



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT ELDORET**

Civil Miscellaneous Application 99 “B” of 2000

**PETER SOME KEINO.....APPLICANT**

**VERSUS**

**A.G. & ANOTHER.....RESPONDENT**

**RULING:**

The Preliminary objection herein is dated the 26<sup>th</sup> January, 2005 and is brought by the Interested Party.

Counsel for the Interested Party submitted that there was no Verifying Affidavit in support of the Ex-parte Chamber Summons filed in court on the 13<sup>th</sup> February, 2000.

Counsel referred to Order 53 Rules (1) sub rule (2) of the Civil Procedure Rules which provides that a Verifying Affidavit “**SHALL**” accompany a Statement of Facts and the use of the words “**SHALL**” which makes it a mandatory requirement.

That the Ex-parte Applicant’s application seeking for leave ought to have had a Verifying Affidavit to confirm that the Statement of Facts were correct, therefore without the same, the application was bad in law and ought to be struck out.

Counsel argued that if the leave sought was incompetent, this also made the main substantive motion incompetent, as well.

Counsel prayed that the main motion be struck out with costs.

Counsel for the state associated herself with the submissions of Counsel for the Interested Party and urged the court to strike out the main motion but did not insist on the issue of costs. Counsel also referred the court to the Court of Appeal decision of **R.-VS- COMMISSIONER OF CUSTOMS (KISUMU) eKLR** **in** support of the anomaly.

The Preliminary Objection was opposed by Counsel for the Ex-parte Applicant who urged the court to dismiss the Preliminary Objection and allow the litigants to access justice as it was their constitutional right.

Counsel cited Articles 48 as read with Article 50 (1) of the Constitution 2010 in support of his

submissions.

Counsel also referred the court to the Court of Appeal decision of **TRUST BANK –VS- AMOLO (KSM)** where it was held that;

**“...every court has an obligation to hear and determine matters on merit....”**

In conclusion Counsel stated that the error was not fatal and the defect did not make the application incompetent and urged the court to dismiss the Preliminary Objection.

Upon perusal of the Record, the court finds that the Ex-parte Applicant filed an application seeking leave of the court. The application had a Statement of Facts but was not accompanied by a Verifying Affidavit, verifying the facts relied upon as required by Order 53 rule 1(2)

I concur with the submissions of Counsel for the Interested Party that at the leave stage the Ex-parte Applicant ought to have filed a Verifying Affidavit verifying the facts relied upon in the Statement of Facts.

This court finds that the Ex-parte Applicant failed to comply with Order 53 Rule 1(2) of the Civil Procedure Rules and finds that leave was irregularly obtained therefore making the Notice of Motion, incompetent.

In these premises, the Preliminary Objection is upheld and the Notice of Motion is struck out with costs to the Interested Party.

It is so ordered.

Dated and delivered in Eldoret this 5<sup>th</sup> day of July 2012.

**A.MSHILA  
JUDGE**

Coram: Before Hon. A Mshila J  
CC: Andrew  
Counsel for Interested Party - Ngetich  
Counsel for Exparte Applicant – No appearance.  
State Counsel – No appearance.

**A.MSHILA  
JUDGE**