



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Misc Civ Appli 235 of 2005

IN THE MATTER OF LAND ADJUDICATION ACT CAP.284 LAWS OF KENYA
AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
PROCEEDINGS IN THE NATURE OF CERTIORARI, MANDAMUS AND
PROHIBITION

AND

IN THE MATTER OF LAND ADJUDICATION OFFICER NAROK DISTRICT

REPUBLIC.....APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER NAROK DISTRICT.....RESPONDENT

AND

TINGA OLE NKUITO.....INTERESTED PARTY

EXPARTE

SIMPANO OLE KESIKE.....SUBJECT

RULING

This ruling is in respect of a preliminary objection that was filed by the interested party on 17th October 2005. The grounds that were advanced for the said objection were as follows:-

1. That the application was incompetent and bad in law.
2. That the application was not served in accordance with the provisions of Order LIII Rule 3(1) of the Civil Procedure (1998 Revised) Rules.
3. That the application has not satisfied the requirements of an application by way of notice of motion for Judicial Review as provided for under Order LIII Rule 4(1) of the said Rules.
4. That there is no copy of the statement accompanying the application by way of notice of motion dated the 12th April, 2005 contrary to the provisions of Order LIII Rule 4(1) of the Civil Procedure (1998 Revised) Rules.
5. That the supporting affidavit of Simpano Ole Kesike sworn on the 12th April 2005 is misleading, misconceived and does not amount to a statement of facts.

6. That there is no affidavit verifying the facts relied upon in the statement of facts, which statement of facts is, in any event, lacking.

On the aforesaid grounds, the court was urged to strike out the said application. Mr. Karanja for the subject/applicant opposed the preliminary arguments as stated above and submitted that under Rule 3(1) of Order LIII there was no requirement that the statement of facts be filed together with the notice of motion. He said that whether the statement of facts was served or not was an issue of fact that could not be raised by way of a preliminary objection. He added that there was an affidavit of service by the process server showing that the statement of facts was served together with the notice of motion and therefore the application was competent.

Regarding the eight days period that is required under Order LIII Rule 3 to be provided between the service of the notice of motion and the day named therein for the hearing, counsel submitted that any default in complying with the same could not be a ground for striking out the notice of motion, it can only be a ground for adjourning the hearing of the application. He admitted that he had not complied with the provisions of Order LIII Rule 3 as aforesaid but the same was due to an oversight as he thought that the application that had been served upon the interested party sometimes in April, 2005 had a hearing date of 19th October, 2005, only to receive a letter from M/S Kagucia & Company Advocates on the 6th October 2005 asking him to take a date for the hearing of the application within fifteen days from the date of the letter failing which they would seek dismissal of the application. He then served a hearing notice on 15th October, 2005.

I will first deal with the last issue regarding the eight days period that is supposed to be allowed in between the time of service of the notice of motion and the hearing date. Mr. Kagucia was right in saying that the interested party was given only three clear days, a fact which Mr. Karanja conceded. While that was the case, such default cannot cause an application to be struck out. It can only be a ground for seeking an adjournment to the hearing of the application. I believe the objective of the rule was to ensure that all parties are given sufficient time to prepare themselves before the hearing date of the application. I will therefore not strike out the application for the said default in compliance with the provisions of Order LIII Rule 3(1) of the Civil Procedure (1998 Revised) Rules. I now turn to grounds numbers 3 and 4 of the preliminary objection. Order LIII Rule 4(1) states as follows:-

“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits 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.”

From the above quoted rule, it is clear that it is mandatory to serve the statement that accompanied the application for leave at the time of serving the notice of motion. However, the affidavits that accompanied the application for leave are only supplied upon demand although I may state on my part that it is always good practice to serve both the statement and the affidavit relied upon in the application for leave together with the notice of motion.

In this particular matter, the interested party stated on the 17th of October 2005 through his notice of preliminary objection that he was not served with the said statement but the process server stated in his affidavit sworn on 18th October, 2005 that he served upon the wife of the interested party the statement and the affidavit that were used at the stage of applying for leave together with the notice of motion. On the one hand we have the interested party's assertion that the said documents were not served and on the other hand there is an averment under oath by the process server disputing the contention by the interested party. There was no suggestion by Mr. Kagucia that the process server lied under oath in his affidavit and no application was made to cross examine him. It is true that the said affidavit was sworn and filed after the filing of the notice of preliminary objection but that does not in itself point to the fact that the averments in the affidavit are untrue. In any event the objection that was taken by counsel for the interested party, is, in my view, not an appropriate preliminary objection as was defined in the celebrated decision of ***MUKISA BISCUIT CO. VS WEST END DISTRIBUTORS LTD*** [1969] E.A. 696 where Sir

Charles Newbold held that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the same decision, Law J. A. delivered himself as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Whereas at this stage it is not quite clear whether the statement that accompanied the application for leave was served together with the notice of motion, I take the view that even if the same had not been served, that may not be a sufficient reason to warrant the striking out of the notice of motion. It would be more appropriate to order that the same be served before the application is argued. But here there is an averment under oath that the statement was indeed served. I cannot just brush aside the contents of the said affidavit simply because it was filed after the notice of preliminary objection was filed and served. I therefore overrule the said objection.

Ground number 5 was not argued and even if it had been, my view would have been that it cannot be raised as a preliminary objection. As regards ground number 6, I have already stated that affidavits accompanying the application for leave are supplied on demand and so that preliminary objection is also unfounded.

In conclusion I dismiss with costs all the grounds that were raised as preliminary objections by the interested party.

And for avoidance of any dispute regarding service of the said documents, I direct the applicant (i.e. the subject) to serve upon counsel for the interested party within the next seven days the statement and affidavits accompanying the application for leave. A hearing date for the application dated 12th April, 2005 should be fixed in the registry.

DATED, SIGNED AND DELIVERED at Nakuru this 15th day of November, 2005.

D. MUSINGA

JUDGE

15/11/2005

Ruling delivered in the presence of Miss Nyagoi holding brief for Mr. Kagucia for the interested party and Mr. Kurgat holding brief for Mr. Karanja for the subject.

D. MUSINGA

JUDGE

15/11/2005