



REPUBLIC OF KENYA

HIGH COURT AT KISII

MISC CIVIL APPLI 246 OF 2004

IN THE MATTER OF ORDER UPON A DETERMINATION BY THE DISTRICT COMMISSIONER
TRANSMARA OF AN APPEAL TOUCHING PARCEL NOS. OSINON/30, OSINON/149 SITUATE
IN TRANSMARA DISTRICT

AND

IN THE MATTER OF AN APPLICATION BY FRANCIS SIALO MEMANTIKI FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF LAND APPEALS NOS. 157 AND 167 OF 1998 TO THE MINISTER UNDER
THE PROVISIONS OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CHAPTER 284 LAWS OF KENYA

BETWEEN

FRANCIS SIALO MEMANTIK APPLICANT

VERSUS

DISTRICT COMMISSIONER,

TRANSMARA DISTRICT RESPONDENT

AND

MATHEW LENTOKA SINTERIA INTERESTED PARTY

RULING

On 31st December, 2004 Francis Sialo Memantiki filed an application for leave to apply for orders of certiorari and Mandamus. The second paragraph of the application is worded as follows:

“2. The relief sought is:-

(a) An order of certiorari to remove

into the High Court and to quash

an order of the District

Commissioner Transmara in Land

Appeal Case Nos. 157 of 1998

dismissing an appeal by the

applicant from the determination

of the Land Adjudication Officer

Osinon Adjudication area dated

21st April, 2004 directing that

parcel No. Osinon/149 be

registered in the name of

MATHEW L. SINTERI.

(b) An order of Mandamus directing that a different District Commissioner do hear and determine the said appeal by the appellant.”

Order LIII rule I (2) requires an application for leave to be accompanied by a statement setting out the name and description of the applicant, the reliefs sought, the grounds on which it is sought, and by an affidavit verifying the facts relied on. **Subrule (3)** further provides that the applicant shall give notice of the application not later than the preceding day to the registrar and the applicant should at the same time lodge with the Registrar copies of the statement and affidavits.

The aforesaid application was not accompanied by a statement of facts and an affidavit verifying the facts relied upon. What is annexed to the application are two affidavits sworn by the applicant. Infact one of them is not a competent affidavit because it does not bear a stamp of a Commissioner of Oaths or the name of such commissioner. There is only a signature of an undisclosed person. The other one is an affidavit which is headed “**verifying affidavit**” and the same reads as follows:

“I Francis Sialo Memantiki of Transmara District

in the Republic of Kenya make oath and state

as follows:

(1) That the pleadings in this Misc. Civil Application and in accordance with my instruction and a verify the same to be correct.(sic)

(2) That I swear this affidavit in verifying the pleadings.

(3) That what I have stated is true to the best of my knowledge.”

The alleged verifying affidavit is improper in that it does not contain any facts relevant to the aforesaid application. In **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY –VS- SILVANO ONEMA OWAKI T/A MARENGA FILLING STATION**, Civil Appeal No. 45 of 2000, the Court of Appeal stated that in an application for Judicial Review it is the verifying affidavit which is of evidential value and not merely the statement accompanying the application for leave. That in essence means that if there is no affidavit which consists of such depositions upon which a court of law, upon perusal of the same, can discern whether leave ought to be granted or not, no leave to institute judicial review application can issue. This is sufficient to render the entire application incompetent.

Secondly, the applicant did not give an appropriate notice to the Deputy Registrar as required under **Order LIII Rule 1 (3)**. The purported notice that was issued was filed on 31st December, 2004 together with the application itself. The applicant did not also lodge with the Deputy Registrar a copy of the statement and the necessary affidavit. That notice is in law incompetent.

Thirdly, the respondent, who was the District Commissioner, Transmara District, decided the appeal in question for and on behalf of the Minister for Lands and Settlement who by virtue of the provisions of **section 29** of the **Land Adjudication Act** was mandated to hear the appeal. It is therefore the Minister who should have been made the respondent and not the District Commissioner.

Fourthly, pursuant to the leave that was granted by the court which allowed the applicant to seek only two prayers, the applicant's notice of motion filed on 10th August, 2006 contains additional prayers which no leave to institute was sought.

For the aforesaid reasons, the application for judicial review is incompetent and is hereby struck out with costs to the interested party.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

22/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Nyambati for the Applicant

Mr. Ochwangi for the Interested Party.

Court: Ruling delivered in open court on 22nd September, 2009.

D. MUSINGA

JUDGE.