



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW**

**MISCELLANEOUS APPLICATION NO. 319 OF 2016**

**IN THE MATTER OF SOCIETIES ACT CAP 108 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF CMCC NO.64 OF 2010 BEFORE THE CHIEF MAGISTRATE'S COURT  
AT NAIROBI**

**AND**

**IN THE MATTER OF APPLICATION BY WAY OF JUDICIAL REVIEW PROCEEDINGS  
FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI AGAINST THE  
REGISTRAR OF SOCIETIES APPOINTED UNDER CAP 108, LAWS OF KENYA**

**BETWEEN**

**REPUBLIC OF KENYA.....APPLICANT**

**AND**

**THE REGISTRAR OF SOCIETIES.....RESPONDENT**

**VERSUS**

**ANN NJERI WAIHUMBU.....1<sup>ST</sup> INTERESTED PARTY**

**SUSAN NDUTA NDUNGI.....2<sup>ND</sup> INTERESTED PARTY**

**MARTIN GACHERU.....3<sup>RD</sup> INTERESTED PARTY**

**DANIEL ABEA.....4<sup>TH</sup> INTERESTED PARTY**

**SUSAN NDUTA KIMANI.....5<sup>TH</sup> INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> INTERESTED PARTY**

**EX-PARTE/APPLICANTS**

**JOSEPH NDEMI WANJIRI.....1<sup>ST</sup> EX-PARTE APPLICANT**

**LUKA GITHINJI NDEGWA .....2<sup>ND</sup> EX-PARTE APPLICANT**

**GODFREY CHEGE MUIGAI.....3<sup>RD</sup> EX-PARTE APPLICANT**

**ANN RUTH WANJIKU.....4<sup>TH</sup> EX-PARTE APPLICANT**

**JACKSON MUSYOKA JUMA.....5<sup>TH</sup> EX-PARTE APPLICANT**

**BEING THE OFFICIALS OF KAWANGWARE MARKET DEVELOPMENT SOCIETY**

**RULING**

1. By a notice of motion dated 22<sup>nd</sup> July 2016 and filed in court on the same day, the exparte applicants claiming to be officials of the Kawangware Market Development Society sought from this court orders:

i. Spent

ii. That leave be and is hereby granted to the exparte applicants to apply for an order of certiorari to remove the decision of the Registrar of Societies given on 19<sup>th</sup> April 2016 for purposes of being quashed. The leave so granted do apply as stay of the said decision;

iii. That leave be and is hereby granted to the applicant to apply for an order of mandamus and or prohibition directing the Registrar of Societies not to issue and or prohibiting him or her from issuing punitive directions against the exparte applicants before the dispute/complaint on purported elections of 13<sup>th</sup> April 2016 is fully heard and determined. The leave so granted does apply as stay of the purported elections.

iv. That this Honourable court be pleased to command the officer commanding Muthangari Police Station be ordered to provide security to ensure compliance with the orders of this Honourable court.

v. Spent

vi. That this Honourable court be pleased to make such other and or further orders that it may deem appropriate in the circumstances.

vii. Those costs of this application are provided for.

2. The notice of motion was based on the grounds on the face of the motion, and supported by the affidavit of Joseph Ndegi Wanjiru commissioned on a photocopied jurat of 22<sup>nd</sup> July 2016 and a further affidavit by the same deponent sworn on 15<sup>th</sup> August 2016 in response to the interested party's replying affidavit sworn on 5<sup>th</sup> August 2016 by Anne Njeri Waihumbu.

3. The motion was specifically brought under the provisions of Section 3,3A of the Civil Procedure Act and Order 53 Rule 1,2, and 3 of the Civil Procedure Rules, 2010 and all other enabling powers and provisions of the law, as well as in the matter of the Societies Act, Cap 108 Laws of Kenya and in the matter of the Law Reform Act Cap 26 Laws of Kenya.

4. The court overtly notes that there is no statutory statement filed by the exparte applicant, setting out the grounds upon which the motion is predicated. Secondly, the application is originated by notice of motion and not chamber summons as stipulated in Order 53 Rule 2 of the Civil Procedure Rules. Nonetheless, this court is prepared to hold that the filing of a notice of motion instead of a chamber summons is only but an issue of form and not substance and is therefore curable by application of Article 159 of the Constitution.

5. However, on the issue of lack of a statutory statement, this court must establish whether the omission thereof is a mere procedural technicality or whether it goes to the root of the matter thereby affecting the substance.

6. I find it necessary to highlight this point because this court is deemed to know the law and therefore it cannot be clouded by the submissions of parties, however persuasive, in arriving at its decision on the substance of the proceedings.

7. Order 53 Rule 1 of the Civil Procedure Rules which is the procedure for filing of Judicial Review proceedings and orders for mandamus prohibition and certiorari is clear that:

***“ 53 (1) No application for an order of mandamus, prohibition and certiorari shall be made unless leave therefore has been granted in accordance with this rule;***

***(2) An application for such leave as aforesaid shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”***

8. From the above initial provisions of the Order 53 of the Civil Procedure Rules, I can certify that leave application is the one subject of this ruling. However, the fact that Rule 2 is clear that the application must be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which the relief is sought and by affidavits verifying the facts relied on, then, in the absence of a statutory statement and or verifying affidavit, the application would be unsupported and would be amenable for striking out in limine.

9. In the present case, the application is accompanied by a supporting affidavit which is unnecessary and a verifying affidavit. However, on that fact alone, this court would not find the application incompetent.

10. The big question is lack of a statutory statement, which in my humble view, is a manifest vitiating error of omission apparent on the face of the record and which this court cannot ignore.

11. Furthermore, the fact that Section 12 of the Fair Administrative Action Act No. 4 of 2015 is clear that: *“12. This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice”* means that the new law does not oust the provisions of Order 53 of the Civil Procedure Rules, since there are no regulations yet, promulgated under Section 13(1) (2) of the Act.

12. 10. Order 53 Rules (2) of the Civil Procedure Rules is clear that the grounds upon which the Judicial Review application will be founded will be in the statutory statement. Further, Order 53 Rule 4 is clear that:

***“4(1) copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter 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.”***

13. From the above Rule 4(1), the applicant, once granted leave, is mandated to file the substantive

motion and serve together with copies of the statement and verifying affidavits accompanying the application for leave.

14. The Rule also prohibits reliance on any grounds other than the grounds relied on in the statement accompanying the application for leave.

15. In **Susan Gacheri Kithinji vs OCPD Dadoab and another [2016] e KLR**, the Honourable Dulu J on 26<sup>th</sup> April 2016 struck out both the application for leave and the substantive motion that were filed without any statement as stipulated under Order 53 Rule 4 of the Civil Procedure Rules.

16. Further, in **John Waweru Vs District Veterinary Office Maragwa & Another [2006] e KLR**, Wendo J in dismissing the application for Judicial Review where there was no statement made it clear, inter alia, that:

***“.....Neither the application for leave, nor the application filed after leave was obtained contains a statutory statement as required by law. On that account, even the application which was filed after leave was obtained, was fatally defective and stands no chance of salvation.”***

17. In the above decisions are persuasive. Nonetheless, they are well grounded on the law as established and there is no contrary superior decision that overrides the said decision. A statutory statement accompanying an application for leave to institute Judicial Review proceedings is a requirement of the law wherein the name and description of parties, the relief sought and the grounds on which the said reliefs are sought should be contained.

18. There is no requirement that an applicant can obtain leave without an accompanying statement and then seek to file the statement later, with the substantive motion.

19. Therefore, the fact that there is no statutory statement filed with the application for leave in this case, in my humble view, renders this application for leave fatally void ab initio since only those reliefs that are or would be in that statutory statement and the grounds thereof, would be used or relied on in arguing or prosecuting the main motion, after leave is granted.

20. This court had the opportunity to deal with a similar issue in **JR 249/2015 Republic Vs Registrar General & 2 Others exparte Thomas Asogo & 2 Others[2016] e KLR** where I held inter alia:

***“95. I am not persuaded that in the circumstances of this case, Article 159 of the Constitution would come to the aid of the applicant. To hold that failure to file a statutory statement to accompany application for leave or the substantive motion is a procedural technicality would be stretching Article 159 too much and to seek to provide succor and cover to parties who exhibit scant respect for rules and matters of substance that clothe this court with jurisdiction to hear and determine the matters before it, and which rules serve to make the process of judicial adjudication and administration fair, just, certain and even handed.”***

21. This court is further fortified by the Court of Appeal decision in **Nicholas Kiptoo Arap Korir Salat Vs IEBC & Others Civil Application Nairobi 228/2013** per Ouko Kiage and Mohammed JJA, that

***“ Courts cannot and in the bending of circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarify where issues of rules and their application are concerned.”***

22. It is for the above reasons that the application herein for leave is fatally incompetent and I proceed to

strike it out.

23. Judicial time is extremely precious and having found that there is no statutory statement accompanying the application for leave and therefore that the application for leave is manifestly fatally incompetent, and having proceeded to strike out that application for leave dated 22<sup>nd</sup> July 2016, I do not find any value in proceeding to determine the merits of the application for leave as that would be a waste of precious judicial time.

24. Furthermore, had the respondents and interested parties raised this issue, this court would have determined the application and issue on the spot. In the end, the notice of motion dated 22<sup>nd</sup> July 2016 is hereby struck out with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 4<sup>th</sup> day of January 2017.

**R. E. ABURILI**

**JUDGE**

**In the presence of**

Mr Muguro for the exparte applicants

Mr A.S Masika h/b for Mr Nyakiangana for the 1-5<sup>th</sup> interested parties

CA: Lorna