



**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GICHERU, OMOLO & TUNOI, J.J.A
CIVIL APPEAL NO. 195 OF 1994**

BETWEEN

1. ABERCROMBIE & KENT LIMITED)

2. ILKEREKESHE SELF HELP GROUP (REPRESENTED

BY LEKISHON OLE MORINTE CHARMAN) APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a ruling of the High Court of Kenya at
Nairobi (Justice Pall) dated 8th November, 1994

in

MISC. CIVIL APPLICATION NO. 362 OF 1994)

JUDGMENT OF THE COURT

With respect to Mr Kinyanjui who did all that could be expected on behalf of his clients, we think there is no merit in this appeal and it must inevitably fail.

In the superior court, the Republic on behalf of Oloololo Game Ranch Ltd which was named as the applicant, applied for leave by way of a summons in chambers under Order 53 rule 2 of the Civil Procedure Rules. We shall hereinafter refer to Oloololo Game Ranch Ltd simply as Oloololo. The leave, as is the practice in such cases, was applied for ex parte, and the purpose was to enable Oloololo to file a notice of motion asking for orders of certiorari, mandamus and prohibition. Pall, J (as he then was) granted leave on the 18th March, 1994 and pursuant to that leave Oloololo lodged its notice of motion apparently on the same day. The motion named the County Council of Narok as the first respondent, the Land Adjudication Officer, Narok Area, as the second respondent and the Director of Land Adjudication and Settlement as the third respondent. Abercrombie & Kent Ltd, and Ilkarekeshe Self-Help Group, the present appellants were named as first and second interested parties respectively. By its own notice of motion dated and lodged in court on the 4th August, 1994, the second interested party, purporting to act under section 9 of the Judicature Act, the Law Reform Act and Section 3A of the Civil Procedure Act, asked the superior court for various orders, the important one for the purposes of this appeal being that the notice of motion dated and filed in court on 18th March, 1994 be struck out as leave to apply for the same had been obtained out of time and that the application for leave as well as the application for an order of certiorari had both been made out of time. The superior court was also asked to discharge and set aside the leave already granted to Oloololo due to its conduct in not making certain disclosures to the Judge in

chambers during the ex parte application for leave. For our purposes it is sufficient to simply say that having fully listened to arguments for both sides and in a reserved ruling the learned Judge rejected the notice of motion by the second interested party. It is against that decision that this appeal is brought.

The Judge took the view that even if his grant of leave ex parte was wrongful, that was no ground for striking out the notice of motion and setting aside the grant of leave itself. He took the view that those matters could once again be raised during the hearing of the motion itself. We think he was probably right on that view. But the important point to bear in mind is this. Under Order 42 Rule 1 (ee) the second interested party was entitled to appeal, as of right and without leave, against the ex parte grant of leave by the Judge. The second interested party did not exercise its right of appeal. Instead it chose the strange procedure of filing a notice of motion within the notice of motion to strike out the latter. We doubt whether that procedure was available to the second interested party. Order 53 makes no provision for striking out a motion filed thereunder. It may well be that a judge would have inherent jurisdiction to set aside ex parte leave if the leave is wrongly granted, but we do not feel called upon to decide that issue. As we have said there is a right of appeal as of right from orders made under all the provisions of Order 53 and we would see no reason for asking a judge to exercise his inherent jurisdiction while the law provides for a right of appeal. We have no doubt in our mind that the learned Judge was right in refusing to strike out the notice of motion filed by Oloololo. That being our view of the matter, we order that this appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of December, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR