



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

Civil Case 150 of 2006

REPUBLIC ..... APPLICANT

VERSUS

THE LAND DISPUTE TRIBUNAL )

CENTRAL DIVISION )

MACHAKOS DISTRICT ) ..... RESPONDENTS

AND

KYALO NDAKA ..... INTERESTED PARTY

AND

SAMMY NZIVO NDUNDA )

AARON NDUNDA )

MUSYOKI NDUNDA ) ..... EXPARTE APPLICANTS

**RULING ON A PRELIMINARY OBJECTION**

1. The Preliminary Objection by Mrs Nzei, advocate for the Interested Party is addressed at the competence of the Notice of Motion dated 4/11/2002. It is her argument that the same offends the provisions of Order LIII Rule 1 (2) of the Civil Procedure Rules because the evidence sought to be relied upon is contained in the Statement of Facts and not the Verifying Affidavit which contains no such evidence. That a Supporting Affidavit that exists on record is a strange document that is unknown to proceedings under Order LIII of the Civil Procedure Rules.

2. Mrs Nzei relies on the decision in Commissioner General, Kenya Revenue Authority vs Silvano Owaki, t/a Marenga Filling Station C.A. 45/2000 for the proposition that all evidence in a judicial review matter should be contained in the Verifying Affidavit only.

3. In opposition, Mr Makau for the ex-parte Applicant has argued that Order LIII Rule 1 (2) has been complied with and the Verifying Affidavit and Supporting Affidavit are properly on record and no leave is require to file any of them.

4. Order LIII Rule 1 (1) and (2) of the Civil Procedure Rules provides as follows:-

“1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.”

5. What is under challenge before me is the contents of the Statement of Facts, the Verifying Affidavit and the Supporting Affidavit on record. I note that the Statement of Facts dated 25/9/2002 in my view, meets the expectation of the Rule because it describes who the Applicant is, the reliefs that are sought and the grounds on which those reliefs are sought. I agree with Mrs Nzei that as was stated in the case of the Commissioner – General, Kenya Revenue Authority (supra), that it is the Verifying Affidavit not the statement to be verified that is of evidential value. I have seen the Verifying Affidavit sworn on 25/9/2002 by Sammy Nzivo Ndunda. The only statement worth repeating is paragraph 3 thereof where the said Ndunda depones as follows:-

“That I do verify that the facts in the Chamber Summons and statement above-mentioned are correct and true and within my knowledge.”

6. The same assertion is repeated at paragraph 4 thereof but there is also an affidavit termed “Supportive Affidavit” where all the evidence relied upon is exhibited. Can that Affidavit be allowed to stand? Order LIII Rule 1 (2) reproduced above uses the words “...affidavits” verifying the facts relied on. “Verify” is defined as a verb of the term “verification” meaning a conclusion for all pleadings that are required to be sworn and “to confirm or substantiate by oath or affidavit” – Black’s Law Dictionary, 18<sup>th</sup> edition.

7. When the Rule uses the words “verifying affidavits” it seems to me that no procedural mistake has been committed where the Applicant has, in one affidavit, laid out all the evidence relied upon and verifies the contents of the Statement of Facts in another Affidavit. In fact the whole language of Order LIII aforesaid is that affidavits to bring all matters to the fore must be filed before the judicial review motion can be heard – see Order LIII Rules 4 (1) and 4 (2) and 4 (3).

8. Having therefore considered the issue before me, I do not see that the Objection has merit and is dismissed with costs to the ex-parte Applicant.

9. Orders accordingly.

Dated and delivered at Machakos this 29<sup>th</sup> day of October 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: Mrs Nzei for Interested Party

Mr Makau for ex-parte Applicant

**ISAAC  
JUDGE**

**LENAOLA**