



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Miscellaneous Civil Application 73 of 2003**

**REPUBLIC.....PLAINTIFF**

**VERSUS**

**KIPKAREN DIVISION LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**KABSABET PRINCIPAL MAGISTRATE’S COURT.....2<sup>ND</sup> RESPONDENT**

**DAVID KIPKONYOR SHOKINO.....3<sup>RD</sup> RESPONDENT**

**TAPROIBEI W/O CHABUTKWEN**

**TABARGOI W/O CHABUTKEWEN**

**KIPROTICH SAWE.....EX-PARTE**

**RULING**

By a Notice of Preliminary Objection n dated 27<sup>th</sup> March 2009 the 3<sup>rd</sup> Respondent has raised the following grounds in opposition to the ex-parte applicant’s application dated 13<sup>th</sup> March 2009.

- 1. That the application offends the mandatory provisions of the Law Reform Act (cap. 26) laws of Kenya.**
- 2. That the prayers sought cannot be granted under the cited provisions of the law**
- 3. Consequently this application is incompetent and unsustainable in law and the third respondent prays that the same be struck out with costs.**

The application which is opposed by the 3<sup>rd</sup> Respondent is the chamber summons application dated 13<sup>th</sup> march 2009 brought on behalf of the Ex-parte applicants following the orders of the Court dated 27<sup>th</sup> January 2009 dismissing their Notice of Motion dated 26<sup>th</sup> March 2003 with costs to the 3<sup>rd</sup> Respondent.

The Application was brought under the provisions of Order IXB Rule 8 and section 3, 3A and 63 (e) of the Civil Procedure Act. The application basically seeks to set aside the orders of the court dated 27<sup>th</sup> January 2009 and pray for the reinstatement of the suit.

The Preliminary objection was argued orally by the parties’ advocates on the 28<sup>th</sup> April 2009.

Learned Counsel Mr. Rotich for the 3<sup>rd</sup> Respondent submitted the application is brought under Order 9B Rule 8 and Section 3, 3A and 63 (e) of the Civil Procedure Rules. He states that it is only order 53 that applies to judicial review and the Civil Procedure Act and rules do not apply.

In support counsel cited the Court of Appeal decision in the case of **Republic Vs. Communications Commission of Kenya (2001) 1 EA 199**, and the digest of **GV Odunga on Civil case law and Procedure at Pg 628** at paragraph 1732.

The second limb of the arguments of Mr. Rotich was that once the court issued its orders of the 27<sup>th</sup> January 2009 it had no jurisdiction to set aside the said orders which are final in nature and an aggrieved party can only appeal. Counsel in supported referred the court to Section 8 (3) and (5) of the Law reform Act. Counsel argued that order 53 does not provide for the orders sought. He quoted the authority in **Republic VS. Minister for Local Government & Ano. Ex-parte Mwachima**.

In reply Counsel for the Ex-parte applicants Mr. Cheptarus opposed the preliminary objection. He submitted that the orders made on the 27.1.2009 were for non-attendance. That Order 9B Hearing and Consequences of Non- attendance allows an aggrieved party to come back and explain why he did not attend court.

Counsel further submitted that the ex-parte applicants have given reasons.

Counsel stated that the orders of the court of 27.1.2009 and the judicial review orders of Certiorari, mandamus and prohibition are different. He submitted that the application needs to be heard on merits. He distinguished the authorities and the provisions under section 8(3) and (5) of the Law Reform Act in that the substantive application has not been heard and there is no order of judicial review nature. He submitted that the Court has jurisdiction to revisit the matter. Counsel relied on the provisions of the Constitution Sections 60 (1) and 65 (2) saying that the High Court has supervisory power over proceedings of subordinate court. He argued the Preliminary Objection to be dismissed.

In brief reply Mr. Rotich argued that the orders of the 27.1.2009 are subject to the provisions of section 8 (3) and (5) of the Law Reform Act. He submitted that the provisions of the constitution cited do not apply, that the section 8 (3) and (5) of the Law Reform Act are not unconstitutional.

I have considered the Preliminary objection and the submissions by Counsel.

The suit herein is a judicial review application. The court on the 27.1.2009 dismissed the suit when the ex-parte applicants failed to attend.

What calls for determination is whether the application by the ex-parte applications under the ordinary provisions of Order 9B Rule 8 and Section 3, 3A and 63 (e) the civil procedure rules is incompetent. Secondly, whether the court has jurisdiction to set aside the orders of the 27.1.2009.

The Civil procedure Act save for Order 53 does not apply to judicial review applications. The substantive law for Judicial Review is the Law Reform Act (cap 26) Laws of Kenya. The Procedural Law is Order 53 of the Civil Procedure. In a litany cases the courts have held that the application of the Civil Procedure Act and Rules there under do not apply to Judicial Review Applications save for Order 53. The Court in Judicial Review application is exercising a special jurisdiction though of civil nature. I am persuaded that Order 9B Rule 8 and Section 3, 3A and 63 (e) the Civil Procedure rules are not applicable to judicial review application and the ex-parte applicants' application is therefore incompetent.

It is the argument by counsel for the ex-parte applicants that since the substantive application has not been heard the order made by the court on the 27.1.2009 is not of judicial review in nature. I am not convinced by this argument. The proceeding on which the order is founded was judicial review proceedings. Any order made by the court will definitely be an order anchored on the judicial review proceedings.

In the case of **Republic VS. Minister For Local Government & Ano. Ex-parte Mwachima** the court

held that in interpreting section 8(3) and 8(5) of the Law Reform Act, once any review orders are made they become final and one can only attack the orders on appeal.

Section 8(5) of the Law Reform Act provides that:

**“Any person aggrieved by an order made in the exercise of the Civil Jurisdiction of the High court under this section may appeal therefrom to the Court of appeal”.**

In the result this court cannot set aside the orders of the 27.1.2009.

I am persuaded that the Preliminary objection is meritorious and I uphold the same. Consequently I strike the Ex-parte applicant’s application dated 13.3.2009 with costs to the 3<sup>rd</sup> Respondent.

DATED AND SIGNED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF AUGUST 2012.

**M.K IBRAHIM**

**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 10<sup>TH</sup> DAY OF OCTOBER 2012.

**F.AZANGALALA**

In the presence of: Mr. Namiti H/B for Mr.Cheptams for the Applicant and

Ms Wanjiku for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.