



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Misc Civ Appli 117 of 2007

CHRISTOPHER OMWOYO MOKUA & ANOTHER.....APPLICANT

Versus

PERMANENT SECRETARY, SECURITY & PROVINCIAL ADMINISTRATION &

ANOTHERRESPONDENT

JUDGMENT

By a Notice of Motion dated 5th March 2007, the ex parte Applicants, Christopher Omwoyo Moku and Yuvinalis Ayienga Nyambwari seek Judicial Review orders of certiorari and prohibition against the Respondents, the Permanent Secretary, Internal Security & Provincial Administration; District Commissioner in South Kisii District, and Provincial Commissioner, Nyanza Province. The orders sought are as follows:-

- (1) An order of certiorari to remove into this Honourable Court and quash the decision or directive made by the Respondents imposing KERINA Area of the South Kisii District as the locality of the headquarters of the said District;
- (2) Prohibition restraining the Respondents from arbitrarily and unfairly imposing the locality of the Headquarters of South Kisii District;
- (3) Costs of the Application to be provided for.

The Application is premised on the Statement dated 28th February 2007, a Verifying, a supporting, and further Affidavits sworn by Christopher Omwoyo Moku on 15th February 2007, 18th February 2007 and 28th February 2007 respectively. On 23rd May 2007, the Applicant also filed skeleton arguments. On the hearing date, Mr. Sitima appeared for the Respondents, was asked to come back for the hearing which was set down for 11.00 a.m. but he never showed up. No papers were filed by the Respondents in reply to the Notice of Motion and the hearing proceeded ex parte.

The Applicants are challenging the decision of the Respondents to make Kerina the District Headquarters of South Kisii District. The deponent of the Affidavit, Christopher Omwoyo, works in

Etago Division within the newly created South Kisii District and claims to have been amongst the delegation which petitioned the President for the District. That on 18th January 2006, he was appointed by the Hon. Omingo Magara, the MP for South Mugirango who had been allowed to appoint some leaders to deliberate the issue of the Headquarters. (COM 1). That on that day, no agreement was reached as to the site of the headquarters and they adjourned to 27th January 2006. On 27th January 2006 the name of the District was agreed on but the issue of the situation of the District Headquarters remained outstanding but the District Officer indicated that he had intentions to choose KERINA, to which the majority of persons present objected and they resolved to present a memorandum to the Provincial Commissioner (COM 3). He contends that the choice of KERINA as the Headquarters of the District was made arbitrarily, contrary to the wishes of the people and unjustified, amounts to abuse of office by the Respondents and contrary to public policy and public interest.

Before I consider the merits of this Application, I do note that the Applicants filed an amended statement dated 26th February 2007 on 28th February 2007 and a Further Affidavit dated 28th February 2007. The question is whether the two documents are properly on record.

Order 53 Rule 4 (1) provides as follows:

“4 (1) Copies of the Statement accompanying the Application for leave shall be served with the Notice of Motion, and copies of any Affidavits accompanying the Application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the Notice allow the statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the Application, and where the Applicant intends to ask to be allowed to amend his statement or use further Affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further Affidavits.”

My understanding of the above provision is that the Statement and Further Affidavits can only be filed with the leave of the court after due Notice is served on the court and the other parties to the application. In the instant case, no such leave was sought and the 2 documents have just been sneaked onto the record. They are irregularly on record and the court therefore strikes off the further affidavit dated 28th February 2007 and the amended statement of the same date. The court will only consider the Affidavits of Omwoyo Mokuia dated 18th February 2007 and a Verifying Affidavit dated 15th February 2007 and the Statement dated 15th February 2007 and filed in court on same date.

When this matter came up before this court on 20th February 2007, the court in its ruling raised the question of the Applicants standing in the matter. It would be expected that the Applicants would address this issue at the hearing, whether or not the Application was opposed. In the Statement filed in court on 15th February 2007, the Applicants merely gave their names, address and their Advocates names. They do not disclose who they are or what their role is in the choice of where the District Headquarters of South Kisii District would be. Omwoyo who depones to the Affidavit in support of the Application claims to have been one of those chosen by their MP Hon. Magara, to take part in the deliberations. There is no document or evidence in support of that contention and what could have been better than the MP, Honourable Magara swearing an Affidavit to that effect. The Applicants may be residents of the area but they are 2 people out of thousands living in South Kisii. The 1st Applicant swore the Supporting Affidavit as an individual but not as having authority of other Applicants from that area.

This court would have no idea whether the two Applicants represent the interests of the majority as they claim to. This is an Application for Judicial Review and those people opposed to KERINA as District Headquarters should have been Applicants or even named as Interested Parties in this Application as they will be affected by these orders. Order 53 R 3 (2) provides that notice has to be served on all parties that may be affected by the court's orders and an Affidavit proving service be filed pursuant to Order 53 R

3(3) Civil Procedure Rules. None of the above has been complied with. The 2 Applicants are two individuals and this court would not jeopardize the interests of the residents of the whole of South Kisii District for 2 individuals. They have not shown how the 2 of them are affected over and above the others in that District. I find that the Applicants have not demonstrated the necessary standing in this matter to deserve the orders of Judicial Review as opposed to the residents of South Kisii and further not all people that may be affected are aware of this Application and even on those grounds alone this court would dismiss the Notice of Motion and it is hereby dismissed with the Applicants bearing their own costs.

Dated and delivered this 5th day of October 2007.

R.P.V. WENDOH

JUDGE

Read in Presence of:-

Mr. Bosire for Applicant.

Daniel: Court Clerk