



REPUBLIC OF KENYA

High Court at Mombasa

Judicial Review 3 of 2011

IN THE MATTER OF: THE LOCAL GOVERNMENT ACT [CAP 21] LAWS OF KENYA

AND

**IN THE MATTER OF: LANDLORD AND TENANT ACT [SHOPS, HOTELS AND
CATERING ESTABLISHMENTS ACT] CAP 301 LAWS OF KENYA**

AND

IN THE MATTER OF: REPUBLIC

V E R S U S

THE RESIDENT MAGISTRATE'S COURT

AT MOMBASA [MUNICIPAL COURT] RESPONDENT

EXPARTE

1. HUSSEIN MAALIM SHEIKH 1ST APPLICANT

2. NURU BADAWI 2ND APPLICANT

AND

HANIFA ABDULKARIM ABDULKADIR.....INTERESTED PARTY

RULING

(1) At the leave stage Hussein Maalim Sheikh and Nuru Badawi (together referred to as **'the Applicants'**) separately swore verifying affidavits on 20th January 2011 in support of their application for permission. The Interested Party thinks that those affidavits were executed by persons other than the Applicants and sought the following orders in the application dated 29th March 2011-

(a) **That this Honourable Court be pleased to Order the 1st and 2nd Applicants to personally appear on a date appointed by the court for purposes of cross examination on their respective verifying affidavits sworn on 20th February 2011.**

(b) **That at on the date appointed by the court for cross examination, the 1st and 2nd**

Respondents do appear with their original official passports as at 20th January 2011.

(c) That in default of compliance with prayer (1) and or (2) above, the two (2) verifying affidavits sworn purportedly by the 1st and 2nd Applicants respectively on 20th January 2011 and the Chamber Summons dated 20th January 2011 filed on 20th January 2011 be struck out of the court record and the Honourable Court be pleased to vacate its orders of 21st January 2011.

(2) Basically, it is the contention of the Interested Party that on the date when the affidavits are said to have been sworn Nuru was in Europe and Hussein in Tanzania. It would therefore not be possible that they appeared before S. R. Shikely advocate who attested to their signatures. It was the view of the Interested Party that cross examination of the Applicants would help verify this.

(3) In response to those allegations Hussein swore an affidavit on 26th April 2011 in which he displayed a copy of his passport as proof that he was in the country on 20th January 2011.

(4) On 27th September 2012 counsel for both parties appeared before me and by consent prayers (1) and (2) of the application were allowed. It was further agreed that the Applicants attend court personally on 28th November 2012 for cross-examination. On the appointed day Mr. Obuya attended Court on behalf of the Interested Party, Mr. Magiya for the Applicants and Mr. Eredi for the Attorney General. Mr. Magiya then informed Court that both Applicants were within the Court precincts but would not be ready to proceed as they had not carried their passports. One passport was said to be due for renewal and the other was left at home. The Interested Party insisted on proceeding. The Court, while attending to other business, waited for the Applicants to show up upto to 1.00pm. At that stage the Court permitted the Interested Party to proceed as it wished. The Interested Party requested that the application dated 29th March 2011 be allowed. Mr. Magiya left the matter to Court.

(5) The date of 28th November 2012 appointed for cross examination of the Applicants was taken by consent. Whilst I was informed by their Counsel that the Applicants were within the Court precincts, they did not physically present themselves to the Court. They may have had good or plausible reason for failing to carry their passports but it is not excusable that they failed to attend Court even after the Court had indulged them upto 1.00pm. I take it that they were reluctant to present themselves for cross examination. Having consented to prayers (1) and (2) of the application, they would be well aware of the consequences of their failure to comply. That is the consequence they must put up with. The affidavits allegedly sworn by the Applicants on 20th January 2011 in support of the Chamber Summons of 20th January 2011 are hereby struck out. The result is that all orders granted on 21st January 2011 are hereby vacated. The Interested Party shall have costs of his application of 29th March 2011.

Dated and delivered at Mombasa this 27th day of February, 2013.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Magiya for Applicants

Kiti for Respondent

Mbuya for Interested Party

Court clerk - Moriasi

F. TUIYOTT
JUDGE