and apart from *Order LIII* of the Civil Procedure Rules which is merely an enabling provision, the rest of the provisions of the Civil Procedure Act and rules do not apply and, with all due respect, it was improper for the Applicant to have brought this application under *Section 3A* of the Civil Procedure Act.

The other reasons in support of the dismissal are as follows: Firstly, as the leave sought is leave outside *Order LIII* of the Civil Procedure Rules and *Section 9(3)* of the Law Reform Act, the court would not have jurisdiction to grant the application bearing in mind the mandatory terms in which the two provisions of the law have been couched.

Secondly, parcels of land, both numerically and correctly, to be affected by the orders sought are not known and specifically set out to avoid abuse and misuse of the court order sought to be obtained and even particulars of the order/decision to be challenged if not doubtful, they are suspect.

Thirdly, the period of six months allowed for seeking leave to file application for Judicial review is sufficient thereby making it unreasonable for anybody to seek leave to extend the six months especially where the time which has passed from the decision complained of is four years like in the instant case where therefore the genuineness of the application is highly questionable especially when he prays for a stay of execution yet that execution was effected four years ago and became covered by *Section 143(1)* of the Registered Land Act as a first registration whether or not the Applicant pretends to have been unaware of that registration. In any case, it should not be forgotten that *Section 9(3)* of the Law Reform Act and *Order LIII(2)* of the Civil Procedure Rules are couched in mandatory terms stating:

**“-----leave shall not be granted unless the application for leave is made not later than six months after the date-----” of the decision.**

With such mandatory terms in the two separate legislation without exception, how lawful is it to grant the order sought?

To avoid doubt therefore, this Notice of Motion dated 9<sup>th</sup> May 2003 be and is hereby dismissed with costs to the Respondent.

**Dated this 11<sup>th</sup> day of March 2005.**

**J. M. KHAMONI**

**JUDGE**