



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC JUDICIAL REVIEW NO. 4 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

BETTY RONO.....3RD RESPONDENT/APPLICANT

(Sued as the Executrix of estate of the late DAVID RONO)

AND

ALMER FARM LIMITED.....EX-PARTE APPLICANT

RULING

1. The 3rd respondent filed an application dated **10/10/2019** under **Order 19 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, seeking an order that the *ex-parte* applicant's director **ABRAHAM KIPTANUI** attends court for purposes of being cross-examined on the contents of the verifying affidavit dated **26/3/2019**, affidavit dated **13/6/2019** and **20/6/2019**.

2. The sworn affidavit of the applicant dated **10/10/2019** was filed in support of the application. The grounds on the basis of which the application is made are that there are factual issues raised by **Abraham Kiptanui** in his affidavits and which can only be addressed during cross-examination; that it is in the best interests of justice that the *ex-parte* applicant's director **Abraham Kiptanui** be cross-examined on the said affidavits. In the supporting affidavit of Betty Rono filed with the application the deponent states that the affidavits of Abraham Kiptanui have alluded to facts relating to the ownership of the suit land and process of purported acquisition of the same. It is also said that there appears to be variance in the contents of the said affidavits and in the belief of the deponent they were not signed by the said Abraham Kiptanui.

3. The applicant filed a supplementary affidavit sworn on **16/12/2019**. In that affidavit she stated that the *ex-parte* applicant raises both procedural and ownership issues which require an interrogation; that there is no evidence that Abraham Kiptanui is of advanced age and bedridden; the apprehension that Abraham Kiptanui is not the one who signed those affidavits is also decipherable.

4. The *ex-parte* applicant filed a replying affidavit dated **15/11/2019** sworn by the same Abraham Kiptanui who is sought to be cross-examined. He depones that he swore the verifying affidavit in support of judicial review notice of motion; that judicial review does not delve into facts forming the substance of the disputes but deals with procedural aspects; that there is no basis has been laid for the proposed cross-examination; that the applicant has not identified the paragraphs in the affidavits which raise the alleged factual issues upon which it is intended to have him cross-examined; and the threshold of issuance of an order of cross-examination has not been attained; that the application is without basis and is meant to delay the hearing of the motion; that the alleged factual issues of ownership complained of are not before this court for determination and that he is of advanced age and currently bedridden in Nairobi and an order for cross-examination would prejudice the conclusion of the case.

5. The *ex-parte* applicant's written submissions were filed on **15/1/2020** while the 3rd respondent filed his on **6/2/2020**.

6. In her submissions filed on **6/1/2020** and of the same date, the applicant maintained that the cross-examination of a deponent is provided under **Order 19 rule 2** of the **Civil Procedure Rules 2010**; that judicial review proceedings are also part and parcel of the Civil Procedure Rules, thus bringing them within ambit of the application of **Order 19 rule 2** of the Civil Procedure Rules. It also maintains that the issue of ownership of title forms the core of the *ex-parte* applicants judicial review motion and therefore the proceedings are not about procedure alone. He maintains that the issue of ownership of the suit property calls for evidence and cross-examination of the deponent herein will

enable the determination of the veracity of the contents of the affidavit.

7. In its submissions the *ex-parte* applicant maintained that the 3rd respondent has not laid basis for cross-examination; he relied on **ELN (Main suing through her mother JN -vs- Benard Heinrich Graff and Another [2016] eKLR** and **R -vs- Constituency Development Fund Board & Another Ex-parte Robert Iltaramwa Ochale & 5 Others [2012] eKLR, GGR, -vs- HPS [2012] eKLR**. It stressed that it is trite that an application for cross-examination ought to state clearly the paragraphs in the affidavit on which it is intended to cross-examine the deponent on.

8. The *ex-parte* applicant also maintained that cross-examination is not tenable in judicial review proceedings. It cited **Sanghani Investments Ltd -vs- Office in Charge Nairobi Remand & Allocation Prison [2007] 1EA 35**, and **Republic -vs- Kenya Revenue Authority Ex-parte Althaus Management & Consultancy Ltd [2915] eKLR**.

9. The interlocutory battle between the 3rd defendant and the *ex-parte* applicant is clearly based on the understanding that affidavit evidence is vital in these proceedings. It was stated long ago that the evidence to be relied on in judicial review proceedings is in the verifying affidavit. In the case of **Commissioner General, Kenya Revenue Authority through Republic v Silvano Onema Owaki T/A Marenga Filling Station [2001] eKLR** where it was stated 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. That appears to be the meaning of rule 1 (2) of 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] 1 K. B. 281).“The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”

At page 283 of the report of the case of R. V. Wandsworth Justices, Viscount Caldecote C.J. said:

“The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.”

The court in the Wandsworth case was considering the provisions of Order 53 of the English Rules of the Supreme Court which are *in pari materia* with our Order LIII of the Civil Procedure Rules...”

10. In the **R -vs- Constituency Development Fund Board & Another Ex-parte Robert Iltaramwa Ochale & 5 Others [2012] eKLR, GGR, -vs- HPS [2012] eKLR case (supra)**, the applicants sought to cross-examine the deponents of some affidavits in the judicial review notice of motion on the basis that the same bore falsehoods made with an intent to mislead the court. Though the court in that case held that in appropriate circumstances the court will allow cross-examination of a deponent, it dismissed the application, stating as follows:

“They (the applicants) seem to clearly know what is not right about those affidavits. What they should have done is to seek leave so that they can file further affidavits to countermand the falsehoods in the affidavits. In my view they have not advanced any good reason for wanting to cross examine the deponents.”

11. The decision in the case of **Sanghani Investments Ltd -vs- Office in Charge Nairobi Remand & Allocation Prison [2007] 1 EA 35** the *ex-parte* applicant sought *certiorari*, prohibition and certain declarations. Declarations were found to be untenable in judicial review by the court with the observation that a declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the court to determine the case on the merits before declaring who the owner of the land is.

12. In the same case, the court distinguished between the ordinary claims regarding ownership occupation and dealings with land from judicial review proceedings stating that:

“I do not agree with the respondents that the underlying dispute herein is ownership of land. Judicial review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the name of the applicant; whether the title is genuine or not. In the case of Rep -vs- Ex Parte Karia Miscellaneous 534 of 2003 Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow *viva voce* evidence and cross examination of witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents they would be copies that would not be sufficient to establish the authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

13. The applicant has relied on the provisions of **Order 19 Rule 2** of the Civil Procedure Rules and that judicial review proceedings are also part and parcel of the Civil Procedure Rules, thus bringing them within ambit of the application of **Order 19 rule 2** of the Civil Procedure Rules. I have considered the decision in **Republic -vs- Kenya Revenue Authority Ex-Parte Althaus Management & Consultancy Ltd [2015] eKLR** where the court agreed with the decision in **Lawson and Anor -vs- Odhams Press Ltd. and Anor. (1948) 2 All ER 717** that cross-examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances and also the decision

in **G G R vs. H-P S [2012] eKLR** that a court may order cross-examination in instances of allegation contained in affidavits of matters touching on fraud, mala fides, authenticity of the facts deponed, bad motive, among others.

14. Concerning the applicability of the Civil Procedure Rules, and specifically **Order 19 Rule 2** therein, I must again refer to the rather persuasive decision in **Republic -vs- Kenya Revenue Authority Ex-Parte Althaus Management & Consultancy Ltd [2015] eKLR** where the court observed as follows:

“10. I have considered the issues raised herein. The first issue for determination is whether Order 19 of the Civil Procedure Rules applies to applications under Order 53 thereof. Section 3 of the Civil Procedure Act on the other hand provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

11. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the Civil Procedure Act are inapplicable. It must be remembered that apart from Order 53 of the Civil Procedure Rules, the provisions of the Civil Procedure Act and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 19 does not apply to these type of proceedings. It ought to be remembered that the preamble to the Civil Procedure Act provides that it is “An Act of Parliament to make provision for procedure in civil courts”. In Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983 the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such an Act and the provisions of the Civil Procedure Act and rules cannot be applied merely because the special procedure does not exclude them. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil nor criminal jurisdiction in the strict sense of the word.”

15. In the instant case the *ex-parte* applicant seeks orders of certiorari directed to the National Land Commission to remove into this court and to quash its decision of **7/2/2019** and the decisions published on **1/3/2019**, and an order of prohibition to prohibit it from interfering with the applicant’s ownership and possession of Land Reference Number 8940. The *ex-parte* applicant cites grounds of illegality, excess of jurisdiction, irrationality, arbitrariness and bias. Clearly, the dispute herein is not about the validity of the *ex-parte* applicant’s title to the land as intimated by the 3rd respondent. It is about the propriety of the procedure employed by the National Land Commission and whether it acted beyond its powers as conferred by the laws and the Constitution of Kenya. I find that the proceedings before court fit into the perfect pigeon hole of normal judicial review proceedings. Deviation from the normal manner of disposal of judicial review proceedings so as to include cross examination of the deponents of the *ex-parte* applicant’s supporting affidavit would go against the normal practice and strong grounds would have to be given to justify this detour which in my view the 3rd respondent has not provided this court with.

16. It is the view of this court that it has been demonstrated by reference to the decided cases above that first, the instant application falls short of the requirements of an application seeking an order that a deponent be summoned to be cross-examined on his affidavit and secondly that in judicial review proceedings it is not the norm to summon deponents to be cross-examined on their affidavits save in very exceptional circumstances.

17. Consequently the application dated **10/10/2019** has no merit and the same is hereby dismissed with costs to the *ex-parte* applicant only.

Dated, Signed and Delivered via electronic mail at Nairobi on this 21st day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.