REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Application 2 of 2009

IN THE MATTER OF AN APPLICATION BY BENSONGITONGA KAMAU TO APPLY FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF NORTH KINANGOP DIVISION LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT 1990

AND

IN THE MATTER OF LAND ARBITRATION

CASE NO.65 OF 2006

REPUBLIC …….....……. APPLICANT

VERSUS

NORTH KINANGOP DIVISION LAND DISPUTESTRIBUNAL ….1ST RESPONDENT

KANGARA KIMANI CHEGE ….....….. 2ND RESPONDENT

BENSON KANGARA KIMANI …..... 3RD RESPONDENT

JERUSHA W. KANGARA …..…….. 4TH RESPONDENT

EXPARTE
BENSON KAMAU GITONGA

RULING

The application dated 24/09/2010 is made under **Order LIII Rule 4(2)** of the **Civil Procedure Rules** seeking that leave be granted to the applicant to amend the Statement of Facts dated 28th February 2007 and to file a further affidavit. It is premised on grounds that there is an error in the statement of facts, and the 2-4th Respondents have filed affidavits raising material facts which require a response. The application is supported by an affidavit sworn by **BENSON GITONGA KAMAU**.

The application is opposed on grounds that it goes against the mandatory provisions of **Order LIII Rule 4(2)** and is an abuse of court process.

The applicant's counsel submitted in writing that there was a procedural error on his part to the effect that in the statement of facts is included a sub-title which reads **"Facts upon which relies is sought"** and the only way to remedy this is by an amendment so as to strike out the sub-title.

Counsel points out that the courts have previously dealt with similar applications such as the case of R V Senior Resident Magistrate's Court, Kajiado exparte **Mpaaya & 2 Others (2004) eKLR** (High Court Misc. Application No.136 of 2003) which stated that:

"The insufficiency of the verifying affidavit in the first place, does not go to the jurisdiction of the court, and is an irregularity which can be cured."

The Respondent's counsel in the written submissions argues that the applicant's substantive motion dated 25/04/2007 was heard on 29th July 2009 where the applicant canvassed his case to completion and the matter was stood over to 4th November 2010 to enable applicant's counsel prepare to respond to the 1st Respondent's grounds of opposition. It is on that date that the applicant sought to argue the present application. It is on account of this that the application is opposed. Further that there are no new matters raised by the Respondents nor has the Respondent demonstrated what new matters arise to warrant admission of a further affidavit.

This court is urged to consider that the further affidavit sought to be introduced are basically the averments on the statement of facts and is a clear attempt by the applicant to cure the irregularities in the pleadings through the backdoor. The application is described as a veiled attempt by the applicant to have the matter started afresh.

Order 42 Rule 4(2) provides that:-

"The High Court may on the hearing of the motion, allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any party to the applications and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand, copies of any such further affidavits."

It has long been recognised that the verifying affidavit is what is of evidential value, and the statement should contain nothing more than the name and description of the applicant and the relief sought (**reference Order LIII Rule 1(2)** under **Order LIII Rule 3(1),** once leave is granted to apply for a prerogative remedy, the application shall be by way of notice of motion.

I have perused the documents relied on by the applicant, actually what the applicant seeks to do is not to respond to new issues – rather it is to rectify the entire defective approach because the statement of facts contain more than what is provided for under Order LIII Rule 1(2) – in fact it contains what should have been included in the verifying affidavit. The verifying affidavit has no evidence, and the proposed further affidavit seeks to reverse the total procedural error made by the applicant. What is contained in the proposed affidavit are not new issues, but issues which were within the knowledge of the applicant as clearly shown in the statement of facts, certainly the intention is to cure the irregularities. A useful decision in this regard is the case of **Commissioner General, Kenya Revenue Authority vs Silvano Onema Owaki Civil Appeal No.45 of 2000**. It then follows that if the statement is the one containing the uncalled for details, it is of no evidential value and the court will not pay regard to it. Indeed this position is confirmed by various decisions – so it is irregular to lodge a statement of all the facts verified by the affidavit.

I think there is a condition placed in amending the statement of defence which is to annex the proposed amendment. This has been met and I therefore allow the prayer to amend statement.

The challenge is with regard to filing a further affidavit, because the provisions of Order 42 Rule 4(2) are clear, that the further affidavits will be allowed:

"If they deal with new matter arising out of the affidavits of any party to the application."

The applicant has failed to demonstrate what new matter has arisen from.

The challenge is with regard to the verifying affidavit – which undoubtedly does not demonstrate what new issues are raised, can it be allowed simply so as to cure the procedural defect. I think we have now gone past the stages of allowing procedural technicalities to unduly hamper justice, especially in a situation where an advocate realises the error made and takes steps to correct it. The spirit is captured by Article 159(d) of the Constitution and what must be done by declining the further affidavit sought to be filed and as to cure the procedural defect . My view on this is that:

(1) No prejudice is occasioned to either party by allowing the filing of further affidavit.

(2) The applicant's evidence will now find its proper place in the affidavits as recognised by the Rules and fortified by case law.

(3) As Ransley J put it in the exparte **Mpaaya case** – the verifying affidavit does not go to the jurisdiction of this court, and filing a further affidavit cures the defect and presents the issue for determination adequately. It cures the irregularity which otherwise shuts out the applicant from being heard.

(4) Disallowing the further affidavit to be introduced will definitely result on the matter being dismissed on technical grounds and the applicant may not have a chance to redeem the situation, because given the nature of the orders sought (certiorari) then Order 53 rule 2, sets a time limit within which to move to court.

I am aware of the decision by Emukule J in **Misc**. **Application No.9 of 2005**, **R V The Registrar of Societies**, but my view is that the decision was made at a time when compliance with strict procedure was required and there was no Constitutional provision offering relief to those who met procedural challenges.

It is on account of this that I find merit in the application and allow it. Costs of this application shall be borne by the applicant.

Delivered and dated this 9th day of October, 2012 at Nakuru.

H.A. OMONDI
JUDGE