



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**MISC. APPLICATION CASE NO. 162 OF 2010**

IN THE MATTER OF AN APPLICATION BY (1) HENRY BOI KAWA (2) HENRY AMALELE WENEKEYA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO 18 OF 1990.

IN THE NAITIRI LAND DISPUTES TRIBUNAL NO. 18/2010 AND KIMILILI PM'S COURT LAND CASE NO. 18 OF 2010

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CHAIRMAN

LAND DISPUTES TRIBUNAL .....RESPONDENT

EXPARTE

1. HENRY BOYI KAWA.....APPLICANT

2. HENRY AMALELE WENEKEYA ..... APPLICANT

VERSUS

TIMOTHY KHISA ALICHUMA ..... INTERESTED PARTY

**JUDGMENT**

This is a Judicial review application seeking to quash the decision of Naitiri Land Disputes Tribunal award which was read and adopted as an order of the court on 21st September 2010. Leave to apply for orders of Judicial Review was granted on 27th October 2010. The leave was to operate as stay. The judge directed that the notice of motion was to be filed within 21 days.

The notice motion was filed on 19th November 2010. The month of October ends on the 31st day. Therefore excluding 27th day leaves 28, 29, 30 & 31 (four days) add to 19 days of November gives you 23 days. This is beyond the 21 days as directed by the judge who granted leave and the law. Order 53 rule 3 provides; "... *the application shall be made within twenty one days by notice of motion to the*

**High Court.** " The notice of motion was therefore filed out of time. The ex parte applicants disregarded this mis-step as there is no explanation given why they did not file the application within time.

The interested party in his replying affidavit deponed that he is wrongly sued. He is the chairman of the School Management Committee of Maliki Primary School. He presented the claim before the Tribunal on behalf of the school as an official of the Management team and not in his personal capacity. He urged the court through their submission for his name to be struck out from the pleadings. The ex parte applicant in paragraph 3 of his supporting affidavit depones thus;

***"The interested party herein is a total stranger to this parcel of land and that he is not entitled to share in the same."***

The ex parte applicant ought to have sued the interested party as chairman of the school and not in his personal capacity. In the award, the Tribunal gave land to the school and not to the person of the interested party. The ex parte applicant has wrongly sued him in his personal capacity. I agree with the submission that his name should be struck out from the pleadings. I am alive to the provisions of article 159 of the Constitution as regards substance rather than courts relying on technicality. However this is more than a technicality. Part of the award sought to be quashed is worded as below;

***1. Henry Boi Kawa transfers plot Kamukuywa/782 to Maliki Primary School.***

***2. The Land Registrar to investigate plot 252 and revert back the original land that the owner of plot 252 had paid for and given to the School for he proposed projects"***

The ex parte applicants were aware the interested part brought the claim on behalf of the school not on his personal interest as deponed in their affidavit. Therefore in allowing the motion to proceed as drafted would go against the rules of natural justice as regards the interests of Maliki Primary school. The order, if the motion is allowed would result into condemning the School unheard as they were not joined as parties to these proceedings.

In light of the foregoing, this motion must fail for the reason of being filed out of time and misjoinder of parties. I will therefore not delve into the merits or otherwise of the motion. I proceed to strike it out. Given the ex parte applicants were the ones sued before the Tribunal I will not condemn them to costs. Each party will bear their respective costs.

**JUDGMENT DATED This 8th day of October 2013**

**A. OMOLLO**

**JUDGE.**