



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**JUDICIAL REVIEW NO. E005 OF 2021**

**IN THE MATTER OF AN APPLICATION BY JUDAH MUTHEE FESTUS FOR LEAVE TO**

**APPLY FOR ORDERS OF CERTIORARI, MANDUMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE JUDICATURE ACT CAP 8 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL NO. 2757 KARAMA**

**JUDAH MUTHEE FESTUS.....APPLICANT**

**VERSUS**

**THE LAND ADJUDICATION & SETTLEMENT OFFICER**

**TIGANIA EAST.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JOSEPH MATHITA IKIRIMA.....INTERESTED PARTY**

**JUDGMENT**

**A. PRELIMINARIES**

1. On 27.10.2021 the court granted the exparte applicant leave to commence judicial review proceedings and directed the notice of motion to be filed and served within 7 days.
2. The exparte applicant filed a notice of motion dated 3.11.2021.
3. The application is stated to be premised on facts set out in the statement of facts and an affidavit verifying the facts sworn by Joseph Muthee Festus. The statutory statement of facts is dated 3.11.2021 with an affidavit verifying the facts sworn on even date with annexures

marked JMF “1”, JMF “2”, JMF “B”, JMF “4” – JMF “11”.

4. The leave granted to commence judicial review proceedings was with regard to an amended chamber summons dated 1.10.2021. The amended chamber summons which was based on an amended statement of facts of the even date and a further affidavit verifying the facts sworn on 1.10.2021.

5. After being granted leave, the *ex parte* applicant filed a new statement of facts and a verifying affidavit completely different from what was initially relied upon at the leave stage.

6. **Order 53 Rule 2 of Civil Procedure Rules** as amended by **L.N 22 dated 26.2.2020** provides that an application for leave shall be accompanied by a statement setting out the name and description of the applicant, the reliefs sought, the grounds on which it is based, affidavits verifying the facts, an averment that there is no other case pending and that there has been no previous proceedings in any court between the applicant and the respondent over the same subject matter, and that the cause of action relates to the applicant’s named in the application.

7. In the instant case, the court made an order for leave based on an amended statement of statutory facts and a further verifying affidavit dated 1.10.2021.

8. The *ex parte* applicant filed a notice of motion whose prayers are based on a statutory statement of facts and a verifying affidavit sworn on 3.11.2021.

9. The respondents and the interested party made replying affidavits based on the new set of documents. Similarly, both parties made submissions on the notice of motion which is based on the documents filed without leave of the court and which are at variance with the substratum of the proceedings.

10. There is no requirement in law to file anything accompanying the notice of motion once leave to commence judicial review has been granted. **Order 53, Rule 4 Civil Procedure Rules** provides the documents to be served alongside the notice of motion as the chamber summons for leave, the statutory statement of facts and the verifying affidavit filed alongside the chamber summons plus any annexures thereto.

11. In *Republic –vs- Land Disputes Tribunal Court Central Division & Another Ex parte Nzioka [2006] 1 E.A 321 Ngamu J.* held that there was no legal requirement that the notice of motion be filed accompanied by anything else since the *ex parte* applicants’ case is deemed to be complete at the leave stage.

12. **Order 53 Rule 4 (1) and 2 of the Civil Procedure Rules** provides that no ground shall, unless provided, be relied upon or any relief sought at the hearing of the motion except on the grounds and the reliefs sought in the initial statement of facts.

13. The court has powers at the hearing of the motion to allow for the amendment of the statement and or filing of further affidavits to be used only if they deal with new matters arising out of the affidavits of any other party to the application. Where an applicant seeks to be allowed to amend his statement or use further affidavits, he has to give notice of such intention of any proposed amendments of his statement of facts.

14. The rule is in tandem with **Section 9 (1) (C) of the Law Reform Act Cap 26** Laws of Kenya, which provides that once leave is obtained, no new ground(s) or other relief(s) except with leave shall be relied upon except those available at the time leave was granted to the *ex parte* applicant.

15. In this case, the *ex parte* applicant amended the chamber summons, the statement of facts and the affidavit in verification prior to being granted leave since pleadings had not been closed.

16. Upon grant of leave, the *ex parte* applicant did not seek any leave to further amend the amended statement of facts and the further verifying affidavit.

17. In *Kenya African National Union –vs- Mwai Kibiki & 6 Others [2005] eKLR*, the court held a statement of facts is supported by a verifying affidavit which is the one which contains the evidence upon which the application is founded and that it must contain both facts and exhibits. The court proceeded to strike out the proposed amended statement of facts which was bringing into focus new and disputed facts, after leave stage.

18. In *Republic –vs- Chief Officer Ministry of Transport & Information Vihiga County Government & 2 Others Ex parte Afuma Ltd, A.G Interested Party, Musyoka J* held that it was unnecessary to file a statement and a verifying affidavit contemporaneously with the notice of motion since the two were filed at the leave stage.

19. In this case, the *ex parte* applicant was under **Order 53 Rule 4 (1) of the Civil Procedure Rules** obligated to serve an amended statement of facts and a further affidavit filed at the leave stage. These were the principle pleadings in the judicial review proceedings.

20. In *Lithotech Exports (PTY) Limited –vs- Electoral Commission Of Kenya [2007] eKLR R.N. Nabuye J* as she then was held the substantive application was defective as it was not accompanied by the statement which it should have been accompanied with hence struck it out.

21. Even though parties have submitted expecting the court to determine the matter on merits, it is apparent the fundamental aspects of the

case are lacking. The exparte applicant did not comply with the law in terms of service of the requisite documents and which he was to rely on during the main hearing. Failure to do so in my view was fatal blow to his case.

22. The respondents and the interested party submitted on a statement of facts and a verifying affidavit which is totally different from what was presented before the court initially. The exparte applicant cannot build on a substratum and ignore it when it comes to the roofing of his house. The effect is obvious that the structure has to crumble.

23. In ***Republic –vs- Amukura Land Disputes Tribunal Exparte James Ochunga [2016] eKLR***, there was an error where there was no evidence of leave to lodge judicial review and secondly the notice of motion was not accompanied by a verifying affidavit. The court found the exparte applicant to have been casual and the court therefore did not see the need to look at the submissions.

24. In this case, the notice of motion is not only defective but also a complete non-starter for being accompanied by a statement of facts and a verifying affidavit which is not only a strange document in the proceedings but also filed without the leave of court.

25. Even if the court were to make a finding that it should ignore the aforesaid documents and proceed to determine the matter on merits based on the amended statement of facts and further affidavit sworn on 7.10.2021, the notice of motion seeks for two prayers unlike the amended statements of facts at leave stage which had prayers for certiorari, prohibition and mandamus. The court therefore cannot help the situation either way.

26. The grounds on the face of the motion and those in the amended statement of facts are also completely different. The 1<sup>st</sup> respondent and the interested party also proceeded to reply to and submit on the wrong statement of facts and the affidavit verifying the facts.

27. The mistake in my view could not have been an oversight or an inadvertent mistake on the part of the parties, especially the exparte applicant given the parties not so long ago extensively submitted on the amended chamber summons dated 10.10.2021 leading to this court's ruling delivered on 27.10.2021. In the said ruling, the court clearly referred to the amended statement of facts and the further verifying affidavit dated 11.10.2021.

28. In the premises, I hold that the notice of motion dated 3.11.2021 is incompetent, a non-starter and an abuse of the court process. The same is dismissed with costs to the respondents and the interested party.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Michuki for interested party

Sandi for exparte applicant

Kieti for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**