



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Misc Appli 273 of 2009**

**IN THE MATTER OF: THE PHYSICAL PLANNING ACT, CHAPTER 286, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COMMISSIONER OF LANDS ..... 1<sup>ST</sup> RESPONDENT  
THE REGISTRAR OF TITLES, MOMBASA ..... 2<sup>ND</sup> RESPONDENT  
THE MUNICIPAL COUNCIL OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT  
THE DIRECTOR, PHYSICAL PLANNING ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**AMRIT KAUR SAROUP SINGH SAGOO ..... INTERESTED PARTY**

**AND**

**DAPHNE PAULINE BAGSHAW  
DAVID WALTER HARRIS  
SUSAN JEAN HARRIS  
PAUL JULIAN FAY  
ALEXANDRA NATHALIE FUNKE  
GEORGE BAGSHAW  
CAREL WILHEMUS FUNKE  
DAVID MUSILA ..... EX-PARTE APPLICANTS**

**\*\*\*\*\***

**RULING**

Mr. Muthama acting for the interested party in these Judicial Review proceedings has raised a Preliminary Objection. He submits that the statement filed in support of the application dated 25<sup>th</sup> May 2009 seeking leave to file Judicial Review proceedings is fundamentally and incurably defective as it is not signed by either the advocate appearing for the party or by a recognized agent. As such he argues it ought to be struck out. Mr. Maundu for the Applicant opposes this motion. The statement being challenged was the one attached to the ex-parte application for leave to commence Judicial Review proceedings dated 25<sup>th</sup> May 2009. I have had a look at the said statement and I note that the same is neither dated nor signed at all.

The second limb of this Preliminary Objection is that the verifying affidavit which was filed to verify the said statement is equally

incompetent and ought to be struck out as it has been signed by one Ms. Daphne Bagshaw who did not have written authority from the other seven Applicants to swear it on their behalf.

With regard to the first limb of the objection Mr. Muthama for the Applicant relies upon submits that the statement offends the provisions of O. 6 r. 14 Civil Procedure Rules which provides that:-

***“Every pleading shall be signed by an advocate or recognized agent (as defined by Order III, r. 2), or by the party if he sues or defends in person.”***

The provisions of this Rule are very clear that every pleading must be signed by an advocate, a recognized agent or by the party suing themselves. These provisions of this Rule are mandatory in that the term used is **“shall”**. Therefore any pleading which offends this Rule is invalid and must be struck out. This was the finding of Hon. Justice David Maraga in **HCCC 89 of 2004 KOFEXCO LIMITED –VS- CETCO LIMITED** in which the learned Judge upheld the view that a re-amended Plaintiff which had been neither dated nor signed **“is no pleading and should be struck out”**

Mr. Maundu for the ex-parte applicant opposed this limb of the Preliminary Objection. He argued that since Judicial Review proceedings are neither civil nor criminal and are special proceedings the Civil Procedure Rules with the exception of O. 53 are not applicable. Mr. Maundu further submits that the Respondents having not been a party to the ex-parte application for leave and having only been served under O. 53 (r. 3) (2) cannot contest leave which has already been granted. Their only remedy is to appeal the grant of leave to the Court of Appeal. On this latter point I do agree with the reply of Mr. Muthama for the Respondents that what is being challenged here is **not** the grant of leave by the court but the validity or otherwise of the supporting documents. Leave which is granted in an application based on invalid pleading cannot be said to be valid nor legal and thus cannot stand. The argument that Judicial Review Proceedings are not subject to the Civil Procedure Rules is also in my view fallacious in the present circumstances. Whether these proceedings are criminal, civil or special in nature they are still brought to court by way of pleadings. Those pleading **must** in my view comply with certain rules of procedure. If a document is unsigned and undated it cannot in any way amount to a valid basis for an application for leave. An unsigned and undated statement is undoubtedly incompetent. Who owns this statement? Who will be called upon to account for the contents of the statement? It is inconceivable that Mr. Maundu is saying that the law allows reliance on unsigned and undated pleadings. In my view the statement in support of the application for leave dated 25<sup>th</sup> May 2009 being neither signed nor dated cannot be properly held to be a pleading within the meaning of the law. I do hold that this statement is incompetent and invalid and a nullity in law. As such I do hereby strike out the same.

Even if the statement were found to be valid, the verifying affidavit sworn by one Daphne Bagshaw is not supported by the written authorization of the other seven Applicants as required by O. 1 r.12(1) and (2) of the Civil Procedure Rules which provide as follows:-

***“12(1) Where there are more plaintiffs than one,  
any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings.  
(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”***

Once again the provisions of this Rule are very clear. In this matter there were eight Applicants. Only one of them Ms. Daphne Bagshaw swore and executed a verifying affidavit. She had no written authority from the other seven Applicants and even if she did have such authority it was not filed in court. This verifying affidavit is in my view equally incompetent and must suffer the same fate as the statement. There is no remedy at this point the only option is to strike it out as defective.

Therefore both the statement and the verifying affidavit in support of the application for leave are fatally defective. These are in my view defects that cannot at this point be cured by way of amendment. Logically therefore the leave which was allowed based on these defective pleadings cannot stand and must be set aside as the same is equally defective. I therefore do hereby strike out both the statement and verifying affidavit annexed to the application for leave dated 25<sup>th</sup> May 2009. That being the case the application for leave has no legal basis and is fatally defective. I do hereby set aside the same.

**Dated and Delivered at Mombasa this 5<sup>th</sup> day of November 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Muthama for Interested Party holding brief for Ms. Langat for 3<sup>rd</sup> Respondent

Mr. Gachiri holding brief for Exparte Applicant

No appearance by Attorney General for 2<sup>nd</sup> & 3<sup>rd</sup> Respondent

**M. ODERO**

**JUDGE**

**5/11/2009**