



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Misc Civ Appli 205 of 2004**

**IN THE MATTER OF AN APPLICATION BY PATRICK NALIANYA WANYONYI AND PHINIAS NGAIRA FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE DECISIONS OF MUNICIPAL COUNCIL OF ELDORET (ELDORET MUNICIPAL COUNCIL) SUSPENDING AND OR TERMINATING THE SERVICES AND OR EMPLOYMENT OF PATRICK NALIANYA WANYONYI AND PHINIAS NGAIRA**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT**

**REPUBLIC .....**

**APPLICANT**

**VERSUS**

**ELDORET MUNICIPAL COUNCIL (MUNICIPAL COUNCIL OF ELDORET) .....**

**RESPONDENT**

**EX PARTE: PATRICK NALIANYA WANYONYI & PHINIAS NGAIRA**

**RULING**

The preliminary point which has been raised by the Eldoret Municipal Council arises from an application originally filed by Patrick Nalianya Wanyonyi and Phinias Ngaira (both of who I shall now refer to as “the applicants”), by way of as Notice of Motion under “Order LIII rules 1, 2, 3 and 4 of the Civil Procedure Rules Cap 21 of the Laws of Kenya as read with Sections 8 and 9 of the Law Reform Act Cap 26 of the Laws of Kenya”.

Briefly, having obtained leave to commence with proceedings for orders of judicial review on 28/9/2004, the applicants proceeded to file the aforementioned Notice of Motion on 15/10/2004 in which they seek the following orders:

*“(a) An order of certiorari to remove into this court and to quash the proceedings and decisions of the respondent made on 24<sup>th</sup> March 2004 and the subsequent proceeding and decision of 1<sup>st</sup> September 2004.*

*(b) An order of prohibition to prohibit the Eldoret Municipal Council (Municipal Council of Eldoret) from further proceeding with the matter and any action harassing and intimidating the applicants with regard to the subject matter of this application (proceedings).*

*(c) An order of mandamus to compel Eldoret Municipal Council (Municipal Council of Eldoret) to reinstate the applicants to their jobs and to pay them their salary arrears and other lawful benefits due to the applicants forthwith and continue salaries and benefits regularly thereafter and also to pay costs of this proceedings.”*

The Eldoret Municipal Council (‘EMC’) however feels that the application is incurably defective and should be struck out. It also maintains that not only are both the verifying affidavits, which were attached to the application defective, but that the statement in support of the application for leave is defective and incompetent.

Mr. Gicheru, learned counsel for the EMC addressed the court on the preliminary objection and it was his submission that, though it was a requirement that the statement in the Chamber Summons and the Notice of Motion be the same, the statements in support of the Notice of Motion and the Chamber Summons were dated 12/10/2004, and 9/6/2004 respectively and likewise, that the verifying affidavits which also have different dates, fell short of the required standards as all the relevant information and facts are contained in the statements.

Mr. Momanyi, learned Counsel for the applicant was of the view that Order LIII only requires that the Chamber Summons and Notice of Motion be accompanied by a statement and verifying affidavit, and that there is no requirement that the statements and affidavits used in the Chamber Summons be the same as those in Notice of Motion. It was also his submission that the date on the documents is not material.

He urged the court to find that the applicants had complied with Order LIII rules 3 and 4 as their substantive application is by way of a Notice of Motion. It was his plea that instead of striking out the application, which he believes is curable he should be allowed to file an affidavit to attach the relevant documents.

But Mr. Gicheru pointed out that the remedy of curing the application was no longer available, as an application for leave to file a further affidavit was disallowed on 9/12/2004, and that though they filed a Notice of Appeal against that decision, they had not filed a Memorandum of Appeal, and that in the circumstances the application, which lacks supporting documents, should be struck out.

Order LIII rules 1(2) and 3 and 4 (1) stipulate that:

*“1(2) 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.

3 (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by Notice of Motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

4(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

It is clear from the above provisions of the law, that the statement and verifying affidavit which accompany the application for leave shall, it being a mandatory requirement, be the ones that were served upon the Registrar, and the same should accompany the substantive application for orders of judicial review.

I am inclined to agree with Mr. Gicheru that a document is given its authenticity by the date when it was sworn, which therefore means that documents which bear separate dates despite the fact that they are otherwise similar amounts to two separate documents, which would contravene the requirements of rule 4 of Order LIII.

The fact that the verifying affidavits accompanying the Notice of Motion bears a date which is different from that which accompanies the application for leave, would in my mind mean that the two, which were made on different dates are different and Mr. Momanyi, cannot be heard to say that they are one and the same.

I have nevertheless taken the above submissions into account and it is important that I point out, that the Notice of Motion was filed in time and the statement which accompanied it, had several exhibits attached to it. The two verifying affidavits one by each applicant, which were similar in material particulars, had four paragraphs. The two relevant paragraphs contain the following deposition:

*“That I have read and understood the contents of all the paragraphs of the statutory statement annexed to this application and verify that all the said paragraphs are correct, true and accurate”*

*“That what is deponed to hereinabove by me is true to the best of my knowledge, information and belief”*

The legal position was well laid down in the case of **Commissioner General of Kenya Revenue Authority V. Silvano Onema Owaki T/a Marenga Filing Station CA (Kisumu) No. 45/2000** as “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’, and cited paragraph 53/1/7 of Supreme Court Practice Rules 1976 Vol.*

1.

*“The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see R. V. Wandsworth JJ., ex p. Read (1942) 1K. B. 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 a statement of all the facts, verified by an affidavit.”*

It is important that I point out that the above citation from the Supreme Court Practice Rules emanates from Order 53 of the English Rules of the Supreme Court, which are similar in material particulars to our Order LIII of the Civil Procedure Rules.

It is for the above reasons that I find that the application, which is not supported by the relevant verifying affidavit, is fatally defective and I do uphold this preliminary objection. The application is thus struck out with costs.

Dated and delivered at Eldoret this 17<sup>th</sup> day of May 2005.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of:

Mr. Gicheru for the respondent

No appearance for the applicant