



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**MILIMANI LAW COURTS  
MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 1998**

**ISABEL WAFFUBWA.....PLAINTIFF**

**VERSUS**

**THE DIRECTOR**

**KENYA WILDLIFE SERVICES..... DEFENDANTS**

**THE ATTORNEY-GENERAL.....RESPONDENTS**

**RULING**

Mr. Muthoga raised a Preliminary objection that the Motion is at variance with the leave granted for the Judicial Review in that the leave did not include the Orders sought in the motion. The Motion has other prayers for which the leave was granted. The affidavit is necessary only for the verification of the facts and it is not supposed to serve as the carrier for the reliefs. Joining of the Attorney-General and Mr. Western are misjoinders. The mistake cannot be corrected by amendment.

Mr. Mwenesi replied that a preliminary objection to be valid must be such that if upheld will go to the root of the claim, which is not the case in this one.

I have looked at the leave granted and compared it with the orders sought in the Notice of Motion. I agree with Mr. Muthoga that in the Notice of Motion there is an additional prayer of Certiorari, which was not in the Order which gave the leave.

As to whether the mistake is fatal, I had to look at Order 53 in English Supreme Court Practice Rules for guidance and to the English Practice on Judicial Review.

An application for Judicial Review must be made into two stages. First being the obtaining of the leave for Judicial Review and thereafter the substantive application for the Judicial Review.

The application for leave in accordance with the order, the applicant must:-

- (1) have sufficient interest
- (2) have a case sufficiently arguable to merit investigation at the substantive hearing.
- (3) must apply for the leave promptly

To show that these requirements are complied with, the application for leave must contain a statement which gives the relief sought and grounds upon which it sought. This is in addition to the verifying affidavit.

The next step would be to serve the copies of statement relied on support of the application for leave with the notice of motion or summons. It is this statement which was used in the application for leave which forms the basis for the substantive application. The statement therefore must contain all the reliefs and grounds in support of the application. The applicant can not introduce other reliefs which were not contained in the statement. Order 53/14/71 provides that:

“ A party will not be allowed to rely upon any ground or seek any relief at the hearing except the grounds and relief set out in the Statement...”.

This is the English position and I believe it applies in our situation as well. The court has power to grant an applicant leave to amend his statement. If the applicant wishes to rely on other grounds or reliefs other than those in the Statement, he has the option of applying for leave to amend. As it stands now the additional reliefs introduced in the Chamber Summons cannot be allowed.

The Preliminary objection is upheld.

Delivered and dated at Nairobi this 14th day of July, 2000.

KASANGA MULWA

JUDGE