



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

MISC CIV APPLI 327 OF 2003

REPUBLICAPPLICANT

-VERSUS-

KIPKAREN DIVISION LAND DISPUTES TRIBUNAL 1ST RESPONDENT

JONAH KIPTOO KIPLANGAT 2ND RESPONDENT

JOSEPH KIBIRGEN CHEPKWONY EXPARTE

RULING

This is a preliminary objection to an application which was brought by way Notice of Motion dated 30th October 2003. The notice of preliminary objection is dated 9th March 2005 and is on three grounds. However, at the hearing of the application counsel for the objector, Mr. Keter, abandoned the third ground of the objection. Consequently, he relied on the following two grounds of objection –

- a) That the application is fatally defective and incompetent for failure to comply with the provisions of Order LIII rule 1(1), (2) and (3) of the Civil Procedure Rules.**
- b) That the verifying affidavit filed in support of the application is fatally defective and does not comply with the provisions of section 35 of the Advocates Act.**

At the hearing of the application Mr. Keter for the applicant submitted that, before a party comes to court for Judicial Review, there must be a notice to the Registrar attaching the affidavit and statement that he intended to rely on. The rule was a mandatory rule and must be complied with. He submitted that a notice to the Registrar must be given not later than the preceding day for filing the application. He submitted that the miscellaneous application filed by the applicants herein for leave to file the Notice of Motion, was filed on the 13th October 2003, which was the same day that the notice was also filed. Therefore, there was no valid notice to the Registrar as required by law. Consequently, the application was fatally defective and had to be struck out. He sought to rely on Eldoret High Court MCA. 17 of 2002 – Republic –vs-. Soy Land Disputes Tribunal & Others. He also sought to rely on Eldoret High Court MCA. 135 of 2004 – Republic –vs-. The Chairman Kilibwon Land Disputes Tribunal.

On the second ground of objection, he submitted that the verifying affidavit was defective. It did not show by whom it was drawn. Under section 35 of the Advocates Act (Cap.16), the affidavit should be rejected as being incompetent. The said section 35 of the Advocates Act provided that the Registrar should reject documents that do not comply with legal requirements.

Mr. Machio for the applicant opposed the preliminary objection. He contended that the application for leave was filed on 13th October 2003 under certificate of urgency. There was a notice addressed to the Deputy Registrar. The notice was filed simultaneously with the filing of the Chamber Summons and the matter did not come for hearing until 27th October 2003. He submitted that the application for leave was heard by Lady Justice Gacheche in Kisumu, who was satisfied that the applicant had complied with the legal requirements and granted the leave, as well as stay. In his view, it was not the legal position that notice should be given before filing of the summons. He submitted that the notice formed part of the pleadings. There was no requirement for prior notice.

He submitted that the previous legal position was that the Deputy Registrar used to sign the notice the preceding day before the matter came before the judge. In our present case, the matter was filed and actually remained pending for 14 days before it went before the judge. He submitted that Eldoret High Court MCA. 135 of 2004 – Republic –vs-. The Chairman Kilibwoni Land Disputes Tribunal did not apply herein. In that particular miscellaneous application, the judge based her decision on something different, that was that a substantive application should have been brought by way of Notice of Motion.

On the issue of the affidavit not indicating by whom it was drawn, he referred to the case of Greenhills Investments Limited –vs- China National Complete Plant Export Corporation[2002] IKL 384. He submitted that section 45 of the Advocates Act (Cap.16) did not apply to our present case. That section of the Advocates Act merely criminalized certain actions. Section 34 of the Advocates Act dealt with pleadings. An affidavit was not a pleading as stated by Justice Ringera, in the case of Greenhills Investments Limited –vs- China National Complete Plant Export Corporation.

He urged the court not to determine this land matter on technicalities. He sought to rely on Eldoret Court of Appeal MCA.292 of 2004 – Francis Origo & Another –vs- Jacob Kumali Mung’alla per Waki, J.A. He submitted that matters should be determined on substantive issues that is, on merits. He also referred to the case of Lt. Colonel Joseph Mweteri Igweta –vs- Mukira M’Etheare & Attorney General, Nairobi Court of Appeal MCA. 270 of 2001.

He submitted further that if a mistake was made then, the court should uphold the principle of determining matters upon substantive justice. He sought to rely on the case of Saanun –vs- Commissioner of Lands & 5 Others – Mombasa High Court Civil Case No.227 of 2002 (unreported).

I have considered the objections and the submissions of both counsel. In my view, the issues for determination are two. Firstly, whether the application is fatally defective as notice for leave to file the application was not given to the Registrar at least one day before filing of the Chamber summons. Secondly, whether the affidavit for the application is defective as having not indicated the person who drew the same in terms of section 34 of the Advocates Act.

Order LIII rule 1 of the Civil Procedure Rules provides as follows –

“1(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereof has been granted in accordance to this rule.

(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, the relief sought, and the grounds on which it is sought and by affidavit verifying the facts relied on. The judge may, in granting the relief, impose such terms as to costs and security as he thinks fit.

(3) The applicant shall give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statement and affidavit, provided the court may extend this period or excuse the failure to file the notice of the

application if good cause is shown..

(4) The granting of leave under this rule, to apply for an order of prohibition or an order of certiorari, shall, if the judge so directs, operate as a stay of the proceedings including only the determination of the application or until the judge orders otherwise.”

I have to consider whether there was failure to comply with the requirements of notice to the Registrar under Order LIII rule 1(3). Counsel for the parties have submitted on the issue. It is not in dispute that the application for leave herein was made on the same date as the filing of the notice to the Registrar. Mr. Machio for the applicant admits as much. Mr. Keter for the objector has submitted that the notice to the Registrar should have been filed at least one day before the filing of Chamber Summons for leave. He has referred me to the ruling by Lady Justice Gacheche in the case of Republic –vs- Soy Land Disputes Tribunal – Eldoret Miscellaneous Civil Application No.17 of 2002, that the mandatory requirements of Order LIII of the Civil Procedure Rules have to be complied with otherwise the application will be defective. I agree with him that Order LIII rule 1 (3) makes the notice of the application for leave to the Registrar to be mandatory, unless the court specifically extends the period or excuses the failure to file the notice of application for good cause shown.

My understanding of Order LIII rule 1(2) Civil Procedure Rules is that the application for leave is to be made to the judge in Chambers. That application is not made to the Registrar. Order LIII rule 1(3) Civil Procedure Rules provides that the applicant shall give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statement and affidavit. In my view therefore, since the application is made to the judge it is sufficient that the Registrar receives notice together with the statement and affidavits at least one day before the matter is placed before the judge in Chambers. That, in my view, is compliance with the legal requirements. In this regard I have to echo what was stated by my sister Justice Gacheche at page 2 of her ruling in the case of Republic –vs- Soy Land Disputes Tribunal – Eldoret Miscellaneous Civil Application No.17 of 2002, when the learned Judge stated as follows –

“In my understanding the Registrar is notified beforehand, so as to allow him time to prepare the matter for presentation before the Judge.”

It is not necessary therefore, that the notice should be sent to the Registrar a day or more before the application for leave is filed. It is, however, necessary that the Registrar receives the notice and copies of the statement and affidavits at least one day before the application is placed before the Judge in Chambers. It is not in dispute here, that the application and notice were filed about 14 days before the application was actually placed before the judge at Kisumu. In those circumstances, I find that there was full compliance with the mandatory requirements of the law regarding the notice to the Registrar.

I now turn to the second ground of objection. That objection is that the affidavit did not show by whom it was drawn and therefore should be struck out together with the Notice of Motion. I have perused the provisions of section 34 and 35 of the Advocates Act. Section 34(1) of the Advocates Act provides, among other things, that no unqualified person shall, either directly or indirectly, take instructions or prepare any document or instrument relating to any legal proceedings. It also criminalizes any contravention of the section. Section 35 of the Advocates Act provides, among other things, that the person who draws or causes to be drawn or prepares any document or instrument referred to in section 34 (1) of the Advocates Act shall endorse his name and address, or the name and address of his firm. It also criminalizes the contravention of the section. The section also provides among other things that the Registrar of the High Court shall refuse to accept or recognize any documents or instruments referred to in section 34 (1) of the Advocates Act unless such document or instrument is endorsed in accordance with the section.

From the submissions of both counsel, it is not in dispute that the verifying affidavit filed in support

of the application for leave does not indicate who drew the same. Counsel for the objector has argued that the affidavit is defective and should be struck out together with the application. References have been made to a number of cases. I have perused the cases. In the case of Greenhills Investments Limited –vs- China National Complete Plant Export Corporation, it was held that an affidavit is evidence and cannot be amended. An affidavit which is amended is fatally defective and must be struck out. In the case of Saanun –vs- Commissioner of Lands & 5 Others – Mombasa High Court Civil Case No.227 of 2002 (unreported), it was held that an affidavit contains merely matters of facts sworn to be true upon knowledge, information or belief. Only formal errors on the face of such an affidavit such as misquoted names, word or titled can be amended to identify it with the suit, as long as it does not alter the meaning of the affidavit. In the case of Lt. Colonel Joseph Mweteri Igweta –vs- Mukira M’Etheare & Attorney General, Nairobi Court of Appeal MCA. 270 of 2001, it was held that a court should endeavour not to shut out an applicant for a fault not his own making and denying him justice. In the case of Francis origo –vs- Jacob Mungala – Nairobi Civil Application No.292 of 2004 it was held that a party should not be shut out from his matter being heard and determined on its merits because of the mistake of counsel.

I have considered this matter anxiously and I am of the view that in terms of Order XVIII rule 7 the Civil Procedure Rules the mistake complained of was a mistake of mere form. It does not go to the substance of the affidavit. I am therefore unable to strike out the affidavit and the application due to the failure to mention who drew the affidavit, as that default does not affect the substantive contents of the affidavit. The objection therefore fails.

In the results therefore I dismiss the preliminary objections and order that the Notice of Motion will be heard and determined on its merits. I order that costs will be in the cause.

Dated and delivered at Eldoret this 4th day of October, 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Machio for the applicant

Mr. Ngaba for the interested party/objectors