



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISCELLANEOUS 36 OF 2011

**IN THE MATTER OF AN APPLICATION BY JAMES MWANGI GACHUNGA FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

AND

**IN THE MATTER OF THE DECISION BY J.K. CHELIMO DISTRICT COMMISSIONER
MBEERE NORTH DISTRICT IN LAND ADJUDICATION APPEAL NO. 314 OF 2003**

AND

**IN THE MATTER OF THE LAND ADJUDICATION ACT, CHAPTER 284 OF THE LAWS OF
KENYA**

BETWEEN

JAMES MWANGI GACHUNGA.....APPLICANT

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER MBEERE NORTH.....2ND RESPONDENT

FAUSTINO NJERU NJOKA.....INTERESTED PARTY

RULING

This is the Notice of Motion dated 6/6/2011 filed under Order 53 Rule 3(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He seeks an order of certiorari to quash and nullify an award by the Hon. J.K. Chelimo, the Mbeere North District Commissioner in Minister's Appeal case No.314/2003 of the Mbita Adjudication Section.

The main grounds being that the Applicant was never given an opportunity to be heard. The Application is supported by an affidavit of the applicant plus proceedings before the District Commissioner. In his affidavit he gives a long history of what transpired.

The interested party filed a replying affidavit opposing the application. He says the application raises no basis upon which orders of Judicial Review may be granted. Counsel for the Applicant filed submissions in which he says the Applicant was not accorded a right to a fair hearing, i.e.

(a) No prior notice of the hearing was given to him in connection to Appeal proceedings before the District Commissioner.

(b) He was given no opportunity to be heard.

The Attorney General submitted on behalf of the Respondent and stated that no coherent legal issues warranting the orders sought had been laid down. The same had also not been filed outside the statutory period.

Mr. Okwaro submitted that the Applicant with others were served for the hearing before the District Commissioner. They refused to proceed with the hearing. The application is not supported by a statement of facts and a verifying affidavit. And that it was not clear what order the Applicant was seeking.

Mr. Kamande for Mr. Mureithi while highlighting the submissions reiterated what was in the written submissions. He stressed that their client had not been given an opportunity to be heard. And that their application was filed within the 6 months required.

The Applicant has filed this Notice of Motion under Order 53 Rule 3 of the Civil Procedure Rules. He did not cite the provisions of the Law Reform Act. But the two provisions are the ones that give this Court jurisdiction to deal with these special orders under Judicial Review. I however find that the omission to cite it did not prejudice the Respondent in any way.

The Applicant was on 18/7/2011 granted leave to institute Judicial Review proceedings. He was directed to file and serve the substantive motion in 21 days. The 21 days lapsed on 8/8/2011. The Notice of Motion herein was filed on 15/8/2011. It is not clear when it was served. Indeed when the Applicant was filing this Notice of Motion, he knew very well that the 21 days had lapsed. The leave that was granted had been spent by 8/8/2011. Therefore the Notice of Motion dated 6/6/2011 and filed on 15/8/2011 was filed without LEAVE of the Court. It cannot be salvaged by Article 159(2) of the Constitution. The provisions of Order 53 Rule 1(1) of the Civil Procedure Rules are mandatory.

Having been filed without LEAVE, I find the said Notice of Motion to be incompetent and fatally defective. I therefore strike it out with costs to the Respondent and interested party.

DELIVERED, SIGNED AND DATED AT EMBU THIS 17TH DAY OF JULY 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Waweru for Kariithi for Applicant

Mr. Okwaro for interested party

Njue CC-