



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Misc Civil Appli 162 of 2006

ESHBON NGARI SAMUEL

(Represented by VIRGINIA NGUGI NGARI.....)
APPELLANT

VERSUS

NJUKI KINYENJE (Represented by NJUKI NJUE.....)
RESPONDENT

AND

IN THE MATTER OF JUDICIAL REVIEW

REPUBLIC OF KENYA.....
.....APPLICANT

EX-PARTE

NJUKI NJUE.....
.....APPLICANT

VERSUS

A.O OKELLO DISTRICT COMMISSIONER, MBERE DISTRICT.....1ST
RESPONDENT

VIRGINIA NGUNGI NGARI.....INTERESTED
PARTY

RULING

Before the court is a Notice of Motion filed on 22/12/2006 under order 53 rule 3 (1). Seeking order of certiorari to quash the decision of District Commissioner, Mbeere District in Appeal No.146 of 1995 dated 22/9/2006.

Before hearing of the motion Ms Munyi for the D.C raised Preliminary Objection on the ground that the statement is not in compliance with requirements of the relevant rule. And that the affidavit does not comply with procedure there are two affidavit filed by the applicant one filed without leave. An affidavit filed by Maina Muguanga who is not a party to proceedings if these affidavit to be struck off, affidavit sworn 17/11/2006 has no substance; it is supposed to verify the matters in the statement. Also there is issue of locus. Applicant has no interest in the matter. Looking at the rule 1 (2) the application for leave

exparte shall be accompanied by a statement setting out the:

- (a) name and description of the applicant
- (b) the relief sought
- (c) the grounds upon which it is sought and hearing affidavits verifying the facts relied on.

The statement dated 17/11/2006 is headed “**statement of Particulars**”. It is not set out therein the name of Applicant and his description. First two paragraphs give a story of how the dispute comes about. The applicant is one Eshbon Ngari Samuel not the Republic proceedings which were intended as evidence were attached to the paragraph 5 of the statements. This evidence was not sworn. Relief sought is contained in paragraph 7 of the statement to quash the decision of D.C Okello.

On the same date there was a verifying affidavit sworn by Exparte applicant but no evidence is attached. On the same day there was an affidavit sworn by one Maina Mugwanya who stated he is the registered proprietor of the land in dispute and that he was not made a party in the proceedings and the D.C proceeded to deprive himself of his land without hearing him.

On 22/12/2006 the applicant Njuki Njue made an affidavit in which he annexed exhibit. This affidavit was not filed with leave of the court. On affidavits to be filed order 53 (1) (2) is clear, the exparte application may be accompanied by one or more affidavits. This is stated and also indicated in rule 4(1). By rule 4(2) the court may allow further affidavits to be used if they deal with new matter arising out of any affidavit of any other party.

It has also to be noted that only persons opposing the application may be heard under the provisions of rule 6. Therefore the defects reflected in this application is in the Heading, “**The Republic**” should be applicant in Judicial Review Application also in the statement. What is stated is not in compliance with the requirements of rule 1 (2) of Order 53. The facts relied upon are required to be in the verifying affidavit not in the statement, Exparte application may be supported by several affidavits but once the leave has been granted further affidavit can only be filed by leave of the court and only in relation to new matters raised in other parties affidavits. Therefore the affidavit filed on 22/12/2005 must be struck off together with its annexures. The remaining affidavit do not have any material evidence which can support Judicial Review Application it dwells mainly on the issue of land dispute but does not specify the grounds to warrant issue of certiorari **Ms. Munyi State Counsel** has drawn to the court attention **Court of Appeal decision in Civil Appeal No. 45/2000 Commissioner General KRA and Silvano Onema Owaki.**

I agree with the decision which in any case binds me in similar circumstances. The decision of High Court in **HCC Misc. Application 1658/2005** also is where the issue of defects was discussed. A high court decision does not bind me but I find that the statement of procedural law expressed therein to be correct.

I therefore find the Preliminary Objection has merit. I uphold the same the application is not brought correctly in the correct party. The applicant filed a statement that does not comply with requirements of the rules of relevant procedure. And one affidavit was filed without leave.

I therefore uphold the Preliminary Objection. Application is dismissed with no order as to costs.

Dated this 10th May, 2007.

J. N. KHAMINWA

JUDGE

10.5.2006

Khaminwa – Judge

Njue –Clerk

Virginia Ngingi Ngari

N/A

Ruling read in open court in her presence.

J. N. KHAMINWA

JUDGE