



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Misc Appli 104 of 2002

IN THE MATTER OF KIANJAI ADJUDICATION UNIT/SECTION LAND PARCEL NO. 3508

REPUBLIC

(EX-PARTE GUIDIO KAUNYANGI NABEA).....
.....APPLICANT

VERSUS

LEMMY BINDAN NJIRU (Land Adjudication Officer – Meru North) 1ST
RESPONDENT

ROSEMARY NKIROTE (Demarcation Officer – Kianjai Adjudication Section)...2ND
RESPONDENT

DANIEL J. LIMBERE (Senior Chief, Kianjai Location).....3rd
RESPONDENT

JUSTUS NGUU (Representing Board of Directors

KARUMELO Z. RUKUNGA) Miathene Hospital.....4th and 5th
RESPONDENT

THE HON ATTORNEY GENERAL.....6TH
RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. The preliminary objection taken by the Advocates for the Respondents is directed at the Notice of Motion dated 28.6.2002.
2. Firstly, it is argued that the motion is wrongly intituled and should be struck off. The argument on this front is that the Republic is not the Applicant as it should be and in this regard I am referred to the well known case of Farmers Bus Service and another vs Transport Licensing Board (1959)EALR 779 as well as Ndete vs Chairman, Land Disputes Tribunal & Another, [2002] I KLR 392 and the decision of my sister, lady Justice Sitati in H.C.Misc 169/2004 Joyce Kathanja vs Marion Kanja where the proper way of intituling an Application for judicial review was considered.
3. I have seen the Notice of Motion under attack and it is clearly in elegantly worded so that in fact

Guidio Kaunyangi Nabea appears to be the Applicant although again he is merely referred to as “ex-parte Guidio Kaunyangi”. The “Republic” appears in the Motion in a misplaced unclear place and that error is not one of form.

4. In the Ndete case particularly that question was well addressed by Ringera J. and I am persuaded by his conclusions as also by those of Sitati J. in Joyce Kathanja’s case (supra).

5. I should only say that counsel for the exparte Applicant relied on the decision of Sir Ralph Windham CJ in *Fazal Kassim Mills Ltd* [1960] E.A. 1002 to argue that the error although admitted is not one of form. The distinguishable aspect of the *Fazal* case was that it related to the history of the two forms of remedies viz writs and orders of mandamus. The learned judge concluded, I think correctly so, that although the two had different historical origins (one being ancient, another modern), the distinction between the two was now more of terminology than substance. This cannot be the case in the intitlement of judicial review Applications; precisely because of their history; the error on who is the correct Applicant is a substantive one and not one of mere terminology or form.

6. I will uphold the preliminary objection in this regard.

7. The second objection is that failure to cite the provisions of s.8 and s.9 of the Law Reform Act is fatal to the Application. My view is that failure to do so cannot be fatal to the Application. S. 9 of that Act provides for power to make rules of court to provide for any matters relating to the procedure of civil courts where an order of mandamus, certiorari or prohibition is sought. Those rules exist as Order 53 of the Civil Procedure Rules which have been cited by the ex-parte Applicant in his motion. I do not see and have not been told what is wrong with the invocation of those Rules without reference to the parent Act although they are themselves nestled in the company of Rules made under a different Act. I will overrule that part of the objection. It would have been of use to the Respondents if no provision of the Act or the Rules was cited but as worded and argued it cannot be sustained.

8. The third objection is with regard to the wording of prayer 1 of the Motion. That prayer for avoidance of doubt seeks orders of mandamus and prohibition in the same breathe but a clear reading of it would show that it is in fact a prayer for prohibition to stop the Respondents from tampering “with the original Adjudication Maps and Records of Land Parcel No.3508 Kianjai Adjudication Section/unit as they obtained in 1991/2.....” The objection is to the effect that the act complained of has already taken place and that the Adjudication Officer was acting within his powers. The question as to whether the act has already taken place is one to be proved by facts nor any law.

9. The objection may otherwise have been sustainable but once it has facts mixed with law and once facts that may be contested come into the midst of a preliminary objection, it ceases to be a demurrer and cannot be a pure point of law which would by itself put the whole matter to rest. I cannot sustain the objection in this regard.

10. The fourth objection is premised on the expectations of Order 53 Rule 4 of the Civil Procedure Rules that the same relief sought and the grounds relied upon at the leave stage must be the same ones to be relied upon at the hearing of the substantive motion. It is argued that the motion under attack has in support a verifying Affidavit and a Statement of Facts relied upon in Misc. Application No. 90/2002 whose connection with the Motion cannot be explained. Counsel for the exparte Applicant argues that in fact that Application was the one in which leave was sought and granted. I agree with him.

11. I have carefully looked at Order 53 Rule 4(1) and the words used are that “copies of the statement accompanying the Application for leave” and also “copies of any affidavits accompanying” that Application shall be served as regards the Statements, and supplied on demand, as regards any affidavits in that regard. I note that in fact copies of the statements accompanying the Application for leave were served and I do not see any error on the part of the ex-parte Applicant and I will overrule the objection in this regard. I do so also because once I am satisfied that the Statement of Facts served is a copy of the one filed in the Application for leave that is the end of the matter as regards the point. I see no Rule that requires that leave must be obtained in the same file prior to filing of the substantive motion.

12. A corollary to the fourth objection is what is contained in the fifth objection; that the Statements of Facts had contained the facts of the case in it and that it was in fact worthless and without it the application could not stand. I agree wholly with this objection. The Statement of Facts as I said earlier was the same one that accompanied the Application for leave and to that extent it was properly before court. It is however a non-statement and completely worthless because it ought to have been very simple and contain only the following matters;

- (i) name of the ex-parte Applicant
- (ii) description of the exparte Applicant
- (iii) the reliefs sought
- (iv) grounds on which the reliefs are sought

13. As is stated in Supreme Court Practice 1976 Vol.1 at paragraph 53/1/7 these are the only matters in a statement of facts and that “it is not correct to lodge a statement of all the facts, verified by an Affidavit.”

In the Motion subject of objection, the statement is 23 paragraphs long and has every conceivable fact in issue including paragraph 19 where the exparte Applicant demands Ksh.1.6 million as compensation from the Attorney General! I can only quote a passage from the decision of the Court of Appeal in Commissioner – General, Kenya Revenue Authority vs. Silano Onema Owaki – C.A. No. 45/2000 where it was stated that

“We would observe that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for Judicial Review. That appears to be the meaning of rule 1(2) of Order LIII”

14. The statement accompanying the motion dated 28.6.2002 is not a proper statement and I will uphold the objection to it. It is instructive that all exhibits in the matter are exhibits attached to the statement and not to the Affidavit. That is clearly an error that renders those important pieces of evidence as completely worthless.

15. I have heard the responses to the objection and sadly they cannot save the Motion which for the reasons I have stated above must be struck out. Mr. Kioga’s spirited defence of it has only partly explained its weaknesses but on the whole it must be struck out.

16. Having so said however, the Notice of Motion dated 28.6.2002 must and is hereby struck out with costs to the Respondents.

17. I must thank both Mr. Justice Rtd Rimita and Mr. Kioga, Advocates for the parties, for an otherwise very useful exchange of lucid submissions and I only avoided reproducing them for the sake of brevity and to focus squarely on the matters at hand.

18. Orders accordingly.

Dated, signed and delivered at Meru this 14TH Day of June , 2006.

ISAAC LENAOLA

JUDGE

In the Presence of:

Mr. Kioga Advocate for the Applicant

Justice (rtd) Rimita Advocate for the Respondents

ISAAC LENAOLA

JUDGE