



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
MISC. CIVIL APP. NO. 6 OF 2008

**IN THE MATTER: OF AN APPLICATION BY KENNEDY BOSIRE GICHANA FOR JUDICIAL
REVIEW**

AND

IN THE MATTER OF: THE REGISTERED LAND ACT

AND

IN THE MATTER OF: LR. NO. KISII MUNICIPALITY/BLOCK II/224

BETWEEN

REPUBLIC APPLICANT

AND

THE COMMISSIONER OF LANDS 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR – KISII.....2ND RESPONDENT

REGISTERED TRUSTEES & REDEEMED GOSPEL CHURCH..... INTERESTED PARTY

EX-PARTE

KENNEDY BOSIRE

GICHANA

RULING

These proceedings in the nature of judicial review were commenced on the 10th March, 2008 when the applicant, **Kennedy Bosire Gichana** filed an ex parte application by way of chamber Summons seeking leave for orders of certiorari and prohibition to issue directed at the commissioner of lands and the District Land Registrar – Kisii respectively. The order of certiorari was to quash the decision of the commissioner of lands dated 12th October, 2007 whereas the order of prohibition was directed at the District Land Registrar, Kisii to prohibit him from implementing or carrying out the execution of the 1st respondent's decision made on 12th October, 2007 in respect of land parcel No. Kisii municipality Block

11/224 **“the suit premises”**. The applicant also sought that leave so granted do operate as stay.

The ex parte application came before **Musinga J** for hearing on 11th March, 2008. However, the application was adjourned at the request of counsel for the ex-parte applicant to enable him file a further affidavit. On 1st April, 2008 the application was heard and in a reserved ruling delivered on 2nd April, 2008 **Musinga J** allowed the application effectively therefore granting leave to the applicant to commence judicial review proceedings in terms aforesaid.

On 14th April, 2008 the applicant filed the substantive notice of motion within the time lines set by **Musinga J**. when granting leave. The notice of motion was thereafter set down for interpartes hearing on various occasions albeit unsuccessfully until 28th May, 2009, when the applicant sought for and obtained leave to file an amended statement of facts. He was ordered to do so and serve the same upon respective parties within 7 days. However and according to the interested party, the applicant did not file the amended statement of facts, as ordered or at all. Though on 19th March, 2009 he had filed a notice of intention to amend the statement of facts, together with the proposed amended statement of facts, the same was neither ratified or adopted by the court.

When finally the substantive notice of motion came up for hearing before me on 19th May, 2010, **Mr. Momanyi**, learned counsel for the applicant and **Mr. Oguttu**, learned counsel for the interested party agreed to canvass the application by way of written submissions. However, **Mr. Oguttu** was of the view that such written submissions should be limited to the points of law that had accrued to the interested party which he intended to pursue by way of preliminary objections. Counsel for the applicant was not averse to the idea. Accordingly the written submission filed as well as the authorities cited and this ruling is limited to the preliminary objections raised by the interested party. They were two fold that:-

i) The verifying affidavit attached to the statement of facts was fatally defective and hence the substantive notice of motion was made in vacuum; and

ii) The applicant did not lodge the decision sought to be quashed in line with order LIII rule 7 of the Civil Procedure rules. Consequently, the applicant is prohibited from questioning the validity of the decision, sought to be impugned.

With respect to the 1st issue aforesaid, the interested party submitted that the applicant averred to the facts attendant to the judicial review proceedings in the statement of facts and not in the verifying affidavit as required. There are therefore no facts, upon which the judicial review proceedings can stand. He went on to submit that an applicant can only file one verifying affidavit, which must accompany a statement of facts and must be lodged simultaneously with the notice to the registrar. Thus a verifying affidavit cannot be lodged subsequent to the statement of facts. In support of these propositions, the interested party relied on the following authorities:-

a) Commissioner General, Kenya Revenue Authority V Silvano Arema Owaki T/A Marenga Filing Station C.A No. 45 of 2000 (UR)

b) Schiffbau – Und Entwicklungese II Schaft Tangermunde & Co Kg V The Public Procurements Complaints Review & Appeals Board & Another, C.A No. 174 of 2005 (UR).

c) Aga khan Education Service Kenya V Ali Seif and 3 others, C.A No. 257 of 2003 (UR).

The response of the applicant was that there were enough affidavits on record which verified the facts. That the applicant filed an ex-parte chamber summons application. However before the court could grant the leave sought, the court asked the applicant to file a further supporting affidavit which he did vide an affidavit sworn on 26th March, 2008. It was then that the court granted the leave to apply for orders of certiorari and prohibition. It was his understanding that under order LIII rule 1 (2) of the **Civil Procedures rules** more than one affidavit may be filed to verify the facts relied on. There were three affidavits on record at the stage of applying for leave. With regard to the authorities cited by the interested

party, it was his view that the case of **Commissioner General Kenya Revenue Authority (Supra)** was distinguishable. The case of **Schifball** (Supra) in fact favoured him. With regard to **Aga Khan** case, it was his submission that if the interested party was aggrieved by the leave granted, his remedy lies in filing an application to set aside the said leave.

As I understand it, Judicial Review Proceedings are special and unique and they are neither criminal nor civil in nature. So that Criminal Procedure Code or Civil Procedure Act and the rules made thereunder are inapplicable. Those proceedings are founded on Sections 8 and 9 of the Law Reform Act and indeed, the Provisions of Order LIII of the Civil Procedure Rules are derived from the said provisions of the law. Therefore it behoves a party seeking a judicial review remedy to strictly comply with the statutory requirements. Judicial review proceedings pursuant to order LIII rule 1 require that the substantive application be filed after obtaining leave of court within 21 days or less. Such leave is granted ex-parte by a judge in chambers. The ex-parte application must be accompanied with or by:-

- (a) ***A statement setting out the name and description of the applicant,***
- (b) ***The relief sought***
- (c) ***The ground on which it is sought, and***
- (d) ***By affidavits verifying the facts relied on.(emphasise mine)***

Preceding the filing of the ex-parte application, the applicant must give the registrar notice of his intention to file the application for leave a day prior and at the same time lodge with the registrar copies of the statement and affidavits. In the circumstances of this case all the above requirements were met by the applicant. Further before the court could grant the leave sought, the court asked the applicant to file a further supporting affidavit which he did. As far as he was concerned therefore all the facts relied on were set out in the application and the various affidavits sworn and filed in court before leave was granted.

By this submission, the applicant is acknowledging the fact that his verifying affidavit was deficient initially. He is essentially in agreement with the submissions of the interested party that the verifying affidavit was a two paragraph affair in which the applicant only confirmed the facts stated in the statement of facts as true. So that the evidence in support of the application was in the statement of facts as opposed to the verifying affidavit. In the case of **Commissioner General, Kenya Revenue Authority** (supra) It was held thus:-

“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 rule 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”.

And further:

“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 fact relied on should be stated in the affidavit (see R. V Wandsworth J J. ex P. read (1942) 1 K. B 281). “The Statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”

Strictly speaking, I would have had no difficulties at all in upholding the interested party’s objection based on the verifying affidavit, had there been no other affidavits which were filed before leave was

granted: Order LIII rule 1 is very clear that besides a statement setting out the name and description of the applicant, the relief sought, ground on which it is sought, the said ex-parte application must also be accompanied by **affidavits** (emphasize mine again) verifying the facts relied on. Though in this case the applicant filed a verifying affidavit in which he merely confirmed the facts as stated in the statement of facts as true, there was however other affidavits filed with the application. Again before the court could grant the leave sought for reasons which are not apparent on record, it directed the applicant to file a further affidavit. That further supporting affidavit was subsequently filed on 27th March, 2008. Looking at the two supporting affidavits, it is apparent that the evidence in support of the application was contained in these affidavits and not in the statement of facts as submitted by the applicant. The rule talks of affidavits verifying the facts relied on and not a verifying affidavit. It matters not that those other affidavits are christened supporting and further supporting affidavits. It is all a question of semantics. In the premises, the case of **Commissioner General**, is clearly distinguishable. In that case the court of appeal allowed the appeal on the ground that the superior court allowed the application on inadmissible evidence. There was only one, three paragraph verifying affidavit more or less as in this case. All the material facts in support of the application were however annexed in the statement of facts. There were no other affidavits. That is not the situation obtaining here though. The court of appeal did not make any mention of affidavits but only dealt with the single verifying affidavit on record. Here there were several affidavits on record at the stage of the ex-parte application for leave and the facts in the statement were verified by those various affidavits.

With regard to the 2nd preliminary point, I think it is non-issue. From the record, it is apparent that the decision sought to be quashed by an order of certiorari was annexed in the supporting affidavit sworn in support of the ex-parte application on 6th March, 2008. In any event, the interested party too has annexed the same letter to his replying affidavit to the substantive Notice of motion. My careful reading and understanding of the provisions of order LIII rule 7 of the **Civil Procedure rules** leads me to the inescapable conclusion that the applicant is only barred from questioning the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion he has lodged a copy thereof verified by an affidavit with registrar. Invoking the *ejusdem generis* rule of construction and or interpretation, I think that, the rule envisages a situation where the decision sought to be impugned arise from judicial proceedings of sorts either in the tribunals and or subordinate courts. I do not think that it was envisaged to cover situations as obtaining here where the decision has been made and or communicated vide a letter. In any event, even if I am wrong in my above conclusion, the failure to file and or lodge the decision sought to be quashed, verified by an affidavit before scheduled hearing of the substantive motion is not fatal to the applicant's case. The same rule allows the applicant if in default to account for his failure to do so to the satisfaction of the court. At the time the substantive motion was scheduled for hearing, the interested party took up the preliminary objections. He did not wait for the motion to be heard and if any explanation for the failure if at all was forthcoming from the applicant. The issue in my view therefore cannot be the basis of a preliminary objection in terms set out in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) E.A 696**. The issue could only be raised at the formal hearing of the substantive Notice of Motion and not as a preliminary point. The applicant would then give the necessary explanation at the hearing if the decision sought to be quashed does not form part of the application. In a nutshell the issue was not strictly a point of law and was prematurely raised.

For all the foregoing reasons, I find no in merit the preliminary objections raised to the substantive motion. The same are hereby dismissed with costs to the applicant.

Ruling dated, signed and delivered at Kisii this 16th July 2010.

ASIKE-MAKHANDIA

JUDGE