



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
MISC.CIVIL CASE NO. 196 OF 2003

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF: AN APPLICATION BY JOSEPH ODHIAMBO OCHAR, LILIAN ANYONGO AKELLO, GEORGE MANGO OGANGO, FREDRICK OCHIENG' DUNDO, GORDON OUMA ODONGO, ABEDNEGO AGGWENGE ABONG &

MILLICENT ATIENO AJUMA

AND

IN THE MATTER OF : THE LOCAL GOVERNMENT ACT CAP 265 LAWS OF KENYA

AND

IN THE MATTER OF BONDO TOWN COUNCIL

AND

IN THE MATTER OF MINUTES NO. 1/7/2003 OF THE BONDO TOWN COUNCIL FULL COUNCIL MEETING

BETWEEN

REPUBLIC EXPARTE JOSEPH ODHIAMBO

GORDON OUMA ODONGO & 5 OTHERS.....APPLICANTS

VERSUS

BONDO TOWN COUNCIL.....RESPONDENT

RULING

This is a preliminary objection to the notice of motion dated 1st September 2003 seeking orders of judicial review in the nature of certiorari directed at the respondent for removal of its full council minutes No. 1/7/2003 dated 29th July 2003 into this court for purposes of being quashed. A notice of raising the objection was duly issued and served.

In his submission Mr. Onsongo for the respondent stated that it is the requirement of Order L111 rule

1(3) of CPR that the applicant shall give notice of the application not later than the preceding date to the Registrar and at the same time he shall lodge with the Registrar copies of the statement and the affidavit provided that the court may for good cause shown extend the period or excuse the failure to file notice . Mr. Onsongo contended that in this case notice was lodged but the applicant did not lodge copies of the statement and affidavit as required. It was Mr. Onsongo's contention that the foundation of the application for leave was fatally defective and consequently the leave granted is incompetent.

Mr. Onsongo also claimed that the applicant had not complied with Order L111 Rule 7(1) of the said Rules in that he did not lodge the copie of the proceedings intended to be quashed together with an affidavit verifying them before the hearing of the notice of motion for orders of "judicial review. According to Mr. Onsongo as the applicant had not complied with these rules the notice of motion should be struck out with costs to the respondent.

In his response Mr. P.J. Otieno for the applicant contended that the minutes complained of in this application are on record as they are annexed to the affidavit of Joseph Odhiambo Ochar sworn on 8/9/2003 and filed with the notice of motion. According to Mr. Otieno once a party has complied with Order L11 rule 1(2) he would have also complied with Order L111 rule 7(1) of the C.P.R. Mr. Otieno claimed that it was not true that in these rules once leave has been granted there has to be another affidavit and that Order L111 rule 7(1) is a mere clarification. On the first ground Mr. Otieno denied that there is any requirement for the applicant to file a copy of statement and an affidavit and serve the Registrar as claimed. Mr. Otieno further contended that as Mr. Onsongo appeared to challenge the grant of leave he should have filed substantive application. He claimed that the alleged defects have not caused any prejudice to the respondent

This objection is based on two alleged failures of the applicant. The first one is that he did not lodge with the Registrar copies of the statement and affidavit in terms of Order L111 rule 1(3) of CPR . This rule provides as follows:- ***"(3) The applicant shall give notice o f the application for leave not later than the proceeding to the Registrar and shall at the same time lodge with the Registrar copies of the statement and affidavits."***

It is not denied that the applicant gave notice to the Registrar of his intention to seek leave as laid down but he did not lodge with the Registrar the said copies of the affidavits and statement as provided by the rule.

The second ground in support of this preliminary objection is that the applicant did not comply with the provision of Order L111 rule 7 (1) of the said rules which states as follows:-

"7(1) . In the case of an application for an order of certiorari to remove any proceedings for the purposes of their being quashed , the applicant shall not question the validity of any order warrant, commitment, conviction, inquisition on record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court."

It has not been denied that the application in this notice of motion seeks an order of certiorari; and that the applicants had not lodged with the Registrar of this Court the offending minute of the respondent verified by an affidavit as laid down. This rule is clear that having failed to comply with the rule the applicants would not be permitted to challenge the validity of the minute complained of as a copy of it has not been brought before the Court.

It is only noted that if the said minute were to be quashed the effect would have been an imposition of the applicants as employees upon the respondent which would appear to have effectively terminated their employment.

In the circumstances as the applicants have not complied with the Order L111 RULES 1(3) and 7(1) of CPR they cannot challenge the minute complained of . The notice of motion dated 1st September 2003 is

dismissed with costs.

Dated and delivered this 24th day of May 2004.

B.K. TANUI

JUDGE