

IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Misc Appli 30 of 2004
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS NAMEDLY CERTIORARI, PROHIBITION AND
MANDAMUS
AND
IN THE MATTER OF AN APPLICATION BY THAMSON NAMUNYU
NJIBWAKALE AND SAMUEL KUCHIKHI FOR LEAVE APPLY TO APPLY
FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND
MANDAMUS
AND
IN THE MATTER OF THE LAND TRIBUNAL ACT NO. 18 OF 1990
AND
IN THE MATTER OF KAMUKUYWA LAND DISPUTES TRIBUNAL CASE NO 5
OF 2003

BETWEEN

REPUBLIC.....APPLICANT

VS

CHAIRMAN, KAMUKUYWA LAND

DISPUTES TRIBUNAL COURT.....RESPONDENT EX-PARTE

VS

i. THAMSON NAMUNYU NJIBWAKALE1ST APPLICANT

ii. SAMWEL WAMALWA KUCHIKHI.....2ND APPLICANT

AND

WYCLIFFE WANYONYI KASAKA.....INTERESTED PARTY/RES

R U L I N G

In a motion taken out pursuant to the provisions of Order LIII rule 3 (1) of the Civil Procedure Rules, the applicants Thamson Namunyu Njibwakale and Samuel Wamalwa Kuchikhi applied for judicial Review orders in the nature of certiorari and prohibition. However when the motion came up for interpartes hearing, Wycliffe Wanyonyi Kisaka, the interested party herein, raised a preliminary objection in a notice dated 21st July 2004. It therefore became imperative that the preliminary objection had to be disposed of first before the substantive motion.

The interested party was of the view that the motion became fatally defective when it failed to cite the provisions of sections 8 and 9 of the Law Reform Act Chapter 26 Laws of Kenya. Mr. Kaosa who appeared for the interested party urged this court to strike out the motion for that reason. He referred to the decision of Mr. Justice Etyang in Kitale H.C. MISC. APPLICATION NO. 150 OF 2001, in which the honourable Judge struck out a similar motion on the ground that the applicant had not cited the substantive law under sections 8 and 9 of the Law Reforms Act.

In his response, Mr. Makokha for the ex parte applicants opposed the preliminary objection. He was of the view that failure to cite the provisions of the sections 8 and 9 of the Law Reform is not fatal at all. He argued that the failure was merely technical which did not go to the jurisdiction of the case.

I have anxiously considered this preliminary objection and the arguments for and against it. To begin with it should be noted that the provisions of Order LIII of the Civil Procedure rules was promulgated pursuant to the provisions of sections 8 and 9 of the Law Reform Act Chapter 26 Laws of Kenya. In my view, the failure to cite the provisions of Sections 8 and 9 of the Law Reform Act is not fatal so long as a party has cited the provisions of Order LIII of the Civil Procedure rules. In any case no prejudice suffered by either side in these proceedings. Consequently I respectively disagree with the decision of my learned brother, Alex Etyang in Kitale H.C. Misc Application No. 150 of 2001.

The second preliminary point raised by the interested party is that the ex parte applicants failed when they did not issue and serve the Deputy Registrar of this court with the notice under Order LIII rule 1 (3) of the Civil Procedure rules at the time of obtaining leave. The applicants' advocate pointed out that the notice was duly served hence opined that this objection lacked merit.

I am satisfied that the notice issued pursuant to order LIII rule 1 (3) of the Civil Procedure Rules was served upon the Deputy Registrar of this court as evidenced in the affidavit of Martin Shikuku Okinda. This objection therefore must fail.

The upshot therefore is that the preliminary objection is dismissed with costs to the ex parte applicants.

DATED AND DELIVERED THIS 13th DAY OF May 2005

J.K. SERGON

JUDGE