



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**JUDICIAL REVIEW NO. 50 OF 2017**

**PHILIP OSOK AWINYO.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The County Government of Kisumu, the 2<sup>nd</sup> Respondent, raised a Preliminary Objection to the Exparte Applicant's notice of motion dated the 14<sup>th</sup> December 2017, through the notice dated 31<sup>st</sup> January 2018, raising seven (7) grounds summarized as follows;

- a) **That the application does not comply with Section 8 of the Law Reform Act Chapter 26 of Laws of Kenya and Order 53 of Civil Procedure Rules 2010.**
- b) **The application is misconceived, bad in law and an abuse of the court's process.**
- c) **That the prerogative order of mandamus is not available to the Applicant as it would amount to propagating and condoning an illegality.**
- d) **That the provisions of the Fair Administrative Actions Act, 2015 upon which the application is anchored on are not applicable to the application.**
- e) ***"That the application is fatally and incurably defective and incompetent to invoke any jurisdiction of the court, hence the court lacks jurisdiction to hear the same."***

2. That the Court gave direction on the 20<sup>th</sup> March 2018 on filing and exchanging written submissions. The Learned Counsel for the Applicant and the 2<sup>nd</sup> Respondent filed their written submissions dated the 29<sup>th</sup> August 2018 and 1<sup>st</sup> October 2018 respectively.

3. The following are the issues for the court's determination;

- a) **Whether the failure to initiate this judicial proceedings in the name of the Republic makes the application dated 14<sup>th</sup> December 2017 defective, bad in law and an abuse of the court's process in view of the provisions of Section 8 of the Law Reform Act and Order 53 of the Civil Procedure Rules.**
- b) **Whether the prerogative order of mandamus would be available to the named Applicant in this proceedings.**
- c) **Who pays the costs of the Preliminary Objection.**

4. The Court has carefully considered the grounds on the notice to raise a Preliminary Objection, the written submissions by both parties Counsel, and the decided cases cited therein, and come to the following conclusions;

- a) That this proceeding was initiated by Phillip Osok Awinyo, as the Applicant, through the Chamber Summons dated the 19<sup>th</sup> September 2017 for leave which was granted on the 4<sup>th</sup> December 2017. That the Notice of Motion dated 14<sup>th</sup> December 2017, which is the subject matter of the Preliminary Objection, was filed on the 15<sup>th</sup> December 2017 which was within the time given in

the Order of 4<sup>th</sup> December 2017.

b) That the 2<sup>nd</sup> Respondent submitted that the notice of motion has failed to comply with the requirements of the law applicable in judicial review proceedings as the application is not brought in the name of the Republic. The Learned Counsel referred to among others the decision of the **Court of Appeal in Farmers Bus Service & Others vs Transport Licensing Appeal Tribunal 1959 E.A. 719** cited in **James Kega Kangau & Others vs Electoral Commissioner of Kenya & Another [2006] eKLR** in support of his submission that where Judicial Review proceedings are not shown to be brought in the name of the Republic, then there is no Applicant before the court to pursue for the orders therein.

c) That the Applicant's Counsel has submitted that the application has complied with **Order 53 Rule 3 of the Civil Procedure Rules** and falls within the realm of **Sections 8 (1) and (2) of Law Reform Act** and relied on the decision in **Cortec Mining Kenya Limited vs Cabinet Secretary Attorney General & 8 Others [2015] eKLR**, among others.

d) That the provisions of **Sections 8 of the Law Reform Act, Sections 13 (7) (b) of the Environment and Land Court Act No. 19 of 2011, Articles 23 (3) (f) and 47 of the Constitution of Kenya 2010** leaves no doubt that this court has jurisdiction to entertain proceedings seeking for prerogative orders.

e) That the decided cases cited by Counsel for the 2<sup>nd</sup> Respondent, especially **Farmers Bus Service & Others vs Transport Licensing Appeal Tribunal [1959] E.A 719** are understood by this court to take the position that prerogative orders are applied for, and issued in the name of the Crown (Republic). That position must be noted to have been obtaining before the promulgation of the Constitution of Kenya 2010 and the legislations emanating thereof like the **Environment and Land Court Act 2011** and the **Fair Administrative Act, 2015**, enacted pursuant to **Articles 162 (2) (b) and 47** respectively of the **Constitution of Kenya 2010**. That unlike the period before the 2010 Constitution when the Judicial Review orders were provided for under the legislation only, that is **Section 8 of the Law Reform Act** and **Order 53 of the Civil Procedure Rules 2010**, they are now recognized as remedies by the **Constitution 2010** at **Article 23 (3) (f)**. That the legislations enacted to operationalize that Article of the Constitution do not appear to require the person moving the court that he/she must do so within six (6) months of the date of the impugned decision, as was the case before then.

f) That the court has taken note of the Court of Appeal decision in **Republic, Exparte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai.281 of 2005** where it said;

*“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go the substance of the appeal and are curable by amendment...is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular”. We think not, as we find that it substantially complies with the guidelines set out by this Court.”*

That further, in the case of **Kisoba Association (acting through John Maina – Chairman, James Ndiba – Organizing Secretary vs Nairobi City County Government [2018 eKLR]**, the court rejected the Respondent's contention that the application was defective for reason of failing to institute it in the name of the Republic.

g) That the foregoing findings leads this court to conclude that the failure by the Applicant to initiate the proceeding for Judicial Review orders in the name of the Republic, as was traditionally the norm before the **2010 Constitution**, does not make the application defective as the substance and intent is clear from the body.

h) That whether the prerogative orders sought will be granted, and whether granting them would amount to sanctioning an illegality cannot be decided at this stage. That decision can only be made when determining the notice of motion which is the substantive application.

i) That the 2<sup>nd</sup> Respondent did not offer any submissions on ground 6 of the Preliminary Objection on whether the Provisions of the **Fair Administrative Actions Act No. 4 of 2015** are applicable in this application. That accordingly, the court takes it that the ground was abandoned.

5. That flowing from the foregoing, the court finds no merit in the 2<sup>nd</sup> Respondent's Preliminary Objection which is hereby dismissed with costs in the cause.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF DECEMBER, 2018.**

**In the presence of:**

Applicant Absent

Respondent Absent

Counsel Ms. Owour for Mweisigwa for Applicant

Mr. Onyango for Gichaba for 2<sup>nd</sup> Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**