



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW 46 OF 2009**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ANDREW K. MIBEI.....1<sup>ST</sup> RESPONDENT**

**H. S. MWANGU.....2<sup>ND</sup> RESPONDENT**

**TOWN COUNCIL OF MARALAL.....3<sup>RD</sup> RESPONDENT**

**ALEX LESEKETETI.....4<sup>TH</sup> RESPONDENT**

**MUSA ABDILE.....5<sup>TH</sup> RESPONDENT**

**PAUL LEKAJA.....6<sup>TH</sup> RESPONDENT**

**RULING**

On 6<sup>th</sup> May 2009 I granted Maralal Village Polytechnic, the ex-parte applicant herein leave to apply for the judicial review order for prohibition against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Pursuant to that leave the applicant filed the substantive notice of motion on 14<sup>th</sup> may 2009. Upon being served with the same the 1<sup>st</sup> and 2<sup>nd</sup> respondents through the state law office has raised a preliminary objection written notice of which they have given.

The eight paragraphs in the preliminary objection raise four main points. The first one is that this court has no jurisdiction to entertain this application. Mr. Bitta, learned state counsel appearing for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, contended that the judicial review jurisdiction granted by **Section 8** of the **Law Reform Act** is a special jurisdiction circumscribed to deal with remedies under public law and not private law civil claims. He said that the claim in this case is a private law claim over ownership of a piece of land which should have been filed in the civil jurisdiction and not under judicial review. The second point raised by Mr. Bitta is that the statement accompanying the notice of motion states the relief sought as leave to apply for an order of prohibition. According to him leave having been granted this court is functus officio and there is therefore no proper application before court. In support of this point he cited the decision of Justice Nyamu in Nairobi **Republic Vs The Defence Council of the Armed Forces of the Republic of Kenya & Another, HC MSC. APL. No.1622 of 2004**. The third point raised is that under the Education Act only private primary schools can act through members of their respective school committees. In this case Maralal Polytechnic not being a primary school it should have brought this

application through its Board of Governors. The last point raised is that Maralal Polytechnic being neither a body corporate nor a registered society, has no locus standi to bring this application.

In response Mr. Wahome for the applicant dismissed the entire preliminary objection as frivolous. I entirely agree with him.

On the first point I agree with Mr. Bitta that the jurisdiction given to this court under **Section 8** of the **Law Reform Act** is a special jurisdiction circumscribed to deal with remedies under public law and not private law civil claims. The applicant's complaint in this case is that though it is the allottee of the unsurveyed Plot No. 181 Maralal Township the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have connived with the other respondents to wrestle the land from it. To that extent it might appear that this is a private law claim. But upon perusal of the 1<sup>st</sup> respondent's letter dated 17<sup>th</sup> March 2009 annexed to the affidavit in support of the application ordering the closure of the applicant's school and the replying affidavits by the Town Clerk of the 3<sup>rd</sup> Respondent, as well as those of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, I am satisfied that the applicant's complaint that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their official capacities are assisting the rest of the respondents to wrestle the suit land from the applicant is not without foundation. If that complaint is found to be true then the applicant will be entitled to the public law remedy of prohibition. In the circumstances the preliminary point raised on jurisdiction has no substance.

With respect I do not appreciate Mr. Bitta's contention that the statement in support of the notice of motion is defective because it gives the relief sought as "leave... to apply for a Judicial Review order of prohibition." Mr. Bitta wants me to read that relief as limited to leave. That is a total misapprehension of the term "relief". The relief required to be stated in the statement is the judicial review order that the applicant seeks.

**Order 53 Rule 4** of the **Civil Procedure Rules** requires the substantive notice of motion filed after leave has been granted to be served along with the statement accompanying the application for leave. That is what was done in this case. The notice of motion in the case of **Republic Vs The Defence Council of the Armed Forces of the Republic of Kenya & Another, HC MSC. APL. No.1622 of 2004** relied on by Mr. Bitta was dismissed because the applicant sought leave to apply for an unspecified judicial review order. It is clear from the statement in this matter that the relief the applicant seeks is the judicial review order of prohibition. That authority has therefore no relevance to this matter. There is therefore no substances in Mr. Bitta's contention.

The third and fourth points relate to the capacity of the applicant to bring this application. There is nothing on record to show that Maralal Village Polytechnic is a public school which should sue through its Board of Governors. I know of no legal requirement that an unregistered society or association cannot sue through its officials. In the circumstances I find that the application by Maralal Village Polytechnic through its named officials is proper and competently before court.

For these reasons I find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's preliminary objection is frivolous and totally unmeritorious. I accordingly overrule it with costs to the applicant.

**DATED and delivered this 1<sup>st</sup> day of October, 2009.**

**D. K. MARAGA**

**JUDGE.**