



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**MISC. APPLICATION NO.119 OF 2011**  
**IN THE MATTER OF FUNYULA LAND DISPUTES**  
**TRIBUNAL**  
**IN THE MATTER L.R. NO. SAMIA/BUNJWANGA/1464,**  
**1465, 1617 & 1618**

**REPUBLIC .....APPLICANT**

**VERSUS**

**FUNYULA LAND DISPUTES TRIBUNAL.....RESPONDENT**

**AND**

**ROCKEY A.O WESONGA.....INTERESTED PARTY**

**JUDGEMENT**

This basically is an application by Ex parte Chamber summons dated 28.7.2009 seeking leave to file a Notice of Motion for the orders of judicial Review Orders. While usually the application is Exparte and generally unopposed, this particular one is facing challenge from the interested party.

In respect to this application the Interested Party filed a Notice of preliminary objection dated 7.10.2010 raising the following points:-

**“That the interested party, Rocky A.O Wesonga will argue in lamine that the entire application be struck out with costs on the grounds that the application is misconceived, incompetent and fatally defective for being non compliant with the mandatory provisions of the Order 53, Rule 2 of the civil Procedure Rules and that the Jurisdiction of this Honorable Court has not been properly invoked”**

In his argument in support of the preliminary objection afforested the interested Party argued that the Ex Parte applicant’s application for leave is fatally defective on the grounds that:

- a) The verifying Affidavit intended to be relied on to support the application for leave did not contain any such facts which could be relied on.**
- b) The Verifying Affidavit in question portended to verify only a Statement of Facts which only carried the name, Description of the applicants, the relief sought and the ground in which the relief is sought.**

In response on this point, the Ex Parte applicant stated that the statement of facts to and which the Verifying Affidavit verified was not limited to the name , description of the applicant and the relief Sought, but it also contained basic facts. He accordingly argued that the court should try and give a party, his day of in court, rather than oust him from the seat of justice. He accordingly said that the court should not allow the suit to go on and reach a hearing under relevant Notice of Motion under which all the relevant facts would be deponent and be considered.

I have carefully perused the application for leave to file a Notice of Motion seeking Judicial Review orders of certiorari. It is important to record law provisions under which the leave application is brought, i.e..0.53 rule 1 ( 2) of the civil suit procedure rules which state : -

**“An application of leave as founded shall be made Exparte to a Judge in Chambers and shall be accompanied by a statement to setting out the name, and description of the applicant, relief sought and the grounds on which it is sought. And by an affidavit verifying the facts relied on.”**

It is clear to the mind from the reading of the rule that the application for leave shall be accompanied by:-

- a) A statement setting out : -
  - i) The name of applicant
  - ii) The description of the applicant
  - iii) The relief sought
  - iv) The grounds on which the relief is sought
- b) An Affidavit, verifying the fact relied on.

Clearly then, an application for leave which does not comply with the above mandatory provision may stand liable for striking out for the following reasons : - First, because Order 53 which is reposed on Section 8 and 9 of the Law Reform Act is a special provision of Law which operates independently and outside the civil Procedure Act and Rules. Secondly, because, the verifying affidavit which does not itself carries facts to be relied on in support of the application for the leave as required under Rule hereinabove quoted, is empty and impotent and therefore incapable for supporting the application for the leave. This is because it does not itself carry out any such facts which can be relied upon to support the application.

In the case between the Commissioner General, Kenya Revenue Authority, through Republic and Silvano Orema Owaki T/A Marenga Filling Station, Civil Appeal No.45 of 2010, the Court of Appeal, considering the substance, content and importance of a verifying affidavit in matters of order 53 of the Civil Procedures Rules, stated thus at page 7 of its printed ruling:

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

In this case before me the Ex parte applicant had supported the Ex parte application for leave, by a verifying affidavit whose content was only the following three statements:-

1. **“That I am the applicant herein hence competent to expose to the facts of this affidavit.**
2. **That I ordinary reside at Busia 48Estate within Busia District in the Republic of Kenya.**

**3. That I verify that the statements of facts and in my application are true to the best of my knowledge, information and belief the source being my advocate on record”.**

This court observes that the Ex Parte Applicant’s verifying affidavit above cited, contained no facts in its contents which the court could rely on to grant the relief sought .The verifying affidavit was, therefore, of no evidential value in so far as the requirement of Rule 1 (2) afore stated is concerned .The case before me is similar to the cited case. The attempt by the Ex Parte applicant to divert this court’s attention to focus to the Statutory Statement of Facts will not assist him. That is so because the statement of facts should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which the relief is sought. This court is not blind to the fact that the applicant’s Statement of Facts contain paragraph 3 intituled “FACTS RELIED ON “Under the paragraph the Applicant purported to include the important facts which ought to have been captured in the verifying affidavit which is contrary to the ruling of the Court of Appeal in the case and hereinabove cited – that such facts should not be included in the Statement of Facts but in the verifying affidavit.

The conclusion I came to , therefore is that the application for the leave is indeed fatally in competent because the verifying affidavit in its support purports to verify the statement of Facts instead of verifying the facts carried by itself, which therefore, should contain the substantive facts upon which the application and the relief is / are based.

The said application is accordingly struck out with costs to the interested Party Orders accordingly.

Dated and delivered at Busia 25<sup>th</sup> day of August 2011.

D.A ONYANCHA  
JUDGE