



REPUBLIC OF KENYA

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**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC MISC APPLICATION NO 127 OF 2017**

**(Formerly Machakos ELC Misc. Application No. 95 of 2009)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

**AND**

**THE KAJIADO DISTRICT LAND DISPUTES**

**TRIBUNAL SAIKO EN PARTELEKWA PAIN**

**ENE PARTELEKWA.....INTERESTED PARTIES/ APPLICANTS**

**AND**

**GITONGA WAMBUGU KARIUKI.....EX PARTE**

**RULING**

What is before Court for determination is the Ex parte Applicant's Notice of Preliminary Objection dated the 27<sup>th</sup> September, 2013 where they are praying for orders that:

1. That Notice of Motion dated the 12<sup>th</sup> August 2013 be and is hereby struck out.
2. That punitive cost to the exparte applicant.

The preliminary objection is based on the following grounds, which in summary is that the Notice of Motion dated the 12<sup>th</sup> August, 2013 does not lie as it is flawed. The Applicants have no privity of the contract and lacked locus standi ab initio to institute a Dispute at the Land Disputes Tribunal. The application is incompetent as well as unmeritorious and the Court lacks jurisdiction to rehear or open concluded judicial review application. That is it firmly established law that where the proceedings are governed by a Special Act of Parliament, the provision of such Act must be strictly constructed and applied. The provisions of Civil Procedure Act and Rules do not apply unless expressly provided by such an Act.

The Notice of the Preliminary Objection is opposed by the Interested parties who filed submissions where they argued that the said Preliminary Objection is ill informed and an abuse of the Court process. They contended that the issue of privity of contract and lack of locus standi ab initio should not be raised at this point in in time. They insisted that the application dated the 12<sup>th</sup> August 2013 sought to stay taxation of the party to party Bill of costs; set aside/ vary ex parte orders dated the 18<sup>th</sup> July, 2013 and leave to file a replying affidavit on the application dated the 6<sup>th</sup> January, 2009. They relied on various judicial authorities including **David Karyu & 12 Others Vs Mwangangi Mbindyo sued as representative of John Mbindyo Mutinda (2014) eKLR; Benjoh Amalgamated Limited & Anor Vs KCB Limited (2014) eKLR; Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696; Oraro Vs Mbaja (2005) eKLR; Peter Ouma Mitai Vs John Nyarara Kisii HCCA No. 297 of 2005; Philip Chemowolo & Anor Vs Augustine Kubede ( 1892 – 88) KAR 103 ATM 104; Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 others; and Aga khan Health Services Kenya Vs Margaret Njoki Njunge & 2 others (2016) eKLR** to oppose the Preliminary Objection.

The Ex parte applicant submitted that the rules are inapplicable and that the Interested Parties are seeking non available orders. He relied on the Court of Appeal decision in **Kunste Hotel Ltd Vs The Commissioner of Lands Civil Appeal No. 234 of 1995** and **Republic Vs the Communication Commission of Kenya Civil Appeal 175 of 2006** where it was held that the Civil Procedure Rules does not provide for setting aside orders of review, stays, or variations. He relied on section 58(3) and 8(5) of the Law Reform Act to reiterate his arguments that the Court lacks jurisdiction to rehear or open concluded Judicial Review Application.

### **Analysis and Determination**

Upon perusal of the Notice of Preliminary Objection dated the 27<sup>th</sup> September, 2013; the Notice of Motion dated the 12<sup>th</sup> August, 2013 including the submissions filed herein, the only issue for determination is whether the Notice of Motion dated the 12<sup>th</sup> August, 2013 should be struck out.

I note the Interested Parties application dated the 12<sup>th</sup> August, 2013 sought to stay taxation of the party to party Bill of costs dated the 20<sup>th</sup> February, 2013; set aside/ vary ex parte orders dated the 18<sup>th</sup> July, 2013 and leave to file a replying affidavit on application dated the 6<sup>th</sup> January, 2009. I note this application has been opposed by the Ex parte Applicant who claims in his Preliminary Objection that the Interested Parties have no privity of the contract and lacked locus standi ab initio to institute a claim at the Land Disputes Tribunal. Further, that the application is incompetent as well as unmeritorious and the Court lacks jurisdiction to rehear or open concluded judicial review application. It is their argument that judicial review proceedings cannot be set aside as they are special procedures not governed by the Civil Procedure Rules.

I note in the instant application the Interested Parties are simply seeking to be granted a right to be heard which is their Constitutional right. Further, from the proceedings, it is clear, they were not accorded the same and the Exparte Applicant were granted orders ex parte. The Interested Parties however admit that their advocate failed to attend Court. In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.**

Further in the Court of Appeal decision of **RAMJI MEGJI GUDKA LTD -Vs- ALFRED MORFAT OMUNDI MICHIRA ;& 2 OTHERS [2005]** eKLR it was held as follows:

**"In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-**

**"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."**

**In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."**

Further in the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '**

I note that the Interested Parties' are merely seeking to be heard, which fact is opposed by the ex parte applicant who is against any attempt of the application dated the 12<sup>th</sup> August 2013 being heard on its merits. Insofar as the ex parte applicants claims that the Law Reform Act as well as Order 53 does not allow judicial review proceedings to be reopened, I opined that the current Constitution cured this technicalities especially at article 159 (2) (d) which provides urges Courts to administer justice with undue regard to procedural technicalities. It is my considered view that it is important for the application dated 12th August 2013 to be heard on its merits as the ex parte applicant has not demonstrated the prejudice he stands to suffer if the said application was set down for hearing.

It is against the foregoing and in relying on the judicial authorities cited above, that I find the Preliminary objection is unmerited and will disallow it.

I direct the parties to fix the application dated the 12<sup>th</sup> August 2013 for hearing within 21 days from the date hereof to enable the court make a final determination of the same.

Costs will be in the cause

**Dated signed and delivered in open court at Ngong this 3rd day of October, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**