



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS CIVIL APPLICATION 7 OF 2009

REPUBLIC OF KENYA APPLICANT

BETWEEN

DISTRICT LAND REGISTRAR NYERI RESPONDENT

NGUGI NJENGA 1ST INTERESTED PARTY

ABEL KANGAU KIBAGE 2ND INTERESTED PARTY

DISTRICT SETTLEMENT OFFICER – 3RD INTERESTED PARTY

AND

HUMPHREY MAINA WAMAE)

WILLIAM KABUCHI) EXPARTE/APPLICANTS

RULING

On 21st April 2009, **Humphrey Maina Wamae** and **William Kabuchi** hereinafter referred to as “*the applicants*” obtained leave to commence as against the **District Land Registrar, Nyeri** hereinafter referred to as “*the respondent*”, **Ngugi Njenga**, **Abel Kangau Kibage** and **District Settlement Officer**, hereinafter referred as “*interested parties*” judicial review proceedings by way of certiorari and Prohibition. The leave so granted was to operate as stay of execution in the matters concerning land parcel numbers **Nyeri/Ngaringiro/437, 438, 467 and 527**. However the stay was to expire after twenty one days if the applicants would not have filed the substantive motion.

On 11th May 2009, the applicants filed the substantive Notice of Motion dated 11th May 2009 and the same was scheduled for hearing on 13th July 2009. On that occasion, **Ms Munyi**, Provincial litigation counsel appearing for the respondent and 3rd interested party respectively raised a preliminary objection to the application stating that the same was bad in law and incurably defective. Counsel submitted that though the application was brought under order LIII of the civil procedure rules, the applicants had failed to cite sections 8 and 9 of the law reform Act. That the statutory statement contained facts which ought to have been in the verifying affidavit. There was a verifying affidavit dated 15th April 2009 but was never

attached to the Notice of Motion. Instead the applicants drew a fresh affidavit dated 8th May 2009 which they annexed to the Notice of motion. That affidavit and the annexures thereto according to counsel ought to be struck out for want of leave.

Mr. Mugo, learned counsel for the applicants sought and was granted time out so as to prepare and respond to the preliminary objection. He did so on 27th July 2009. His response was that there was no legal requirement to cite sections 8 and 9 of the law reform Act in the body of the application. And in any event failure to cite such provisions was not at all fatal to the application. The statement of facts though containing other materials, did however contain the address, the reliefs sought and the grounds upon which the reliefs were sought. He conceded though that the affidavit dated 8th May 2009 was filed irregularly. He had no problem with the same being expunged from the record. Finally counsel submitted that the court cannot dismiss the application. The worst that can happen is to strike it out.

I have carefully considered the preliminary objection, the submissions in favour and in opposition to the same and have reached the conclusion that it was well taken. Sections 8 and 9 of the Law Reform Act donate powers and confer jurisdiction to this court to hear matters of judicial review. Order LIII of the civil procedure rules is merely procedural. It is therefore mandatory for the said sections of the law Reform Act to be cited in the body of the application so as to confer jurisdiction to this court to hear and determine an application for judicial review. As correctly pointed out by **Ms Munyi**, failure to cite those provisions of the law renders the application incurably defective.

The second issue taken up by **Ms Munyi** was that the statutory statement contained the facts of the application instead of the same being in the verifying affidavit. **Mr. Mugo** conceded to this fact but hastened to add that the same statutory statement complied substantially with the basic requirements of the law since it also contained the description of the applicant, the relief sought and the grounds upon which the reliefs were sought as required by order LIII rule 1 (2) of the civil procedure rules.

There is no denying in my view that the statutory statement as filed is in complete breach of the requirements of order LIII rule 1 (2) of the civil procedure rules. The statutory statement accompanying the application must only contain the name and description of the applicant, the relief sought and the grounds on which it is sought and nothing else. The statutory statement filed herein runs foil of the aforesaid requirements. It contains evidence which ordinarily should have been in the verifying affidavit. In the case of **Commissioner General, Kenya Revenue Authority v/s Silvano Onema Owaki T/A Marenga Filling Station, civil appeal number 45 of 2000 (UR)**, the court of appeal observed: “..... **The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case It is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the supreme court practice 1976 VI. 1 at paragraphs 53/1/7**

“The application for leave “By a statement” – The facts relied on should be stated in the affidavit (See Republic v/s Wandsworth JJ; ex.p reat (1942) 1KB 581). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.....”

At page 283 of the report of the case of **Republic v/s Wandsworth Justice, Viscount Caldecote C.J.** said:

“The court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction”

The court in the Wandsworth case was considering the provisions of order 53 of the English rules of the supreme court which are in Pari materia with order LIII of the civil procedure rules. The same situation obtains here. The statement of facts contain evidence which ought to have been in the verifying affidavit. Indeed the verifying affidavit which accompanied the application at the leave stage is made up of three paragraphs only. It simply states:

“1. THAT I am the 2nd ex-parte applicant herein hence competent to swear this affidavit.

2. THAT I hereby verify that the matters set out in paragraphs 1 – 13 of the statement of facts are true to the best of my knowledge, information and belief.

3. THAT what is deponed herein above is true to the best of my knowledge, information and belief”

From the foregoing it is clear that the verifying affidavit above sought to verify the statutory statement which should not be the case. As it is therefore some of the contents of the statutory statement touching on evidence are worthless and inadmissible. If the same are struck out as it should then the substantive Notice of Motion shall be left bare and naked. There will be no evidence in support thereof since the verifying affidavit which should have contained the evidence in support of the application aforesaid does not have such evidence.

The applicants perhaps realising the mistake they had made earlier in the verifying affidavit sought to correct that omission by filing another affidavit with the substantive notice of motion. That subsequent affidavit dated 8th May 2009 was filed without leave of court and ought therefore to be struck out. **Mr. Mugo**, concedes that much. In any event order LIII rule 4 of the civil procedure rules specifically provide that the statements and affidavits accompanying the application for leave are the same ones to be served on the respondents and or interested parties with the substantive Notice of Motion. There is no room therefore for an affidavit which did not initially form part of the proceedings at the leave stage to be introduced by the applicant with the substantive Notice of motion.

In the upshot, I find that the preliminary objection is merited. Accordingly the Notice of Motion dated 11th May 2009 is hereby struck out as being bad in law, incompetent and fatally defective. The respondent shall have the costs of the application.

Dated and delivered at Nyeri this 8th day of October 2009

M. S. A. MAKHANDIA

JUDGE