



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC JR. APPLICATION NO. 104 OF 2010

COSMAS MURIUNGI THAMBO.....EX-PARTE APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION OFFICER

TIGANIA EAST DISTRICT.....RESPONDENT

MARGARET KABERIA M'TWAKOROI.....INTERESTED PARTY

R U L I N G

The Notice of Motion herein is dated 11th January, 2011. The Application states that it is predicated upon Order III, Rule 3 (1) of the defunct Civil Procedure Rules and Section 8 and 9 of the Law Reform Act. It seeks orders:

(a) That this Honourable Court be pleased to issue an order of mandamus to compel the District Land Adjudication Officer of Tigania West District to implement the decision in A/R Objection No. 912 in respect of P/No.8450, 8437 and 7834 within Antuamburi Adjudication Section.

(b) That costs be provided.

The Interested Party filed a Notice of Preliminary Objection dated 18th May 2012. It stated as follows: “The suit herein is improperly instituted as it is not instituted in the name of the Republic and is therefore incompetent and is for striking out.”

The Interested Party in support of the Preliminary Objection referred to the case of **Farmers Bus Service ad Others Versus The Transport Licensing Appeal Tribunal, EALR 1959 at page 779** where the Court of Appeal at Nairobi dealt at length with the form of initiating applications for prerogative orders. He submitted that the Application filed by the Exparte Applicant was incompetent *ab initio* as it was wrongly initiated and was, therefore, not capable of being amended with the leave of Court.

The Exparte Applicant submitted that his statement of facts and the verifying Affidavit clearly showed that the Republic was the Applicant. It was also submitted that the Preliminary Objection merely sought to rely on procedural technicalities and should be dismissed with costs to the Applicant as the Constitution and provision's of the Civil Procedure Act overruled any such procedural technicalities.

The Respondent had also filed grounds of opposition dated 13th February, 2013. They were:

- 1. That the Application is misconceived, fatally defective and an abuse of the Court process.**

2. **That the Application has not complied with Order 53 of the Civil Procedural Rules.**
3. **That Judicial Review remedies are discretionary in nature and sometimes the Court will not grant them even when deserved.**
4. **That Judicial Review is concerned not with merits of the decision being challenged but with the decision making process.**
5. **That the Application is not properly entitled.**

In his submissions, the Respondent pointed that several authorities had cited failure to bring a Judicial Review Application in the name of the Republic as being fatal. As the Application had no Applicant, who should have been the Republic, it should be struck out. It was further submitted that the Judicial Review Jurisdiction under sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules was a special jurisdiction which was *sui generis* and should be handled carefully. It was also submitted that Judicial Review was not concerned with the merits of the decision being challenged but with the decision making process. Finally, it was submitted that Judicial Review Remedies are discretionary and in view of the fact that the Application had defects it should be dismissed with costs.

The Respondent proffered the following authorities:

1. **Farmers Bus, Service and Others V. The Transport Licensing Appeal Tribunal, Court of Appeal 63 of 1959.**
2. **James Kega Kangau & Others V the Electoral Commission of Kenya, Misc. Application 1570 of 2005, Nairobi.**
3. **Ndete V. Chairman, Land Disputes Tribunal, Misc. Civil Appeal No. 70 of 2002, High Court, Bungoma.**
4. **Joyce Kanja Rinthara & Another V. Marion Kanja and Others Misc. Civil Application 169 of 2004, High Court Meru.**

It is clear from all the authorities proffered that Judicial Review is a special jurisdiction governed by provisions of sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. Where there are statutory provisions, failure to observe them is not a mere procedural technicality. It is a substantive legal issue. In the case of Judicial Review, which is a special jurisdiction, non-compliance is fatal. It will render an application incompetent. I also agree with the Respondent that Judicial Review is not concerned with the merits of the decision being challenged but with the decision making process. In this application the process is not being challenged.

In the circumstances, the Application by the Exparte Applicant is found incompetent and is dismissed with costs to the Interested Party and the Respondent.

It is so ordered.

Dated and Delivered in Open Court at Meru this 8th day of October, 2013 in the presence of:

Cc Daniel

Murango Mwenda present for Interested Party

Kieti for Respondent

P. M. NJOROGE

JUDGE