



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Miscellaneous Civil Application 44 of 2008**

**HARON KITHINJI .....**  
**APPLICANT**

**VERSUS**

**THE CHAIRMAN, MERU CENTRAL DISTRICT**

**LAND DISPUTES TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**THE MERU CENTRAL LAND DISPUTES TRIBUNAL .....2<sup>ND</sup> RESPONDENT**

**JANE KARIMI KAIRIGO ..... 1<sup>ST</sup> INTERESTED PARTY**

**BEATRICE KANYUA ARUN ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

Learned counsel for the interested parties in this judicial review application has raised what is headed “*Notice of Preliminary Issues to be Decided by Court Before Substantive Applicant (sic) is Heard.*” –, which I understand to be a notice of preliminary objection. The grounds of objection are framed as questions but in essence do raise the following points:-

- (i) that the statement of facts is signed by the advocate instead of the applicant
- (ii) that there are two statements of facts instead of one
- (iii) that there are two verifying affidavits which are infact supporting affidavits
- (iv) that it is irregular for the applicant to have sworn on maters of law.

The preliminary objection was opposed by counsel for the applicant who submitted that it was not

preliminary objection in the strict understanding of the term. That there was nothing irregular about the affidavits or statements. That the first verifying affidavit accompanied the notice to the Registrar while the second one accompanied the notice of motion.

I have considered these arguments and hold the following view of the matter:-

This being a preliminary objection, the same must meet the strictures enunciated in the case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (1969) EA 696, namely that the objection must consist of a point of law which if argued as a preliminary objection may dispose of the suit. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

It is trite that before an application for judicial review can be instituted the applicant must in the first place obtain leave of the court to do so. Application for leave by way of chamber summons is sought *ex parte*. It must be accompanied by a statement of facts and affidavits verifying the facts upon which the application is premised. The statement of facts must be confined only to the following details:-

- (i) name and description of the applicant
- (ii) the relief sought, and
- (iii) the grounds on which the relief is sought.

The facts relied on in bringing the application is verified by an affidavit. Issue has been taken in this preliminary objection with the fact that the statement of facts has been signed by the applicant's advocate. In view of the details required to be contained in the statement of facts, namely name and description of the applicant, the relief and the grounds upon which it is sought, I find nothing irregular or objectionable to applicant's advocate signing the same. Those details are indeed matters of law which an applicant may not be competent to draw unless he does not have the services of counsel. That disposes of the first ground.

The second objection is to do with the two statements of facts in this application. The first statement of facts is dated 10<sup>th</sup> June 2008. The same was served upon the Registrar a day preceding the application for leave. When the application for leave was brought on 11<sup>th</sup> June 2008 once again there was a statement of facts of the same date – 11<sup>th</sup> June 2008. What does the law require?

The applicant must give notice of the application for leave to the Registrar not later than the preceding day. He must at the same time lodge with the Registrar copies of the statement of facts and affidavits. See sub-Rule (3) of Order 53 Rule 1.

Sub-Rule 2 provides that an application for leave made *ex parte* by way of chamber summons must also be accompanied by a statement of facts as well as verifying affidavit(s). What is to be served upon the Registrar is a copy of the statement already prepared to accompany the application for leave. It is therefore the same statement. The only problem with the statement facts accompanying the application for leave in this matter is that it is dated 11<sup>th</sup> instead of 10<sup>th</sup> June 2008, being the date of the original of that served upon the Registrar. The mix-up on the dates alone cannot be a basis of dismissing the application. As a preliminary point of objection that ground also fails.

The third ground challenges the existence of two affidavits and argues that the affidavits are infact supporting affidavits. Once again the affidavit accompanying the application for leave is or ought to be the original of the copy served on the Registrar. The problem again is with the date.

I understand the second limb of the objection to assert that the affidavit ought only to verify the facts in the statement, and ought not to appear to be in the form of supporting affidavit. The simple answer to that ground is provided by Order 53 Rule 1(2) of the Civil Procedure Rules which provides for the use of verifying affidavits in judicial review applications.

It is explicit that the facts relied on in bringing the application for judicial review must be verified by affidavits. This provision has been interpreted in several judicial decisions, the leading one being The Commissioner General, Kenya Revenue Authority Through Republic V. Silvano Onema Owaki T/A Marega Filling Station – Civil Appeal No. 45 of 2000 in which the law was stated as follows:-

*“We would observe that it is the verifying affidavit which is of evidential value in an application for judicial review.”*

The court relied on the Supreme Court Practice 1976 Vol. 1 paragraph 53/1/7 which states:-

*“The application for leave “By a statement”. The facts relied on should be stated in the affidavit (See R. V. Wandsworth J.J. EXP. Read (1942) IKB 281. The statement should contain nothing more than the name and description of the applicant, the relief sought. It is not correct to lodge a statement of all the facts verified by an affidavit.”*

Both the statement of facts and verifying affidavit comply with the law and this ground of objection similarly fails.

The final ground is that it is irregular for the applicant to have deponed in the verifying affidavit as to matters of law. That ground alone is not capable of disposing of the application. Even assuming that there are paragraphs in the affidavit which raise issues of law, the worst that can happen is to strike out the offending paragraphs identified as paragraphs 9, 11 and 12, leaving the rest of the affidavit intact.

That ground also does not comply with the strictures in Mukisa case and therefore fails. In a nutshell, the objection is overruled with costs to the applicant.

Dated and delivered at Meru this 10<sup>th</sup> day of June. 2009.

**W. OUKO**

**JUDGE**