



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**JUDICIAL REVIEW NO. 25 OF 2009**

**FRANCIS HINGA RUAMBA.....APPLICANT**

**VERSUS**

**THE SRM WANGURU..... 1<sup>ST</sup>  
RESPONDENT**

**THE CO-OPERATIVE TRIBUNAL..... 2<sup>ND</sup>  
RESPONDENT**

**MWEA RICE GROWERS MULTI-**

**PURPOSE CO-OP. SOCIETY LTD... INTERESTED  
PARTY**

**R U L I N G**

One Francis Hinga Ruamba who is the Applicant herein has moved this court under Section 65 of the now repealed Constitution of Kenya. Section 65 deals with the supervisory jurisdiction and protection of fundamental rights and freedoms of the individual. For enforcement of any such rights, the court has to be moved in the manner provided for under Section 2 of the so called Gicheru Rules. This Rule provides as hereunder:-

***“Unless a matter is specifically provided for under Section 67 or Section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court***

***under Section 65 of the Constitution shall do so by way of originating notice of motion.”***

This rule clearly and in mandatory terms stipulates the manner in which the court must be moved. It has to be by way of originating notice of motion. In as far as this matter has been brought by way of chamber summons; it is irredeemably and incurably defective. The same should on that account alone be dismissed.

Rule 3 also clearly and in mandatory terms commands a party moving the court under Section 65 to set out the motion as demonstrated in Form A of the Schedule to those Rules. The said Form A also refers to originating notice of motion and not chamber summons. The motion being one filed by a qualified counsel should comply with the format and other requirements as set out in the constitution. It does not. The Rules cited i.e. Rules 20 and 21 are irrelevant as they deal with applications premised on Rules 11 and 12 which deal with Section 70 – 83 of the Constitution and not Section 65.

I have nonetheless carefully perused the Application and noted the contents of the rival Affidavits and the submissions filed by counsel for the parties herein. I wish to point out that the Affidavit dated 25<sup>th</sup> May 2009 sworn by Pius Njogu Kathuri which was filed in court on 28<sup>th</sup> May 2009 was properly commissioned contrary to the submission of counsel for the Applicant. I do agree with counsel that an affidavit must be commissioned by a commissioner of oaths and not by a firm of advocates. The rubber stamp of Munene Muriuki the Advocates clearly shows that they are also commissioners for oaths. I do not see where counsel for the applicant was going with that submission.

On the substantive aspect of the Application, I largely agree with counsel for the interested party. The Applicant appears to have been aggrieved by the decision of the magistrate to proceed with the matter *exparte*. The proceedings of the court on the date the judgment was entered have not been annexed and I am in the circumstances unable to see if there was any affidavit of service or what advised the magistrate to make the finding that counsel for the Applicant had been duly served.

Be that as it may, my considered view is that the applicant herein was aggrieved by the entry of the *ex-parte* judgment. This was done by the trial magistrate and the tribunal in accordance to the Rules of Civil Procedure which clearly allows for entry of such judgments. In entering the judgment the magistrate acted within his jurisdiction and discretion. That does not call for this courts supervision. That does not indeed give rise to a constitutional violation of any kind which would require the Appellant to move this court under Section 65 of the repealed constitution.

The Applicant's recourse lay squarely within the Civil Procedure Rules. He ought to have moved the same court to set aside the said judgment or review the same and if that was refused, then he could move to the High Court on Appeal. That was the proper route to take and that would even explain why none of the authorities cited by counsel for the applicant relate to constitutional references. They are either judicial review matters or applications to set aside *ex parte* judgments under the Civil Procedure Rules.

This Application is therefore deficient in both format and substance. The same is hereby dismissed with costs to the Respondents and interested party. The stay orders granted earlier are hereby vacated.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 7<sup>th</sup> day of December 2010

**In presence of:- Mr. Omulana for Macharia for Applicant**

**Mr. Nduku for Kahiga for Interested Party.**



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