REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 176 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21(1), 22(1) (2) & (4) 23, 25(c), 27(1) , 40(1) & (3),41(1) & (2) ,43,47(1) & (2) , 50(2), 176 & 206 CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE INCOME TAX ACT, CAP 470 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE VALUE ADDED TAX ACT, 2013

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

BETWEEN

NAIROBI CITY COUNTY GOVERNMENT.....APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Before this court for determination is chamber summons dated 10th April 2017 brought under the provisions of Section 3A of the Civil Procedure Act, Section 8 and 9 of the Law Reform Act, Order 53 Rules 1(1),(2),(3) & (4) of the Civil Procedure Rules and all other enabling provisions of the law.

2. The application filed by the Nairobi City County Government seeks from this court leave to institute Judicial Review proceedings against the Kenya Revenue Authority (KRA) and the Attorney General and for orders.

1. Spent

2. That leave be granted to apply for Judicial Review order of Certiorari to remove into this Honourable Court and quash the agency notice dated 27th March 2017 issued by the 1st respondent Kenya Revenue Authority to the Principal Secretary of the National Treasury in respect of funds due and payable to the applicant by the National Treasury;

3. That leave be granted to the applicant to apply for Judicial Review order of Prohibition to remove into this court and prohibit the respondent from issuing any other or further agency notices to the Principal Secretary of the National Treasury in respect of funds due and payable to the applicant by the National Treasury;

4. That pending hearing and determination of the notice of motion application, the Honourable court do and hereby issue a temporary order suspending the agency notice dated 27th March 2017 issued by the 1st respondent to the Principal Secretary of the National Treasury in respect of funds due and payable to the applicant by the National Treasury;

5. That the leave so granted do operate as a stay of issuance of any other or further agency notice(s) to the Principal Secretary of the National Treasury by the 1st respondent in respect of funds due and payable to the applicant by the National Treasury;

6. Any other or further relief which this Honourable court deems fit and just to grant

7. Costs of and incidental to the application.

3. The chamber summons is supported by 9 detailed grounds on the face thereof and the unsigned "statutory statement" and verifying affidavit sworn by Gregory S. Mwakanongo on 10th April 2017.

4. The application was opposed by the respondents who filed a replying affidavit sworn by Asha K. Salim, Manager Debt Enforcement in the 1st respondent's Domestic Department.

5. Before delving into the applicant's complaint, the court notes that the applicant's "statutory statement" which is dated 10th April 2017 is not signed and I have marked the said page 25 of the application bundle as unsigned.

6. The question is whether failure to sign the statutory statement is fatal to the chamber summons. Order 53 Rule 2 of the Civil Procedure Rules provides that:

" An application for leave to commence Judicial Review shall be by way of chamber summons accompanied by a statement setting out the nature and description of the applicant, relief sought and the grounds in which it is sought and by an affidavit or affidavits verifying the facts relied on."

7. In addition the provisions of Order 53 Rule (1) (2) of the Civil Procedure Rules stipulate that the grounds upon which the Judicial Review application will be founded will be in the statutory statement.

8. Further, Order 53 Rule (4) of the said Rules specifically expresses that:

> ***"4(1) <u>Copies of the statement accompanying the application for leave shall be served with the notice of motion</u> 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 relief set out in the said statement."[Emphasis added].***

9. In the instant case, albeit there is a "statutory statement" and verifying affidavit accompanying the chamber summons for leave, but the "statutory statement" is not signed by either the applicant or its counsel on record.

10. The question is whether an unsigned "statutory statement" or pleading is a valid pleading and or whether the omission is a mere procedural technicality curable by Article 159(2) of the Constitution.

11. In my humble view, an unsigned "pleading' is no pleading at all as it is not owned by the party filing it and therefore the omission cannot be a mere procedural technicality curable by application of Article 159(2) (c) of the Constitution.

12. A statement of facts, as seen from the provisions of Order 53 Rules 1,2,3 and 4 of the Civil Procedure Rules reproduced above is very critical in an application for judicial review as only grounds and reliefs set out in the statement shall be relied upon at the hearing of the substantive motion.

13. Further, it is the copy of the statement accompanying the application for leave that shall be served with the notice of motion and copies of any affidavits accompanying the application for leave.

14. The law under which this application is premised is Order 53 Rule 1,2,3 and 4 of the Civil Procedure Rules as set out on the face of the application, among other statutory provisions and these proceedings not being civil proceedings, Section 3A of the Civil Procedure Rules would not necessarily be applicable particularly with the legal bar at Section 8 of the Law Reform Act that these judicial review proceedings are neither civil nor criminal proceedings.

15. In my humble view, therefore, failure to file a signed statutory statement renders the application for leave fatally defective *ab initio* and therefore incompetent. I say so for reasons that from the provisions of Order 53 Rule 4 (1) of the Civil Procedure Rule, it is clear that the statutory statement is such a fundamental pleading in Judicial Review proceedings where orders of certiorari prohibition and mandamus are sought such that without the statement, then leave would not lie.

16. Order 53 of the Civil Procedure Rules is the only Rule that is a Procedural Rule implementing Sections 8 and 9 of the Law Reform Act on the three Judicial Review orders. Moreso, not even the Fair Administrative Action Act , 2015 amended or repealed the said Order and neither were the provisions of the Law Reform Act on the 3 Judicial Review Remedies amended or repealed. Section 12 of the Fair Administrative Action Act, 2015 is clear that the Act recognizes common law remedies and rules of natural justice.

17. It is for that reason that I find that rules serve to make the process of judicial adjudication and administration fair, just, certain and even handed. As was held in Nicholas **Kiptoo Arap Korir Salat v IEBC & others Civil Application** 228/**2013 Nairobi** - Ouko, Kiage, and Mohamed JJA:

> " ***Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is the even- handed and dispassionate application of the rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."***

18. It is for the above reasons that I find and hold that the chamber summons dated 10th April 2017 is not soundly grounded in law and I would not hesitate to strike it out for being a nullity.

19. I add that there is good reason why the law regulating pleadings is that every pleading must be signed by an advocate or recognized agent or by the party if he sues or defends in person. See **CA Nairobi Nos 13 & 19 of 2001 consolidated Vipin Maganlal Shah Alulkumar Maganlal Shah vs Investments & Mortgage Bank Ltd & 2 Others[2001]** where the issue was whether a plaint which was filed on 27th April 2000 unsigned was a pleading as required by law and therefore whether it could form the basis of a suit. The court of Appeal held, inter alia:

> ***"…. The truth of the matter is that parties to litigation are entitled to go and peruse court file…… " Mr Regeru in his usually learned way relied on certain English and Indian authorities and we think we must examine them first . We shall start with the English authorities upon which Mr Regeru relied. First, of course was Halsbury's Laws of England 4th Edition VOL.36 which deals with among other things, "pleadings" and under the heading: " 2. contents of pleadings" at page 7 and at paragraph 7 page 7 under sub heading "signature " is to be found this statement:***
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> > ***"Pleadings need not be settled by counsel, but where a pleading is settled by counsel, it must be signed by him.***
> >
> > ***The only signature which is permitted to appear on pleadings is that of counsel or a solicitor or a litigant in person. If a pleading has been settled otherwise than by counsel, it must be signed by the solicitor of the party by whom it is served, or by the party himself if he sues or defends in person."***
> >
> > ***So that, it is obvious from this passage that a pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognized agent. The reason for this was settled in the ancient case of Great Australian Gold Mining Company V Martin [1877] 5 ch D.1 at page 10 to be a "voucher that the case is not a mere fiction." Several cases are quoted as illustration of the passage in Halsbury's Laws of England. In France v Dutton [1891] 2 QB 208, a clerk to a solicitor signed the Solicitor's bill of costs on behalf of the solicitor. Objection was taken to the clerk's signature but the objection was overruled in the ground that the clerk's signature was sufficient. The issue here was not that there was absolutely no signature. The issue was whether the clerk's signature was sufficient and as the Solicitor had authorized the clerk to sign on his behalf, the signature was really that of a recognized agent of the solicitor. But in the earlier case of the Queen on the Prosecution of Harding Rees V Cowper [1890] 24 QB D 533, it was held that:***
>
> ***" In order to entitle the plaintiff in an action in a county court to the costs of entering a plaint by a solicitor, the solicitor must sign the particulars, and a lithographed statement of the solicitor's name on the particulars is insufficient."***
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> ***In the latter's case, it was held , in effect, that the solicitor had not signed the plaint and the plaintiff was denied his costs, even though Lord Escher, MR dissented from the decision. Mr Regeru next relied on the case of Fick and Fick Limited vs Assimakis [1953] 3 ALL ER 182 where it was held that:***
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> > ***" as the writ which was issued was properly endorsed with a signed statement of claim, the absence of a signature to the statement of claim on the copy served on the defendant was cured by the appearance which the defendant must be taken to have entered."***

Mr Regeru contended that as the appellant entered unconditional appearance the Bank's

suit, even if there had been no signature on the plaint, in the file, these unconditional appearance cured that defect. We do not think Mr Regeru is right on this aspect of the matter. In the Ficks' case, the writ which was issued was properly endorsed with a SIGNED statement of claim. What was not signed was a copy of the statement of claim served upon the defendant and as the defendant had entered an unconditional appearance to the claim, the defect in the unsigned copy served on him was cured. We doubt very much if the position would have been the same if the original writ issued was not endorsed with a signed statement of claim. The position in England, at least, according to those authorities appear to be that a pleading must be signed either by counsel or the party in person or the party's recognized agent. Whether a pleading which has not been signed can be struck out or dismissed is not clear from these authorities.

Here in Kenya, this court dealt with the case of Samaki Industries (Nairobi) Ltd V Samaki Industries (K) Ltd, Civil Appeal No. 203 of 1995 unreported. There, a suspended advocate filed an appeal on behalf of a party, signing the memorandum of appeal and the other relevant documents. This court had no difficulty in holding, indeed, it was conceded, that the appeal having been filed by an unqualified advocate on behalf of an appellant, was incurably defective and was struck out. The court did not call upon the appellant to sign the memorandum of appeal and this validate it."

20. The Court of Appeal in the above **Vipin Maganlal Shah Alulkumar Maganlal Shah vs Investments & Mortgage Bank Ltd & 2 Others** case after referring to the Indian position stipulated in **Mulla on Civil Procedure**, where it was stated that failure to sign a plaint was not fatal to the case nonetheless went ahead to hold that:

"……There is of course the object the legislature had in mind in requiring that a plaint be signed either by counsel or party suing. The object must clearly be to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or pleading or as was said in the Australian case of Great Australian Gold Mining Company case, supra, to be:

" a voucher that the case is not a mere fiction."

Again, in Kenya Order VII Rule 1(e) now requires that a plaint shall contain…….

" If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on? If the plaint is not signed a required by order VI Rule 14, these other requirements clearly become meaningless.

Whatever may be the position in India or even in England, the position in Kenya seems to be that a party who files unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law. We shall go no further than that because as we said earlier, we must deal with the issue of whether or not there was on record a copy of the signed plaint when the summons to strike out was lodged in the superior court."

21. In **ELRC case No. 269/2014 Anthony Simiyu Kisiangani & another V Nzoia Out Growers Company Ltd & 2 Others [2015] e KLR** citing **Regina Kavenya Mutuku & 3 Others v United Insurance Company Ltd Nairobi Milimani HCC No. 1994/2000 [2002] 1 KLR 250** Ringera J (as he then was) held and I agree though persuasively:

"An unsigned pleading had no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity."

22. The above case also cited the Court of Appeal decision in **CA 13 & 19/2001 Vipin Maganlal**

Shah vs Investment & Mortgages Bank Ltd & 2 Others [supra] with approval on the effect of an unsigned pleading and stated:

> ***"Where a pleading is not signed the same would be struck out rather than being dismissed……"***

23. From the above authorities among others **Cheraik Management Ltd v National Social Security Services Fund Board of Trustees & Another [2012] eKLR i**t is clear to me that whereas procedural lapses should not be elevated to fetish in order to override substantive justice, I am unable to accept as being validly on record such a substantive pleading as statutory statement in Judicial Review proceedings, which pleading is not signed by either the applicant or its advocate on record and therefore I have no hesitation in declaring the unsigned statutory statement on record a nullity for want of signature or ownership or authentication thereof.

24. In my view, authentication or ownership of pleadings by the pleader is not a mere procedural technicality curable by application of Article 159(2) (d) of the Constitution. As stated in **Cheraik Management Ltd vs NSSF** (supra) case, the tenets of the Constitution is that parties must be treated equally in the eyes of the law and none of the parties should be accorded undue advantage in legal proceedings.

25. There are, indeed, good reasons why the law world over requires that pleadings be signed by the pleader or their legal representatives as it is a "voucher that the case is not a mere fiction." Therefore, Article 159 2(d) of the Constitution and even the inherent jurisdiction of the court or the overriding objectives of the law cannot be resorted to by a party whose act is declared a nullity under the law. See Hunker **Trading Company Ltd vs Elf Oil Kenya Limited Civil Application No. Nairobi 6 of 2010.**

26. This, in my view, is not a case where the court can excuse a party for the mistakes of its counsel and as was stated in **John Ongeri Mariaria & 2 Others vs Paul Matundura Civil Application No. Nairobi 301 of 2003** [**2004] 2 EA 163.**

> "***Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their own costs that the consequences of careless and leisurely approach to work by their advocates must fall on their shoulders….whenever a solicitor by his inexcusable delay/mistake deprives a client of his cause of action, his client can claim damages against him…whereas it is true that the court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone ….. justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent."***

27. It is for the foregoing reasons that I find and hold without sympathy to the applicant and without delving into the merits of the application which was argued quite vigorously by both sides that a pleading /statutory statement accompanying the chamber summons for leave which statement is not signed is incapable of being verified by an affidavit as it is a nullity *ab initio*, is incompetent and is liable to be struck out.

28. In the end, I strike out the chamber summons dated 10th April 2017. Costs are in the discretion of the court. In this case, as the issue of unsigned statutory statement was discovered by the court in the course of writing of this ruling and as no party alluded to it; and as the court is deemed to know the law, which law I have applied to strike out a pleading which is a *nullity ab initio*, I make no orders as to costs of the application for leave which is hereby struck out and the temporary stay earlier on granted is hereby vacated.

29. Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of May, 2017.

R. E. ABURILI

JUDGE

In the presence of:

Miss Otieno h/b for Mr Makokha for the exparte applicant

Mr Ado for the 1st Respondent

Mr Odhiambo for the 2nd Respondent

CA: George