



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**MISC. CIVIL APPLICATION NO. 94 OF 2003.**

**REPUBLIC..... APPLICANT**

**VERSUS**

**KWANZA L.D.T. COMPRISING OF**

**ONYANGO WAO )**

**SIMON REMBONGOTO) .....1ST RESPONDENT**

**RICHARD TUBATA )**

**KITALE SNR. PRINCIPAL MAGISTRATE..... 2ND RESPONDENT**

**ANDREW MAINA GITHINJI .....3RD RESPONDENT**

**EXPARTE – DAVID GOMBE WAMUCHIRU**

**R U L I N G.**

The applicant filed the application dated 25/6/2004 seeking for orders of certiorari to remove into this court and quash the decision of the Kwanza Land Disputes Tribunal, which was read and adopted as judgment of the Kitale SPM’s court land case No. 63 of 2003. The same is brought to court under OLIII r. 3 (1) and 2 of the Civil Procedure Rules.

Mr. Onyancha for the interested party opposed the application saying that the same was improperly before the court or failing to comply with OLIII r. 4(1) and OLIII r.

7 (1) Civil Procedure Rules and asked the court to strike it out.

I will not even go into the merits of the application because I believe that the same is irreparably defective and should therefore be struck out. I base my findings on the following grounds.

- (i) Although Mr. Onyancha did not raise that point, I have said time and again that a Notice of Motion for Judicial review orders must indicate that the same is based on section 8 & 9 of the Law Reform Act. This is so because the Law Reform Act is the statute that mandates an applicant to file for judicial Review OLIII Civil Procedure Rules merely provides for the procedure. It is imperative therefore that the provisions of the Law Reform Act as well as those of the civil Procedure Rules that enable the party to file the application for Judicial Review be clearly indicated on the application. Failure to cite provisions of the Law Reform Act in the Notice of Motion alone would make me strike out this application. (ii) As rightly

stated by Mr. Onyancha, OLIII r.4 has not been complied with. OLIII r.4 (1) provides:-

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”

OLIII r. 4 (2) provides that any party wishing to amend the statement of particulars or file further affidavits can only do so with the leave of the court.

There was no leave granted in this matter for the applicant to file the fresh affidavit in place of the one filed at the time of leave.

(iii) I also agree with Mr. Onyancha that there was no verifying affidavit filed with the Notice of Motion as stipulated by OLIII r. 7 (1). The failure to do so was not explained to the satisfaction of the court. Counsel for the applicant ought to have given the explanation for the failure before he prosecuted his motion. He could not do so in reply after the issue had already been raised by Mr. Onyancha.

For the foregoing reasons, I find that the Notice of Motion before me is incompetent. The same was filed by a qualified counsel and the non-compliance with the Rules cannot be excused.

The same is accordingly struck out with costs to the interested party.

**WANJIRU KARANJA.**

**AG. JUDGE.**

Delivered, signed and dated at Kitale this 13th day of April, 2005.