

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION 757 OF 2007

FRANCIS SIALO MEMANTIK.....APPLICANT

Versus

DISTRICT COMMISSIONER, TRANSMARA DISTRICT.....RESPONDENT

MATHEW LENTOKA SINTERIAINTERESTED PARTY

RULING

These are Judicial Review proceedings. The ex parte Applicant has filed the Notice Motion dated 9th November 2007 seeking leave of this court to amend his statement of facts and that the amended statement annexed to the Affidavit in support of this Application be deemed as duly filed and served upon payment of the requisite fees. The application is supported by the Affidavit of the Applicant, Francis Sialo Memantik who depones that he instructed Mainye & Co. Advocates to file a Judicial Review application. He is now informed by the Advocates that when the Advocate filed the Chamber Summons, he inadvertently referred to the Statement dated 31st December 2004 as a Chamber Summons. That it is therefore necessary to correct the said mistake so that the statement is in conformity with the requirements of Judicial Review Applications. That the amendment is only procedural and the Respondent will not suffer any prejudice if the Application is allowed but that the Applicant will suffer irreparably if the Application is not granted.

The Interested Party was represented by Otiso Advocate who filed grounds of opposition on 26th November 2007. The said grounds are; that the Notice of Motion seeking to amend the Statement is mischievous, misconceived and bad in law; that the Notice of Motion is made late in the day as the main Notice of Motion was ready to be heard, the arguments having been filed and that this Notice of Motion is meant to defeat the issues of law raised by the Interested Parties in their submissions; that the intended amendment is a nullity as no statement was ever filed in the first instance but that instead the amendment is meant to introduce a statement after commencement of Judicial Review proceedings and that the amendment is a nullity since the Judicial Review proceedings were commenced after the 6 months; and lastly, that the amendment will prejudice the Interested Party who cannot be compensated by way of costs.

Order 53 rule 4 (2) Civil Procedure Rules allows for amendment of the Statement of facts with the leave of the court. That rule provides as follows:-

“Order 53 Rule 4 (2) The High Court may on the hearing of the Motion allow the said Statement to be amended, and may allow further Affidavits to be used if they deal with new matters arising out of the Affidavits of any other party to the Application and whether 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 preferred amendment of his Statement and shall supply on demand copies of any such further Affidavits.”

For there to be an amendment, the document to be amended must have been filed in the first place and therefore there must have been a statutory statement filed with the Chamber summons seeking leave of the court to file Judicial Review proceedings in accordance with Order 53 Rule 1(2) of the Civil

Procedure Rules. It is the Interested Party's contention that the document sought to be amended and which is framed as a Chamber summons was never filed in the first place. I have perused the file and I have seen the Chamber summons dated 31st December 2004 seeking leave of the court to file Judicial Review proceedings. It was also filed on 31st December 2004 and was given the number 246/04 titled ex parte Chamber summons. It was accompanied by an Affidavit sworn by the Applicant on 30th December 2004 and a verifying Affidavit dated 31st December 2004 with annexures thereto. There was no statutory statement filed with the Chamber summons. At paragraph 1 thereof, reference is made to a Statement filed pursuant to order 53 Rule 1 (2) Civil Procedure Rules. If anything, the Chamber Summons was not properly framed as it purported to incorporate what would ordinarily be matters to be contained in the Statement. No statement having been filed with the Chamber Summons, the question of amendment cannot arise as there is nothing to amend. What is apparent is that the Chamber Summons Application was filed without a Statement of facts which contravenes provisions of Order 53 R 1 (2) Civil Procedure Rules. A statutory Statement is core to an Application of Judicial Review. It contains the reliefs sought, which should be replicated in the Notice of Motion, and also contains the grounds upon which the Application for Judicial Review is premised.

Order 53 R 4 (1) Civil Procedure Rules provides that it is the Statement which is filed with the Chamber summons, that a copy thereof, will be served with the Notice of Motion. So, only one statement can be filed. The same rule provides that the grounds in the statement are the ones to be relied upon at the hearing of the motion. No other grounds can be introduced at the hearing save those in the statement. So if no statement is filed, then there will be no grounds to be adduced at the hearing of the motion and the motion would be baseless.

What the Applicant is doing is indeed mischievous because he is trying to sneak into the Application a document which is really a copy of the Chamber Summons filed on 31st December 2004, which he wants converted into a statutory statement when no statement was ever filed in the first place. The Application for amendment in my view is brought in bad faith, meant to defeat the Interested Party's case as it raised the issue of the defect of the Judicial Review Application there being no Statement.

The Application has no merit and it is dismissed with costs to the Interested Party.

Dated and delivered this 13th day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Ogutu holding brief for Mr. Mboya for Interested Party