



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS APPLICATION NO. 373 OF 2010

ANDREW NKIIRI THIRINJA}
NEWTON KAMAU NGETHE}.....APPLICANTS
KAMAU MUCUHA }

VERSUS

REPUBLICRESPONDENT

RULING

Para 1. What was coming up for hearing before the court is a Chamber Summons application for leave to take out Judicial Review proceedings dated 12th July 2010. The 1st and 2nd Respondents filed their grounds of opposition and the interested party too filed a replying affidavit.

Para 2. More than a year later, on 13th October 2011, the Applicants served the Respondent and the interested party with a supplementary verifying affidavit in support of the verifying affidavit. The Respondents and the interested party have therefore objected on grounds that:

- i) Order 53 makes no provision for a supplementary verifying affidavit;
- ii) The said supplementary verifying affidavit was filed without leave of court;
- iii) The Respondent and interested party would need time to reply to the matters raised therein, which matters have been in the knowledge of the Applicant for 14 months since the filing of the application. The result will be to delay this application and the case in the lower court which was stayed pursuant to this application;
- iv) It is argued further that when the case in the lower court is delayed the memories of the witnesses will fade and that will defeat the interests of justice.

They therefore urged the court to strike out the supplementary verifying affidavit and order that the

application should proceed on the material already before the court.

Para 3. In his response Mr. Sigei learned counsel for the Applicant, admitted that indeed they filed a supplementary verifying affidavit on 13th October 2011 without leave of court, but that this came about because they were only able to lay their hands on the report on the investigations, in August 2011. That it is therefore not true that they were party to this information in July 2010 when they filed this application.

Para 4. He further argued that the contents of the supplementary verifying affidavit, corroborate the verifying affidavit. Further that Art 159 of the Constitution gives this court jurisdiction to dispense justice without undue regard to technicalities. On this point he also cited Section 3 of the Judicature Act Cap 8 Laws of Kenya which vests in the court the jurisdiction to consider substance in dispensing justice

Para 5. First and foremost Judicial Review is a special jurisdiction. The substantive law governing Judicial Review is 58 and 59 of the Law Reform Act Cap 26 Laws of Kenya although its procedure is to be found under **Order 53** of the **Civil Procedure Code**. This means that civil procedures do not apply to Judicial Review in the strict sense.

Order 53(2) states:

“An application for such leave as aforesaid 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.”

This implies that there can be more than one verifying affidavit to verify the facts relied upon.

Para 6. I have considered the above procedural rule and the fact that the applicant did not seek the leave of court, and that there is a matter which has been stayed in the lower court awaiting the conclusion of this matter to determine whether it shall proceed or not.

Para 7. The administration of justice normally requires a court to investigate the substance of the dispute before it and decide upon it on merit so that errors in the application or in the manner of filing should not deter a litigant from the pursuit of his or her rights.

Para 8. The Court of Appeal in **TRUST BANK LTD V AMOLO LTD (2003) E.A. at pg 352** put the principle in the following words:

“The spirit of the law is that as far as possible, in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

Having so stated the court finds that the reasons tendered for the lateness in the filing of the supplementary verifying affidavit are reasonable and acceptable.

Para 9. The court also weighed the difficulties that would be occasioned by further delay of the

application, in view of this supplementary verifying affidavit, to which the Respondents may want to respond vis-a-vis the need to investigate the substance of this dispute and decide it on merit. The court finds that it is in the interest of justice, and having due regard to Art 159 (2) (d) of the Constitution to allow the said supplementary verifying affidavit.

Para 10. The court shall deem the supplementary verifying affidavit filed by the applicant on 13th October 2011 as being properly on record by exercising its inherent jurisdiction under Order 53 of Civil Procedure Rules.

Costs shall be in the cause.

**L. A. ACHODE
JUDGE
28th October 2011**

Court: Ruling read and signed in open court this 28th day of **October, 2011.**

**L. A. ACHODE
JUDGE
28th October 2011**