



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**JUDICIAL REVIEW NO. 9 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**BUSIA CHIEF MAGISTRATE**

**THERESE HUDSON.....RESPONDENTS**

**PETER LUDASIA.....INTERESTED PARTY**

**MATHIAS MURUMBA MAKOKHA.....EX PARTE APPLICANT**

**JUDGMENT**

1. These Judicial Review Proceedings were commenced on 30<sup>th</sup> September 2015 pursuant to Leave granted by this Court on 23<sup>rd</sup> September 2015. In it the Exparte Applicant, Mathias Murumba Makokha seeks the following orders;
1. **That an Order of Ceterari do issue to quash the Proceedings and Ruling made on the 8<sup>th</sup> September 2015 relating to the exhumation of the body of LUCIA OGULIA in the Busia Chief Magistrates Court Civil Case No. 158 of 2015.**
2. **That an Order of Prohibition do issue directed against the 2<sup>nd</sup> respondent THERESE HUDSON, prohibiting her from exhuming the body of LUCIA OGULIA.**
3. **That the Costs of this Application be provided.**
2. From the Statement of Facts filed alongside the Motion of 30<sup>th</sup> September 2015 it is said the Exparte Applicant is one of seven surviving children of Lucia Ogulia (The Deceased) who died on 15<sup>th</sup> day of April 2015. Following that Death a dispute arose between two children of the Deceased as to where she was to be buried. The disputants were Therese Hudson (the 2<sup>nd</sup> Respondent) and Peter Ludasia Makokha(the Interested Party). The dispute culminated in litigation being Busia Chief Magistrates Court Civil Case No. 158 of 2015. The lower Court made a determination of the dispute and that decision was affirmed by the High Court in an Appeal settled on a legal technicality.
3. What happened after the High Court Decision is the trigger of the current proceedings. The 2<sup>nd</sup> Respondent, in the same proceedings that determined the burial dispute, made an application for the exhumation of the body of the Deceased from where it had been interred. And the Learned Magistrate allowed the application.
4. Although there was an attempt by the Exparte Applicant to raise other grievances in respect to the Learned Magistrate's order, the primary ground for attack as set out in the Statement of Facts

dated 21<sup>st</sup> September 2015 is that the Learned Magistrate decided the matter without giving other children of the Deceased and in particular the Exparte Applicant an opportunity of being heard. That this was contrary to the Rules of Natural Justice.

5. However, the Notice of Motion was confronted with an immediate challenge that it was not supported by any evidence. The difficulty arose because of the contents of the Notice of Motion dated 30<sup>th</sup> September 2015 that commenced these proceedings. The application was supported by the Copy of Statement of Facts that accompanied the Application for leave and a verifying affidavit.
6. The verifying affidavit is a short 5(five) paragraph affidavit whose contents are reproduced below.
  1. **That I am a male adult of sound mind and the Ex-parte Applicant in this case.**
  2. **That I have read the contents of the Statutory Statement and the Chamber Summons and confirm that the contents are as per my instructions to my advocate on record.**
  3. **That there has been previous case in Busia Chief Magistrates Court being Civil Case no. 158 of 2015 on the matter.**
  4. **That I made this affidavit to verify the correctness of the averments contained in the Statutory Statement.**
  5. **That what is deponed to herein is true to the best of my knowledge.**
7. Counsel Juma for the Exparte Applicant did not think the challenge to be serious because of the provisions of Order 53 Rule 4 of the Civil Procedure Rules:-

#### **Order 53 Rule 4**

1. **Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.**
2. **The High Court may on the hearing of the motion allow the said statement to be amended and may allow further affidavit to be used if they deal with new matter arising out of the affidavits of any other part of the application, where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.**
3. **Every part of the proceedings shall supply to any other party, on demand copies of the affidavit which he proposes to use at the hearing.**

His argument was that copies of any affidavits accompanying the application for leave could be supplied on demand.

8. This argument, in my view, may have missed the more fundamental issue raised by Mr. Ashioya that as it stood the Application was incapable of being allowed as it was not supported by any evidence. In my view, the provisions of Order 53 Rule 4 of the Civil Procedure Rules do not change the legal position that in matters of Judicial Review it is the Verifying Affidavit not the Statement to be verified which is of evidential value. See The Decision in **Kisumu Civil Appeal No. 45 of 2000 Between Commissioner General, Kenya Revenue Authority through Republic & Silvano Onema Owaki T/A Marenga Filling Station** in which the Court of Appeal held:-

**We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/17:**

**The application for leave “By a Statement” – The facts relied on should be stated in the affidavit (see R. v Wandsworth JJ., exp. Read (1942) 1K.B.281). “The Statement”**

should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”

At page 283 of the report of the case of R. V Wandsworth Justices, Viscount Caldecote C.J. said:

*“The Court has listened to argument on the proper procedure or remedy in the case of exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.”*

The court in the Wandsworth case was considering the provision of Order 53 of the English Rules of the Supreme Court which are in pari materia with our Order LIII of the Civil Procedure Rules.

9. As the Verifying Affidavit filed alongside the Notice of Motion dated 30<sup>th</sup> September 2015 does not contain any evidence in support of the application the Exparte Applicant would have had an almost insurmountable task of persuading this Court that the 1<sup>st</sup> Respondent made the order in breach of the Rules of Natural Justice. That may well have been the end of the road for the Applicant but for the 2<sup>nd</sup> Respondents own stance to offer some evidence.
10. On 10<sup>th</sup> November 2015, Counsel for the 2<sup>nd</sup> Respondent sought leave of this Court to file a replying affidavit to the Interested Party’s affidavit sworn on 6<sup>th</sup> November 2015. That leave was granted on 19<sup>th</sup> December 2014 and the 2<sup>nd</sup> Respondent duly filed a replying affidavit. Looking at that affidavit, the 2<sup>nd</sup> Respondent may have unwitting, and partly, resolved the difficulty that the Exparte Applicant had placed on his own path. The Affidavit of 2<sup>nd</sup> Respondent gives some evidence of what transpired before the Lower Court. What is that evidence?
11. The uncontested evidence by the 2<sup>nd</sup> Respondent is that the High Court allowed him to move the Lower Court for exhumation. Then in paragraph 17 states as follows:-

**17 That the Court could not have given audience to a party who did not have it, and who had not applied to be enjoined in the suit, but pages 77, 78 and 79 of the bundle of documents proves the participation of Mr. J.V. Juma for the Exparte Applicant, hence this application is not properly instituted, and is fatally defective on that account.**

This Court is therefore entitled to look at the contents of pages 77, 78 and 79 of the bundle of documents filed in support of the Notice of Motion.

12. Those pages of the Exparte Applicants bundle contains some Ground of Opposition filed in the Lower Court matter by Mathias Makokha, Mary Onyango and Martina Wanjala as Interested Parties and an affidavit of Mathias Murumba Makokha on 3<sup>rd</sup> September 2015. Mathias is the Exparte Applicant herein.
13. It is against this short evidence that now I consider and determine the matter at hand. As I turn to do so, this Court underscores the provisions of Order 53 Rule 1 sub rules 1 and 2 of the Civil Procedure Rules in respect to grounds to be relied upon at hearing of a Judicial Review application. The Rules provide:-

**Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the**

**grounds and relief set out in the said statement.**

**The High Court may on the hearing of the motion allow the said statement to be amended and may allow further affidavit to be used if they deal with new matter arising out of the affidavits of any other part of the application, where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.**

Clearly, unless leave of Court has been granted an Applicant can only be allowed to rely on the grounds set out in the Statement accompanying the application for leave.

14. This Court has emphasized the provisions of Order 53 Rules 4 and 5 as it sensed an attempt by the Applicant to expand the scope of its application at the hearing. As alluded to earlier, the only ground specifically raised in attack of the Learned Magistrates Decision was that it was made contrary to the Rules of natural justice as the Applicant and other members of the Deceased family were not given the opportunity of being heard on the matter. As to whether the Lower Court was functus officio or lacked jurisdiction to grant the orders were not set out as grounds of attack against the Magistrates Decision but were alluded in the Statement of Facts as matters raised before the Learned Magistrate.
15. On this only one ground, Counsel for the Exparte Applicant submitted that it was a breach of the Rule of Natural Justice to confine the hearing of exhumation of the body to only two of the Deceased children leaving out the other five (5) children and clan elders. In support of that submission, Counsel referred this Court to the Decision in **Otieno vs Ougo & another** (1987) eKLR at page 425 where the Court of Appeal stated:-

**“It may have been seen that the gist of the action was to finally oust African customary law and then proceed to apply common law and written law in all circumstances. However, that is not correct. This court is not required or expected to decide to give African Customary law or common law any new place in our jurisprudence as we have already explained. Under Section 3(2) of the Judicature Act the Courts of the country MUST be guided by African customary law provided such law is not repugnant to justice and morality or inconsistent with any written law:”**

16. Responding to this, Counsel for the 2<sup>nd</sup> Respondent argued that any party dissatisfied with the Decision of the Court ought to have appealed against it. Secondly, the Exparte Applicant had not placed before this Court any material or evidence to prove that he was denied an opportunity to be heard. Further that the Exparte Applicant had never sought to be enjoined in the Lower Court case or Appeal and had failed to act diligently.
17. The Ruling sought to be quashed was made on 8<sup>th</sup> September 2015. On 3<sup>rd</sup> September 2015, the Exparte Applicant with two (2) Others filed Grounds of opposition and an affidavit opposing the Application for exhumation. Although there is no evidence that the Interested Parties had applied to be enjoined into the suit, the evidence is that they had opposed the Application for Exhumation 5 days before the Court rendered its decision on it. Whether or how the Court dealt with those issues is however unknown to this Court because the Exparte Applicant failed to place before this Court the proceedings and decision of the Court in any admissible way. The Exparte Applicant failed to file an affidavit properly introducing the decision of the Court as evidence herein and did he bother to comply with the Provisions of Order 53 Rule 7 which required him, as he was seeking an order of certiorari, to lodge with the Deputy Registrar a verified copy of the Decision he sought to impeach before the hearing of the Motion. As it stands this Court is asked to find that the Court breached the Rules of Natural Justice without evidence as to how the Court committed the breach. There is no evidence as to how the Lower Court dealt with the Interested Parties views of the matter. Without that evidence the Exparte Applicant is unable to demonstrate the breach allegedly committed.
18. The Notice of Motion dated 30<sup>th</sup> September 2015 is therefore for dismissal. I do hereby dismiss it with costs.

Dated, signed and delivered at Busia this 19<sup>th</sup> day of January 2016

**F. TUIYOTT**

**J U D G E**

In the presence of

Oile – C/Assistant

Juma for the Exparte Applicant

N/A for the Respondents

19.1.16

Before F. Tuiyott

C/Assistant – Oile

Mr. Juma for Exparte Applicant

N/A for 2<sup>nd</sup> Respondent

Court: Judgment dated, signed and delivered in open court.

**F. TUIYOTT, J.**

J.V. Juma: I seek stay for 21 days to decide which was to proceed.

Court: Stay for 21 days is hereby granted.

**F. TUIYOTT, J.**

19.1.16.