



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
IN THE ENVIRONMENT AND LAND COURT
JUDICIAL REVIEW NO. 20 OF 2013

IN THE MATTER OF AN APPLICATION BY NANCY WATHIBA KIMOO FOR LEAVE TO APPLY
FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF PROCEEDING IN KERUGOYA PRINCIPAL MAGISTRATE'S COURT L.D.T
NO. 16 OF 2010

REPUBLIC APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE'S COURT KERUGOYA1ST RESPONDENT

THE CENTRAL LAND DISPUTES TRIBUNAL 2ND RESPONDENT

TABITHA W. MURIUKI 3RD RESPONDENT

AND

NANCY WATHIBA KIMOO EX-PARTE APPLICANT

RULING

By a Notice of Motion dated 9th December 2014 and filed herein on 19th December, 2014 pursuant to leave granted by this Court vide the ruling delivered on 8th December 2014, the applicant moved this Court seeking the following substantive orders:-

1. *That an order of certiorari do issue to remove into the High Court and quash the award of the Central Land Dispute Tribunal of 8th June 2010.*
2. *That the costs of this application be borne by the Respondents.*

The application was stated to be based upon the grounds set out in the Chambers Summons dated 15th June 2010, statement of facts and the verifying affidavit therein and on grounds and submissions to be adduced at the hearing.

The 3rd respondent filed grounds of opposition to the said Notice of Motion citing the following:-

1. ***That the application is fatally incompetent.***
2. ***That the application is frivolous and abuse of the Court process.***
3. ***That the application offends the provisions of Order 53 Rule 1(2) and Rule 4(1) of the Civil Procedure Rules as it is not accompanied by a statement setting out the name and description of the applicant and the grounds on which it is sought.***
4. ***That the application is not supported by any verifying affidavit.***
5. ***That the application lacks facts to be relied on.***

The 1st and 2nd respondents did not file any responses to the application.

As indicated above, this Notice of Motion was filed pursuant to the orders of this Court made on 8th December 2014 which extended time to the applicant to file this application. The relevant paragraph of the said orders reads as follows:-

“I accordingly grant the applicant an extension of time for the filing of the Notice of Motion to the effect that the said Notice of Motion be filed and served within 21 days of the delivery of this ruling”.

It is not in dispute that when the applicant made her ex-parte application dated 15th June 2010 before W. Karanja J. (as she then was), the same was accompanied by a statement setting out her names, the reliefs sought as well as the affidavit verifying the facts relied upon as required by **Order 53 Rule 1(2) of the Civil Procedure Rules**. This Court having granted her an extension within which to file the Notice of Motion, the applicant was also required to comply with the provisions of **Order 53 Rule 4(1)** while filing the said Notice of Motion. That Order provides as follows:-

Order 53

Rule 4(1): “Copies of the statement accompanying the

application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and reliefs set out in the statement”

From the above, it is clear that when in my ruling dated 8th December 2014 I allowed the applicant to file and serve her Notice of Motion within 21 days, the same ought to have been served upon the respondents and all other affected parties together with the statement accompanying the application for leave. Gori, Ombongi advocates for the 3rd respondent have raised grounds of opposition to the Notice of Motion dated 9th December 2014 that was subsequently filed by the applicant following my ruling on the ground that the same was not accompanied by a statement setting out the name and description of the applicant and the grounds on which it is sought. Mr. Magee advocate for the applicant filed submissions stating that the ex-parte Chambers Summons was filed pursuant to **Order LIII Rule 1 of the Civil Procedure Rules** then in force and that following this Court’s order, the 3rd respondent was served with the application for leave together with all the documents hereto including the affidavit in verification of facts in compliance with **Order 53 Rule 4(1) of the Civil Procedure Rules**.

I have looked at the provisions of then **Order LIII Rule 1 of the Civil Procedure Rules** and in so far as the requirement of statement setting out the reliefs sought and the verifying affidavit is concerned, it is

not different from the new **Order 54 Rule 1 of the Civil Procedure Rules**. It also requires that the said statement and verifying affidavit be filed with the application for leave as does the current **Order 54 Rule 1 of the Civil Procedure Rules**. **Order LIII Rule 4(1)** is similar in its provisions to the current **Order 53 Rule 4(1)** which I have reproduced above. This Court's order was dated 8th December 2014 and therefore the applicant was required to comply with the mandatory provisions of **Order 53 Rule 4(1) of the Civil Procedure Rules**.

Did the applicant comply with the mandatory provisions of **Order 53 Rule 4(1) of the Civil Procedure Rules** with regard to service of the statement accompanying the application for leave with the Notice of Motion? Although Mr. Magee in his submissions has stated that there was compliance, the answer to that is to be found in the affidavit of service of Jackline W. Kiragu advocate dated 19th January 2015 and filed in Court on the same day. Paragraph 2 of that affidavit states as follows:-

“That sometime on 15th January 2015 within Nyeri Town while under employment of MAGEE WA MAGEE & CO. ADVOCATES I served the firm of GORI OMBONGI & CO. ADVOCATES with a Hearing Notice for the application dated 9th December 2014 dated 19th March 2015 by tendering them a copy of the same and requiring their signature”

A copy of the Notice of Motion dated 9th December 2014 is so far as is relevant for this ruling sets out the order sought as follows:-

1: “That an order of certiorari do issue to remove into this Court and quash the award of the Central Lands Dispute Tribunal of 8th June 2010.

2: That costs of this application be borne by the respondents”

Which application is based upon the grounds set out in the Chambers Summons dated 15th June 2010, statement of facts and the verifying affidavit filed therein and on grounds on submissions to be adduced (sic) the hearing”.

The Notice of Motion filed herein, and which the Court would expect was the one served upon the firm of Gori Ombongi advocate for the 3rd respondent does not contain a copy of the statement of facts or even the verifying affidavit. It only states that it is based on the grounds set out in the Chamber Summons dated 15th June 2010. That Chamber Summons having been argued ex-parte, it is required that once leave is granted, the statement accompanying the application for leave **SHALL** be served with the Notice of Motion. That is what **Order 53 Rule 4(1) of the Civil Procedure Rules** demands.

Counsel for the 3rd respondent has raised grounds of opposition to the effect that there was no compliance with **Order 53 Rule 4(1) of the Civil Procedure Rules** and from what I have state above, that

complaint is well merited. It was not enough to state in the Notice of Motion that the same is based on the grounds set out in the Chamber Summons dated 15th June 2010 without serving the 3rd respondent with the statement of facts as required by law. It is of course not in doubt that both the firm of Magee wa Magee Advocates and that of Gori Ombongi Advocates have all along been seized of this matter on behalf of the applicant and the 3rd respondent and canvassed the applicant's application dated 8th November 2011 seeking leave to file the Notice of Motion out of time. However, once that leave was granted, it was mandatory that the provisions of **Order 53 Rule 4(1) of the Civil Procedure Rules** are complied with and that the said Notice of Motion is served with the statement that accompanied the application for leave. That is the only way the respondent will know the case against it. That was not done in this case thus rendering the Notice of Motion defective.

I have considered if this failure is a mere technicality curable by **Article 159 of the Constitution** but it is clear from the Court of Appeal Case of **SIGALAGALA POLYTECHNIC VS NELSON OGWERO C.A**

CIVIL APPEAL NO. 13A of 2013 that it is not.

Ultimately therefore, the 3rd respondent's grounds of opposition are up-held with the result that this Court finds the Notice of Motion dated 9th December 2014 and filed herein on 19th December 2014 to be incompetent. The same is accordingly struck out with costs to the 3rd respondent.

B.N. OLAO

JUDGE

13TH OCTOBER, 2015

13/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Maina for Magee for Applicant – present

Mr. Ombongi for Respondent – absent

COURT: Ruling delivered this 13th day of October 2015 in open Court.

Mr. Maina for Mr. Magee for Applicant present

Mr. Ombongi for Respondent absent.

B.N. OLAO

JUDGE

13TH OCTOBER, 2015