



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPEAL NO. 48 OF 2010**

**(FORMELY MISCELLANEOUS CIVIL APPLICATION NO. 140 OF 2008 NAIROBI HIGH COURT)**

**IN THE MATTER OF AN APPLICATION BY PHILIP MUTUSE**

**FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF APPEAL TO THE MINISTER CASE NO. 167 OF 2006**

**BETWEEN**

**PHILIP MUTUSE KIMUYU.....APPLICANT**

**VS**

**THE MINISTER OF LANDS AND SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**JAMES KALOKI.....2<sup>ND</sup> RESPONDENT**

**JAMES N. KITOMBO.....3<sup>RD</sup> RESPONDENT**

**MUSILU MUTHAI.....4<sup>TH</sup> RESPONDENT**

**DAUDI KALOKI.....5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. This is a Ruling on a Preliminary Objection by the 2<sup>nd</sup> – 5<sup>th</sup> Respondents seeking to have Judicial Review proceeding challenging the decision on Appeal to the Minister Case No. 167 of 2006 (hereto referred to as the “decision” in regard to plot No. 261 (1680), dismissed. The Applicant filed a notice dated 25<sup>th</sup> March 2008 under Order 53 Rule (3) of the Civil Procedure Rules on 28<sup>th</sup> March 2008 to the Registrar of the High Court of Kenya at Nairobi together with a statutory Statement in accordance with Order 53 Rule (2) of the Civil Procedure Rules.

2. The Applicant filed this application No. 48 of 2010 on 31<sup>st</sup> March 2008 under the High Court vacation Rules and all other enabling laws for the following orders under Certificate of Urgency for Orders:-

1. **THAT** leave be granted to the Applicant to apply for Orders of Certiorari to quash the respondent’s award by Appeal to the Minister Case No. 167 of 2006 of 2<sup>nd</sup> October 2007 and leave granted to operate as a stay.

2. **THAT** all necessary and consequential orders and directions be given

3. **THAT** the cost of this Application be provided for

3. The above mentioned application was to seek leave as required for Judicial Review matters and upon grant of leave the substantive

application was filed by Notice of Motion dated 21<sup>st</sup> April 2008.

4. On the 2<sup>nd</sup> day of April 2008 the Court made the following orders in respect of the above mentioned application:

1. **THAT** this matter be and is hereby certified urgent.
2. **THAT** leave be and is hereby granted to the applicant to apply for orders of Certiorari to quash the respondent's award by Appeal to the Minister Case No. 167 of 2006 of 2<sup>nd</sup> October 2007.
3. **THAT** the main Motion be filed and served within 21 days from today.
4. **THAT** leave hereby granted shall operate as stay provided that the main motion is filed and served within 21 days from today and in default stay hereby granted will automatically lapse.
5. **THAT** costs be in the cause.

5. On the 17<sup>th</sup> November 2009 the 2<sup>nd</sup> - 5<sup>th</sup> Respondents appointed the firm of Kasyoka and Associates Advocates to act for them in the matter, whereupon Counsel for the 2<sup>nd</sup> - 5<sup>th</sup> Respondents filed a Preliminary Objection dated 17<sup>th</sup> day of November 2009 on the following grounds:-

1. The application is fatally defective in form and substance and offends the mandatory provision of sections 8 and 9 of the Law Reform Act – Chapter 26 Laws of Kenya.
2. The applicant has no Locus stand to apply for Orders of Certiorari which is a sole preserve of the Crown/Republic.

6. The firm of KALWA & COMPANY ADVOCATES filed a Chamber Summons dated 6<sup>th</sup> December 2011 on the 7<sup>th</sup> December 2011 under Order 9 Rule 13(1) of the Civil Procedure Rules for Orders that:

1. The Firm of KALWA & COMPANY ADVOCATES be allowed to cease acting for the Applicant herein.
2. Costs of this Application be provided for.

8. This application was supported by the Affidavit of FRANCIS KALWA dated 6<sup>th</sup> December 2011 but the application was never prosecuted.

### **Submissions**

8. The 2<sup>nd</sup> - 5<sup>th</sup> Respondents filed their submissions on the 27<sup>th</sup> July 2012 which were based on two main reasons i.e the application has no merits and is totally defective:

1. The Applicant has no locus standi to bring this application
2. Challenge to decision under the provisions of the Land Disputes Act No 18 of 1990 (now repealed) while the decision was made under the provisions of the Land Adjudication Act Cap 284 Law of Kenya.

9. On the issue of *locus standi* counsel for the 2<sup>nd</sup> - 5<sup>th</sup> Respondents submitted that the application before this court being Judicial Review seeking prerogative Orders which are granted at the instance of the Crown/Republic, once leave is issued the Applicant should have filed the Notice of Motion in the name of "The Republic of Kenya," as the Applicant "Ex-parte PHILIP MUTUSE KIMUYU."

10. Counsel for the 2<sup>nd</sup> - 5<sup>th</sup> Respondents further submits that the Applicant failed to make the Republic a party, nor did he serve the Attorney General with a copy of the proceedings and further the Applicant did not serve the Application upon the 1<sup>st</sup> Respondent.

11. The 2<sup>nd</sup> - 5<sup>th</sup> Respondents also submit that they should not have been sued as the Respondents as they did not make the decision the Applicant seeks to challenge and that they should have been brought to the suit as interested parties.

12. Counsel for the 2<sup>nd</sup> - 5<sup>th</sup> Respondents relied on the case of ***Peter Gitahi Kamaiithi vs Secretary, Public Service Commission & Others H.C Misc. Civil App. No. 22 of 2009*** [2010] eKLR.

13. On the issue of which provisions the decision was made, Counsel submitted that the decision was made under the provisions of the Land Adjudication Act Cap 284 Laws of Kenya. He notes that it was the decision of the Minister on an Appeal to the Minister under provisions of section 29(1) (a) & (b) of the Land Adjudication Act.

14. Counsel for 2<sup>nd</sup> - 5<sup>th</sup> Respondents submits that the Minister had every right to determine the issues and thus cited the preamble of the Land Adjudication Act which states 'An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust Land and for purposes connected therewith and purposes incidental thereto.' He thus concluded his submissions seeking that the Application

be dismissed with costs.

15. On the 8<sup>th</sup> June 2015 the 2<sup>nd</sup> – 5<sup>th</sup> Respondents filed a Notice of Change of Advocates from KASYOKA & ASSOCIATES to the firm of M/S KAMOLO & ASSOCIATES ADVOCATES. However, from the Record it is noted that the Applicant and the 1<sup>st</sup> Respondents did not file their submissions for the Preliminary Objection

### **Issues for determination**

16. The issues for determination arising in the Preliminary Objection dated 17<sup>th</sup> November 2018 are as follows:

1. Whether the application is fatally defective in form and substance and offends the mandatory provision of Section 8 and 9 of the Law Reform Act – Chapter 26 Laws of Kenya; and
2. Whether the applicant has *locus standi* to apply for orders of Certiorari.

### **Determination**

The Law Reform Act

17. Section 8 of the Law Reform Act provides as follows:

1. The High Court shall not, whether in the exercise of its Civil or Criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.
2. In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of justice (Miscellaneous provisions) Act, 1938, (1 and 2, Geo. 6, c.63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.
3. No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.
4. In any written law, reference to any writ of mandamus, prohibition, or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.
5. Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High court under this section may appeal therefrom to the court of Appeal.

18. Section 9 of the Law Reform act is in the following terms:

### **Section 9 – Rules of court**

1. Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court.
  - a. Prescribing the procedure and the fees payable on documents filed or issued in cases where an order of Mandamus, prohibition or certiorari is sought;
  - b. Requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;
  - c. Requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.
2. Subject to the provisions of subsection (3), rules made under subsection may prescribe that applicants for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for the leave relates,
3. In the case of an application for an order of certiorari to remove any judgment, order decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time of appealing has expired.

19. The issues raised by the Counsel for the 2<sup>nd</sup> – 5<sup>th</sup> Respondents are mainly based on the form taken up by the application, that is, the way the pleadings were drafted and filed.

20. At the outset, the Court must underline the Constitutional background of substantial justice as set out in Articles 23 and 159 of the Constitution. Article 22 (3) (d) of the Constitution provides that:

“The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.”

Article 159 (2) (d) of the constitution provides that:

“In exercising judicial authority, the courts and the tribunals shall be guided by the following principles:-

d. Justice shall be administered without undue regard to procedural technicalities.”

#### **Defect in form of Notice of Motion and locus standi**

21. As held in *Farmers Bus Service & Ors v The Transport Licensing Appeal Tribunal* (1959) EA 779, the Court of Appeal for Eastern Africa held that Prerogative Orders are issued in the name of the Crown and application for such orders must be correctly instituted with the Republic as the applicant upon leave having been granted. But failure to properly intitle the proceedings as such is not fatal, and as held in the *Farmers Bus Service* case, the proceedings and documents should be amended. The point of the proceedings having been shown to be brought in the name of the applicant, rather than the Republic, is, with respect, not a Preliminary Objection within the meaning of a pure point of law capable of disposing the entire matter as held in *Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors Ltd.* (1969) EA 696, 700-1.

22. In addition, Order 51 Rule 10 (2) of the Civil Procedure Rules has clarified the place of form in pleadings by providing that **substance** shall not be trumped by the **form** as follows:

**“[Order 51, rule 10.] Provision under which application is made to be stated.**

10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

See also *Rambhai & Co. (Uganda) Ltd. v. Lalji Ratna & Anor.* (1970) EA 106.

23. However, it does not necessarily follow that courts should overlook all technicalities and defects in form but each case must depend on its own facts and circumstances. However, in all cases of lack of form or default in compliance with a technicality, the court must seek to have the defect in form remedied and any correction and or amendments made consistently with the substantial justice principle and ensure that justice prevails. The court should see that none of the parties shall be prejudiced by such lack of proper form.

24. In *Peter Gitahi Kamiatha*, supra, Makhandia, J. (as he then was) struck out a judicial review Notice of Motion on the principal ground of failure of the statutory Statement to disclose the relief sought and the grounds thereof. I would, respectfully, consider it appropriate to strike out such a pleading because there is indeed no competent suit before the court without the reliefs sought and grounds therefor.

#### **Service on the Attorney General**

25. On the issue of service on the Attorney General for the 1<sup>st</sup> Respondent and whether the 2<sup>nd</sup> – 5<sup>th</sup> Respondents should have been enjoined as Respondents or interested parties, the Civil Procedure Rules have elaborate remedy as regards service on all persons affected and the court may direct the persons to be served, and the joinder, non-joinder and mis-joinder are matters only of technical value because an application cannot be defeated for want of form. The primary concern of the court is that such affected parties are heard on the matter and not the capacity or name in which they are sued or appear in the cause.

26. Order 53 is clear on service on respondents including the power of the court of its own motion to direct service on persons who, in the court’s view ought to have been served. Order 53 Rule 3 of the Civil Procedure Rules provides significantly as follows:

**“[Order 53, rule 3.] Application to be by notice of motion.**

3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

**(2) The notice shall be served on all persons directly affected,** and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the

affidavit shall be before the High Court on the hearing of the motion.

**(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.”**

**On the facts of the case**

27. It is not in contention that there was a decision made by the District Commissioner of Makueni and whether the same was *ultra vires* is an important determination of the substantial dispute between the parties, which is a serious question to be presented to the Judicial Review Court.

28. The Court does not at this stage consider the substance of the application, whether the impugned decision was properly and lawfully made, which must await full hearing of the application.

**Orders**

29. Accordingly, for the reasons set out above, the court makes the following orders:-

1. The 2<sup>nd</sup> – 5<sup>th</sup> respondent’s Preliminary Objection herein is dismissed.
2. The Applicant shall amend the Notice of Motion herein to show the Republic as the Applicant and serve the same on the Respondents, any Interested Parties and other persons directly affected in accordance with Order 53 Rule 3 of the Civil Procedure Rules, 2010.
3. The Amended Notice of Motion shall be served upon the Respondents and any Interested Parties within fourteen (14) days from the date of this Ruling.
4. The Respondents and any Interested Parties shall file their respective Responses within seven (7) days from the date of service of the Amended Notice of Motion.
5. This matter shall be heard on such date or dates as the Court shall, in consultation with the Counsel for the Parties, appoint.
6. Costs in the Cause.

Order accordingly.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF DECEMBER 2018.**

**G.V. ODUNGA**

**JUDGE**

**Appearances:-**

M/S Kalwa & Co. Advocates for the Applicant.

M/S Kamolo & Associates, Advocates for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents.