



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**MISC APPLICATION NO. 38 OF 2003**  
**IN THE MATTER OF AN APPLICATION BY**  
**VICTORY CHRISTIAN CENTRE PRESENTED BY REV. JAMES MUTHAMA**  
**KAVUVA AND KEFA WATSON MUSONYE FOR JUDICIAL REVIEW ORDERS OF**  
**CERTIORARI AND PROHIBITION**  
**AND**  
**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 AND**  
**THE CHAIRMAN KANDUYI LAND DISPUTES TRIBUNAL**  
**ETWEEN**  
**REPUBLIC ..... APPLICANT**  
**VS**  
**THE CHAIRMAN KANDUYI LAND**  
**DISPUTES TRIBUNAL ..... RESPONDENTS**  
**EX PARTE**  
**VICTORY CHRISTIAN CENTRE**  
**REPRESENTED BY REV. JAMES MUTHAMA**  
**KAVUVA AND KEFA MUSONYE ..... APPLICANTS**  
**AND**  
**JOHN A. OMUKALA )**  
**SALAMA SAIBU MIRANGA ) ..... INTERESTED PARTY**  
**q *Whether failure to serve notice***

*upon the Registrar is fatal.*

## **RULING**

The applicants took out a notice of motion pursuant to the Provisions of Order LIII rules 1 and 3 of the Civil Procedure rules in which they sought for Judicial review orders in the form of certiorari and prohibition with a view of having the decision of the Kanduyi Land Disputes Tribunal dated 24.10.2002 quashed and to further prohibit the Bungoma Senior Resident Magistrate's court from adopting the aforesaid decision.

At the commencement of the hearing of the motion, counsel for the 1st interested party, raised a preliminary objection to the effect that the motion was incompetent and bad in law for no notice of the institution of the proceedings was given to the registrar of this court as provided for under Order LIII rule 1 (3) of the Civil Procedure rules.

Mr. Gichana who appeared for the applicants contested the preliminary objection by stating that the notice was filed and served upon all the parties involved in this matter. However he was unable to show evidence of service of the notice upon the Registrar of this court. The relevant provisions of the law that governs the preliminary objection provides as follows:

- “ 1. (1) No a pplication for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.*
- 2. An application for such leave as aforesaid shall be made ex parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The Judge may in granting leave, impose such terms as to costs and as to giving security as he thinks fit.*
- 3. The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of statement and affidavits:*
- Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown”*

It appears the applicants filed the application for leave at the same time with the notice to the registrar and there is no evidence on record to show that the notice was served upon the registrar. It is obvious from the provision of order LIII rule 1 (3) that the notice must be served upon the registrar one day before the application for leave can be argued. It is clear that the Registrar of this was not served with notice. The issue which is left for me to decide is whether the failure to give notice of the application for the prerogative orders is fatal to the motion?

A close perusal of sub-rule (3) shows that the law is couched in mandatory terms. However the proviso gives me discretion to extend the period or to excuse the failure to file the notice of the application for good reasons. In this case the applicants have not applied to this court for extension of the period to file the notice nor have they sought for leave to be excused from filing the same.

This court made a decision over the issue at hand in the case of **WALTER FREDRICK ODHIAMBO VS REGISTRAR OF TRADE UNIONS Nairobi H.C. Misc Appl. No 210 of 1987** where Cockar J (as he then was) and Amin J. said:

*“We agree with Mr. Nowrojee that those prerogative orders fall under a special jurisdiction of this court created by a statute whe reby an institution of the Republic is empowered to supervise the functions of its subordinate institutions. There are no pleadings involved. The whole process becomes a nullity if leave is not obtained from a Judge in chambers.*

*It is to be observed th at the application itself before the Judge in chambers is ex parte. The Registrar receives the notice on behalf of the Republic which thereby becomes involved in the matter. In our view notice to the Registrar of the application under sub -rule (3) is an integral part of the application for leave. It is mandatory because without it the application itself is incomplete, incompetent and cannot be proceeded with. The proceedings are a nullity.”*

In these proceedings the applicants filed the notice but did not serve the same as required and if he did so then there is no evidence of service on record. I am in agreement with the decision of the learned Judges in the case of **WALTER FREDRICK ODHIAMBO** (Supra). The purpose of serving the notice of the application is to enable the Republic through the Attorney General if need be to participate at the ex parte stage of seeking for leave to intervene and probably oppose the application. Hence failure to serve the notice upon the Registrar of this court renders the whole proceedings fatally defective.

In the final analysis it is my conclusion that the preliminary objection has merit. Consequently the motion is hereby struck out with costs to the 1st interested party.

**DATED AND DELIVERED THIS 18th D AY OF June 2004**

**J.K. SERGON**

**JUDGE**