



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 1977

MURIUKI KIMONDO.....APPLICANT

VERSUS

1. FRANCIS MAINA

2. SENIOR SETTLEMENT OFFICER 1

3. DISTRICT SURVEYOR AT NYERI.....RESPONDENT

JUDGMENT

This is an application seeking orders, *inter alia*, that the applicant be granted leave to apply for orders of *certiorari* and *mandamus* to bring to the High Court “the decision, order or ruling of the second and third respondents for the purpose of investigating and quashing the said decision”.

The application is brought under Civil Procedure Rules order LIII, rule 1, which provides:

(i) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore has been granted in accordance with this rule.

(ii) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on...

Rule 1 clearly contemplates a procedure by way of chamber summons, and the first sentence of the application starts by stating “Let all parties attend the judge in chambers ...”. However, the application is headed as “Notice of Motion”. This is wrong. The notice of motion procedure becomes applicable under order LIII, rule 3, after leave has been granted. However, this is a minor procedure irregularity which I am empowered to overlook and I do so.

The power to make orders of *mandamus* and *certiorari* is vested in this Court by section 8(2) of the Law Reform Act which provides as follows:

In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938 of the United Kingdom, empowered to make an order of *mandamus*, prohibition or *certiorari*, the High Court shall have power to make a like order.

Thus the law applicable to such proceedings is the English law which has been admirably summed up in *Halsbury’s Laws of England* (3rd edn), pages 52 to 145. Briefly, an order of *mandamus* is, in form, a

command directed to any person, corporation or inferior tribunal, requiring him to do some particular thing (therein specified) which appertains to his (or their) office and is in the nature of a public duty. An order of *certiorari* is an order, directed to an inferior tribunal, requiring the record of the proceedings in some cause or matter to be transferred to the High Court to be dealt with there.

Although it is not so stated clearly in the application, the first respondent would appear to be a farmer, and the relief sought against him is:

That the first respondent be restrained from interfering with and trespassing the land plot 792, Endarasha scheme as determined by old boundary marks as they were before the decision of the second and third respondent which is being investigated.

There is, in any event, no allegation that the first respondent is doing anything in the nature of a public duty or is a member of any inferior tribunal. The procedure for grant of temporary injunctions and interlocutory orders is laid down in order XXXIX of the Civil Procedure Rules. That procedure has clearly not been followed in respect of the first respondent. In any event, under order XXXIX, rule 3:

The Court shall in all cases, except where it appears that the subject of granting an injunction would be defeated by the delay, before granting the injunction, direct notice of the application for the same to be given to the opposite party.

This is not a proper case for dispensing with service of notice on the first respondent and, in any event, it is embarrassing for him to become a party to an application which is primarily seeking orders of *certiorari* and *mandamus*. Therefore, I strike out the name of the first respondent from the present application.

I will now deal with the second and third respondents, who are respectively described as “senior settlement officer 1, Nyeri”, and the “district surveyor, Nyeri”. It is alleged in paragraph 5 of the application that:

The second and third respondents constituted a ‘tribunal’ which was improperly constituted in law and made an illegal decision by excising the land of the applicant.

Under what statutory provision or other law they constituted a tribunal, or why that tribunal was improperly constituted in law is not specified in the application. If the tribunal was illegally constituted or with no legal backing, the applicant is not bound by its findings and has no cause to complain to the Court. It is stated in *Halsbury’s Laws of England* (3rd edn), page 53 that;

Where [as is frequently the case] no right of appeal to the Court exists, the three orders here under consideration [ie *mandamus*, prohibition and *certiorari*] form the principal means by which the determination of these tribunals and other persons and bodies can be brought before the Court.

The applicant does not state whether or not he has any right of appeal from the decision of that tribunal. A copy of the proceedings before that tribunal or even its decision is not annexed to the present application. Before granting leave to issue the order of *certiorari*, it is the duty of the court to satisfy itself that a person or persons complained against have legal authority to determine questions affecting the rights of subjects and has the duty to act judicially. There are no facts before me upon which I can so determine. Where, upon the face of the proceedings themselves, it appears that the determination of the inferior court tribunal is wrong in law, *certiorari* to quash will be granted; but again, the proceedings complained against are not before me.

In paragraph 7 and 8 of his affidavit, the applicant claims that in November 1976 and January 1977 the first respondent “closeted” with the second and the third respondent in his absence and “decided” and demarcated a new boundary between his and the first respondent’s plots, and that the new boundary excised about ten acres of his land. If there has been any criminal conspiracy to defraud the applicant, he can, of course, pursue his appropriate remedy under the criminal law.

Mr Kaburu for the applicant claims that orders against his client were made by that tribunal) in December 1976 and January 1977; but there is no evidence as to what either of the two orders contained. Upon considering all the material before me, I do not consider that it is a fit and proper case in which I should order the issue of *certiorari* and I refuse it.

Now, as to the issue of the order of *mandamus*, the applicant claims in paragraph of this application:

That the second and third respondents be prohibited from interfering with the boundary marks delineating the land plot 792 in Endarasha scheme in possession of the applicant until further orders.

At *Halsbury's Laws of England* (3rd edn), page 53, it is stated: "*Mandamus* will be appropriate to compel a tribunal to exercise a jurisdiction which it possesses but declined to exercise".

There is no such allegation in the instant case. In any event, if the applicant is to be believed the illegally constituted tribunal has already given its decision. Clearly, there is no need to issue the order of *mandamus* in such circumstances. In the final premise, as the matters now stand before me, I refuse to make any of the orders applied for by the applicant.

Application dismissed.

Dated and Delivered at Nyeri this 17th June 1977.

S.K.SACHDEVA

JUDGE