



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 953 of 2007

HARUN NGUNYAI.....APPLICANT

Versus

MWANGI NGUYAI & THREE OTHERS.....RESPONDENT

JUDGMENT

This is a Judicial Review application. The ex parte Applicant Harun Ngunyai seeks an order of certiorari to move into the High Court and quash the proceedings and award of the Gatanga Land Disputes Tribunal issued on 25th April 2007 and adopted by the Chief Magistrate's Court on 30th July 2007 and costs of this application. The Notice of Motion is dated 17th September 2007 and supported by a statement of the same date and skeleton arguments filed on 24th April 2008. It is the Applicants case that the proceedings of the tribunal were conducted in his absence and that was in breach of rules of natural justice. That he resides in Molo and yet notification of the hearing date at the Tribunal is dated 19th April 2007 addressed to both him and the Respondent and allegedly forwarded to the Chief of Keriara to forward to 1st Respondent. That it was not shown how the Applicant was served and the Applicant could not have come from Molo to attend the Tribunal as the time was short.

The 2nd ground upon which the application is premised is that the Tribunal acted in excess of its jurisdiction in ordering a resurvey of land parcel 16/Gatura 471 and 804. That the Tribunal should have appreciated from the 1st Respondent's evidence and the letter of the Land Registrar which disclosed that there was no boundary dispute but that the 1st Respondent was claiming a portion of the land.

Lastly, that the Tribunal exceeded its jurisdiction in entertaining a dispute in respect of land registered under the Registered Land Act. (Cap 300 Laws of Kenya) as both the Applicant and 1st Respondent possess titles to their respective land parcels and whereas the Applicant got title Loc 16/Gatura 804 on 3rd June 1987, the Respondent got his certificate Loc 16/Gatura/Block 471 on 13th February 1976 and each has been on their respective portions for over 30 years. Counsel relied on the decision in REP V THE CHAIRMAN NANDI HILLS DIVISION LAND DISPUTES TRIBUNAL MIS APPLICATION 195/2001 in which the court found that the Tribunal had no jurisdiction to entertain disputes in respect of registered land.

Mwangi Ngunyai, the 1st Respondent, filed the Replying Affidavit dated 25th October 2007 in opposing the motion. He deposed that their late father never allocated any land to them and that it is the 1st Respondent and Applicant who processed the titles in 1976 and 1987 but he came to realize that the actual position on the ground was that the Applicant had encroached on the Respondent's land and despite request, the Applicant declined to have the title adjusted which prompted the filing of the complaint before the Tribunal and that both parties demanded all the proceedings before the Tribunal.

That what the Tribunal determined was not ownership of land but re survey and therefore the Tribunal acted within its jurisdiction.

Even though the Respondent did not address the question of the competency of this motion, I think it proper that this court does so before endeavouring to consider the merits of the application. Under Order 53 Rule 4 (1) Civil Procedure Rules, it is the statement of facts and the verifying affidavit filed along with the Chamber Summons that are supposed to be served with the Notice of Motion and they are the ones that should be relied upon to support the motion.

In this case however, the applicant relied on a statement dated 17th September 2007 in support of the motion. Order 53 R 4 (2) Civil Procedure Rules allows for amendment of a statement and the filing of further affidavits in reply to affidavits filed by other parties. The statement dated 17th September 2007 is not an amended statement nor was leave granted to file further affidavit. The affidavit filed on 17th September 2007 is not a further affidavit nor is it filed with the leave of court. The result is that both the statement and affidavit dated 17th September 2007 filed with the Notice of Motion are irregularly on record and must be struck off.

Under Order 53 Rules 1 (2) Civil procedure Rules the Chamber Summons application that seeks leave to commence Judicial Review proceedings shall be accompanied by a statement which sets out the name and description of the Applicant, the reliefs sought and grounds on which it is sought and by affidavits verifying the facts relied on. What the above provision means is that it is the verifying affidavit that will contain the evidence while the statement only contains the names of the Applicant, the reliefs sought and grounds relied upon. This position was confirmed by the Court of Appeal in the case of COMMISSIONER GENERAL KRA V SILVANO ONEMA OWAKI t/a MARENGA FILLING STATION CA 45/2001 IKSM. The Court of Appeal rendered itself thus:

“We would observe that it is the replying affidavit and not the statement to be verified which is of evidential value in an application for Judicial Review. That appears to be the reasoning of Rule 1 (2) of Order LIII.” The Court of Appeal referred to the Supreme Court Practice Rules 1976 VO 1 paragraph 53/1/7 which reads as follows:

“The facts relied on should be stated in the affidavit (see REP V WANDSWORTH 57 ex parte REED (1942) 1 KR 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 in a statement all the facts verified by an affidavit.” In the WANDSWORTH CASE, Calcedo L.J. rendered himself as follows: “the court will look at the affidavit to see what facts are.....”

In the instant case, the verifying affidavit dated 21st August 2007 filed with the Chamber Summons is made up of only 3 short paragraphs where the applicant says he is well versed with the case and that he was verifying the facts. That affidavit is so brief and does not contain a single fact that can support the Notice of Motion. It is not of any evidential value. I have seen the statement and I note that from paragraphs 3 to 21 of the statement, it does not only contain grounds but most of it is facts. The Applicant has also purported to annex the documents that they rely upon to the statement and yet they should have been annexed to the affidavit. That out rightly offends Order 53 Rule 1 (3) Civil Procedure Rules. The evidence in the statement is misplaced and renders the statement defective and therefore be struck out. The effect of the striking out is that the Notice of Motion is not supported by any evidence. The same is naked and incompetent and fatally defective, and it can only be struck out. Since the Notice of Motion is so incompetent and fatally defective, the court will not go into considering the merits of this application or whether the order sought can issue. The whole Notice of Motion stands struck out with costs to the 1st Respondent.

Dated and delivered this 30th day of June 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Ndegwa holding brief for Mr. Chelangat for Applicant

Mr. Ndugu for Respondent

Daniel: Court Clerk