



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO. 2 OF 2014

(JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION TO INSTITUTE JUDICIAL REVIEW FOR WRITS
OF MANDUMUS AND PROHIBITION**

AND

IN THE MATTER OF NYAMASIBI WARD ADMINISTRATOR

AND

**IN THE MATTER OF CONSITUION OF KENYA – 2010 AND THE COUNTY
GOVERNMENT ACT 2010**

AND

**IN THE MATTER OF THE KISII COUNTY GOVERNMENT MINISTRY OF ADMISTRATION
AND INTERNAL SECURITY**

BETWEEN

JOHN SAGWE.....1ST APPLICANT

LAWRENCE OMBATI.....2ND RESPONDENT

AND BICHOTI.....3RD RESPONDENT

JOHN MOYWAYWA.....4TH APPLICANT

AND

KISII COUNTY GOVERNMENT.....1ST RESPONDENT

PUBLIC SERVICE BOARD-KISII COUTY.....2ND RESPONDENT

EMILY BOSIBOR NYAKENYWA.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 27th January 2014 and expressed to be brought under **Order 53 Rules 4** of the **Civil procedure Rules 2010** the applicants seek the following orders:-

1. ***THAT this application be certified urgent and be heard ex parte.***
2. ***THAT leave be granted to the applicants to enable them institute an application for the judicial review under the writs of mandamus and prohibition prohibiting the respondent from issuing the letter of appointment to the interested party herein who is scheduled to be confirmed as the Nyamasibi Ward Administrator and yet she is not a subject of the said ward.***
3. ***THAT if the leave is granted [the same] do operate as a stay of the appointment pending the hearing and determination of this application.***
4. ***THAT costs of the application be borne by the respondent.***

2. The application was supported by an affidavit sworn by the 1st applicant herein John Sagwe with authority from the other 3 applicants. He deponed that the 2nd respondent advertised vacancies in Kisii County in reference to ward administration asking interested parties to submit their applications for vacancies in their respective wards. That the 2nd respondent shortlisted the successful candidates and thereafter interviews were conducted by her. That applicants were considered based on their academic, residential, leadership and integrity qualities as enshrined in **Chapter Six of the Constitution of Kenya, 2010.**

3. The deponent further stated that the Interested Party is a permanent resident of Mwamogesa village as is so clearly evident from the particulars in her national identity card. That her constituency is Kitutu Chache while Nyamasibi Ward of which she was appointed administrator is situated within Nyaribari Masaba Constituency. It is the deponent's contention therefore that because of this geographical factor, the Interested Party ought not to work as ward administrator in Nyamasibi ward where she is a stranger. According to the deponent, the residents of Nyamasibi ward were so infuriated by the Interested Party's appointment that they had to ask their MCA to seek particulars of the Interested Party's academic credentials and copies of her national identity card. They also wanted her letter of appointment recalled and the respondents restrained from confirming her appointment.

4. The respondents filed Grounds of Opposition as well as a Notice of Preliminary Objection. When the matter came up before me for inter partes hearing on 10th March 2014, parties agreed to canvass the Preliminary Objection by way of written submissions. The submissions were filed as ordered.

5. I have carefully considered the written submissions and the pleadings in general. From an analysis of the same, the following issues arise for determination:-

1. *Whether the respondents Preliminary Objection dated 03/02/2014 amounts to a Preliminary Objection as understood in law?*
2. *Whether the applicant's application meets the requirements of **Order 53 Rule 1** of the **Civil Procedure Rules**;*
3. *Whether the applicant's application is overtaken by events?*

6. The Respondent's Preliminary Objection advances the following grounds:-

1. *That the said application contravenes the express provisions of the law and in particular **Order 53** of the **Civil Procedure Rules** as there are no affidavits verifying the facts relied on.*
2. *That there are no facts as required by the law as the said facts should be contained in a verifying affidavit and not the statement in accordance with **Order 53(1)(2)** of the **Civil Procedure Rules.***
3. *That the supporting affidavit sworn on 27th January, 2014 by John Sagwe is bad in law and the entire application fatally defective as the alleged authority is neither exhibited nor filed along with the suit.*
4. *The 1st respondent has never applied and or been shortlisted for interviews in respect of Ward Administration in the County Government of Kisii nor is there any evidence tendered to support paragraph 6 of the supporting affidavit which in any event makes any sense.*

7. With regard to the first issue, a preliminary objection was defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd, [1969] E.A. 696** where Sir Charles Newbold P stated the following:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

The Learned Judge also stated the following:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In the instant case, though points 1, 2 and 3 of the preliminary objection raise what can be said to be pure points of law, point number 4 is not a point of law as it requires formal proof. Because of the foregoing the respondents’ preliminary objection does not meet the threshold of the **Mukisa Biscuit case** (supra).
9. With regard to the second issue **Order 53 rule 1** of the **Civil Procedure Rules 2010** provides:-

“1 (1) No application for an order of mandamus prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex-parte 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.”

10. Does the applicant’s application satisfy the conditions set out above? In other words, is the application 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 upon?
11. On perusal of the said application, I am satisfied that there is compliance. All the documents mentioned under **Order 53 Rule 1 (2)** were duly filed and are on the file. If the respondents were not served with the same, they should have applied for copies, but they did not do so.
12. In the premises, the respondents’ notice of preliminary objection dated 14th February, 2014 fails as his contention that the statement of facts and verifying affidavit are not infact in the file is untrue.
13. Before I conclude this ruling, I must comment on the applicants’ Notice of motion which seems to be unprofessionally drafted and contains numerous grammatical and drafting errors. The errors could be excused if the applicant had drafted the pleadings by himself, but he engaged counsel to draft and file the pleadings on his behalf. I am aware of the provisions of **Article 159 (2) (d)** of the Constitution, but in my considered view, those provisions should not be abused especially where a party is represented by counsel.
14. In the premises, the respondents’ preliminary objection dated 3rd February 2014 is found to be without merit and the same is accordingly dismissed. Costs shall abide the outcome of the main application.
15. Orders accordingly.

Ruling dated and delivered at Kisii this 5th day of June, 2014

RUTH NEKOYE SITATI,

JUDGE.

In the presence of:

Mr. C.A. Okenye for Okemwa for the Applicants

Mr. S.M. Sagwe for Onsembe for the respondents/Interested party

Mr. Bibu - Court Assistant