



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIORBI
MISCELLANEOUS APPLICATION NO. 136 OF 2003

**IN THE MATTER OF AN APPLICATION BY MASAINI OLE SONKOI MPAAYO, KAPORRI
OLE MURIANKA AND NTALEL ENE NGENCHE TO APPLY FOR AN ORDER OF
PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT KAJIDO, LAND
DISPUTE TRIBUNAL MISCELLANEOUS APPLICATION NUMBER 5 OF 2003 AND
KAJIADO DISPUTE TRIBUNAL CASE NO. TC/89/2002, 190/2002 AND 191/2002**

**BETWEEN JEREMIAH RISA NAKAYA AND KAPORRI OLE MURIANKA MASAINI OLE
SONKOI AND NGENCHE OLE NKURNE (DECEASED)**

RULING

The Applicant applies for an order to file a supplementary affidavit in terms of the draft annexed to the Application. This affidavit sets out the facts on which the Applicant relies in support of his application for a Judicial Review.

The verifying affidavit filed with the application for leave to file this Judicial Review was in my view defective as it contravened the provisions of O.53 rule 2 and the decision of the Learned Court of Appeal KRA V Owaki C.a. No.45 of 2000 and in the case of my ruling in Misc. application No.1267 of 2003 Kenya Telecommunications Investment Group Ltd versus Telecommunication Commission of Kenya.

I stated in relation to the verifying affidavit in that matter as follows:-

In this present application the verifying affidavit sworn by Titus Ndundu on the 23/10/2003 for the Applicant on paragraph 2 states as follows

“That I have read the statutory statement accompanying the application for leave to apply for the Orders of certiorari mandamus and prohibition and state that all the facts set out herein are true and I repeat the same herein and verify the same as true to my knowledge, information and belief, the sources of which information and the basis of my belief being duly disclosed.”

Although he stated that he repeats the same the same are not set out in the affidavit. Both Mr. Inamdar and Mr. Regeru relied on the case of KRA v Owaki C.A. No.45 of 2000 in which a joint Judgment the Learned Court of Appeal stated at page 7 as follows:

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review. What appears to be the meaning of rule 1(2) of the order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7.

“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} IK.B. 281) “The statement should contain nothing more than the name and the description of the applicant, the relief sought. It is not correct to lodge a statement of all the facts, verified by an affidavit”.

Mr. Orengo relied on outline of Judicial Review in Kenya by Mr. P. Lumumba and Mr. Norwrojee in which is set out a precedent for a verifying affidavit. This merely states that the facts contained in the statement filed with the application {for leave to apply for Judicial Review} are true.

He also submitted that the ratio of the Wandsworth case referred to above was that a Court is entitled to look at an affidavit to determine the facts.

In the Owaki’s case referred to above the Learned Court of Appeal cited with approval a passage from the Supreme Court Practice 1976 Volume 1 at paragraph 53/1/7 in which it is stated ”It is not correct to lodge a statement of all the facts verified by an affidavit”

I accept that the Judgments in the Wandsworth case were not dealing with the procedures in cases of Judicial Review, Lord Caldecote C.J. stated in his Judgment

“The only way in which that denial of Justice can be brought to the knowledge of the court is by way of affidavit”

I understand the ratio of the Court of Appeal in the Owaki case to be that under O.53 rule 1(2) it is necessary for the facts relied on to be verified by an affidavit. That is the affidavit should contain the facts and not merely that the statements of facts should be verified in a verifying affidavit.

Mrs. Pareno for the Respondent submitted that it was not possible for the defective verifying affidavit to be superseded by a further affidavit, which complied with the Rules.

In the case referred to above I indicated that it might be possible for an applicant to apply to put in a further affidavit to cure a defect on the one filed.

In that case the Application I was dealing with was to strike out the order granting leave to file the Judicial Review therein, which had been granted.

In this present case the matter has proceeded further and a Notice of Motion has been filed pursuant to the order for leave.

The Respondent has not however applied to strike out the order for leave on the ground that the Application for leave was defective.

O.53 rule 4(2) states as follows:-

“The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement and shall supply on demand copies of any such further affidavits.”

This in my view is merely permissive and does not take away the power of the court if it so wishes to accept a further affidavit to supplement a verifying affidavit filed with the application for leave.

The insufficiency of the verifying affidavit in the first place does not go to the Jurisdiction of the Court and is an irregularity, which can be cured.

In the result I overrule the preliminary objection.

Dated and delivered at Nairobi this 15th day of May, 2004

P.J. RANSLEY

JUDGE