



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 687 OF 2000

DAVID MWANGI.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RULING

The applicant filed proceeding for a judicial review under order 53 of the Civil Procedure Rules. It seems that he had obtained judgment against the Government from the High Court of Kenya whereby he was declared the owner of a particular piece of land. He was also awarded the costs of the said suit.

The Government failed to pay his costs. The applicant then filed these proceedings seeking orders of *mandamus* to compel the Attorney General to pay the costs.

The application was brought under certificate of urgency but the Court (Githinji J) rightly declined to certify it as urgent.

It then came before me on a Friday judge matter and the issue of procedure in presenting the application to Court then arose.

The advocate for the applicant claimed that he had complied with the service of his documents to the Registrar by lodging his documents in the registry and obtaining a court stamp. That the subordinate staff should do the work on behalf of the Registrar or else he would be overwhelmed.

For ease of clarification I wish to outline the procedure in which an applicant comes to Court by way of judicial review. There have been articles written on this matter by Mr Norowjee, an advocate of the High Court of Kenya some years back. There is an authority dealing with the subject matter by Akiwumi J (as he then was) and Chesoni J (as he then was). I would invite the applicants to those readings.

The title of the proceedings is important. I wish to begin here. An application is always of the Republic against the respondent. The actual party who brings the application is not described as the applicant. The Republic is referred to as the applicant. The person who brings the application is the “*ex parte*” applicant. Therefore the format should appear as such.

Republic of Kenya

In the High Court of Kenya at Nairobi

Misc Civil Suit Application No.....

In the matter of an application for leave to apply for judicial review and for orders of *mandamus*.

In the matter of: quote act

In the matter of:.....applicant

Republic applicant

Versus

The Hon Attorney Generalrespondent

Ex parte David Mwangi..... applicant

A miscellaneous civil suit application file is opened in the registry of the High Court of Kenya. This is opened in the registry of the High Court of Kenya. This is on presentation by the *ex parte* applicant with a statement (o LIII r 1 (2) CPR)

i) Setting out the name and description of the applicant

ii) The relief sought

iii) And the grounds on which it is sought.

iv) And verifying affidavits.

A chamber summons is also filed together with the above document seeking for leave to bring an application for order of *mandamus*, prohibition or *certiorari*.

This application for leave is *ex parte* and heard before a judge in chambers. Before the application is heard the day preceeding the hearing an application for leave to bring an application for a judicial review, the applicant must give notice of the application for leave.

“Not later than the preceeding day to the Registrar”. He shall also “lodge with the Registrar copies of the statement and affidavits.”

(Emphasis my own)

This means that the rules require that the Registrar is notified of the applications on judicial review being made. A notice is given to the Registrar and copies of the statement lodged with him on the preceeding day before the hearing.

It therefore means that a file has to be first opened before the notices and documents are given to the Registrar. One does not serve the notice then open the file. I seem to be under the impression that the parties go to the registry and file their notice without a file being opened. They then file their documents the following day when the file is opened and say it constitutes a service on the Registrar. This is not correct.

The judge on hearing the application *ex parte* for leave to apply for orders of prohibition and *certiorari* may grant leave. There are situations that the judge may refuse to grant orders of leave. For example under order LIII r 2 CPR if leave applied for orders of “*certiorari* to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed” the application for leave must be made within 6 months of the date when the orders are issued.

Where leave has been granted for orders of *mandamus*, prohibition or *certiorari*, the “application shall be made 21 days by notice of motion to the High Court and there shall, unless the judge granting leave has otherwise directed be at least 8 clear days between the service of the notice of motion and the day named therein for hearing”.

The notice of motion is served on all persons directly affected once filed.

The filing of the notice of motion is done in the same file as to whenever leave was sort. This is because it is this file that contains the statement and affidavits relied on in the application. A new suit file is not opened. If it was the Rules would have provided for a motion to be filed as opposed to a notice of motion.

Once the notice of motion has been filed on all persons an affidavit of service that said notice of motion must be filed before setting the case for hearing (order LIII r 3(3) CPR). If such a person has not been served the affidavit of service is to state such fact.

Copies of the statement must also be served. This is served together with the notice of motion. The affidavit are supplied.

The applicant (*ex parte*) shall have the right to begin during the hearing. Any person desiring to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard.

In this present application, a statutory statement has been filed. A verifying affidavit and a notice to the Registrar were also filed.

The documents were filed under certificate of urgency in the High Court of Kenya at Nairobi Civil Registry. This was on 28.6.2000. The applicant (*ex parte*) appeared the same day the documents were filed before Githinji, J. The Hon judge declined to certify the matter urgent.

Instead of taking a hearing date in the registry, the matter was placed on the Friday judge matters. Service of the application was effected on the Attorney General.

The advocate conceded that the application he was coming for was for leave to apply for orders of *mandamus*. That this application is heard *ex parte* and service on the Attorney General was done by his clerk. This was an oversight.

I believe that service should be on the Registrar by way of notice and lodging of the statements and affidavits. The purpose of such notice is to give the Registrar an opportunity to alert the respondent, if need be of such application being filed. There would be 21 days in which to be prepared or be alerted.

The Registrar should have in place registers to receive these documents. For ease of proof that this has been done an affidavit of service should be filed to this effect.

The application for leave to apply for a judicial review is made *ex parte*.

I note in this matter that the format of bringing this application is defective. As stated earlier the Republic is the applicant and is named by bringing the application to Court when we refer to the *ex parte* applicant (The one who actually files and brings the proceedings to Court) he is referred to as the applicant.

I hereby find that the notice to the Registrar was not given to him. By filing the notice in the registry, it does not mean that the Registrar has been given the said notice. This is because the Rules specifically says that a notice be given to the Registrar. Application for judicial review are not as many as the number of suits filed in Court. The Registrar cannot be overwhelmed by being served personally. My interpretation of Registrar includes the Principal Registrars and the Deputy Registrar in any High Court.

I find that the notice has not been given to the Registrar “ not later than the preceding day”.

This Court can of course extend the period in which such notice is given to the Registrar or exercise the filing of the notice for good cause.

In this instance I would decline to extend the period as the proceedings are manifestly defective. This can be cured by an amendment and before any of the application is heard.

This matter be amended within 14 days. That thereafter the Registrar be given the amended notices and statement and affidavits on the proceeding day before hearing.

Dated and Delivered at Nairobi this 21st day of July 2000.

M.A.ANG'AWA

JUDGE