



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Miscellaneous Application 67 of 1996

PATRICK NJURE M'AMWIRI APPLICANT

VERSUS

DICKSON LINCHA DEFENDANT

RULING

The application before court is a chamber summons dated 4th October 2008. It is brought by respondent in this judicial review matter. The respondent seeks by that application for the dismissal of this cause for want of prosecution. The application is brought under O. XVI Rule 5 and 6 of the Civil Procedure Rules.

In the affidavit in support, the respondent stated that leave was granted to the *ex parte* applicant on 16th October 1996. That the main application for orders of *Certiorari*, prohibition and mandamus was filed on 25th November 1996. Since the same application was filed, the respondent deponed that *ex parte* applicants had failed to prosecute the application. That the matter was last in court on 15th February 2007 when it was stood over generally.

The respondent stated that the *ex parte* applicant had failed to take steps to dispose the matter. That the continuous pendency of the matter was causing the respondent concern, anguish and prejudice. Finally, the respondent stated that the *ex parte* applicant had continued to occupy parcel No. 2046 Kiguchwa adjudication section. Such occupation, the respondent stated, was causing him great injustice. The *ex parte* applicant responded to that application by filing grounds of opposition. In his grounds of opposition he stated:-

- 1. That the application is frivolous, and a total abuse of the court process and should be dismissed with costs.***
- 2. That the matter herein is brought under the provisions of Order LIII being a judicial review which is neither civil or criminal but sui generis procedure.***
- 3. That the provisions of Order XVI Rule 5 and 6 are totally inapplicable in the matter***

In oral submissions, the *ex parte* applicant counsel stated that Order XVI applied to suits. This matter, he argued, was not a suit. For that reason, he argued that the application cannot be granted as prayed. In response, counsel for the respondent stated that there cannot be a wrong without a remedy.

According to my perusal of this court file, I found that the *ex parte* applicant was granted leave to apply for judicial review on 18th November 1996. That leave was ordered to operate as stay to restrain the Land Adjudication Officer Nyambene from implementing his decision dated 2nd July 1996. And deponed by the respondent, the *ex parte* applicant as a result of that stay of 1996 has remained in occupation of the suit land to date. The respondent deponed that such application was causing him injustice. The *ex parte* applicant did not file a replying affidavit to controvert what the respondent deponed.

From the date when the court granted that stay, there have been numerous adjournments in this matter which was filed in 1996, which in my view, were largely contributed by the *ex parte* applicant. As correctly stated, the matter was last in court on 15th February 2007. Up to the time when the respondent filed the present application, the *ex parte* applicant made no attempt to fix this matter for hearing.

Even after this application was filed, the *ex parte* applicant was unmoved to take any action to set the application for hearing. As correctly argued by the *ex parte* applicant, matters of judicial review are of special jurisdiction neither the Civil Procedure Act and the Rules are applicable to the proceedings of Judicial Review. The reason for that is because Order LIII is a special jurisdiction that is neither criminal or civil which cannot rely on either Criminal Procedure Code, Penal Code, Civil Procedure Act or The Civil Procedure Rules. In **Ndete V. Chairman Land Disputes Tribunal & Ano. (2002) KLR 392** Ringera J. (*as he then was*) stated that under the Civil Procedure Rules, Order LIII is a special jurisdiction as the rules therein are not made under the Civil Procedure Act but under the provisions of section 9 of the Law Reform Act and in that regard Order VI Rule 12 of the Civil Procedure Rules that had been cited in the course of arguing the application was not applicable in arguing the proceedings brought under Order LIII which is promulgated in pursuance of the provisions of Section 9 of the Law Reform Act. Ringera J. again reaffirmed this position in **Welamondi Vrs. The Chairman Electoral Commission of Kenya (200) 1 KLR 486** by holding that in exercising powers under Order LIII, the court is neither exercising civil or criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis*. It therefore followed that it was incompetent to invoke section 3A and Order 1 Rule 8 of the Civil Procedure Rules and Sections 42, 79 and 80 of the Constitution of Kenya.

That as it may be, I am of the view that the present application is not defeated by the mere fact that the respondent relied on the Civil Procedure Rules. In my view, the prayers sought by the respondent can be entertained with the court invoking its inherent jurisdiction. The court is duty bound to ensure that its process is not abused in any way. The *ex parte* applicant, in my view, has done just that in this matter. He obtained stay in 1996 and in effect denied the respondent the right of occupation of the suit property.

Having obtained that stay, the *ex parte* applicant more than three times applied for adjournment for one reason or another. Much more, when the case was last adjourned generally in February 2007, the *ex parte* applicant did not make any attempt to fix the matter for hearing. He is abusing the process of this court by enjoying the orders of 1996 and not seeking to have this matter concluded.

This court has powers to stop such abuse. One of the powers, in my view, is to dismiss this case. This court will not shy away from exercising its duty.

Accordingly, the order of this court is that this case is hereby dismissed for want of prosecution. The costs of this case are awarded to all the respondents and the costs of chamber summons dated 4th October 2008 are awarded to the respondent/applicant

MARY KASANGO

JUDGE

Dated and delivered at Meru this 2nd day of July 2009.

M.J.A. EMUKULE

JUDGE