REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Misc. Civ Appli. No. 169 of 2004

JOYCE KANJA RINTHARA ……..……..…….. 1ST APPLICANT

FRANKLINE MUTHURI …….……..…….. 2ND APPLICANT

VERSUS

MARION KANJA …….……..……. 1ST RESPONDENT

ANN NAOMI …….……..…… 2ND RESPONDENT

SABERA KARIMI …….……..…… 3RD RESPONDENT

DAMARIS GACHERI …….……..…….4TH RESPONDENT

MERU CENTRAL DISTRICT LAND DISPUTES TRIBUNAL ..……5TH RESPONDENT

RULING OF THE COURT

What is before me is an application for Judicial Review in which the applicants herein, Joyce Kanja Rintuara and Frankline Muthuri pray for orders:-

1. That the honourable court do grant an order for Judicial Review of the proceedings and order in Meru Central District Land Disputes Tribunal Case No. 22 of 2004.

2. That the honourable court be pleased to issue orders of certiorari and prohibition to remove for purpose of being quashed the decision in Meru Central District Land Disputes Tribunal Case No. 22 of 2004 and all subsequent decisions or orders thereto.

3. Costs of this application be provided for.

The application which is said to be brought under Order 53 Rule 3 of the Civil Procedure Act and all other enabling provisions of the law is premised on four brief grounds on the face thereof:-

1. That the tribunal had no jurisdiction to deal with the issues in dispute.

2. That the decision was ultra vires, irregular.

3. That the tribunal did not address itself to the fact that the 1st applicant was the registered proprietor of land parcel No. NYAKI/CHUGU/570 and that her deceased father had transferred the same before his demise.

4. That the whole proceedings were a nullity.

The application was filed in court on 24.8.2004. The same was filed pursuant to leave granted to the applicants on 4.8.2004.

On the 3.11.2004, M/S Kiautha Arithi & Co. Advocates for the 1st, 2nd, 3rd and 4th respondents (hereinafter called the respondents) filed their Notice of Preliminary Objection on points of law. The same was dated 1.11.2004. The Preliminary Objection was raised on the grounds that:-

1. The application for leave dated 3.8.2004 was improperly intituled and therefore the leave granted pursuant thereto was improperly granted and should be set aside.

2. The Notice of Motion dated 23.8.2004 is improperly intituled and should be struck out with costs to the 1st respondent.

3. The procedure adopted by the applicant is otherwise an abuse of the court process.

Earlier on the 26.10.2004, the 1st respondent Marion Kanja made and swore a replying affidavit to the application on behalf of the respondents.

In an apparent attempt to forestall the preliminary objection filed by the respondents, the applicants, through their counsel, M/S F.K. Gitonga & Co. Advocates filed an application by way of chamber summons dated 14.5.2005 on the 16.5.2005. By that application, the applicants sought leave of the court to amend their Notice of Motion dated 23.8.2004. The grounds in support of the application were that the amendment was necessary so as to include the name of the Republic as the applicant and that such amendment could only be done through the provisions of the law. Further, that the proposed amendment would not result in any prejudice to the respondents. Finally, that the proposed amendment would elucidate the issues for determination by this court on merit.

Mr. Mwanzia for the respondents strenuously opposed the application initially made orally by Mrs. Gitonga for leave to amend. Mr. Kiogora Arithi who appears for the 5th respondent was in agreement with Mrs. Gitonga. On 3.11.2005, Mrs. Gitonga for the applicants informed the court that though her application for leave to amend was filed on 16.5.2005, the same had not been served upon counsel for the respondents. The court therefore ordered that the preliminary objection do proceed to hearing.

It is against that background that the preliminary objection on points of law was canvassed before me on 3.11.2005. During the hearing of the preliminary objection, Mr. Mwanzia for the respondents submitted that the applicant in Judicial Review applicants must always be the Republic, and that the omission to show the Republic as the applicant in this case was fatal to the application as a whole. He submitted that the omission by the applicants to bring their application in the name of the Republic was a grave error of substance that goes to the root of the application. In effect therefore, that there was no applicant.

It was also contended on behalf of the respondents that the purported applicants omitted to cite the provisions of the Law Reform Act, which provisions clothe this court with the jurisdiction to deal with the application before it. As it were, Mr. Mwanzia submitted, this court has no power to grant the orders sought.

The following authorities were cited to the court in support of the case for the respondents:-

(a) Henry Amwayi Ndete -V- Chairman Land Disputes Tribunal & another (2002) IKLR 392.

(b) Farmers Bus Service & others –V- The Transport Licensing Appeal Tribunal (1959) EA 779.

(c) Mohammed Ahmed -V- R. (1957) E.A. 523

(d) Jotham Mulati Welamondi -V- Chairman Electoral Commission of Kenya – Misc. Civil Application No. 81 of 2002.

(e) Philip Kiilu Menze & 42 others -V- Cons Matata T/A Cons Matata & Co. Advocates – HCCC suit No. 2070 of 2000.

It was also contended on behalf of the respondents that the omission by the applicants is so grievous that the provisions of Order 6 Rule 12 cannot cure it. This is on the ground that Judicial Review proceedings are special in nature and defects therein cannot be rectified under the other provisions of either the Civil Procedure Act or the Civil Procedure Rules made under the Civil Procedure Act.

Mrs. Gitonga for the applicants thought otherwise. She contended on behalf of her clients that any defects on the Notice of Motion are curable under the provisions of section 72 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya. The section provides as follows:-

"72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document or which is not calculated to mislead."

In her view therefore, the omission is not fatal to the application.

Commenting on the authorities cited by counsel for the respondents, Mrs. Gitonga submitted that all those authorities are irrelevant to the present case. She distinguished the Ndete and Mohammed Ahmed cases from the present case in that therein the Republic was shown as both applicant and respondent. She cited the case of ***Philip Meenze and others -Vs- Cons Matata*** in support of her clients' case.

The first issue for determination by the court is whether the omission by the applicants to bring this present application in the name of the Republic and to cite the provisions of the Law Reform Act, Cap 26, Laws of Kenya is an incurable defect. Secondly, whether, as contended by Mr. Mwanzia on behalf of the respondents, the order granting leave to the applicants was improperly given and whether the same should be set aside.

It is trite law that an application for judicial review should be made in the name of the Republic. It is not in dispute that the present application is not brought in the name of the Republic. The court, in the case of **Henry Awayi Ndete** (above cited) citing the earlier case of **Farmers Bus Services -Vs- Transport Licensing Tribunal** (also cited above) held that Judicial Review applications should be made in the name of the Republic. Though this case is of persuasive authority only, it has cited earlier Court of Appeal decisions which have restated the law on applications of this nature. In view of the foregoing, the preliminary objection succeeds on the ground that the applicants' application is not made in the name of the Republic.

What about the failure by the applicant to cite the provisions of sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya? Cap 26 of the Laws of Kenya is an Act of Parliament to effect reforms in the law relating to civil actions and prerogative writs. Section 8(1), thereof prohibits the High Court, whether in the exercise of its civil or criminal jurisdiction from issuing any of the prerogative writs of mandamus, prohibition and certiorari. Sub section 2 of the section however gives power to the High Court to issue orders of mandamus, prohibition and certiorari in any case in which the High Court in England is empowered to make similar orders by virtue of the provisions of section 7 of the Administration of Justice

(Miscellaneous Provisions) Act 1938 of the United Kingdom. As the applicants are seeking prerogative writs of certiorari and prohibition, it behoves the applicants to clothe the court with the necessary legal power to issue the orders sought by citing the relevant provisions of the law. The applicants have not cited those very provisions that clothe this court with that power to issue the orders sought

Considering all the authorities cited to the court, both binding and persuasive, there is no doubt in my mind that this failure by the applicants to cite the provisions of the Law Reform Act is fatal to the application.

It was the applicants' contention that the defects are curable by the provisions of section 72 of the Interpretation and General Provisions Act, Cap 2. The applicants argued that the omission is one of form and not substance. In all the authorities that were cited to the court and many others, it has been held that Order 53 of the Civil Procedure Rules is a special jurisdiction exercisable only under those rules and the Law Reform Act. In effect therefore, the provisions of Order 6 Rule 12 and those of section 72 of Cap 2 are not available to the applicants for the cure of the defects in the application. The omissions herein go to the substance of the application and not mere form. In this regard, I do accept the submissions by learned counsel for the respondents, and make a finding that no other provision of the Civil procedure Rules or the Civil procedure Act is applicable to applications under Order 53 of the Civil procedure Rules.

Further and as already noted, the Court of Appeal in the **Mohammed Ahmed** case (above) held that "…….**prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith…….”** A combination of the failure by applicant to make the application in the name of the Republic and failure to cite the provisions of Cap 26 of the Laws of Kenya have made the applicants' application incurably defective. On these grounds, the preliminary objection succeeds.

Mrs. Gitonga submitted that in the **Welamondi** case (above) failure to make the application in the name of the Republic was found to be a mere want of form and therefore excusable. I have carefully read that ruling and nowhere does it support the view that has been put forward by Mrs. Gitonga. The one thread that runs thought that ruling and indeed through all the other authorities cited to me is to the effect that the applicant in an application of this nature is always and must be the Republic and that the relevant provisions of the Law Reform Act must be cited as the statutory basis for the court to issue the kind of orders that are sought herein by the applicants.

As to whether or not the leave granted to the applicants on 3.8.2004 should be set aside, it is my finding that though the form used in that application for leave was incorrect, there is no point, in view of the outcome of the preliminary objection to set the order for leave aside.

In the result, I find that the applicants' application is both incompetent and misconceived in substance. For this reason, the preliminary objection is sustained. The Notice of Motion dated 23.8.2004 and filed in court on 24.8.2004 is hereby struck out with costs to the 1st respondent.

Orders accordingly.

Dated and delivered at Meru this 14th day of December 2005.

RUTH N. SITATI

JUDGE

14.12.2005