



No.335/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION (J/R) NO. 300 OF 2010

IN THE MATTER OF LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE ESTATE OF THOMAS KIMILU NDUNDA (DECEASED)

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS**

BETWEEN

MAGDALINE NGWEMBE KYULU.....1ST APPLICANT

FREDRICK KAKULA KYULU.....2ND APPLICANT

PATRICK KINGOLA KYULU.....3RD APPLICANT

FRANCIS MUTUKU KYULU.....4TH APPLICANT

DANIEL WAMBUA KYULU.....5TH APPLICANT

IMMACULATE MUMO KYULU.....6TH APPLICANT

RULING

1. Leave was granted by **Makhandia, J** (*as he then was*) on the 20th September, 2012 to:-

- i. Magdaline Ngwembe Kyulu
- ii. Fredrick Kakula Kyulu
- iii. Patrick Kingola Kyulu
- iv. Francis Mutuku Kyulu
- v. Daniel Wambua Kyulu
- vi. Immaculate Mumo Kyulu;

pursuant to the provisions of **Section 8** of the **Law Reform Act** and **Order 53** of the **Civil Procedure**

Rules. Per the **Order** of the Court the applicants were required to file a substantive motion in accordance with laid down rules.

2. On the **11th October, 2012** the applicants filed a substantive notice of motion seeking orders:-

- i. **That** this Honourable Court be pleased to grant the applicants, Judicial Review Orders of *mandamus* directed to the area **Chief Kiou Location, Makueni District** compelling him to release to the Applicants the original identity card belonging to **Thomas Kimilu Ndunda (deceased)** which he forcefully confiscated and to compel the said chief to issue the applicants with a letter confirming their relation to the deceased to enable the applicants to file a Succession Cause for the estate of the said **Thomas Kimilu Ndunda**.

3. The application is premised on grounds that;-

- i. The applicants are the beneficiaries of the estate of **Thomas Kimilu Ndunda**;
- ii. They intend to apply for letters of administration but the areas chief confiscated the deceased's original identity card and has refused to hand it over to the applicants;
- iii. The chief has also refused to issue them with a letter confirming their status.

4. The application is supported by an affidavit jointly deposed by all applicants whereby they aver that **Thomas Kimilu Ndunda** who died on the **26th day of April, 2006** was a brother to their father one **Kyulu Ndulu** also deceased. The said **Thomas Kimilu Ndundu** died a bachelor leaving properties **Plot Numbers 1073 and 1888 Uvaleni Adjudication Section** within **Makueni District**.

5. Being his blood relatives they wish to apply for Letters of Administration but they are curtailed as the area chief of **Kiou Location** obtained from them the deceased's original identity card that he has declined to release.

6. Further they stated that the chief has personal interest in the property knowing that the deceased was not survived by any wife or children and failure to grant orders sought would render the estate unadministered perpetually which leaves it open to abuse, grabbing and wastage.

7. The application was unopposed.

8. As I have stated in the past, prerogative orders are used by the court to review decisions of Public bodies. The State has the mandate of ensuring that the decision made by the public body is lawful. It is for that reason that the state must act on behalf of the party who is dissatisfied by an action taken by a public body. (*see Merdick Nenkalash versus Kajiado Land Disputes Tribunal & Others, Civil Miscellaneous Application No. 46 of 2012, Machakos*).

9. In this case at the point of seeking leave to institute judicial review proceedings the applicants herein correctly described themselves as such. However, at the point of filing the substantive motion they ought to have indicated the name of the party who was deemed to have brought the application on their behalf, namely the State (Republic). This position was stated in the case of *Farmers Bus Service versus Transport Licencing Appeals Tribunal [1959] E.A. 779*. In the case the court illustrated the format to be used when drawing up such an application. It has been emphasised that the applicant must be the Republic.

10. In the case of *Welamodi versus the Chairman, Electoral Commission of Kenya[2012] 1 KLR, 486* it was stated thus:-

"...orders of certiorari, mandamus and prohibition must issue in the name of the Republic and applications made in that regard must be made in the name of the Republic at the instance of the person affected by the omission or action to issue".

11. In the instant case the State is omitted. It is not a party. Being a Judicial Review matter, it is the State

that is expected to act to rectify the irregularity made that has resulted into the injustice complained of by the applicants. Failure to include the State means that there will be nobody to supervise the order sought if granted.

12. In the premises, without delving into merits of the application the same must fail. Consequently, I strike it out with no order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 1ST day of JULY, 2014.

L.N. MUTENDE

JUDGE