



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISC APPLI 607 OF 2002**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE LAND DISPUTES TRIBUNAL LIMURU.....1ST  
RESPONDENT**

**THE SENIOR RESIDENT MAGISTRATE LIMURU.....2ND  
RESPONDENT**

**PRISCA WACEKA .....  
INTERESTED PARTY**

**EX-PARTE:**

**SIMON THONDU**

**NJUGUNA**

**RULING**

The Applicant commenced these proceedings for Judicial Review by an ex-parte Chamber Summons Application dated 29th May, 2002 in which he sought and obtained the Leave of Court. Consequent upon obtaining Leave as aforesaid, the Applicant filed the substantive Notice of Motion on the 6th August, 2002. In the Notice of Motion the Applicant prayed for:-

- (a). An Order for Certiorari to remove unto this Honourable Court and to quash an award made by the Land Disputes Tribunal Kiambu District at Limuru on the 25th March, 2002 in the Land Disputes Tribunal Case Number 16/124/2004 purportedly under the provision of Land Disputes Act No. 18 of 1990 Section 3.
- (b). An order for Prohibition to remove unto this Honourable Court and to prohibit the Senior Resident Magistrate Limuru from entering Judgement in Land Case No. 2 of 2002 based on the aforesaid unlawful award.

(c) That the costs of the Application be provided for.

The Application was said to be grounded upon the statutory statement and verifying Affidavit of **SIMON THONDU NJUGUNA** sworn on 29th May, 2002 and filed in Court on 30th May, 2002.

Upon service of the substantive Motion, the Respondents appeared through the Attorney General who filed a Replying Affidavit sworn by **EZRA ADODI AWINO**, the then Senior Resident Magistrate, Limuru. An interested party by the name of **PRISCA WACHEKE** also appeared through Messrs Kirundi & Company Advocates. However she was contend with only filing Notice of Preliminary Objection.

The matter then came up for hearing before Rimita J (as he then was) on 9th October, 2003. He reserved the ruling to 28th November, 2003. However as fate would have it, the said Judge left Judicial Service before he could deliver the Ruling.

On the 5th February, 2004 the Application once again came before Lenaola J who ordered that the same be heard **De novo** before any Judge. On 18th January, 2005, the matter came before me for hearing.

As a Notice of preliminary objection had been filed by the interested party, I directed that the preliminary objection be argued first. Mr. Owagi Learned Counsel for the interested party in his submissions stated that although he had 20 grounds to urge in his Notice of Preliminary Objection, he would only confine himself only two. He paraphrased the 2 grounds as, that touching on the verifying Affidavit and finally that dealing with the order of prohibition sought. On verifying Affidavit sworn on 29th May, 2002 by one Simon Thondu Njuguna Counsel submitted that it did not comply with the requirements of Order 53 Rule 1 (2) of the Civil Procedure Rules. He contended that the facts necessary to support an Application for Judicial Review must be contained in the verifying Affidavit. The verifying Affidavit in support of the instant Application only contained 3 paragraphs. The 1st paragraph dealt with the description of the Applicant. The 2nd paragraph dealt with annexure STNI. The 3rd paragraph merely confirmed that whatever had been deponed to was true and within the knowledge of the Applicant. The verifying Affidavit aforesaid was according to Mr. Owangi bare as no facts were properly laid before the Court to enable it grant the prayers sought. It was his further submission that the verifying Affidavit being bare was incapable of being tested and verified. He therefore called for the dismissal of the Application on that ground. In support of his submissions Counsel drew the attention of the Court to the following authorities.

(a). Commissioner General, Kenya Revenue Authority –vs- Silvano Onema Owaki t/a Marenga Filing Station C.A. 45/2001 (Kisumu) and

(b). HCCC 1018/2001 Raphael Joseph Karuri –vs- The Chairman Ololiser Land Control Board & 3 others.

On the issue of Prohibition, Mr. Owangi submitted that the same cannot be granted as it had been overtaken by events. He submitted that by the time the Application was made Judgment had already been entered by Limuru Senior Resident Magistrate's Court in SRMCC No. 2 of 2002 based on the award of the Land Tribunal. In essence therefore there was nothing left to prohibit by an order of this Court. Mrs. Natome Learned State Counsel who appeared for the Respondents supported the preliminary points taken up by the interested party. She also called for the dismissal of the Application with costs.

In response, Mr. G. Kamonde Learned Counsel for the Applicant submitted that the preliminary objection was misplaced. He contended that the verifying Affidavit was only relevant for purposes of obtaining Leave and no more. On the issue of Prohibition, Counsel conceded that the issue had indeed been overtaken by events. However he submitted that the applicant still had a remedy courtesy of Section 91 of the Civil Procedure Act. He therefore prayed that for the foregoing reasons, the preliminary objection be dismissed with costs.

On the face of the Notice of Motion dated 18th August, 2002, it is stated that the same **“is based upon statutory statement and the verifying Affidavit of Simon Thondu Njuguna sworn on 29th May, 2002 and filed on 30th May, 2002 and on the following grounds and any other grounds to be adduced at the hearing hereof.....”**. So that apart from the statutory statement, the verifying Affidavit and the grounds thereof, there is no other form of evidence in support of the Application. In the circumstances I am unable to agree with Counsel for the Applicant that the verifying Affidavit is only relevant for purposes of obtaining Leave of Court to commence Judicial Review Proceedings. By his own admission and for purposes of this Application, the Applicant has indicated that the verifying Affidavit forms part and parcel for the Application for Judicial Review. It is upon the verified facts that this Court may be guided as appropriate whether or not to grant the prayers sought.

Order 53 Rule 2 provides for the statement of facts which must contain the following elements:

- (i). Name and description of the Applicant.
- (ii). Relief sought and
- (iii). Grounds on which the relief is sought.

The statement of facts is in turn supported by the verifying Affidavit. So that the said Affidavit actually verifies the facts as set out in the statement. The verifying Affidavit accompanying the Notice of Motion is a three paragraph affair couched in the following terms:

- “1. THAT I am the Applicant in the above case and therefore fit and proper person to swear this Affidavit.
2. THAT attached and marked STN1 is a photocopy of the certified copy of the Lands Disputes Tribunal Judgement which I hereby certify.
3. THAT the facts deponed to above are true and within my knowledge”

In the **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY --VS- SILVANO & ONEMA OWAKI T/A MARENKA FILLING STATION**, (Supra) the Court of Appeal rendered itself thus:

**“We would observe that it is the verifying Affidavit and 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 (20 Order LIII.”**

The Court also referred to the supreme Court practice 1976 Vol. 1 paragraph 53/1/7 which provides as follows:-

**“The facts relied on should be stated in the Affidavit (see REPUBLIC – VSWANDSWORTH JJ ex-parte Read (1942) 1 KR 281. The statement should contain nothing more than the name and the description of the Applicant, the relief sought and the grounds on which it is sought. It is not correct to lodge in a statement all the facts, verified by an Affidavit.”**

In **REPUBLIC –VS- WANDSWORTH (SUPRA) VISCOUNT CALCEDOTE, LJ** rendered himself as follows: **“.....the Court will look at the Affidavit to see what facts are .....**”

Taking into account all the foregoing authorities what emerges is that evidence in support of an Application under Order 53 should be in the verifying Affidavit and or Affidavits and not the statement of

facts. In the instant Application, the verifying Affidavit has no evidence at all in support of the Motion. It is a three paragraph affair saying nothing. It is as was well put by Counsel for the interested party bare. Consequently the Application is bare and incapable of being tested or verified. To exhibit the decision that is sought to be impugned in the verifying Affidavit without saying anything more is untenable. That leaves us with the ground of opposition as the only evidence in support of the Application. However the said grounds of opposition do not advance the cause of the Applicant any further.

As I have already stated apart from annexing the decision of the Land Disputes Tribunal to the verifying Affidavit, no other facts are included in the Affidavit and their truth sworn to. There is therefore no evidence at all in support of the motion; apart from the statutory statement which is already stated is of no evidential value. That being my view of the matter I would uphold the preliminary objection, and dismiss the Application as being defective as the facts relied on are not incorporated in the verifying Affidavit nor are they sworn to.

As regards, the order for Prohibition, both Counsels agree that the same has been overtaken by events. Judgment which the Applicant sought to prohibit from being entered by the Senior Resident Magistrate in Land Case Number 2 of 2002 had already been entered by the time the Application was preferred. In the circumstances, the Court would be acting in vain if it grants such an order. In any event, the Order for prohibition was dependant on the order of Certiorari being granted. As it is apparent, such an Order is no longer available to the Applicant, as I have upheld the preliminary objection taken by the interested party on the issue of verifying Affidavit.

For the aforesaid reasons, I am satisfied that the preliminary objection was well taken and consequently I dismiss this Application with costs to the Respondents and interested party.

Dated at Nairobi this ..... day of ..... 2005

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**M. S. A. MAKHANDIA**

**JUDGE**