



Masara & another v County Government of Nairobi (Environment and Land Judicial Review Case E004 of 2022) [2023] KEELC 288 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2022
OA ANGOTE, J
JANUARY 26, 2023**

BETWEEN

NAFTAL OKWANYO MASARA 1ST APPLICANT

JANE MASARA 2ND APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

RULING

1. What is coming up before the Court is the Respondent’s Preliminary Objection dated April 8, 2022 in respect to the application dated March 24, 2022, seeking leave to file a substantive judicial review motion on the grounds that;
 - i. The Application herein is fatally defective, frivolous, bad in law, lacks merit and the same is an abuse of Court process.
 - ii. The Applicant has not justified grant for leave to file a substantive motion under Order 53 Rule 1(2)(b) of the [Civil Procedure Rules, 2010](#).
 - iii. The Application herein does not have an affidavit verifying the statutory statement rendering the judicial review application naked and unattainable.
 - iv. The Application herein is incompetent and fatally defective and ought to be struck out.
2. In response to the Preliminary Objection, the 1st Applicant filed a Replying Affidavit and Grounds of Opposition both dated June 15, 2022. It was averred vide the Grounds of Opposition that the Preliminary Objection is *mala-fide* and meant to waste the Court’s time as the question of the lack of a Verifying Affidavit cannot be raised to warrant the striking out of the application especially as there is formal leave on record allowing the filing of the substantive motion.



3. It was deponed by the 1st Applicant that the Respondent is by law prohibited from discharging the leave granted by the Court unless through a formal application; that the Respondent is relying on a judicial technicality as there is an Affidavit on record that verifies and supports the contents of the statutory statement dated March 24, 2022 and that the objection herein is technical in nature and cannot warrant the striking out of the suit.
4. The Applicant further deponed that the application is premised on Order 53 of the Civil Procedure Rules which does not provide a time limitation for filing of the Verifying Affidavit and that the Court should be guided by the spirit of the Constitution and in particular Article 159 which behooves the Court to determine matters on merit.
5. It was deponed by the Applicant that him, together with the 2nd Applicant, swore a Supporting Affidavit on March 24, 2022 setting out the grounds upon which they pray for the reliefs of mandamus against the Respondent, which affidavit they were informed by Counsel was sufficient to verify the correctness of the statutory statement.
6. According to the Applicant, the instant application is premised on Order 53 of the Civil Procedure Rules which does not impose a statutory timeline for the filing of the Verifying Affidavit; that the advocate will orally seek to have the Verifying Affidavit sworn on June 15, 2022 deemed as duly filed and that on March 28, 2022, the Court granted the Applicants formal leave to file the substantive motion, which leave can only be discharged by the filing of the substantive motion.
7. The Respondent submitted that the Applicant, prior to receiving the Preliminary Objection dated April 8, 2022, filed the Statutory Statement without accompanying it with a Verifying Affidavit; that Order 53 Rule 1(2)(b) of the Civil Procedure Rules, 2010 provides that an application for leave to file a judicial review application shall be accompanied by a Verifying Affidavit and that in the present case, the Verifying Affidavit was filed on June 15, 2022 after the filing of the Preliminary Objection and the same is an afterthought and ought to be struck out.
8. Counsel for the Respondent submitted that the Judicial Review application not having been accompanied by a Verifying Affidavit is fatally defective. Reliance in this respect was placed on the cases of Mesback Aluvale vs Attorney General & 3 Others [2013] eKLR cited by the Court in Kenya Council of Employment and Migration Agencies vs Attorney & 4 Others; State Department for Public Service & 4 Others [2021]eKLR where the court stated that a Verifying Affidavit is key in a judicial review application, without which the application is naked and unsustainable.
9. It was submitted that as expressed in the cases of Republic vs Busia Chief Magistrate and 2 Others- Ex-parte Mathias Murumbe Makboka [2016]eKLR and Kenya African National Union vs Mwai Kibaki & 6 Others[2005]eKLR, it is the Verifying Affidavit and not the statutory statement that is of evidentiary value.
10. It was submitted by the ex parte Applicant's advocate that the ex-Applicant filed an application dated March 24, 2022 supported by an Affidavit sworn by the 1st Applicant that was named a Supporting rather and not a Verifying Affidavit and that the same verified the correctness and supported the statutory statement dated March 24, 2022.
11. Counsel submitted that the Respondent's protestations are merely procedural and do not go to the root of the matter especially in light of the fact that the application was heard and leave granted thereafter. Counsel relied on the case of Jefitha Muchai Mwai vs Peter Wangio Thuku [2015] eKLR where the Court held that failure to file a Verifying Affidavit is not fatal and can be cured by filing and serving the same. Reliance was also placed on the case of Microsoft Corporation vs Mistumi Computer Garage(2001)E.A page 460.



12. Counsel submitted that the Application of March 24, 2022 was mentioned on March 28, 2022 where the Court granted the Applicants leave to file the substantive motion; that the Respondent having approached the Court after grant of the leave has failed to advance sufficient reasons warranting the discharge of the said leave and that in any event, the Respondent ought to have filed a formal application.

Analysis and determination

13. Having read the Preliminary Objection, the responses thereto and submissions by the parties, the issue that arises for determination is whether the Preliminary Objection is competent.

14. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of *Mukbisa Biscuits Manufacturing Co Ltd vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that;

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. Newbold, P further held as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

16. The Supreme Court in the case of *Hassan Ali Jobo & Another vs Suleiman Said Shabbal & 2 Others*, Petition NO. 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa case and stated as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

17. The Supreme Court while addressing the position of parties resorting to the use of Preliminary Objections pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* [2015] eKLR;

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of



the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

18. The court will examine the Preliminary Objection raised against the aforesaid general guidelines.
19. The Respondent objects to the application of March 24, 2022. The gravamen of this objection is that the application seeking leave to file a substantive judicial review motion was not accompanied by a Verifying Affidavit as per the provisions of Order 53 Rule 1(2)(b) of the Civil Procedure Rules, which is to the effect that an application for leave shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
20. Indeed, there can be no doubt from a reading of the above provision that a Verifying Affidavit is a mandatory document in an application for leave to file judicial review proceedings. In view of the requirements of the provisions of Order 53, the Court opines that this is a proper preliminary objection as it questions the validity of the Judicial Review application in light of failure to file a mandatory pleading if at all.
21. The Respondent has challenged the competency of the Motion dated March 24, 2022 on account of the Applicant’s failure to file a Verifying Affidavit accompanying the same. It is the Respondent’s contention that the failure aforesaid renders the motion fatally defective and seeks to have the same struck out.
22. In response, the Applicants have averred that the application was supported by an Affidavit which verified its correctness and supported its contents and as such, the Respondent’s argument is technical in nature and does not go to the root of the matter; that Order 53 does not set timelines for the filing of the Verifying Affidavit and that the Applicants swore an Affidavit on June 15, 2022 and will seek to have the same admitted into evidence.
23. It’s the Applicants’ position that the Court vide its ruling of March 28, 2022 granted the Applicants leave to file the substantive motion, which leave the Respondent has not sought to set aside and cannot purport to do so vide the present objection.
24. The procedure for the institution of Judicial Review Proceedings begins with an application for leave to file the substantive motion. This is provided for under Order 53 Rule 1(1) of the Civil Procedure Rules which provides as follows;

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.”

25. The provision sets out the requirements to be met in such an application viz;

“

- “(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by-
 - (a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and



(b)affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.”

26. Blacks law Dictionary, 18th Edition defines “Verify” as a verb of the term “verification” meaning a conclusion for all pleadings that are required to be sworn and “to confirm or substantiate by oath or affidavit.”
27. The role of a Verifying Affidavit in judicial review pleadings was discussed by the Court of Appeal in Commissioner General, Kenya Revenue Authority thro’ Republic vs Silvano Onema Owaki T/A Marenge Filling Station[2001]eKLR, where it was stated as follows;

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review.”
28. The court in Commissioner General(*supra*) relied on the Supreme Court Practice 1976 Vol. 1 paragraph 53/1/7 which stated:-

“The application for leave “By a statement”. The facts relied on should be stated in the affidavit (See R. V. Wandsworth J.J. EXP. Read (1942) IKB 281.”
29. This position was supported in Republic vs Busia Chief Magistrate and 2 Others Exparte - Mathias Murumbe Makokha [2016] eKLR where the Court restated that that the legal position on Judicial Review remains that it is the Verifying Affidavit not the statement to be verified which is of evidential value.
30. Having considered the motion, what is clear is that while what was filed is a Supporting and not a Verifying Affidavit, the same lays out the facts and evidence in support of the motion and indeed verifies the same. In view of the foregoing, does the failure to set out the facts in support of the application in the Verifying Affidavit and setting these facts in the affidavit filed in support of the Chamber Summons invalidate the Chamber Summons?
31. The Court in Sabina Zaverio Masaku vs County Secretary, County Government of Meru & 2 Others [2021] eKLR while dealing with a similar issue stated thus;

“My understanding is that facts must exclusively be contained in a verifying affidavit and whose omission makes the application and proceedings fatally defective as was held in Tana River Pastoralists Development Organization & 4 Others –vs- National Environment Management authority & 6 Others [2009] eKLR.

However, it should also be noted the Tana River Pastoralists cases (*supra*) was determined pre-2010 Constitution and before judicial review was elevated into a constitutional right governed by Article 22, 23 and 47 of the Constitution.

In light of the above developments and given a constitution must under Article 259 be interpreted, as if law is always speaking, I am constrained to find the omission curable under Articles 22 and 159 of the Constitution as read together with Section 1A and 1B of the Civil Procedure Act. The supporting affidavit to the motion sworn on 17.2.2020 suffices under the circumstances.”



32. Similarly, the Court in the case of *Jared Nzano vs Independent Electoral and Boundaries Commission* [2017] eKLR opined thus;

“Counsel for Respondents has submitted that the application is fatally defective as the applicant did not comply with the provisions of order 53 Rule 3 (1) (2) and (3) of the *Civil Procedure Act* in that the applicant did not annex a verifying affidavit to the substantive notice of motion. With regard to this contention, the court notes that the applicant had annexed a supporting affidavit to the Exparte chamber summons vide which he sought leave to file the notice of motion. Having filed the same, the court hereby excuses the failure to annex a verifying affidavit to the notice of motion application. The supporting affidavit in this case serves the same purpose with a verifying affidavit and in view of Article 159 (2) of the *constitution*, it is a technicality that can be excused and I hereby excuse the same.”

33. In the case of *Republic vs Kikuyu Land Dispute Tribunal & Another Ex-parte Kenneth Ndungu Muigai & Another* [2013] eKLR the Court expressed itself as follows:

“In this case, the three paragraph verifying affidavit which is very thin on the facts, the deponent purports to reiterate the contents of the statement of facts by confirming the truth of the information contained therein. That is not the kind of verifying affidavit contemplated under judicial review proceedings. However, the Court has noted that there is another affidavit which was filed and sworn in support of the Notice of Motion to which the documents relied upon are exhibited. The procedure guiding judicial review applications does not, however, have room for supporting affidavits. This position was restated in Republic –VS- Land Disputes Tribunal Court Central Division and Another Ex-parte Nzioka [2006] 1 EA 321....

However, in such matters the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory that ultimate end of justice. The court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. (See Suleiman –VS- Amboseli Resort Limited [2004] 2 KLR 589). The court has therefore to consider the effect of striking out the application herein as against considering the same on its merits notwithstanding. In this case, if the court were to opt for the former, the ex-parte applicant would forever be driven from the seat of justice since under sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya such application must be brought within six months of action complained of. It is therefore my view that in the circumstances of this case the court ought to invoke its powers under Article 159(2)(d) of the *Constitution* and deem the said irregularity as a procedural deficiency and proceed to determine the Motion on its merits.”

34. The Court agrees with the foregoing pronouncements and takes the position that the failure to file a Verifying Affidavit and filing a Supporting Affidavit in its stead is not fatal. The Supporting Affidavit deponed to the facts relied on by the Applicants and indeed serves the same purpose as the Verifying Affidavit. This omission is curable by Article 159 of the *Constitution* as read together with Section 1A and 1B of the *Civil Procedure Act*. The Court finds that the Affidavit supporting the Chamber Summons sworn on 24th March, 2022 suffices in the circumstances.
35. It is noted that even if the Court were to take a contrary position on the failure to file a Verifying Affidavit, the Court granted the Applicants leave to file the substantive motion on March 28, 2022. It is now accepted that leave can only be discharged by way of a formal application.



36. This position was appreciated by the Court in *Republic vs Land Disputes Tribunal Court Central Division & another ex parte Nzioka* [2006] I E.A.321, where Justice Nyamu (as he then was) held that although the grant of leave is provisional, until it is set aside for good reason, it can only be set aside upon an application and not through a preliminary point and only before the filing of the substantive motion.
37. The court in the Nzioka case (*supra*) further held that once the substantive motion was filed, the leave granted was spent and parties had to contest the application for judicial review on its merits. It was the view of the court that any errors or irregularities in the application seeking leave could only be contested before the filing of the substantive motion.
38. In the case of *Republic vs Secretary of State Exp Harbage* [1978] ALL ER 324 which was cited with approval by the Court of Appeal in *Aga Khan Education Service Kenya vs Republic & Others* [2004] eKLR it was stated:
- “It cannot be denied that leave should be granted, if on the material available, the court considers going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the Judge who granted leave to set aside such leave.”
31. In view of the foregoing, it follows that the Respondent’s assertion that the Applicant has not justified the grant for leave to file a substantive motion under Order 53 Rule 1(2)(b) of the Civil Procedure Rules, 2010 is moot in light of the fact that leave has already been granted, and no application has been filed to set it aside.
31. In light of the foregoing the Court dismisses the Notice of Preliminary Objection dated April 8, 2022 with costs.

Dated, signed and delivered virtually in Nairobi this 26th day of January, 2023.

O A Angote

Judge

In the presence of;

Ms Esami holding brie for Nyamu for Respondent

Ms Karita holding brief for Kihara for Applicant

Court Assistant - Valentine

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