



JUDICIAL REVIEW

- It is the copies of verifying Affidavit or affidavits accompanying the application for leave and the statement which should be served on the respondent with the Notice of Motion. Serving other affidavits not allowed.
- Further affidavits only allowed if they satisfy the requirements of Rule 4(2) where a new matter is introduced by another party to the application
- Where reliefs set out in the statement are at variance with those in the Notice and no application was made to amend the statement made, application was struck out.
- Verifying Affidavit without facts not adequate. Application struck out

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

MISC CIVIL APPLICATION NO 572 OF 2004

IN THE MATTER OF THE LAND ADJUDICATION ACT, CAP 284, LAWS OF KENYA

AND

IN THE MATTE ROF LR NO N THARAKA/MARIMANTI/664

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE MINISTER FOR LANDS AND SETTLEMENT.....1ST RESPONDENT

THE LAND REGISTRAR, THARAKA NITHI DISTRICT.....2ND RESPONDENT

THE DISTRICT LAND SURVEYOR THARAKA NITHI DISTRICT....3RD RESPONDENT

EX-PARTE

JULIUS KIBORO NJOGOO MITUGO

RULING

When the application dated 18th May 2004 came before me for hearing on 4th May 2005 Mr Nyandieka

the learned Counsel for the Interested party raised several preliminary objections dated and filed on the same day. Mr Raballa, counsel for the respondent had filed grounds of opposition on 15th April 2005 but at the hearing he associated with Mr Nyandieka's submissions.

In the body of the application the following orders have been sought:-

1. An order of prohibition to stop and prohibit the respondents from surveying subdividing, excising, registering dealings, transferring or otherwise dealing with LRNO N Tharaka/Marimanti/664
2. An order for certiorari to remove to the High Court and quash the proceedings Order decision and or ruling of the 1st respondent in Appeal No 125 of 1994 relating to N tharaka/Marimati/664. The application is supported by an affidavit of the exparte applicant dated 18th May 2004 and filed on 19th May 2004.

At page 2 of the statement of the substantive reliefs sought are:

- (a) That the court be pleased to grant leave to the applicant to apply for an order of prohibition
- (b) That the court be pleased to grant leave to the applicant to apply for an order of certiorari
- (c) That the said leave do operate as stay of the proceedings ...

Attached to the statement is a verifying affidavit by the exparte applicant sworn on 7th May 2004 and filed on the same date.

The exparte chamber application which sought leave and which leave was granted on 13th May 2004 is dated 13th May 2004 and filed on the same date.

The Notice to the Registrar was filed on 7th May 2004 including the statement and two affidavits entitled supporting affidavit and verifying affidavit both sworn by the exparte applicant on the same day

The points of objection taken are:-

1. The Notice of Motion is bad because it does not cite the Law Reform Act Cap 26 of the laws of Kenya
2. There is no proper verifying affidavit. The only verifying affidavit is a four paragraph affidavit devoid of facts. And as regards the supporting affidavit sworn on 18th May 2004 and filed on 19th May 2004 it came in existence after exparte order for leave was granted on 13th May 2004 and there was no leave to file it.
3. The reliefs claimed in the statement are at variance with the reliefs sought in the application and no leave to amend and statement has been sought or granted.

Mr Kirimi the learned counsel for the applicants response was as under:-

1. There is no specific legal requirement to cite the Law Reform Act in an application for judicial review
2. That when the Notice to the Registrar was filed on 7th May 2004 as per the requirement of O 53 rule 1(3) that Notice was lodged with a statement of facts and two affidavits one christened verifying affidavit and the other supporting affidavits and the later contains facts verifying the statement hence the granting of leave and the court must have looked at the affidavits on 13th May 2004. The court is bound to look at the affidavits on record

3. It was conceded that the grounds of relief sought in the statement are at variance with those appearing in the body of the statement – but after the grant of leave the Notice does state a substantive prayer. He invited the court to invoke s 72 of the Interpretation and General Provisions Act and hold that the variance is curable because the duty of the court is to do substantial justice and the *ex parte* order for leave has not been challenged.

The intention of the legislation in seeking verification of the statement was to separate or screen good applications from frivolous ones. In reply Mr Nyadieka said that he had not been served with the affidavit in support dated 3rd May 2004 and the supporting affidavit was filed on 19th May 2004 as per the record. The fact that there is an extracted *ex parte* order is no proof that an affidavit was served on 7th May 2004

Order LIII rule 1(2) states that an application for leave 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 notice to the registrar is to be given not later than the previous day and at the same time lodge with the registrar copies of the statement and affidavits. The rules envisage a situation where it is the same statement and affidavits which will be relied on at the hearing of the substantive application for orders of Judicial review.

However in this case the affidavit(s) filed including the verifying affidavits were sworn 7th of May 2004 respectively and were also filed in court on 7th May 2004 whereas the same affidavits were filed and stamped 19th May 2004 and are also said to have been sworn on 19th May 2004 together with the substantive application for Judicial review.

The *ex parte* chamber application for leave including the *ex parte* order were filed and granted on 13th May 2004 respectfully. The respondent denies having been served with the 7th May affidavits.

The court's findings on this is that it is irregular for a statement filed earlier to be verified by an affidavit or affidavits sworn and filed on 19th of May almost 6 days after the filing and hearing of the application for leave on 13th May 2005. There is also no provision for the filing of further affidavits in support of the substantive application for leave. Instead, the affidavits accompanying the *ex parte* application for leave including the statement are the ones required to be served on the registrar and are the same copies required to be served on the respondents on demand pursuant to O 53 rule 4(1). The validity of the affidavits is doubtful since affidavits containing the same content and substance and having the same deponent cannot be sworn twice on different dates before the same Commissioner. The deponent has a lot to explain in this regard.

Under the rules the only affidavits admissible are verifying affidavits and there is no provision for a supporting affidavit. The only verifying affidavit is a four paragraph affidavit devoid of facts but purporting to verify facts set out in the statement. This runs counter to the Court of Appeal holding in the case of *COMMISSIONER GENERAL KENYA REVENUE AUTHORITY v SILVANO OWAKI T/A MIRENGA FILLING STATION KSM CA45* of 2000.

Quite apart from the irregularity set out above and which is apparent on the face of the two sets of affidavits the inadequacy of the verifying affidavit entitles this court to strike out the application.

I must however disallow the respondents counsel contention that this court has no jurisdiction to entertain the application on account of the Law Reform Act and its provisions having not been cited. I see no legal basis for this contention at all. The jurisdiction of the court even where there is no citation must be ascertained from the substance and the content of an application and the statute giving the powers or jurisdiction and in this case it is clear to the court that the application was brought under O 53 rule 1(2) which order was made pursuant to s 9 of the Law Reform Act. Jurisdiction has been conferred by an Act of Parliament and this is a matter of law which the court cannot ignore. As stated in s 3 of the Judicature Act, the jurisdiction of the court shall be exercised in conformity with

(a) the Constitution

(b) subject thereto, all other written laws

(c) subject thereto and so far as those written laws do not extend or apply the substance of common law, the doctrines of equity and the statutes of general applications in force in England on the 12th August 1897 ...

In this case a specific written law ie the Law Reform Act does give this court jurisdiction to hear the application.

The other substantial objection raised is that the relief claimed in the Notice of Motion is at variance with the reliefs in the statement. This point has been conceded by the applicants counsel but they have urged the court to do justice although no attempt has been made to apply to amend the statement as provided for under O 53 rule (2). It is a mandatory requirement under O 53 rule 4 for the grounds and reliefs in the Notice of Motion to tally with those in the statement. In the instant case the statement asks for leave instead of the reliefs. The court cannot grant that which has not been sought in the statement.

On this ground again the court is entitled to strike out the application because without seeking the reliefs currently sought under the Judicial review jurisdiction ie certiorari, mandamus and prohibition this court has no basis of exercising its jurisdiction under s 8 of the Law Reform Act. This court did strike out Notice of Motion with almost with similar defects in the cited case of *GEORGE MUCHAI v CHARITY NGILU & 2 OTHERS HC MISC 1613/2003*. The same fate must unfortunately befall this application as well.

For the two reasons as set out above the application is struck out with costs to the respondents.

DATED and delivered at Nairobi this 3rd day of June 2005.

J G NYAMU

JUDGE