



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

Misc Civ Appli 174 of 2004

REPUBLIC APPLICANT

VERSUS

PERMANENT SECRETARY OFFICE OF PRESIDENT APPLICANT

AND

DAVID NJAGI WAMBUA)

KIOKO NDONYE) APPLICANT

R U L I N G

By a chamber summons dated 5.10.2004 and filed in this court on 26.10.2004 the exparte applicants David Njagi Wambua and Kioko Ndongye obtained leave of this court to bring this application for Judicial Review. Consequent to obtaining the said leave, the applicant filed the substantive Notice of Motion on 2.11.2004. In the Notice of Motion the applicants seek an order of Mandamus compelling and/or directing the Permanent Secretary's Office of the President to pay the decretal sum as ordered in Machakos Senior Principal Civil Case 104/1995 Kioko Ndongye and David Njagi versus Jones Wambua Mulwa and the Attorney General and which sum the respondent has for no apparent reasons refused to pay and that unless compelled by this court the respondent may not pay the sum of Ksh. 147,724/-. The application was said to have been founded on grounds contained in the statement, verifying and supportive affidavit dated 5.10.2004 and annexures thereto.

Upon service of the Notice of Motion the respondent appeared through the Attorney General who filed a notice of preliminary objection on 10.3.2005.

The matter came up for hearing on 16.3.2005 and Mrs. Matome representing the Attorney General urged the court that she be heard on her Preliminary objection first.

The court obliged. The learned State Counsel's contention is that the application as filed does not comply with Order 53 Rule 1 (2) Civil Procedure Rules in that the verifying affidavit filed on 5.10.2004 does not verify the facts relied upon and is of no evidential value. That the said affidavit only contains 4 paragraphs which only describe the parties which are not facts to be relied upon and that therefore the application is bare with no evidence to be relied upon and should therefore be struck out and if the affidavit is struck off this application should be automatically struck out as there would be no evidence to support it. In support of her arguments, the counsel relied on two authorities.

1. REPUBLIC VS. LAND DISPUTES TRIBUNAL (LDT) LIMURU & OTHER EXPARTE SIMON THONDU HCC 607/2002.

2. KRA V. OWAKI (KSM) CIVIL APPEAL 45/2000

In the first case of LAND DISPUTES TRIBUNAL LIMURU the preliminary objection was taken on similar grounds that the verifying affidavit did not contain the facts to be relied upon and the court upheld that objection as there was no evidence in the affidavit upon which the application was grounded. In the second authority of KRA v. Owaki the Court of Appeal observed that it is the verifying affidavit and not the statement of facts to be verified which is of evidential value in an application for Judicial Review.

In response Mr. Makau counsel for the applicants argued that he had complied with Order 53 Rule 1 (2) Civil Procedure Code as all the necessary documents had been filed which included the statement, verifying affidavit and supportive affidavit sworn by one Ramesh Shah dated 5.10.2004 and that Order 53 Rule 1 (2) allows a party to file affidavits verifying the facts relied upon and that the preliminary objection is misconceived, bad in law and that the authorities do not refer to a situation where a supportive affidavit may be filed and that the Preliminary objection should be dismissed.

Order 53 Rule (1) 2 Civil Procedure Rules provides as follows:

“An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.”

I have underlined the word affidavits above because Rule 1 (2) provides for filing not one verifying affidavit but a person can file several affidavits if there is need.

The Learned State Counsel has no quarrel with the statement filed by the applicant which only contains the names description and grounds. Her quarrel is with the verifying affidavit dated 5.10.2004 and sworn by Ramesh M. Shah. That affidavit contains 4 paragraphs only. In it the deponent describes himself as the director of the applicant, states that the facts in the chamber summons had been read to him by his advocate and that they are true to the best of his knowledge. He then verified these facts to be correct. Indeed that affidavit does not contain any evidence as to how the dispute arose. However filed along with the chamber summons was another affidavit termed as supportive affidavit which sets out how this claim arose and annexes documents upon which the applicant relies on. It is the document which is of evidential value in this chambers summons. The Learned State Counsel for some reason totally ignored this affidavit and made no reference to it. The authorities cited do confirm that it is the verifying affidavit which is of evidential value to the application. From a drafting of Order 53 Rule 1 (2) it is apparent that one can file several verifying affidavits. That is why I underlined the word affidavits when I quoted the sub rule above. J. Makhandia in his ruling in **REPUBLIC VS. LDT LIMURU** at page 8 observed that evidence in support of an application under Order 53 Rule 1 and 2 should be in the verifying affidavit or affidavits but not in the statement of facts. This is the spirit of Rule 1 (2). The question is whether the affidavit titled ‘supportive’ affidavit by the applicant can be taken to be a verifying affidavit. This supportive affidavit sets out the evidence upon which the application is grounded. The applicant could as well have left out the word ‘supportive’ affidavit and just called it an affidavit and just called it an affidavit, I believe it would have had the same purport as a verifying affidavit. I do find that the supportive affidavit filed herein dated 5.10.2004 and filed along with the chamber summons on 25.10.2004 verifies the facts relied upon and the applicant has duly complied with Order 53 Rule 1 (2) Civil Procedure Rules and the Learned State Counsel should have had a look at it instead of restricting herself to the usage of the word verifying.

For the above aforesaid reasons I find no merit in the preliminary objection raised. It is misplaced and without basis; it is hereby rejected and dismissed with costs to the applicant.

Dated at Machakos this 20th day of April 2005.

R. V. WENDOH
JUDGE