



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**MISC. APPLICATION NO. 33 OF 2010**

**REPUBLIC.....APPLICANT**

**VERSUS**

**SIGOR LAND DISPUTE TRIBUNAL.....1ST RESPONDENT**

**ELIZABETH CHEPSOWAR..... 2ND RESPONDENT**

**MERINYANG NYORSOK (MOYOY CLAN)..... EX-PARTE**

**R U L I N G**

1. A Notice of Motion dated **19th July, 2010** was filed by the ex-parte applicant **Merinyang Nyorsok** supposedly on behalf of a clan called “**Moyoy**”, seeking an order of certiorari to remove into this court and quash the award of the Sigor Land Dispute Tribunal which was adopted as a judgment of the court on **30th April, 2008** in **Kapenguria's PMCC Land Case No. 5 of 2008**.

The said Sigor Land Dispute Tribunal was cited as the first respondent while the Principal Magistrate's Court at Kapenguria was cited as the second respondent. **Samson Longole** on behalf of the “**Soko**” clan, was cited as the Interested Party.

The basic ground in support of the application was that the material land dispute tribunal acted without jurisdiction in making a decision concerning ownership of land and on a claim which was about five hundred (500) years old well outside the period of limitation and in awarding specific performance of a customary contract. Other grounds included the incapability of enforcing the award of the tribunal and the lack of capacity on the part of applicant and the objector before the tribunal in instituting and defending a representative action on behalf of their respective clans.

2. The Notice of Motion aforementioned remains pending. The attempts made on 25th July, 2011 and 7th December, 2011, to have it prosecuted did not succeed. In the meantime, a second notice of motion dated 6th June, 2013, was filed by the ex-parte applicant and another seeking the inclusion of that other person i.e. **Solomon Mworor Nyorsok**, as a party to this matter in place of the ex-parte applicant who passed away on 20th April, 2011. This second motion was withdrawn on 25th March, 2014, and was succeeded by the current motion dated **11th April, 2014**, seeking to have the applicant, **Solomon Mworor Nyorsok**, substituted for **Nerinyang Nyorsok** (now deceased) also known as **Mnangat Lokotum Nyorsok** as the ex-parte applicant on behalf of the **Moyoy clan**.

The application is brought under Order 1 Rules (10) and 14 and Order 24 Rule 3(1) of the Civil Procedure Rules (2010) and Section 3A and 100 of the Civil Procedure Act and is based on the grounds contained in the Notice of Motion as supported by the applicant's affidavit dated 11th

April, 2014, and further affidavit dated 23rd October, 2014

3. The respondents opposed the application on the basis of the grounds of opposition dated 25th July, 2014. The interested party similarly opposes the application on the basis of the facts contained in his replying affidavit dated 22nd July, 2014. The learned counsel, **Mr. Barongo**, appeared for the applicant at the hearing of the application and relied on the supporting grounds as fortified by the supporting affidavits. He submitted that the suit should be revived to allow the substitution of the applicant as a party following the demise of the initial applicant. That, the revival of the suit is necessary since the initial applicant passed away more than one year ago resulting in the abatement of the suit. That the record of the court shows that the applicant did not sit on his rights and that the delay in bringing the application has been explained. That the application is brought under the correct provisions of the law and in any event, the court has the discretion to extend time and may not therefore dismiss the application on account of technicality.
4. **M/s Lungu**, learned counsel for the respondents, submitted that the applicant has not given sufficient excuse to warrant revival of the suit which abated on 20th April, 2012. That the delay in bringing the application is inordinate considering that the withdrawn application was filed belatedly and so was the application for the limited grant of letters of administration. That, the application is brought under the wrong provisions of the law and should therefore be dismissed.

Learned counsel for the interested party, **Mr. Wanyama**, agreed with the respondents, and added that the delay of about three (3) years in bringing the application was not explained. That, there is no disclosure of the suit which allegedly survives the deceased. That, the applicant has come to court without clean hands and is merely abusing the court process.

5. Upon due consideration of the application on the basis of the supporting grounds and those in opposition and also on the basis of the arguments put forth by both sides, it became apparent to this court that the basic issue for determination is whether the application is competent and proper before the court and if so, whether the applicant is entitled to the orders sought in the appropriate notice of motion.

Basically, this is a judicial review matter and therefore “**Sui-generis**” such that the provisions of the Civil Procedure Act and Rules do not apply save Order 53 of the Civil Procedure Rules which is the Procedural Law for such matters while the substantive law is the Law Reform Act (Cap 26 LOK). Order 53 of the Civil Procedure Rules has no provision for substitution of parties or for the revival of a matter after abatement and inherent powers of the court are inapplicable where there is a specific provision of the law.

6. Indeed, Order 53 CPR was made pursuant to powers donated by S.9(1) of the Law Reform Act and in **Republic -vs- Communication Commission of Kenya (2001) 1 EA 199**, the Court of Appeal held that on their own terms the provisions of Section 8 and 9 of the Law Reform Act which vests in the High Court of Kenya the power to issue orders of mandamus, prohibition and certiorari are not subject to any other Act of Parliament.

In **Republic -vs- Commissioner of Customs & Excise HC. Misc.Cr. No. 832 of 2003**, the High Court at Nairobi reiterated that the only part of the Civil Procedure Rules which is applicable to judicial review is Order 53 whose rules were in turn made under Section 9 of the Law Reform Act. It was also held therein that Section 3 and 3A of the Civil Procedure Act have no application to judicial review. [See also, **Commissioner of Lands -vs- Kunste Hotels Ltd (1995-1998) 1 EA 1**].

7. It is clear that proceedings under Order 53 Civil Procedure Rules are special in nature, that Order 53 stands on its own with its own rules and therefore, the Civil Procedure Act and Rules do not apply to them.

In as much as the present application is brought under the provisions of the Civil Procedure Act

and Rules, it is incompetent and improper before this court for the grant of the orders sought herein by the applicant and not even Article 159 (2) (d) of the Constitution can save it.

8. In the upshot, the application is hereby dismissed with costs to the respondents and the interested party.

Ordered accordingly.

**J.R. KARANJA**

**JUDGE**

**9/07/2015**

Read and signed this **9th** day of **July, 2015**

In the presence of Mr. Samba holding brief for Katina

for Applicant and Mr. Wanyama for Interested Parties.