



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

**Misc. Civ Appli.188 of 2002**

**PAUL KIBUGI MUTE ..... APPLICANT**

**VERSUS**

**ATTORNEY GENERAL ..... RESPONDENT**

**RULING**

The applicant has filed an amended Originating Summons as required under the applicable rules as per LN 131/2001. He has also invoked O 36 rule 8A and 9 of the Civil Procedure Rules and has as a result applied for directions. At the time the application was filed i.e. 19<sup>th</sup> November, 2004 the respondent had not entered appearance and the respondent had not filed any affidavit in reply. The respondent has since filed a replying affidavit.

The thrust of the applicant's application as per the submissions by his Counsel is to be allowed to give viva voce evidence at the hearing of the Originating Summons. No mention of this has however been set out in the application or the affidavit in support.

**The reasons given is that the parties have not agreed on the correctness or sufficiency of the facts as set forth in the summons and affidavit. The applicant relies on written submissions filed on 13<sup>th</sup> April, 2005 and supplementary submissions dated 4<sup>th</sup> July 2005. Both sets of submissions have attached highlighted authorities.**

On the other hand the respondent relies on the written submissions filed on 11<sup>th</sup> July 2005. The advocates were given ample opportunity to highlight the written submissions.

The learned counsel for the applicant Mr Orenge has relied on Court of Appeal decision of RASHID ODHIMBO ALOGGOH & OTHERS v HACO INDUSTRIES LTD Ca. 110 of 2001 unreported at page 9 where the Court states:

**“What should the constitutional court have done. In our respectful view, it should first have considered whether or not the allegations made by the appellants were true. It appears that the parties were prepared to have the factual issues which they raised to be determined on affidavit evidence. We do not know how the constitutional court would have gone about this, but since this was an Originating Summons, some assistance could have been derived from the provisions of Order 36 Rule 10(1) of the Civil Procedure Rules which allow the affidavits to be treated as pleadings and thereafter the parties are allowed to give viva voce evidence from which the court**

**would be able to make up its mind on which side of the divide the truth lay. The burden of course, would have been for the appellant to show the court that the facts on which they based their claim were true. If the court had found that the facts as put forward by the appellants were not true then that would have been the end of the matter. Even on matters touching on the Constitution the facts on which the contravention is based must either be proved or admitted or agreed.”**

Reliance has also been placed on the case of *JARED BENSON KANGWANA v ATTORNEY GENERAL HC Misc 446 of 1995* unreported where Hon. Mr Justice Khamoni is said to have admitted oral evidence in judicial review proceedings.

On the other hand counsel for the respondent Mrs Dorcus Oduor has strongly argued that Order 36 of the Civil Procedure Rules does not provide for the giving of evidence viva voce. She has further argued that the applicant has not made allegations within his knowledge so as to lay the basis for any viva voce evidence nor has he shown the nature of the exhibits he wants to produce and further that he has not shown the reason why he has not produced them already since he has not been prevented from doing so. She has argued that the point concerning the effect of Order 36 rule 10 was not directly in issue in the Court of Appeal and the court could only have expressed itself obiter. If the court had been given the opportunity to consider the nature and effect of Rule 10(1) of Order 36 it would have applied a different phraseology “to express the nature scope and effect of the Rule”

I have given considerable weight to the arguments of counsel as outlined above.

Mrs Oduor’s argument concerning the scope of Order 36 has great merit. The wording of O 36 rule 9 and 10 which I will set out herein in extenso give no room for viva voce evidence.

Rule 9 reads:

**“On the hearing of the summons, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts and to raise the matters in issue between the parties.”**

Rule 10(1) reads:

**“Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, Order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.”**

Rule 10(2) is not relevant the summons for directions order 51 having been repealed.

It is clear to the court that what the two rules emphasise to the courts power to order that evidence may be adduced by an order for further affidavits. A party may also be allowed to apply for particulars of the affidavits filed where an order has been made for them to stand as pleadings.

The second reason why the court would not allow the applicant to adduce viva voce evidence is that the application before the court is by way of an Originating Summons and is in fact a collateral attack on the criminal proceedings in the lower court and the constitutional court must of necessity steer clear of any temptation to deal with detailed matters of fact which might have a bearing or influence on the conduct of the criminal proceedings in the lower court. A Constitutional Court must never descend into the arena of the lower court by allowing the giving of viva voce evidence, this would be a clear invitation to just so descend, thereby giving rise to possible prejudice. The applicant has not demonstrated to the court that his alleged violations of s 70 and s 77 of the Constitution cannot be proved by affidavit evidence as contemplated in Order 36. He has also not applied to be allowed to give viva voce evidence in his

application for directions nor has he applied to have the affidavits regarded as pleadings.

The third reason why the request to give viva voce evidence must fail is that it is the court's view that the provision of the Constitution on fundamental rights are clear that the objectives behind the enforcement of the fundamental rights and freedoms set out in Chapter 5 of the Constitution include unhindered accessibility to the court, speed and expedition in obtaining redress. This explains why the rules made under s 84(6) of the Constitution were specifically tailored to advance these objectives by incorporating the provisions of Order 36 where practicable. Proof by way of affidavit evidence is what was contemplated and is what can assist in meeting the above objectives. This explains why the new rules entitled "The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 clearly stipulate that a Petition under s 84 must be supported by an affidavit and any supporting evidence.

While still on the wider objectives of easy access to justice in constitutional matters, it may be important to share the Indian experience on this although we have not yet gone the Indian Supreme Court way – they appear to have gone to the extreme right of the pendulum in this (and for good reasons).

In **SUNIP MAZUDAR v STATE OF MADYA PRADECH** [1994] Supp 2 Supreme Court case 327 the Court gave an order on the basis of a letter addressed to the Chief Justice by a journalist. The journalist alleged in the letter that the safety precautions in the Indian Army's communication test firing range in Madhya Pradesh were inadequate with the result that villagers in the vicinity who tended to stray into the range were either killed or injured. After hearing the respondents the court gave an order compelling the state government to take adequate precautions. In a similar environmental matter which touched on the right to divert a river and the application of the doctrine of public trust the Supreme Court was able to act on a news item in a newspaper. At the moment this court is not advocating the same measures to achieve access to this court, in view of the rules made under our Constitution – but the two cases do demonstrate the need for the court especially in constitutional matters to aim at achieving a fair but a speedy determination of the cases. This in turn calls for easy access to the court, relaxed requirements on standing and speedy determination. Viva voce evidence would not be conducive to the above objectives in most cases. Affidavit evidence has served us well so far. In constitutional matter I see no good reason to depart from its use and none has been demonstrated in this case. Even where affidavits provide the mode of proof the court does come to a determination on the basis of the affidavits and should problems of veracity arise cross examination could be allowed.

I would therefore disallow the direction for viva voce evidence on the grounds set out above.

Finally no such prayer has been made in the application itself and I am not inclined to grant that which has not been sought in the application.

In the result the direction for viva voce evidence is refused on the above grounds. Directions shall however issue in the following terms:

- (1) Hearing to proceed on the basis of affidavit evidence
- (2) Applicant at liberty to file a further affidavit within the next 10 days
- (3) Upon service of the further affidavit the respondent and the Interested Party at liberty to file further affidavits within 10 days
- (4) After the 20 days stipulated in directions 2 and 3 above all parties to file and exchange written submissions with lists of authorities (if any) fully paginated and highlighted within 10 days
- (5) Matter to be mentioned for compliance and allocation of a hearing date on 7<sup>th</sup> May 2006 at 9 00 am.

It is so ordered.

DATED and delivered at Nairobi this 31<sup>st</sup> day of March 2006.

J.G. NYAMU

**JUDGE**