



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

Misc Appli 172 of 2004

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR ORDERS OF

CERTIORARI AND PROHIBITION AND

IN THE MATTER OF AN APPLICATION UNDER ORDER LIII OF THE CIVIL PROCEDURE RULES

AND IN THE MATTER OF THE LAND PARCEL KNOWN AS UASIN GISHU/SOY/ KAPSANG BLOCK 8 (NYALILBEI) 41

BETWEEN

REPUBLIC.....APPLICANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CHAIRMAN OF THE SOY/TURBO LAND CONTROL BOARD.....2ND RESPONDENT

DISTRICT LAND REGISTRAR UASIN GISHU DISTRICT....3D RESPONDENT EX-PARTE

FLOMENA CHEPKEMBOI

KIPLAGAT OLE SIGOWO.....1ST INTERESTED PARTY

JONATHAN KIPTUM KURGAT.....2ND INTERESTED PARTY

RULING

This is a Preliminary Objection to a Chamber Summons dated 10/06/2005. The Chamber Summons was filed by A.K. Chepkonga & Co. Advocates and was said to have been brought under Order XX Rule 22 and Order XXIV Rule 1 Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act (Cap 21). It seeks for two substantive prayers. Firstly, that the Court be pleased to set aside orders of or to reinstate the suit of 7th June, 2005 and all consequential orders emanating therefrom. Secondly, that pursuant to the above prayer, this application for judicial review dated 17th August 2004 and preliminary objection dated 8th February, 2005 be reinstated.

The notice of preliminary objection was dated 18th July 2005. It objects to the chamber summons on the grounds that :-

1. The application is misconceived, incompetent and fatally defective hence ought to fail.
2. This honourable court lacks jurisdiction to hear the application
3. The application offends order LIII of the Civil Procedure Rules.
4. The supporting affidavits are misplaced and an abuse of the process of court.

The applicant was not represented at the hearing of the preliminary objections. At the hearing of the preliminary objections, Mr. Wafula for the 2nd interested party submitted that the chamber summons was brought under Order XX Rule 22 and Order XXIV Rule 1 Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act (cap 21). Order XX Rule 22 did not exist in the Civil Procedure Rules and was therefore not available to the applicant. Also Order XXIV dealt with withdrawal of suit, while the matter herein was not a suit.

The legal regime that governed the proceedings before the court were under Order LIII of the Civil Procedure rules. No party was allowed to invoke any other rule or provision of the Civil Procedure Act, as the jurisdiction of Order LIII was governed by section 8 and 9 of the Law Reform Act. That was a special jurisdiction. He sought to rely on the case of Republic –vs- The Chairman – Kilibwoni Land Disputes Tribunal and Selly Jemutai – Eldoret H.C. Misc. Civil Applications No. 135 of 2001 and the case of Republic –vs- Kibomet Land Disputes Tribunal and Martin Simiyu – Kitale H.C. Misc. Civil Application No. 124”A” of 2001. He also sought to rely on the case of Henry Omwami Ndete –vs- Elizabeth Okoyana – Bungoma H.C. Misc. Civil Application No. 79 of 2002.

He further submitted that the application was overtaken by events as title deeds had already been issued. On 25/5/2005 Mr. Chepkonga for the applicant appeared in court and withdrew the then existing application because title deeds had already been issued. There was no reason for filing another application. Also costs had already been taxed. I have considered the objections which were not opposed as applicant’s counsel Mr. Chepkonga did not appear at the hearing of the preliminary objections.

The first objection is that the application cited Order XX rule 22 which did not exist. I have perused the Civil Procedure Rules. Order XX ends with rule 20. There is no rule 22. Rule 20 provides that applications should be brought by way of summons. The reference to rule 22 in my view, was a clerical error. The failure to cite a correct provision of law is not fatal. It is curable under Order L rule 12 Civil Procedure Rules. I have also perused Order XXIV of the Civil Procedure Rules. It deals with withdrawal of suits. If the Civil Procedure Rules were applicable in this matter, that Order would not be of any assistance to the applicant. He is not seeking for withdrawal of a suit.

The most important objection to the application is the applicability of the Civil Procedure Act and the Civil Procedure Rules under which the application was brought. This matter relates to judicial review proceedings for orders of certiorari and prohibition which was applied for through a Notice of Motion dated 17th August ,2004. It is trite that applications for orders of certiorari and prohibition are governed by the provisions of Order LIII of the Civil Procedure Rules. Those provisions relate to powers donated by section 8 and 9 of the Law Reform Act and not the Civil Procedure Act. They relate to motions for judicial review. The Civil Procedure Act and Rules under which the Chamber Summons was brought do not apply to motions for judicial reviews. I am in agreement with the decision of my sister Karanja J. in the case of Republic –vs- Martin Simiyu and Others - Kitale Misc. Civil Case No. 124”A” of 2001, where the learned Judge stated –

“Indeed motions for judicial review enjoy a jurisdiction that is “sui generis”. They are not governed by the Civil Procedure Rules”.

In my view, the application is fatally defective. The provisions of the Civil Procedure Act and Rules under which it was brought are not applicable. On that ground the application has to be dismissed.

As to whether the application has been overtaken by events, it has not been disputed by the applicant that

title has been issued or that taxation has already been done. However, I do not find it necessary to delve into the dept of those issues, as I have already decided that the application is fatally defective. Mr. Wafula appears to have abandoned the ground that the affidavits were misplaced and an abuse of the court process. I will therefore let that ground of objection rest there.

In the result, I uphold the preliminary objection and dismiss the Chamber Summons application with costs to the 2nd interested party.

Dated at Eldoret this 25th day of November, 2005.

GEORGE DULU,

Ag. Judge.