



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
JUDICIAL REVIEW NO. 7 OF 2010

KEVIN MBOGO.....1ST APPLICANT

EDWIN OKELLO.....2ND APPLICANT

VERSUS

UNIVERSITY OF EASTERN AFRICA BARATON.....RESPONDENT

RULING

By an application in the form of a Notice of Motion filed in court on 5th July, 2010 the applicants **Kevin Mbogo** and **Edwin Okello** pray for orders that (1) the decision and orders made herein on 16th June, 2010 dismissing the applicant's motion on notice for Judicial Review dated 25th February, 2010 be reviewed and set aside, and the applicants' said motion be allowed as prayed.

The application is grounded on the premises, *inter alia*, that there is an error of Law and fact apparent on the face of the said decision; that under Order 53 Rules 4(1) the motion is to be supported by copies of the statement and verifying affidavits accompanying the application for leave; that the application for leave was supported by the 1st applicants' affidavit; that the motion was based on the statutory statement and the verifying affidavit lodged with the application for leave; that the court erred in finding that the motion was unsupported following the striking out of the verifying affidavit of the same applicant filed on 15th February, 2010; that the court erred in dismissing the motion on technical grounds and that there being no defect in pleadings and the court having found in favour of the applicants on merit it is only fair and just that the motion dated 25th February, 2010 be allowed.

The application is supported by an affidavit sworn by **Mr. Peter Kaluma** counsel for the applicants. The affidavit is an elaboration of the above grounds of the application.

The application is opposed and in this regard there is a replying affidavit sworn by **Mr. Elijah Momanyi Mogona** counsel for the respondent. It is deponed in the affidavit, *inter alia*, that review is not available to the applicants under Order LIII of the Civil Procedure Rules; that the applicants should have appealed since they challenge the court's appreciation of the law and that their desire is to have the court revisit its decision and arrive at a different decision.

The application was argued before me on 31st May, 2011 by **Mr. Miyari**, Learned Counsel for the

applicant and **Mr. Momanyi**, Learned Counsel for the respondent. Counsel restated their respective clients' positions taken in their respective affidavits.

I have considered the application, the affidavits filed and counsels' submissions. I have also given due consideration to the authorities cited. Having done so I take the following view of the matter. The applicants have not moved the court under section 80 of the Civil Procedure Act or Order XLIV of the Old Rules probably because those provisions would not apply to their application. They have instead invoked the inherent jurisdiction of the court. The substance of their complaint however is that the court should not have struck out their motion on notice on the basis that it was unsupported because it was indeed supported by a statutory statement and a verifying affidavit both of which had been filed with the application for leave. In the applicants' view a different conclusion should have been arrived at in that the court should have found that their notice of motion was competent.

I have read and re-read the ruling of my Learned Sister **Mwilu J.** rendered on 16th June, 2010. Having done so, I find that the Learned judge was not oblivious to the fact that the application for leave had been validly filed and properly supported. In her own words:-

“In the instant case the application for leave was properly brought/filed on 3rd February, 2010. It is dated 1st February, 2010. The verifying affidavit sworn by Kevin Mbogo and dated 1st February, 2010 was commissioned before Rahonoka Aboye Commissioner for oaths. Leave was granted on 12th February, 2010 and the substantive Motion was filed on 5th March, 2010. It is dated 25th February, 2010. That motion is attached to a certificate of urgency dated 15th February, 2010 filed in court on the same date. The verifying affidavit sworn by Kevin Mbogo accompanying the motion is neither dated nor commissioned by a commissioner for oaths and therein lies the problem. Similarly the annexures to the verifying affidavit are not marked. Under Order LIII of the Civil Procedure Rules the verifying affidavit to be attached to the main motion, as well as the statement of facts and supporting affidavits must be those or copies of those that accompanied the application for leave.”

The Learned Judge was therefore clear in her mind that the application for leave had been predicated on a valid statutory statement and a properly commissioned verifying affidavit. So the Learned Judge's decision to eventually strike out the motion on notice was a meditated judicial decision. If that decision was incompetent or legally unsound it would only be corrected by the Court of Appeal and not in the manner adopted. I am afraid the inherent power of the court cannot be invoked to vary, my Learned Sister's decision as I would be sitting on appeal against her said decision. I do not have such jurisdiction. I even doubt whether my Learned Sister herself would have such jurisdiction.

The applicants' application dated 21st June, 2010 and filed on 5th July, 2010 is without merit and is dismissed with costs to the respondent.

It is so ordered

**DATED AND DELIVERED AT ELDORET
THIS 24TH DAY OF AUGUST, 2011**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Songok H/B for Mr. Chuma for the Applicant and

Mr. Momanyi for the Respondent.

F. AZANGALALA

JUDGE

24TH AUGUST, 2011