



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 1271 OF 2002

OLKIOMBO LIMITED.....1ST APPLICANT

SHADRACK ROTIKEN2ND APPLICANT

WILLIAM SALAON OLE YIAILE3RD APPLICANT

SAMUEL SOITANAE OLE KORIATA4TH APPLICANT

NJAANGA OLOLOIGERO5TH APPLICANT

KOILEKEN OLE KIRROKORR6TH APPLICANT

V E R S U S

THE COUNTY COUNCIL OF NAROK RESPONDENT

R U L I N G

The Applicant in this Judicial Review seeks an order to file further affidavit to incorporate into the Judicial Review application facts that had arisen since the Notice of Motion was set for interpartes arguments. The affidavit was actually filed on 13th May 2003 a day before the day fixed for hearing but Mr. Mwenesi for the Applicants sought leave orally to have leave to file the said affidavit and have the same be deemed as properly filed. Mr. Nzioki for the first interested party agreed but Mr. Kilikumi counsel for the second interested party supported by Mr. Kinyanjui for Respondent objected vehemently on two grounds; first that the affidavit is filed without notice under Order 53 Rule 4(2). Secondly that the application should be made in writing in any case. Generally, the provisions regarding affidavits is contained in Order 18 of the Civil Procedure Rules herein. Order 18 Rule (1) states: -

“1. any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable.

(6) The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

(7) The court may receive any affidavit sworn for purpose of being used in any suit not withstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof.

(8) Applications under this order shall be by summons or orally in court provided that, where it appears to the court that either party bonafide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2(1) Upon any application, evidence may be given by affidavit but the court may at the instance of either party order the attendance for cross examination of the deponent.

r(9) Unless otherwise directed by the court, an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.”

The Kenyan Order 18 compared to the Indian corresponding Order 19 and the English Order 41 RSC gives affidavit wider scope. Under our Evidence Act, affidavit is evidence which it is not in India, and where it can only be used in interlocutory applications. Here, the Court has power to call for affidavit evidence, call the deponent to give oral evidence and also be cross-examined on it, the Court also may strike out scandalous, irrelevant or oppressive affidavits and, can introduce any affidavit to be used in any suit and to (not to notice) irregularity in form or misdescription of parties and not to reject any affidavit because it was sworn before the case was started.

Affidavits in whichever case they are used, must conform with these attributes and features and it is upon this background that one looks at Order 53 Rule (4) 2 of the Civil Procedure Rules where it provides for affidavits, saying: -

4(1) Copies of the statement accompanying the application for leave shall be served with the Notice of Motion and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall subject as hereinafter 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.

2. 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 with new matter arising out of the affidavit 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 affidavits.

3. every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”

It stipulates that Applicant must give notice to amend his statement or use further affidavit which he proposes to use. What is the purpose of requiring notice of intention to be given and for leave of the Court to use further affidavit? I think there is certain restriction on the use of affidavits in Judicial Review for example courts are reluctant to allow a deponent to be examined during the hearing of the motion and even in the Chamber application stage.

See GEORGE vs. SECRETARY OF STATE FOR ENVIRONMENT (1979) 77 LGR 689 (C.A.) But this should not create any impression that use of affidavit evidence in Judicial Review displaces any usual requirement of admissibility or that it interferes with standard of proof because with special reasons a deponent can still be cross-examined on his affidavit. See LEWIS V JAMES (1886) 32 CH. D. 326 Legal burden remains on the Applicant to prove on the balance of probabilities when all the evidence has been reviewed that an order lies and evidential burden also lies more pointedly at the initial and qualifying stage of leave to show that there is locus standi.

The Court while giving leave for the admission of further evidence or affidavit uses its discretion and the discretion must only be judicially exercised on stated principles. It was not pointed to me what these points are or should be or whether they were relied on at all, but all in all the discretion may be exercised in favour of further evidence, if:-

a) the fresh evidence shows what material was before the person making the decision complained of; or,

b) the evidence (further affidavit) is required in order to determine a jurisdictional or procedural error; or,

c) the evidence relates to the alleged misconduct of a party or a person making the decision.

Per HALSBURY'S LAWS OF ENGLAND 4TH EDITION VOL. 37 PARA 575 (PAGE 438)

See generally,

ASHBRIDGE INVESTMENT LTD. vs. MINISTRY OF HOUSING & LOCAL GOVERNMENT (1965) 3 ALL R 371 R v BOLTON (1841) 1 QB 66 EX. P. ALBERT AND MAUD JOHNSON TRUST LTD. (1974) QB 24

HALSBURY'S LAWS OF ENGLAND above quoted states: -

“These limitations on the admission of fresh evidence apply to proceedings for certiorari generally, whether to quash the decision of an inferior Court or tribunal after a hearing or to quash the decision of a Minister where there has been no hearing; BUT FRESH EVIDENCE will not be admitted to show that the Minister has been misled by the failure, short of fraud, of a party to place before him evidence a party to place before him evidence which would probably have caused him to come to a different conclusion.”

See RV. SECRETARY OF STATE FOR THE ENVIRONMENT EX. P. POWIS (1981) 1 ALL ER 788 C.A. Per Dunn L.J

. There is a similarity between further evidence in Judicial Review and that on appeal. It may be easier for parties to follow the wide road of admission on appeal in allowing fresh evidence than on Judicial Review. That is why the Courts have sought in great earnest to show the distinction that there is in the two systems. In Judicial Review as opposed to appeal cases, Courts' outlook is focused on PUBLIC LAW feature requiring Courts to observe that the jurisdiction of the Court in Judicial Review is to REVIEW a jurisdictional error or a defective decision and not to hear an appeal against that decision or its merits. Discussing the two systems may show more clearly that there is a distinction between appeal and Judicial Review in production of further evidence. On appeals the Courts now follow the principles stipulated by the Court of Appeal in LADD v MARSHALL (1954) 1 WLR 1489; (1954) 3 ALLER 745 (Denning) and I show it here to show the contrast; where he said: -

“When a litigant has obtained judgement in a Court of justice...he is by law entitled not to be deprived of that judgement without very solid grounds if it is sought to deprive him of his judgement by further evidence, three conditions must be satisfied before it can be received.

First, it must be shown that the evidence could not have been obtained with reasonable diligence at the use at the trial.

Secondly, the evidence must be such that if given it would probably have an important influence on the result of the case.

Thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it needs not be incontrovertible.”

These are conditions that apply on appeal and cannot be used in admitting further affidavit for Judicial Review. As I said, the distinction lies in the difference between review and appeal and the contrast will clearly illustrate the Judicial Review position even better. The Review position in contrast is as was stated by Dunn L.J. in Rv. SECRETARY OF STATE FOR THE ENVIRONMENT & ANOTHER EX. P. POWIS (1981) 1 ALLER 788 where he said: -

“Finally, there was an application on behalf of the appellant to admit fresh evidence which the Divisional Court had refused to admit. Like the Divisional Court, we considered the evidence De BENE ESSE. What are the principles on which fresh evidence should be admitted on Judicial Review? They are: -

(1) that the Court can receive evidence to show what material was before the Minister or inferior tribunal

(See Per Lord Denning MR in ASHRIDGE INVESTMENTS LTD. vs. MINISTER OF HOUSING AND LOCAL GOVERNMENT (1965) 3 ALLER 376) -

“(2) Where the jurisdiction of the Minister or inferior tribunal depends on a question of fact or where the question is whether essential procedural steps were not observed THE COURT MAY RECEIVE and consider additional evidence to determine the jurisdictional fact or procedural error (See de Smith’s Judicial Review of Administrative Action (4th Ed on 198 page 140-141 and cases there cited)

3) where the proceedings are tainted by misconduct on the part of the Minister or member of the inferior tribunal or the parties before it.” Example of such misconduct are bias by the decision making body or fraud or perjury by a party in each case FRESH evidence is admissible to prove the particular misconduct alleged.”

These pronouncements I think may also guide this Court in considering this application.

Against these principles, what would Applicant do? He should indeed show the intended further affidavit to the Court and to the parties to see that the further affidavit has not only a new matter, but one arising out of the affidavit of some other parties. From the principles by Dunn L.J. above, it would appear to me that the Court would then subject the affidavit sought to be introduced to Dunn LJ’s categorization above. It also behoves the objector to state why new evidence should not be admitted.

In this case, the proposed further affidavit by SOITANAE OLE KORIATA sworn on 13.5.2003 talks of receiving copies of correspondence from Permanent Secretary Ministry of Local Government and Town Clerk County Council of Narok which now shows that there is no defence to Judicial Review. That there was irregularity which may constitute misconduct under the third ground given by Dunn LJ.

Mr. Kalikumi’s ably argued objection however, was that Notice of the Filing was not given but from my analysis of the legal position, it appears the issue of Notice of Intention would have to be considered in the light of those principles. All however, is in the discretion of the Court.

Superstone & Goudie in “Judicial Review” 1992 Edition page 381 says -

“Theoretical basis of Judicial Review requires the Court to consider questions of jurisdiction and procedural propriety rather than the rights or obligations of parties in the normal sense those terms are used .. Judicial Review is concerned with ‘vertical’ relationship between individuals and the state rather than the “horizontal” one between individuals and this renders the purpose of remedies available in public law different.”

It is my view that the further affidavit can be admitted and I so do. Application is granted. The further affidavit filed herein be regarded as duly filed.

DATED at Nairobi this 6th day of June 2003

A.I. HAYANGA

JUDGE

Read to -

Mr. Kilikumi for 2nd interested party

Mr. Kinyanjui for Respondent

Mr. Kinyanjui holding brief for Mr. Wainana for 1st interested party

Miss Karai holding brief for Mr. Mwenesi for Applicant