



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
HC MISC CIVIL APPLICATION 82 OF 2003

CYRUS NYAGA KABUTE1ST APPLICANT

CYRUS NJAGI NJUE2ND APPLICANT

VERSUS

KIRINYAGA COUNTY COUNCIL1ST RESPONDENT

THE CHAIRMAN, KIRINYA COUNTY COUNCIL WORKS,

TOWN PLANNING, MARKETS

AND HOUSING COMMITTEE.....2ND RESPONDENT

THE CLERK, KIRINYAGA COUNTY COUNCIL..... .3RD RESPONDENT

GERALD NJAGI CHEGE..... .4TH RESPONDENT

RICHARD KARANI..... 5TH RESPONDENT

DICKSON MURAGE 6TH RESPONDENT

NJAGI NYAGA 7TH RESPONDENT

FREDRICK NYAGA DAVID8TH RESPONDENT

FRANCIS NJERU DAVID 9TH RESPONDENT

KENNEDY KABUTE KIMOTHO 10TH RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection herein as raised by Mr. Kareithi, learned Counsel for the 4th –10th Respondents has five limbs:-

- i) that the Applicants did not seek leave before instituting the proceedings for Judicial Review Orders.
- ii) that the grounds relied upon are not verified by Affidavit.
- iii) that the Application is incorrectly intituled.
- iv) that the 2nd Applicant took out letters of administration to enable him institute proceedings after

actually filing the proceedings.

v) that the 1st Applicant had no authority to swear an Affidavit on behalf of the 2nd Applicant.

2. The first ground must fail because from the record, leave was granted to institute Judicial Review Proceedings in this matter by Khamoni, J. on 3.3.2004. The point is therefore moot.

3. The second ground as framed and argued was unclear to me. The Notice of Motion dated 19.3.2004 has an Affidavit which in my view is proper under Order 53 Rule 1 of the Civil Procedure Rules I will not say more on the point.

4. The third ground is valid. Time and time again our courts have said that the Applicant in Judicial Review Applications is the “Republic” ex-parte the Applicant. The decision in **Farmers Bus Service and Others vs Transport Licensing Appeal Tribunal [1959] EALR 779** has to my understanding been followed with little or minor variation. In that case at Page.781, the Court of Appeal stated thus;-

5. ***“Leave having been granted, the Notice of Motion should have been intituled; Republic Vs The Transport Licensing Appeal Tribunal [1959] EALR 779 and The Overseas Touring Co. (E.A.) Ltd Ex-parte (the applicants)”***.

Where a party does not follow this form of intituling the Application, the said Application is ordinarily struck off.

6. The Notice of Motion before me is headed;

“Cyrus Nyaga Kabute1st Applicant

Cyrus Njagi Njue

(Suing as the personal representative of the Estate of

Njue Nyaga (deceased)2nd Applicant

Versus

Kirinyaga County Council1st Respondent

The Chairman Kirinyaga County Council

Works, Town Planning, Market and2nd Respondent

Housing Committee3rd Respondent

The Clerk, Kirinyaga County Council 4th Respondent

Gerald Njagi Chege 5th Respondent

Richard Karani 6th Respondent

Dickson Murage7th Respondent

Njagi Nyaga.....8th Respondent

Fredrick Nyaga David9th Respondent

Francis Njeru David..... 10th Respondent

7. The form is clearly wanting. The 1st –3rd Respondents are properly named and judicial Review Orders can attach to them. The 4th –10th Respondents are in the place of The Overseas Trading Co. Ltd and The Kenya Bus Services Ltd in the Farmers Bus Services Case (Supra). They are only “Interested Parties” and not proper “Respondents”. Similarly the purported Applicants, Cyrus Nyaga Kabute and Cyrus Njagi Njue are not proper Applicants. They are “ex-parte Applicants” and the “Republic” ought to have been the “Applicant”. It has not been said so and that renders the Application as incompetent. Once that is my finding then the Application must be struck out.

8. The fourth ground of objection is similarly valid. The 1st Applicant who argued the Application on behalf of himself and the 2nd Applicant admitted in his submissions that indeed letters of administration to the estate of Njue Nyaga deceased were issued after the filing of the proceedings. If that be so, he had no business in the matter and if his sole position was as the personal representative of the Estate of Njue Nyaga and in fact at the time filing these proceedings he had no locus standi, then his name must be struck out.

9. The fifth ground similarly succeeds and in view of matters raised above, the 1st Applicant had no authority to purport to swear an Affidavit on behalf of a person in the name of the 2nd Applicant who had no locus standi. Matters are not made better by fact of the 2nd Applicant filing a Notice of Authorisation on 10.11.2004, to allow the 1st Applicant to swear affidavits and sign pleadings. This was a year and seven months after this matter was filed.

10. For reasons given therefore the Objection is upheld and the Notice of Motion dated 19.3.2004 is hereby struck out with costs to the 4th –10th so –called Respondents.

Orders accordingly.

Dated and delivered in open court on this 1st day of December 2004.

I.LENAOLA

AG. JUDGE

Applicants present

Mr. Mugo for Mr. Kareithi for the Respondents.

I.LENAOLA

AG. JUDGE