



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
MISC. CIVIL APPLICATION NO. 81 OF 2009

SAMUEL KANJA KINUNU.....PLAINTIFF

VERSUS

NDORO RITHO alias NDORO NJINJO.....DEFENDANT

R U L I N G

1. The ex-parte applicant Samuel Kanja Kinunu has moved this court under Order LIII Rule 3(1) & (2) of the Civil Procedure Rules for orders of certiorari to remove into the High Court, the decision of Wanguru Land Disputes Tribunal Case No. D26 Vol.5/379 of 2009 and the subsequent judgment in Wanguru SRM Arbitration Case No.10.

2. Ndoro Ritho alia Ndoro Njinjo who is the 1st respondent to the application has raised a preliminary objection on the following grounds :-

(1) That the said Notice of Motion seeking judicial review orders is fatally defective as the said orders are not available under the cited provisions.

(2) That the entire proceedings herein are a nullity and an abuse of the court process as the issues herein were fully dealt with and determined on 5.10.2009 vide Embu High Court Misc. application No. 42 of 2009 in an application for judicial review between same parties ad in respect of the same subject matter and the proceedings herein are res judicata.

(3) That the application herein is overtaken by events as the order of Wanguru Senior Resident Magistrate Arbitration case No. 10 of 2009 dated 2.7.2009 were duly executed and the suit land LR. MWEA/MUTHITHI/SCHEME/121 transferred to 3rd parties.

Following directions given by the court written submissions were duly filed and this court has to determine the preliminary objection based on those submissions.

2. I have given due consideration to the preliminary objection and the submissions of both counsels. The preliminary objection essentially raises 3 main issues. Firstly is whether the notice of motion dated 16th October 2009 is fatally defective. In this regard it is submitted that the failure by the applicant to bring the notice of motion within the armpit of Sections 8 & 9 of the Law Reform Act is a substantial and procedural defect that goes to the heart of the matter. For the applicant it is submitted that the application was properly brought under Order LIII Rule 3(1) and (2) of the Civil Procedure

Rules. These provisions lay the procedure to be followed when instituting proceedings for Judicial Review. It was argued that any omission was a procedural omission which does not go to the substance of the application.

3. In my considered view applications for Judicial Review are normally brought under Order 53 Rule 3(1) of the Civil Procedure Rules, which provides the procedural law and Sections 8 and 9 of the Law Reform Act which provides the substantive law. Thus it is desirable that all these provisions be cited. However, failure to cite these provisions is not necessarily fatal as Order 51 Rule 10(1) of the Civil Procedure Rule 2010 clearly provides that :-

“Every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”.

The 1st respondent’s objection on that ground must therefore fail.

4. The second issue is whether the applicant’s notice of motion is an abuse of the court process. It is alleged that this is so because the applicant had earlier filed another similar Miscellaneous Application No. 42 of 2009 in which he obtained leave of the court to apply for order of Judicial Review. In my considered view the issue raised is one based on a matter of evidence. It is not an issue which arises from the pleadings. It cannot therefore be raised by way of preliminary objection but ought to be canvassed under order 2 Rule 15(d) of the Civil Procedure Rules 2010.

5. Be that as it may, assuming that the applicant did obtain leave to institute judicial proceedings in Misc. Application No. 42 of 2009, and failed to file a substantive application within 21 days as directed by the court, that application is spent. At best it could only be used by the court as a good reason to reject the applicant’s subsequent application for leave to institute judicial proceedings which the applicant sought in the present suit. The substantive application not having been filed or adjudicated upon in Misc. application No. 42 of 2009, the issue of res judicata cannot arise. As the substantive application in the present suit is completely new, the objection on that ground cannot therefore hold.

6. The 3rd issue was that the application has already been overtaken by events. It is alleged that once the applicant’s ex-parte application for leave was dismissed the order of stay were discharged and the 1st Respondent transferred MWEA/MUTITHI/SCHEME/121 which was the subject of the tribunal award to a 3rd party who has not been enjoined to the proceedings. It is evident that the issues raised are contentious issues which cannot be dealt with by way of a preliminary objection. Moreover a perusal of the court record herein reveals that this court issued orders on 29th September 2009 granting leave to the applicant to apply for order of certiorari to remove into High Court the decision of Wanguru Land Disputes Tribunal Case No. D26/Vol.5/379 and further ordered the leave to operate as a stay of any further proceedings in relation to land parcel No. MWEA/MUTITHI/SCHEME/121. Thus it would appear that there was an order of stay in force when the 1st respondent allegedly sold the land to the 3rd party. Further the fact that the 3rd party has not been joined in the suit is neither here nor there as Order 53 Rule 3(4) empowers the court to direct that any person who out to have been served with the notice of motion seeking orders of judicial review be served.

7. The upshot of the above is that for the reasons aforesaid I overrule the preliminary objection dated 9th July 2010.

H. M. OKWENGU
JUDGE

Signed by the above but delivered and dated at Embu this 1st day of March 2011.

M. WARSAME
JUDGE

In the presence of:-

N/A.....Advocate for the Plaintiff
Mr. Kahiga.....Advocate for the Defendant
Njue.....Court Clerk