



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 44 OF 2010

IN THE MATTER OF REGISTERED LAND ACT – CAP 300 LAWS OF KENYA

AND

**IN THE MATTER OF LEASES ELDORET /MUNICIPALITY BLOCK
8/574,575,577,578,579,580,581,582,585,586 AND 587**

BETWEEN

REPUBLIC.....APPLIANT

VERSUS

**THE DISTRICT LAND REGISTRAR
UASIN GISHU DISTRICT.....RESPONDENT**

**1. SOMOG LIMITED
2. VICTORIA JESAND
3. HOSEA K. RUTO
4. ANNE CHEROP CHEPSIROR
5. KENSTEN LIMITED
6. WILLIAM SAMOEI RUTO EX-EXPARTE APPLICANTS**

AND

MUNICIPAL COUNCIL OF ELDORETINTERESTED PARTY

RULING

This ruling relates to Preliminary Objections raised by the respondent, the District Land Registrar Uasin Gishu district and he 1st Interested Party, the Municipal Council of Eldoret. The 2nd Interested Party the Ethics and Anti-Corruption Commission supported both objections.

The objection by the respondent is twofold. It is contended that the applicant has failed to disclose its capacity to institute these proceedings and that the deponent of the verifying affidavit has failed to disclose the requisite authorization to commence these proceedings on behalf of the applicants.

The 1st Interested Party's main objection is similar to that of the respondent but is expressed somewhat differently. It is contended that the 2nd, 3rd, 4th, 5th and 6th applicants did not swear any verifying affidavits in support of the application and their names and parcels of land relating to them should therefore be expunged from the record; that the verifying affidavit is defective and the deponent thereof

has not annexed any authority from the 1st applicant authorizing the filing of these proceedings and that the statutory statement accompanying the Notice of Motion is not in the same form and substance as the statement filed when leave was sought and obtained. The last grounds of objection can be summarily disposed of. This record has only one statutory statement which was filed with the application for leave. There is no further or amended statement and the objection raised by the 1st respondent in that regard is without merit.

The rest of the objections may however be dealt with together – as in my view, they all revolve around the authority to bring these proceedings. In support of his objection, the respondent submitted that the deponent of the verifying affidavit has not disclosed by way of annexure the character of the 1st applicant, **Somug Limited** and the deponent's directorship. In the respondent's view which was also the view held by the interested parties, the said deponent had to demonstrate firstly that he was authorized to swear the verifying affidavit on the authority of the 5th applicant.

With regard to the 2nd, 3rd and 4th applicants the same submissions were made by the respondent and the interested parties. In their view if indeed they authorized the deponent to swear the verifying affidavit and commence these proceedings such authority had to be in writing and should have been exhibited. In this regard the following decisions were invoked. **Joseph Mwangi Wachira -vrs- Sagana Town Council [NAI HCCC NO. 1765 of 2000] (UR)** and **Joseph Kariuki & Others –vrs- James Ameyo [Kisumu HCCC No. 124 of 2003] (UR)**.

Responding to the Preliminary Objections, the applicants through their counsel submitted that the objections were based on technicalities and offered both the Oxygen rule of the Civil Procedure Rules and article 159 of the Constitution. It was further argued, on behalf of the applicants that the objections seek to restrict or limit the exercise of their fundamental rights under the same Constitution which, permit institution of suits on behalf of others, and to that extent are themselves unconstitutional. The applicants could not resist delving into the merits of their application. I have considered the preliminary Objections and the rival arguments together with the authorities cited by counsel. Having done so, I take the following view of the matter. The principles which have been established over time in matters of preliminary objections are now well known. The *locus classicus* is the decision of the predecessor of our Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd –vrs- West and Distributors Ltd [1969] E.A. Sir Charles Newbold** rendered himself as follows at page 701.

“A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The challenge made by the respondent and the 1st interested party in my view raise pure points of law and arise from the pleadings and if successful may dispose of these proceedings. It is also now settled that objections in limine may be taken in judicial review proceeding. (See **Welamondi -vrs- Chairman – Electoral Commission of Kenya [Bungo HCMA No. 81 of 2002] (UR)** among others.

The 1st applicant is Somug Limited and the deponent of the verifying affidavit **Paul Kipngeno Chirchir** describes himself as its director. It is apparent therefore that the 1st applicant is a corporate entity with a distinct and separate legal existence. As an artificial person, the 1st applicant can only take decisions through the agency of its organs namely, the board of directors or the general meeting of its shareholders. As regards litigation by an incorporated company, which the 1st applicant is, the board of directors or the shareholders in a general meeting are the only bodies who have authority to sanction the use of the company's name in proceedings. A board member, including a director or secretary of the company, cannot institute proceedings in the name of the company in the absence of express authority usually expressed by way of resolution. In **Begerere Coffee Growers Limited –vrs- Sebaduka And Another [1970] E.A.** it was held, *inter alia*, as follows:-

“C (1) When companies authorize the commencement of legal proceedings, a resolution or

resolutions have to be passed either at a company or Board of Directors meeting and recorded in the minutes.”

If however, a suit is commenced without authority; such suit can still be ratified by a subsequent resolution of the board or general meeting of the company. In the matter at hand, the respondent and the 1st interested party, in their respective preliminary objections, stated that the deponent of the verifying affidavit had failed to annex the requisite authorization to commence these proceedings and swear the verifying affidavit on behalf of the 1st applicant. Those objections were lodged on **18th and 8th March, 2011 respectively**. By the time the objections were argued, no written authority was introduced or referred to. The applicants’ main argument was that the objections were technical and would defeat the objectives of the Civil Procedure Rules and the provisions of the Constitution which prohibit challenges as based on technicalities.

There is therefore no real challenge to the objections and I find and hold that the deponent of the verifying affidavit has not demonstrated satisfactorily that he had the requisite authority to swear the verifying affidavit or institute these proceedings on behalf of the 1st applicant.

There are then the 2nd, 3rd, 4th, 5th and 6th applicants. With regard to the 5th applicant, it is **Christened Kensten Limited**. It is apparent therefore that it is an artificial person. As an incorporated body, like the 1st applicant, it can only take decisions through the agency of its organs which primarily are the board of directors or the general meeting of its shareholders. It is one of these organs which can authorize the use of the company’s name in litigation. The deponent of the verifying affidavit is neither a director of the 5th applicant nor is he a shareholder thereof. He does not even suggest that he was authorized by the 5th applicant to commence these proceedings or swear the verifying affidavit on its behalf. The inescapable condition is therefore that these proceedings have been instituted on behalf of the 5th applicant without its authority.

The 2nd, 3rd, 4th and 6th applicants are persons with flesh and blood and can act on their own behalf as they are under no disability. They allegedly own individual parcels of land which are mentioned by the deponent of the verifying affidavit. Yet they have not sworn verifying affidavits and have not authorized the said deponent to do so on their behalf.

Order 13 (1) & (2) of the Civil Procedure Rules is in the following terms:-

“13(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner where there are more defendants than one, any one of them may be authorized by any other of them to appear, plead, or act for such other in any proceedings, and in like manner where there are more defendants than one, any one of them may be authorized by any other of them to appear, plead or act for such other in any proceedings.

(2) The authority shall be in writing, signed by the party, giving it and shall be filed in the case.”

(Emphasis supplied).

So, under the above rule, if the 2nd, 3rd, 4th and 6th applicants authorized the deponent of the verifying affidavit to swear the said affidavit, such authority had to be in writing and had to be filed. In the absence of such written authority, the deponent of the verifying affidavit cannot purport to have sworn the same on their behalf. The 2nd, 3rd, 4th and 6th applicants have therefore not filed any verifying affidavit in these proceedings. They in any event, did not authorize the deponent of the verifying affidavit to commence these proceedings. The Notice of Motion is therefore unsupported. Under Order 53 of the Civil Procedure Rules, a verifying affidavit is a prerequisite to the granting of leave to commence judicial review proceedings. In **Commissioner General, Kenya Revenue Authority –vrs- Silvano Orema Owaki t/a (Marenga Filling Station [Civil Appeal No. 45 of 2000] (UR)**, It Was Held Inter-Alia As

Follows:-

“The Application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by 1 (2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.

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 53/1/7.

The application for leave “By a statement” – the facts relied on should be stated in the affidavit (see Republic –vrs- Wandsworth JJ. Ex p. Read [1942] 1 K.B. 281 ...”)

It must be clear by now, from my above analysis, that the objections raised by the respondent and the 1st interested party are neither technical nor do they offend the Constitution. Failure to support the applicants’ application with valid verifying affidavits is not a mere procedural lapse. It is a fatal defect which goes to the root of the application. It cannot also be gainsaid that commencing these proceedings without the authority of the applicants is not a mere technical flaw but a fatal omission. In Chaliche F.C.S. Ltd –vr- Odhiambo & 9 others [1987] KLR 182, it was held, *inter alia* as follows:-

“ 3 It is not proper procedure and amounts to miscarriage of justice for a party to be allowed to represent his co-defendants without their written authority, as required by the Civil Procedure Rules Order rule 8 or rule 12. (New Rule 13).

4. The rules of procedure have two objectives to translate into practice the rules of natural justice, so that there are fair trials and procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time.

5. Where the rules are dealing with the precepts of natural justice, the courts should be slow to conclude that they are mere technicalities”.

So, if the applicants desire to exercise their rights, be they constitutional or otherwise, they are perfectly entitled to do so in the manner the law recognizes that. That is for good order and in their own interests. It has also been said and in my view correctly that rules of Court are not made to flower the statute books and increase their volumes. They are made to be followed and obeyed.

With all due respect to the applicants, no attempt was made by them to respond to the objections raised by the respondent and the 1st interested party. The cases of Yasin Fahim Twaha & Another –vrs- District land Registrar – Lamu (Malindi HC JR No. 17 of 2010) (UR). Registrar of Titles [Nairobi HCC Pet. No. 107 of 2010] (UR) on which they placed reliance do not in reality advance their cause. In those cases, authorization to commence proceedings was not an issue nor was failure to file verifying affidavits considered. The case would have been relevant if the motion did not have the defects I have discussed above.

The upshot of my consideration of the grounds of objection taken by the respondent and the 1st interested party is that I find the motion on notice to be incompetent in substance. Accordingly, the preliminary objections thereto is sustained and it is consequently ordered that the motion be and is hereby struck out with costs to the respondent and the interested parties. The said costs to be borne by Paul Kipngeno Chirchir, the deponent of the verifying affidavits.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS

28TH DAY OF FEBRAURY, 2012.

F. AZANGLALA

JUDGE

Read in the presence of:-

Mr. Chichir holding brief for the Respondent and

Mr. Nyarotso holding brief for **Mr. Gicheru** for the 1st Interested Party.

F. AZANGALALA

JUDGE

28/02/2012.