



REPUBLIC APPLICANT

VERSUS

MERU NORTH DISTRICT LAND ADJ. RESPONDENT

FREDRICK MWORIA EX PARTE

RULING

It should be noted that the title of the notice of motion filed in this judicial review matter and dated 28th May 2008 is entitled as follows:-

REPUBLIC APPLICANT

VERSUS

MERU NORTH DISTRICT LAND ADJ.

OFFICER RESPONDENT

FREDRICK MWORIA EX PART

REPRESENTING M'LARAMA

MARIMBA..... APPLICANT

JOSEPH LITHIMBI REPRESENTED BY

JOSPHAT KIULUNIINTERESTED PARTY

That notice of motion seeks orders of *certiorari* prohibition and mandamus. It seeks to quash the decision of Meru North District Land Adjudication officer of 18th December 2007. It seeks to prohibit the implementation of his order and seeks orders to have the adjudication officer recognize the applicant

ownership of the parcel of land Uringu 1 No. 2208. By a preliminary objection filed by the interested party it is contended that the said application is bad in law and should be dismissed. The preliminary objection is dated 18th of September 2008. The objections are:-

1. That the applicant has no locus to bring the application and in so doing, is a busy body.
2. That the notice of motion is bad in law and against the provisions of order LIII of the Civil Procedure Rules in that the so called *ex parte* applicant did not serve the requisite notice to the registrar and that he had no leave to file the said notice of motion.
3. That the notice of motion is not properly supported and discloses no cause of action against the respondent or the interested party.

On the first ground, the interested party argued that the applicant is a busy body since he had filed the judicial review application representing M'Larama. Indeed in the many affidavits filed by the applicant herein, three in total, I gathered that M'Larama is the owner of the plot the subject of the judicial review proceedings and is also the father of the applicant. After leave was granted to file the judicial review, the applicant filed a notice of motion which was supported by an affidavit. That affidavit was filed without the leave of the court. That as it may be, annexed to that affidavit, is a general power of attorney donated by M'Larama to Fredrick Mworira. It is not clear whether M'Larama who donated that power is the same one as named in the notice of motion because in the power of attorney his name is spelt as *M'Rarama*. Again that aside, that power of attorney was not registered nor was stamp duty paid for it. That being so Section 19 of the Stamp Duty Act Cap 480 prohibits such a document being received in evidence in civil proceedings. Section 19 (1) and (2) provides:-

“19 (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

That power of attorney cannot be received in evidence in this case. On the second ground, the interested party is challenging the leave that was granted to apply for judicial review orders. The interested party without formerly moving the court by way of an application cannot in my view seek to question that leave by way of a preliminary objection. In this regard, I respectfully agree with the case of **Republic Vrs. District Adjudication Officer – Tharaka & Others Misc. Application No. 176 of 2005** where the court had this to say:-

“However, since the leave was granted on 10th November 2005, I agree with Mr. Murango Mwenda learned counsel for the ex parte applicant that this being a court of cognate jurisdiction it cannot of its own motion go behind the decision granting leave. It can only do so where there is a specific application to set aside or vacate the order of leave granted ex parte. So the leave stands as granted,.....”

Even though I will not entertain the preliminary objection on that issue, I find that the notice of motion before court is incompetent because the only valid affidavit on record is the one that was filed on 12th May 2008 which is entitled verifying affidavit. In that affidavit, the *ex parte* applicant deponed as

follows:-

1. *That I am the applicant named herein above and in this application and therefore competent to swear this affidavit.* the statutory statement of facts relied on
2. *That I have made the statement filed herein with and hereby reiterate and verify the said statement in accordance with order LIII Rule (8) of the Civil Procedure Rules.*
3. *That the said statement is true and within my knowledge.*

It is the verifying affidavit and not the statement of facts which contains evidence or evidential material in support of the relief sought. Such a verifying affidavit cannot just refer to the facts in the statement of facts. This indeed was the finding in the case Commissioner General KRA Versus Silvano Onema Omaki Kisumu Civil Appeal No. 45 of 2000:-

“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. I at Paragraph 53/1/7:

“The application for leave “by statement a statement” the facts relied on should be stated in the affidavit (see R Vrs. Wandsworth JJ., 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 lounge a statement of all facts, verified by an affidavit.”

At page 283 of the report of the case of R. Versus Wandsworth justices Viscount Caldecote C.J. said:-

“The court has listened to argument of the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason, the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in the ordinary case of excess of jurisdiction.”

The Court of Appeal in that case proceeded to allow the appeal on the ground amongst others that the respondent affidavit failed to have the evidential material necessary for the application for judicial review. My finding is that the notice of motion before court is incompetent for being supported by a verifying affidavit which fails to set out the facts that are verified. Ground 3 of the preliminary objection fails in my view, because whether or not the notice of motion discloses a cause of action can only be determined at a full hearing. At present, what is before court is a preliminary objection. When a party raises a preliminary objection, he is taken to accept all the facts as pleaded to be correct. It should not be raised if what is sought is the exercise of the court’s discretion. See the case of Mukisa Biscuit Manufacturing Co. Ltd Vrs. West End Distributors Ltd [1969] E.A where it was stated:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit..... A preliminary objection is in the nature of what used to

be a denurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are collect. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

For that reason, the 3rd objection is rejected. In the end, I find for the reasons stated before, that preliminary objection number 1 and 2 do succeed. I cannot however finish this ruling without referring to the authorities of the applicant. In the case of **Republic The Minister for Finance and the Commissioner of Insurance as licensing and regulating officers Versus Charles Lutta Kasamani T/A Kasamani & Co. advocates** Civil Appeal (Application) No. 281 of 2005 the Court of Appeal was dealing with an objection raised against the notice of appeal. That in my view distinguishes that case from this case. I found that the authority did not assist the applicant. **Republic Versus The Hon. Attorney General** Misc. Civil Application No. 105 of 2001 was another authority which was supplied by the applicant. The copy supplied to the court was very poor and I found that some words were obliterated but of most concern was the fact that it seemed to have been an incomplete authority because it did not have the last page showing the judge who delivered it. I was unable therefore to rely on it. In the end, the notice of motion dated 18th September 2008 is hereby dismissed for being incompetent with the costs thereof being awarded to the interested party. The interested party is also awarded the costs of the preliminary objection as against the applicant.

Dated and delivered at Meru this 29th day of October 2009.

MARY KASANGO

JUDGE