King'ola v Wambugu & 2 others (Civil Appeal 86 of 2018)
[2023] KECA 840 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 840 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 86 OF 2018

HM OKWENGU, KI LAIBUTA & JM MATIVO, JJA

JULY 7, 2023

BETWEEN

KISIPAYIAN OLE KING'OLA ..... APPELLANT

AND

THE SENIOR RESIDENT MAGISTRATE KILUNGU, HON. PATRICK WAMBUGU ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

PANYA OLE KINYANJUI ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Makueni (C. G. Mbogo, J.) delivered on 18th January 2018 in Misc. App. No. 8 of 2017)

JUDGMENT

1. The appellant, Kisipayian Ole King'ola, filed a Chamber Summons dated April 24, 2017 in the Environment and Land Court at Makueni in ELC Misc. App. No. 8 of 2017 for leave to move the court for judicial review of the orders of the 1st respondent (the Senior Resident Magistrate at Kilungu) dated 3rd and April 7, 2017 in RMCC No. 31 of 2017. The appellant's Summons were taken out ex parte pursuant to order 53 rule 1 of the *Civil Procedure Rules*, 2010 and was supported by his statutory statement dated April 24, 2017 accompanied by the requisite verifying affidavit sworn on April 24, 2017.

2. On May 8, 2017, C. G. Mbogo, J. granted the appellant leave to apply for orders of certiorari to quash the afore-mentioned decisions of the 1st respondent, and orders of prohibition restraining the 1st respondent from hearing any dispute in RMCC No. 31 of 2017 relating to Land Parcel Nos. Kajiado/Kaputiei/2178 and 4919. The learned Judge also gave orders that leave to apply for the judicial review sought to operate as stay of proceedings in Kilungu RMCC NO. 31 of 2017.

3. Having obtained leave, the appellant filed a notice of motion dated May 15, 2017 seeking orders of certiorari and prohibition aforesaid together with orders that the body of the late Eunice Naserian Kisipayian be released to the appellant for decent reburial. The appellant also prayed for costs of the application.

4. The appellant's Motion was anchored on 5 grounds, namely: that the 1st respondent's impugned decisions were made in breach of the rules of natural justice, were illegal, unreasonable and prejudicial; that the power exercised by the 1st respondent were not within his jurisdiction or adjudication area as required under section 26 of the *Environment and Land Court Act*, 2011; that the respondents were subject to the supervisory jurisdiction of the ELC; and that the 1st respondent acted ultra vires his powers under section 9 of the *Magistrates' Courts Act*, 2015.

5. It is noteworthy that the appellant's Motion was not accompanied by any statutory statement or verifying affidavit in compliance with order 53 rules 3, 4 and 7 of the *Civil Procedure Rules*, which require the Motion to be accompanied by:

   a) an affidavit giving the names and addresses of, and the date and place of service on, all persons who have been served with the Notice of Motion (rule 3(3));

   b) copies of the statement accompanying the application for leave to be served together with copies of any affidavits accompanying the application for leave to be supplied on demand (rule 4(1)); and

   c) a verifying affidavit deposing to the validity of the decision sought to be quashed, unless such decision had been lodged before the date set for the hearing of the Motion (rule 7(1)).

6. In opposition to the appellant's motion, the 3rd respondent, Panya Ole Kinyanjui, filed a replying affidavit sworn on 19th June 2017 contending that the appellant's Motion was bad in law, incompetent, an abuse of the court process, ill-advised, unmeritorious and brought in misapprehension of the applicable law; that one cannot stop a judicial officer from conducting his statutory duty; that the court did not order detention of the dead body, but only restrained the appellant from burying it on his land; that Kilungu RMCC case was not an ELC matter; and that the 1st respondent had jurisdiction to give the impugned orders. He urged the trial court to dismiss the application.

7. On their part, the 1st and 2nd respondents filed Grounds of Opposition dated 4th September 2017 stating that they had no interest in the suit property; that, under the *Public Health Act*, the Magistrates' Court had jurisdiction to determine issues relating to burial and exhumation of bodies; that the 1st respondent acted lawfully and within his mandate; that the exhumation orders sought had no relation to ownership of the suit properties; and that the appellant's Motion and the substantive suit should be dismissed with costs.

8. In his judgment dated January 18, 2018, Mbogo, J. dismissed the appellant's Motion with costs to the respondents on the grounds that the application was fatally defective, bad in law and an abuse of the court process. As the learned Judge observed:

> " 10. The Notice of Motion application before me is unsupported by affidavit and statutory statement. The ex-parte applicant cannot purport to rely on the statutory statements and the affidavit in support of the summons that he filed together with the chamber summons on the 05th May 2017. The two documents became spent upon the grant of leave to the ex-parte applicant to apply for judicial review."

9. Dissatisfied with the judgment of Mbogo, J., the appellant moved to this Court on appeal faulting the learned Judge for: holding that the Motion was fatally defective and lacked merit; holding that the affidavit filed in support of his Summons and the statutory statement became spent after the Summons had been heard and determined; relying on a High Court judgment in HC Misc. App. No. 41 of 2014 (unreported), which was not binding on him; and for failing to appreciate that proceedings in judicial review were not based on the *Civil Procedure Act*.

10. Learned counsel for the appellant, M/s. Kasyoka & Associates, filed written submissions dated April 1, 2019 citing 2 judicial authorities, but without disclosing the years on which they were reported. Suffice it to note their submission that "... once leave is granted, the supporting affidavit and the statutory statement and other documents filed with the Chamber Summons for leave are subsumed in the substantive Motion;" that it is only order 53 of the *Civil Procedure Rules* that applies to judicial review proceedings; and that all other Rules of procedure have no place in such proceedings. Counsel urged us to allow the appeal and set aside the impugned judgment of the ELC (Mbogo, J.) dated January 18, 2018.

11. In rebuttal, learned counsel for the 1st and 2nd respondents, Mr. Menge made oral submissions contending that the appeal had no merit and should be dismissed with costs.

12. On their part, learned counsel for the 3rd respondent filed written submissions dated October 5, 2019 and a list of authorities dated May 19, 2023 citing the cases of *Josephine Wambui Mwangi v Michael Mukundi Ngugi* [2021] eKLR and *Mwala Land Disputes Tribunal & Another v Kiilu Mathuva & 3 Others; ex parte Kyengo Mathuva* [2006] eKLR,

    submitting that the appellant's substantive Motion did not indicate that it relied on the statutory statement and grounds advanced in his Summons for leave. Consequently, the appeal should be dismissed with costs.

13. Having examined the record of appeal, the impugned judgment, the written and oral submission of the parties and the law, we form the view that the appeal before us stands or falls on our determination of two main issues, namely whether the learned Judge erred: in holding that the statutory statement and affidavit filed in support of the appellant's Summons for leave to seek judicial review were spent upon determination of the application; and in holding that the appellant's Motion was fatally defective and without merit.

14. On the 1st issue as to whether the statutory statement and verifying affidavit filed in support of the appellant's Summons were spent upon determination of the application, we take to mind the fact that the appellant's statutory statement dated April 24, 2017 was filed pursuant to order 53 rule 1(2) of the *Civil Procedure Rules* in support of the appellant's Summons; that the statutory statement also sets out the prayers sought in the Motion as: an order of certiorari to quash the decision of the 1st respondent dated 3rd and April 7, 2017; an order of prohibition to stop the Honourable court from presiding over or hearing any matter regarding the subject matter of Kilungu RMCC No. 31 of 2017; stay of proceedings in the case aforesaid; an order that the body of the late Eunice Naserian Kisipayian be released to the appellant for decent reburial; and such further or other relief that the honourable court may deem just and expedient to grant.

15. It is also noteworthy that paragraph 14 of the appellant's verifying affidavit points to the fact that it was also made "in support of [the appellant's] application for leave to file an application for orders of certiorari and prohibition and thereafter in support of the substantive motion to quash the orders of the Honourable Magistrate in RMCC No. 31 of 2017, and to prohibit him from hearing any other land matter concerning land parcel No. Kajiado/Kaputiei/4919 concerning Panya Ole Kinyanjui and

myself" (the appellant); and that the said Panya Ole Kinyanjui is since deceased. In effect, the statement and verifying affidavit filed in support of the Summons and also intended to support the Motion cannot be said to have been spent.

16. We take to mind the fact that the appellant purposed to have his substantive motion supported by the same statutory statement and verifying affidavit by which his Summons for leave was also backed. Be that as it may, the substantive Motion makes no reference to the said statement and verifying affidavit, raising the question as to its form and validity. In this regard, the mandatory provisions of order 51 rule 4 of the *Civil Procedure Rules*, which requires every notice of motion to state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used to be served, cannot be the basis for testing the validity of judicial review applications made pursuant to order 53.

17. We approach this issue cautious not to suggest that the provisions of *Civil Procedure Rules* apply to judicial review proceedings much the same way as they do in ordinary civil proceedings. Moreover, order 53 of the *Civil Procedure Rules* is, for all intents and purposes, a self-contained code. We say so taking to mind, with approval, the decision of the High Court of Kenya at Nairobi (A. I Hayanga and A. Visram, JJ.) in *M. M. Ole Keiwua & J. V. Odera Juma v Yash Pal Ghai* [2002] eKLR where the learned Judges, citing two decisions of this Court, had this to say on the special nature of judicial review proceedings:

> "... proceedings under order 53 are special proceedings for special purposes having special and specific rules of its own. These special rules have been enacted pursuant to powers donated to the Rules Committee under section 9 of the *Law Reform Act*. Accordingly, it assumes the force of law from an Act of Parliament from the *Law Reform Act*, and not from the Rules Committee established under section 81 of the *Civil Procedure Act*. That makes proceedings under Order 53 special proceedings, as the Court of Appeal so stated in R. v. Communications Commission of Kenya, Civil Appeal No.175/2002. These proceedings are neither Civil nor Criminal as the Court of Appeal stated in The Commissioner of Lands v Kunste Hotel, CA 234/95. They are neither "an action" as defined in the *Interpretation and General Provisions Act*, or a "suit" as defined in the *Civil Procedure Act*. See also Walter Odhiambo v. Registrar of Trade Unions (HC Misc. 210/89)."

18. With that in mind, a cursory look at the face of the appellant's Motion discloses the grounds on which it was made, while the statutory statement and verifying affidavit aforesaid point to the appellant's intention to rely thereon in support of his Motion. Whether or not the affidavit evidence therein contained would have satisfied the trial court to grant the orders sought is not for us to judge. What is clear, though, is that the appellant's Motion met the minimum formal requirements ofa motion under order 53. As to whether the Motion met the mandatory requirements prescribed under order 53 rules 3(3), 4(1) and 7(1) of the *Civil Procedure Rules*, we hasten to observe that that issue was not in contention; that, in any event, all parties concerned were duly served and actively participated in the proceedings; that the statutory statement and verifying affidavit required to be served pursuant to rule 4(1)had been served and replied to; and that copies of the impugned orders were also annexed to the verifying affidavit in compliance with order 53 rule 7(1) of the *Civil Procedure Rules*. Accordingly, we find nothing to suggest that the appellant's Motion was fatally defective for want of form.

19. We draw this conclusion mindful of the peremptory nature of the word "shall" as used in the aforementioned rules. Discussing the use of the word "shall" in statutory provision, Wessels JA in *Sutter vs. Scheepers* 1932 AD 165, at 173 – 174 laid down the following guidelines:

> "The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction."

20. In the same vein, the Supreme Court of Nigeria in Dr *Arthur Nwankwo and Anor v Alhaji Umaru Yaradua and Ors* [2010] LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC. had this to say:

> "The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation."

21. The *Black's Law Dictionary* (6th Edition) defines the word "shall" as follows:

> "As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

22. Considering the foregoing rendition of the word "shall", the only question that arises is whether the appellant satisfied the mandatory requirements of order 53 rules 3(3), 4(1) and 7(1) of the *Civil Procedure Rules* with regard to his Motion and the requisite statutory statement and verifying affidavit deposing to the factual evidence sought to be relied upon in support of the Motion. To our mind, he did. He complied with those peremptory rules notwithstanding the fact that the statement and verifying affidavit aforesaid had been lodged in support of both the Summons for leave and the subsequent Motion for judicial review orders.

23. Though not in issue, it would be remiss of us not to point out that the apparent infraction in failing to make reference to the statement and verifying affidavit on the face of the motion is, in our considered view, a technicality of procedure excusable by virtue of article 159(2) (d) of *the Constitution*, which impels courts and tribunals, in exercise of their judicial authority, to administer justice "... without undue regard to procedural technicalities ..." Guided by this principle, we find that the appellant's Motion was not fatally defective as concluded by the learned Judge.

24. As Nyamu, J. (as he then was) correctly observed in *Republic v Land Disputes Tribunal Court Central Division and another ex parte Nzioka* [2006] 1 EA 321:

> "... there is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion. Indeed, there is no requirement that the motion be filed simultaneously with any other documents. Order LIII, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be

relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However, under order LIII, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can only do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order LIII have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete as at leave stage and practicing advocates are hereby cautioned that the Civil Division procedure of filing many affidavits to counter the opponent's case is a hangover which is not acceptable under the Judicial review jurisdiction."

25. In *Republic v Chief Magistrates Court Thika & another Ex-Parte Applicant Joseph Kamunya Kinuthia* [2016] eKLR, Odunga, J. (as he then was) was like minded when he held that:

> "... the applicant ought not to have filed any affidavits further to the one filed at leave stage without the leave of the court. However where the subsequent affidavit does not introduce any new material or fresh facts, the filing of such an affidavit is purely superfluous and to deny an otherwise merited application on the basis of such a procedural flaw would be contrary to article 159(2)(d) of *the Constitution*. Therefore nothing turns on the issue of the said supporting affidavit or even the grounds in the Motion though the failure to adhere to the rules may be a ground for consideration when it comes to issues of costs."

26. We hereby affirm the afore-cited High Court decisions of Nyamu and Odunga, JJ., both of which address with clarity the formal requirements to be met in applications for judicial review orders. Having considered the record of appeal as put to us, the impugned ruling, the written and oral submissions of learned counsel for the appellant and for the respondents, the cited authorities and the law, we reach the inescapable conclusion that the appellant's appeal succeeds, and the same is hereby allowed with no orders as to costs. Consequently, the judgment of the ELC at Makueni (C. G. Mbogo, J.) is hereby set aside. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR