



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC. CRIMINAL APPEAL NO. 14 OF 2015

IN THE MATTER OF AN APPLICATION BY KAMUSINGA YEARLY MEETING OF FRIENDS
CHURCH (QUAKERS) FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE SOCIETIES ACT (CAP 108) LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

THE REGISTRAR OF SOCIETIES.....RESPONDENT

JOHN MAKOKHA

JOEL WEKESA

JAMES SIMIYU WABUKHA.....EXPARTE APPLICANTS

GRAHAM KISIANG'ANI

JAPHETH MUKOYA

RULING

1. The ex parte applicants namely John Makokha, Joel Wekesa, James Simiyu , Graham Kisiang'ani and Japheth Mukoya sought leave to file for judicial review proceedings in Misc. Application NO. 11 of 2015.
2. Leave was granted to commence proceedings for an order of certiorari to remove into court and quash the decision of the Registrar of Societies contained in the letter dated 6.2.15 cancelling registration no. 45492 in the name of KAMUSINGA YEARLY MEETING OF FRIENDS CHURCH (QUAKERS). The substantive motion was to be filed within 21 days.
3. Subsequent to the above leave the Ex -parte applicant filed a substantive motion subject matter herein in a separate file, being this file Misc. Application NO. 14 of 2015. This is what has triggered the Preliminary Objection by the respondent who contends that the Notice of Motion herein is fatally defective, bad in law and does not meet the basic tenets of Judicial Review applications.

In her submissions, Miss Lutta for the respondent argued that Order LIII Rule 3 did not contemplate two separate suits in a judicial review and that the substantive application should have been filed in the earlier file. She relied on the following authorities in support.

1. **REPUBLIC V. THE CHAIRMAN KABRAS LAND DISPUTES TRIBUNAL & ANOTHER EXPARTE JEREMIAH LUCHOMBO [2007] eKLR**
2. **REPUBLIC VS. CHIEF MAGISTRATE THIKA & 2 OTHERS EXPARTE ROBERT MWANGI MBUGUA [2013] eKLR**
3. **MICHAEL MUNGAI V. ATTORNEY GENERAL & 9 OTHERS [2015] eKLR.**

4. In his response Mr. Were for the *Ex-parte* applicants opposed the preliminary objection and argued on his part that Order L111 does not make it mandatory for the Notice of Motion to be filed within the first file i.e the file where leave was sought. As relates to the authorities cited he submitted that the judges therein did not state that it is mandatory to file within the first file. Further the issue raised is a mere technicality. He relied on Article 159 (d) of the Constitution arguing that the court should not base its decision on a technicality but on the substance of the matter.
5. I have considered the rival submissions by learned counsel on record and the authorities relied on. The issue in contention is whether a substantive motion in a judicial review matter upon obtaining leave ought to be filed in the suit where leave was obtained.

Apart from the three authorities cited by counsel for the respondent I have considered three other authorities namely;

1. **Republic vs. Funyula Land Disputes Tribunal & 3 Others Misc. Appl. No. 327 of 2003.**
2. **Republic vs. Attorney General & 2 Others *Ex-parte* Lemmy Gacheche Wa Miano**
3. **Republic vs. Meru Central District Land Tribunal *Ex – parte* M’Arimi Ikiunga Misc. Appl. No. 68 of 2008.**

In the three authorities cited by the learned Counsel for the applicant/respondent judges of concurrent jurisdiction were of the view that it makes good practice and is practical to file the substantive motion in the same file as the application seeking leave

In **Republic vs. Funyula Land Tribunal & 3 Others** (supra) and also **Republic vs. Attorney General & 2 others** in both courts of concurrent jurisdiction the court held the opinion that once leave was obtained the matter was spent and the substantive Notice of Motion has to be filed in a fresh suit.

In the case of **Republic vs. Meru Central District Land Tribunal *Ex-parte* M’arimi Ikunga High Court Misc. Application NO. 68 of 2008.**

A preliminary objection was raised challenging the filing of the substantive motion in the file where leave was obtained. The same was said to be fatal and ought to be struck out. The applicant there argued that the process of obtaining leave, service upon the respondent and filing the substantive motion were all one process and that it was good practice to bring them together. The judge in the matter stated

“I for one do not consider it fatally to file a motion under the same file where leave was granted.”

Order LIII rule 3 (1) provides that once leave is obtained the Ex-parte applicant should file the substantive motion within 21 days. The rule does not provide for such a motion to be filed in a separate file. In my view, to file the motion in the file where leave was obtained ensures continuity in the matter and also is a check against duplicate files being opened. More often than not, the miscellaneous file under which leave I was obtained, if the substantive motion is not filed under it, remains open in court registry and continues to be reflected as a back log.

I am in agreement with the submission of the Ex-parte applicant that filing of the motion in the same file as the file where leave is obtained is a better practice but it should be noted to either file the substantive motion in the file where leave was obtained or not does not go to the root of the matter. It is, in my view, of no consequence. The objection fails and is rejected” (emphasis mine)

6. It is evident from the authorities cited above that there are different opinions as regards the procedure to be followed at least within the High Court. I am inclined in this era of the Constitution 2010 that frowns upon technicalities on the face of substance, align myself with the sentiments of Kasango J in the latter case. I do concur that It matters not where the motion is filed. The court ought to be concerned with the substance of the case other than technical procedure. Indeed since all papers filed in the earlier suit have been filed in this suit together with the substantive motion no prejudice is likely to be suffered by the respondent and furthermore the issue raised does not go to the root of the matter. However as noted by all judges in all the cases quoted above, it is good practice to file the substantive motion within the file where leave was obtained as this avoids duplication and unnecessary opening of files and is definitely neat practice.

For the reasons given above the preliminary objection fails.

Dated at Bungoma this 9th day of June 2015.

ALI-ARONI

JUDGE