REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPLICATION 472 OF 2002

R E P U B L I C

-VERSUS-

THE CHIEF MAGISTRATE'S COURT AT MOMBASA

ex parte

ALEXANDER MUTUA HOSEA

- AND -

1. JULIUS MBAABU M'MWETI……..1ST INTERESTED PARTY

2. JOSEPH GACHAU MUTURI……..…….2ND INTERESTED PARTY

3. MICHAEL GITAU NGAE……..…….3RD INTERESTED PARTY

RULING

The substantive cause is a judicial review matter; but a party, describing himself as the plaintiff, and represented by learned counsel ***Mr. B. O. Odongo***, has come to challenge the same, by way of the Notice of Motion dated ***27th October, 2009***. This application is brought under Order **LIII**, rules 2 and 4(2) of the Civil Procedure Rules, and it carries two prayers: (i) that the main applicant's amended Notice of Motion of ***30th May, 2009*** with the accompanying amended Statement of 30th May, 2009 be struck out with costs; (ii) that the costs of the application be provided for.

The applicant elected to drop off some of the supporting grounds, but retained the following:

(i) ***that leave to institute the amendments was obtained by non-disclosure of the fact that Civil Appeal No. 67 of 2002 between the*** *ex parte* ***applicant and the Interested Parties challenging the subject order herein, had already been instituted;***

(ii) ***that, concealing the said fact when seeking leave to institute a judicial review application denied the Judge an opportunity to exercise his discretion under Order*** *LIII*, ***rule 2 of the Civil Procedure Rules;***

(iii) ***that, both the application by Chamber Summons dated 19th February, 2009 for amendment, and the ruling thereon delivered on 25th May 2009, were only in respect of the Notice of Motion (and not the Statement) and, therefore, the amendment of the*** *Statement* ***was done without the leave of the Court;***

(iv) ***that, the amended Notice of Motion is supported by*** *amended affidavit* ***which was re-sworn – but an affidavit cannot be amended;***

(v) ***that, the application is an abuse of the process of the Court.***

Facts are given through the supporting affidavit of 3rd Interested Party, ***Michael Gitau Ngae***, sworn on 28th October, 2009. The deponent professes awareness that when in 2002 the ***ex parte*** applicant filed his judicial review application, he (the ***ex parte*** applicant) had already lodged an appeal against the order he now wants to be quashed by way of judicial review – and the said appeal was registered as HCCA No. 67 of 2002, between ***Alexander M. Hosea*** (the ***ex parte*** applicant) and ***Julius Mbaabu Mweti, Joseph Gachau Muturi*** and the deponent. The said appeal, it is deposed, was formally admitted on record in March, 2003 and a certificate to that effect was issued to the advocates of the parties.

Learned counsel ***Mr. Odongo*** submitted that an appeal, to the knowledge of the ***ex parte*** applicant, had been pending at the time leave

was being sought to amend the judicial review application – but this fact was not disclosed. In counsel's words: "The application was made by the person who [had] appealed. He knew the facts, but he did not disclose". Counsel urged that this amounted to non-disclosure of vital facts which the Court needed to know, for it to exercise its discretion by virtue of Order **LIII**, rule 2 of the Civil Procedure Rules. Counsel submitted that the leave to amend the judicial review application had been obtained by non-disclosure of a material fact. That an appeal was pending, was well known to the judicial review applicant whose appeal it was, and who had already received from the Court a certificate of admission for the appeal.

Counsel further urged that the ***ex parte*** applicant had not sought leave to amend his Statement accompanying the judicial review application, and so the amendment made to the Statement should be considered to have rendered the same a nullity.

Learned counsel ***Mr. Kenzi***, for the judicial review applicant, contested the application which he contended was frivolous and abusive of Court process.

Mr. Kenzi made contentious, some of which were not supported by evidence on record; he stated that the appeal, HCCA No. 67 of 2002 had been withdrawn on ***12th October, 2009***. But the record shows that the judicial review applicant did file a Chamber Summons application on ***19th February, 2009*** seeking to amend the substantive application. It is not made clear whether the said withdrawal of the appeal preceeded or came after the application for leave to amend the judicial review application: for counsel at the same time contended that "the existence of an appeal does not invalidate an application for judicial review".

On the contention that the ***ex parte*** applicant had purported to amend a duly sworn affidavit, counsel urged that he had amended only the title of the affidavit, but not its substance; and similarly counsel urged that he had amended only the heading of the Statement accompanying the application for judicial review. Counsel submitted that "if the Court holds that we should not have amended the statement, the Notice of Motion still remains in place ……."

From the facts on record, it is not evident that relevant information on the status of the said appeal had been in the forefront, as the applicant sought to amend his judicial review application; it is also clear that the amendment which was made to the Statement accompanying the application had not been based on a consent expressly sought; just as it is clear that there was an impropriety in the making of an amendment to an affidavit of fact already sworn. The original affidavit had been sworn on 26th September, 2002 before ***William O. Mogaka***, ***Advocate***; and to the amended application of 30th May, 2009 a different affidavit was annexed, sworn by the ***ex parte*** applicant before ***M. Omwenga, Advocate***. Since an affidavit is a statement of fact sworn to be a true account, there will be no rationale in the same being amended, as it would now tell a different story – and this undermines the document's evidentiary value.

I, therefore, allow the applicant's prayer, and order the ***ex parte*** applicant's amended Notice of Motion dated 30th May, 2009 and the amended Statement dated 30th May, 2009 struck out, with costs to the applicant herein. The ***ex parte*** applicant shall bear the costs of the instant application.

DATED and **DELIVERED** at **MOMBASA** this 26th day of February, 2010.

SIGNED

J.B OJWANG

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JUDGE