

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCELLANEOUS APPLICATION NO. 327 OF 2003

BETWEEN

REPUBLIC APPLICANT

VERSUS

FUNYULA LAND DISPUTES TRIBUNAL & 3 OTHERS RESPONDENTS

RULING

The interested parties raised preliminary points of law against the motion dated 7th January 2004. The points are contained in a notice of preliminary objection dated 16th April 2004.

It is said that the motion was filed out of time. The *ex parte* applicant submitted that the motion was filed within time in view of the provisions of order XLIX rule 3 A of the Civil Procedure Rules.

This Court granted leave to the *ex parte* applicant on the 5th day of December 2003 to file the substantive motion within 21 days. The Court exercised its jurisdiction to issue the order *inter alia* pursuant to the provisions of order LIII rule 3 (1) of the Civil Procedure Rules. It should be noted that order LIII were enacted pursuant to the provisions of sections 8 and 9 of the Law Reform Act which rest in the High Court of Kenya the power to issue orders of *certiorari*, prohibition and *mandamus*. The aforesaid provisions are not subject to any Act of Parliament. It is therefore crystal clear that the provisions of order X LIX rule 3 A of the Civil Procedure Rules does not apply. The applicant should have filed the motion within the given 21 days from 5.12.2003 that means the application should have been filed on or before the 26th day of December 2003. I agree with the submissions of Mr Omondi for the interested parties that the motion was filed out of time.

The second preliminary point is that the motion is not properly before this Court because it was commenced under the file which leave was sought and obtained. It was the submission of Mr Bongonko for the *ex parte* applicant that there was nothing wrong because that is a matter which is purely administrative. Under order LIII rule 3 (1), the substantive motion can only be filed after leave has been obtained. The law does not envisage a situation where the motion is filed under the file which leave was issued. The Chamber Summons application is considered as spent when leave has been granted. The applicant in this case should have originated the proceedings by filing the notice of motion in a separate miscellaneous application. In my humble view the failure to adhere to this practice renders the whole motion fatally defective for being improperly before court.

The third objection relates to the fact that the *ex parte* applicant had indicated that the motion was filed pursuant to order LII rule of the Civil Procedure Rules. The applicant was quick to point out that it was a typographical error which can be corrected. I am prepared to accept the view expressed by the applicant that it was a typographical error. For purposes of arguments, it is trite law that this Court is barred under section 8 (1) of the Law Reform Act cap 26 Laws of Kenya from issuing orders of *mandamus*, prohibition or *certiorari* in exercise of its civil or criminal jurisdiction. Hence this Court lacks the necessary jurisdiction to grant the orders sought in the motion under order LII rule 3 of the Civil Procedure Rules. This position was stated by the Court of Appeal of Kenya in the case of *Kenya National Examination Council vs Republic Ex parte Geoffrey Gathenji Njorooge & 9 others* CA No 266 of 1996. The Court of Appeal in the case *The Commissioner of Lands vs Kunste Hotel Ltd* CA No 234 of 1995.

The Court of Appeal stated that in exercising the power to issue or not to issue an order of *certiorari* the Court is neither exercising civil nor criminal jurisdiction. It would be exercising a special jurisdiction.

The upshot therefore is that the preliminary objection is upheld. The motion dated 7th January 2004 is ordered struck out with costs to the interested parties.

Dated and Delivered at Busia this 4th day of June 2004.

J.K.SERGON

JUDGE