REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL MISC APPLICATION NO. 79 OF 2002

HENRY AMWAYI NDETE…….……. APPLICANT

VERSUS

CHAIRMAN LAND DISPUTES TRIBUNAL……..RESPONDENT

AND

ELIZABETH ANYOKLO OKOYANA…..….INTERESTED PARTY

RULING

In this motion on notice, Henry Amwayi Ndete, who describes himself as the Applicant, seeks the prerogative writ of certiorari to issue to remove to this court for purposes of its being quashed the decision of the Land Disputes Tribunal made on or about 6.3.2002 and all consequential orders of the lower court purporting to adopt the same on 19.4.2002 purporting to excise and alienate the whole of 4 acres of his land known as KISA/EMESATSI/1082. The motion is expressed to be brought under section 3 A of the Civil Procedure Act, order L III rule 1 and (2) of the Civil Procedure (amendment) rules, 1992 and the order of court issued on 19.4.2002. The motion is grounded essentially on the proposition that the Land Disputes Tribunal acted in excess of its jurisdiction as it could not have adjudicated on a matter concerning beneficial ownership of Land Registered under the Provisions of the Registered Land Act, Cap.300 of the Laws of Kenya.

Both the respondent and the interested parties have objected to the motion on grounds that the same is fundamentally defective in that it has not been made in the name of the Republic. They rely on the case of **FARMERS BUS SERVICE V TRANSPORT LICENSING APPEAL TRIBUNAL** (1959) E.A. 779. Counsel for the applicant replies that order 6 rule 12 provides that no pleading should be objected to for want of form and that order 50 rule 12 also saves any application which does not recite the provisions of law under which it is made.

I have considered the arguments. It is established law that applications for certiorari mandamus or prohibition should be made in the name of the Republic. The case of **FARMERS BUS SERVICE V TRANSPORT LICENSING APPEAL TRIBUNAL** (1959) E.A. 779 held that such applications should be made in the name of the crown. When Kenya became a Republic in 1964, the crown was superseded in all legal proceedings to which it was a party by the Republic. The application for judicial review therefore ought to be made in the name of the Republic. This one is not.

Secondly, section 8 (1) of the Law Reform Act, Cap. 26, which enactment is the statutory basis for the grant of the reliefs of certiorari, mandamus or prohibition, expressly forbids the High Court from issuing any of the prerogative writs of mandamus, prohibition or certiorari. Subsection (2) does however empower the court to issue orders of mandamus, prohibition or certiorari in like cases as the High Court

in England would do under the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938 of the United Kingdom. The present motion seeks in express terms a prerogative writ of certiorari - a relief which the court is expressly barred by statute from issuing.

In the premises, the only issue here is whether the two shortcomings in the motion are errors of form which should not prejudice the application by dint of order 6 rule 12 and order 50 rule 12 of the Civil Procedure rules.

I am afraid that they are not. For a start, order 50 rule 12 has no application to the matter as the complaint is not that the applicant has failed to recite the provisions of law under which the motion is brought: It is that the applicant is not the proper applicant in law.

As regards order 6 rule 12, the same does not also avail the applicant. Order 53 of the Civil Procedure rules is a special jurisdiction. The rules embodied therein are not made under the civil Procedure Act but under the provisions of section 9 of the Law Reform Act. This fact which appears not to be well known or appreciated is only too well illustrated by a reference to the very first rules made in connection with prerogative orders in 1957. Order 6 rule 12 is made under the provisions of section 81 of the civil Procedure Act and has no application to proceedings brought pursuant to order 53 which is promulgated in pursuance of the provisions of section 9 of the Law Reform Act. Further more, the applicant seeks a relief which the statute itself bars the court from granting. Even if the failure to intitule the motion in the name of the Republic were an error of form curable by Order 6 rule 12 - and I hold it is not - the prayer for a prerogative writ is not such an error of form. It is an error of substance in that a relief excluded by the statute is expressly sought.

In the result, I uphold the objections by counsel for the respondent and counsel for the interested party and order struck out the motion on notice with costs to both the respondent and the interested party.

Dated at Bungoma this 9th Day of July 2002.

A.G. RINGERA

JUDGE

JUDICIAL REVIEW

- Form of application
- Application to be made in the name of the Republic
- Nature of Relief to be granted
- Statutory basis of Order LIII.