

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

Civil Misc Appli 169 of 2000

BETWEEN

**DIOCESE OF KAKAMEGA
TRUSTEESAPPLICANT**

VERSUS

**THE DIOCESE OF KAKAMEGA TRUSTEES IKOLOMANI DIVISION
RESPONDENT**

A N D

**UNITED COMPANY LTD.INTERESTED
PARTY**

R U L I N G

The application for judicial review made in the Notice of Motion dated 21-11-00 was on 11-4-05 fixed for hearing on 14-11-05 when it came up before me.

Mr. Mukavale, learned counsel for the interested party, sought leave orally to file a further affidavit on behalf of his said client. His application was premised on the ground that his client wished to bring to the attention of the court a Ruling in Kakamega H.C.C.C. No. 198 of 1999 so as to help the court, he said, to arrive at a just decision.

The application was opposed by Mr. Fwaya, learned counsel for the Applicant who contended that a similar application had been made (on 25-9-01) and rejected (on 22-10-01). It was his contention that the interested party had not demonstrated that there were new issues or given notice to that effect. It was Mr. Fwaya's submission that the court had no jurisdiction to grant leave to file the intended further affidavit. In his view, the interested party was out to delay the litigation. In this regard, he pointed out that the judicial review application was filed 5 years ago on 23-11-00 yet the interested party had not made up his mind to prosecute the matter. Mr. Fwaya urged the court to reject the application.

Does the court have jurisdiction to grant the leave sought? And if so has the interested party made out a case for the grant of the leave to file a further affidavit? The answer is to be found in Order 53 Rule 4(2).

Rule 4(2) of Order 53 stipulates:-

“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 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.”

It is discernible from this rule that the court has jurisdiction to grant leave for the filing of further affidavits if the party applying for such leave shows (1) that such further affidavits will deal with new matter and (2) that the new matter arises out of the affidavits of any of the other party to the application.

The interested party did not demonstrate to the court what the new matter was, much less that it arose out of the affidavits of any of the other parties. On this score alone, the application must fail.

It was not however necessary for the interested party to give notice of his intention to apply for leave to file such further affidavit because such notice is only required of the Applicant. It is not required of any other party to the application.

In the result, the application fails and is hereby dismissed with costs to the Applicant.

Dated, signed and delivered at Kakamega this 5th day of May, 2006.

G. B. M. KARIUKI

J U D G E