REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION 20 OF 2008

IN THE MATTER OF: AN APPLICATION BY TANA RIVER PASTORALISTS DEVELOPMENT ORGANIZATION, TANA DELTA CONSERVATION ORGANIZATION, EAST AFRICAN WILD LIFE SOCIETY, CENTRE FOR ENVIRONMENTAL LEGAL RESEARCH AND EDUCATION AND GEORGE MULAMA WAMUKOYA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION DIRECTED AT THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY, MUMIAS SUGAR COMPANY LIMITED, TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY, TANA RIVER COUNTY COUNCIL, COMMISSIONER OF LANDS AND THE WATER RESOURCES MANAGEMENT AUTHORITY ("The respondents")

AND

IN THE MATTER OF: THE CONSTITUTION

AND

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND CORDINATION ACT, 1999 (EMCA)

AND

IN THE MATTER OF: THE WATER ACT 2002

AND

IN THE MATTER OF: TRUSTLAND ACT

AND

IN THE MATTER OF: WILDLIFE (CONSERVATION AND MANAGEMENT) ACT

R U L I N G

Professor Githu Muigai raised a Preliminary Objection regarding the entire proceedings presented before this court which he submits is a violation of the mandatory provision of Order 53 Civil Procedure Rules with regard to statement of facts and affidavits as required under Order 53 rule 2. It is Prof. Muigai's contention that it is wrong to state all the facts in the statement then verify them by an affidavit. In this regard he has referred to the case of **Commissioner General KRA V Silvano Owaki CA No. 45 of 2000 page 7** which he terms as the defining jurisprudence by the Court of Appeal on how Judicial Review

should be treated with regard to statements of facts and affidavits.

That decision of Commissioner General KRA at page 7 stated as follows, drawn from a passage from the Supreme Court Practice 1979 Vol. 1 at paragraph 53/1/7

"***The application for leave" By a statement" – The facts relied on should be stated in the affidavit …."The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit"***

Prof. Muigai argued that it is wrong to state all the facts in the statement then verify by an affidavit and that Maraga J, ruled as much in the case of **Kassim Hamisi Mwachukunia v AG EKLR 2005 Pg2 at para5.**

Prof. Muigai pointed out that the Court was approached by way of Notice to the Registrar dated 2-7-08 informing the court that certain orders were to be sought and verifying affidavit sworn by the Chief Executive Officer of the 4th applicant. It is the 4th paragraph of that affidavit, which reads as follows:

"***THAT I have read the statement and perused the documents accompanying the application for leave in the above matter and state that the facts therein are true to my knowledge and I verify the same. Annexed hereto and marked "JL – 1A" is a true copy of the Statutory Statement of Facts."***

That is what is contested on the basis that the affidavit does not state facts but addresses issues which were summarized in one sentence and then said to be true. This is then followed by eleven paragraphs of statements of reliefs sought and 8 paragraphs of grounds on which the reliefs are sought. It is Prof. Muigai's contention that the facts relied on from paragraph 4-11are required to be in an affidavit (as they are contentious matters) and that portion being contained in the statement is misplaced and incurably defective.

He therefore prays that the motion be dismissed since there are several decided cases which indicate what a statement should contain and this goes way beyond what is anticipated by Order 53(rule 2

Mr. Njenga in response submits that just by referring to the statement, confirms that the same is recognized, and any surpluses that it may contain does not occasion any prejudice to the respondent and it should not be a ground to dismiss the Notice of Motion. He points out that the Notice of Motion is presented under section 3 of the Environment Management Act, Cap 26 Laws of Kenya and Order 53 and that this court's jurisdiction is established under Section 3 of the Environmental Management and Co-ordination Act, which is a substantive legislation whilst Order 53 is more of a procedural legislation. Mr. Njenga further argues that although substantive justice is to be found in the provisions of Order 53, the same is based on a substantive procedural Act of Parliament and not some subsidiary legislation. Mr. Njenga's contention is that since leave was already granted in exercise of Order 53, then unless it can be demonstrated that the same was granted unprocedurally, then it should not be disturbed. However Prof. Muigai interjected to clarify that the leave obtained was not being question.

Mr. Njenga submitted that the significance of environmental matters is seen in the decision by **Hayanga J. in Nzioki and 2 others V Tiomin Keny Ltd. Page 424, para 3** and urges the court that should there be any defect in manner of statement or verifying affidavit, then the procedural provisions of Order 53 should not override the substantive justice as set out in the **Environmental Coordination and Management Act** and so the Preliminary Objection should be overruled.

Dr. Wamukoye further submitted that Respondent's counsel was circumventing the granting of leave by the court. He argued that the whole purpose of obtaining leave is so that the court can determine whether what is placed before it is arguable evidence the principle legislation is section 3 of the Environmental Management and Co-ordination Act: Dr. Wamukoye contends that there is nothing to demonstrate that the purported defect would prejudice the Rights and questions why the voices of those who speak on behalf of the public should be contained – he referred the case of **Macharia V Wangombe Civil suit No.**

128 of 1971 page 46 which stated that a shortcut is accepted to expedite but not to delay justice and the court may still exercise its discretion in the interest of the environment and the people. He also referred to the decision in **Inland Revenue Commission V National Federation 1982 AC 617 at pg 657** where Lord Diplock said; that it would be a lacuna in law if a pressure group was prevented by outdated technical rules of LOCUS STANDI – from bringing a matter to the attention of the court.

However Professor Muigai's position is that once a litigant chooses to assert certain rights, then they are bound by the procedural law that governs the determination of those rights and that the purpose of the procedural law is to make sense to the substantive law – so once applicants chose to approach court under the provisions of Order 53, then violation of these provisions cannot be wished away as mere technicality because if the affidavit does not verify the claim, then it is worthless and the loopholes cannot be cured and the only recourse is to dismiss the application.

What does Order 53 rule 1(2) provide? It states as follows in relation to application for Judicial Review:-

"***An application for such leave as aforesaid shall be made exparte 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 …"***

Does this then limit the applicants as regards the contents of the statement to simply, name and description of party and the reliefs and grounds on which it is sought: of course the question one would then ask is, if that is all that the statement contains, then what facts in the verifying affidavit verifying. It would appear that all evidential facts should be set in an affidavit and not in the statement. But why should parties be bogged down with matters of procedure? Why cant they just proceed to substantive issues? It seems that this leave stage, as it were, is the sieve sifting or threshold stage – as seen in the decision of **Captain Geoffrey Kajoga, JB Kangwana V AG Misc. App. 446 of 1995**.

This distinction of what the statement should contain was discussed in the case of **Commissioner General KRA V Silvano Owaki t/a Maringa Filling Station Civil Appeal No. 45 of 2000** (which is an unreported decision), at page 7.

"***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.***

That appears to be the meaning of rule 1 (2) of Order LIII.

The 4th paragraph verifying affidavit sworn by Jael Ludeki (CEO of the 4th Applicant) and dated 1st July 2008 simply states that the statement and documents accompanying the application for leave in the matter and the facts therein are true.

Paragraph 4-11 of the Statement actually has a subtitle reading;

"***The facts relied upon, and then sets out in details those facts – thereby overloading the statement, which under Order LIII Rule 1(2) is limited as to the nature of its contents."***

Mr. Njenga argues that by making reference to the statement, it confirms that the same is recognized and that refuge is offered by section 3 of the Environmental Management and Co-ordination Act which is the substantive legislation section 3 recognizes that a person is entitled to a clean and healthy environment and where the right has been infringed upon, then such person may apply to the Act for redress.

That section simply creates the detailed reliefs which an aggrieved party may seek for it does not contain the procedural law. It follows then that the procedural law and practice is as set out under Order LIII Rule 1 (2) it then follows, that the reference to the statement by 4th respondent's Chief Executive Officer, in her affidavit does not give its surplus contents validity and would in no way authorize this court to recognize them as they violate the rules of procedure.

The ratio decidendi of the Court of Appeal in the Owaki case is that the verifying affidavit should contain the facts and not merely that the statement of facts should be verified in a verifying affidavit.

Of course the significance of Environmental Law and Environment issues cannot be downplayed, yet this court must avoid allowing emotional tuggings and involving the favours reframe of "who will speak on behalf of the public" by Dr. Wamuhoya, does not sanitize what is obviously and apparently a procedural defect. Indeed the voice of the people, when being echoed through professional of no less standing than individuals who are thoroughly schooled in the law must then adhere to the very procedural provisions provided by the regulations of that professed calling and the shortcut anticipated in the case of **Macharia V Wanyoike (1981) KLR** does not come to the applicant's aid in the present situation for the simple reason that it will not expedite justice, rather the court will have allowed a shortcut in breach of a fundamental rule. I fail to appreciate the relevance of Lord Diplock's sentiments referred to by Dr. Wamukoya in the **IRA Commission Case**.

From the arguments so ably presented before this court by all counsel involved, from the decided cases cited, and I have taken the liberty to also make a reading of the text by P. L. O. Lumumba and P. O. Kaluma on

"***Judicial Review of Administrative Actions in Kenya. Law and Procedure" (Jomo Kenyatta Foundation),*** - the jurisprudence that is established is undoubtedly that to all evidential facts should be set out in an affidavit, not in the statement of failure to file an affidavit setting out the facts relied upon renders the application incompetent for want of evidence. I would borrow from the words of my brother Nyamu J (as he then was) in the decision of **Paul Imison V The AG and 3 others Misc. Civil Appl. 1604 of 2003** that:-

"***it is clear both on the interpretation of Order 53 Rule 1 (2) and the Mireng Filling Station case, that the facts must be exclusively contained in the affidavit. The statement is therefore not capable of being adopted by an insufficient affidavit. The statement has no evidential value both under the Rule and as interpreted in the Mireiyi Filling Station case."***

I therefore find that there is merit in Preliminary Objection raised and the same is upheld on the application is therefore struck out for failure to comply with Order 53 rule 1(2). Costs shall be borne by applicants.

Delivered and dated this **18th** day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Agwara holding brief for Mumma for 6th respondent and also holding brief Mr. Ojiambo for 1st respondent.

Mr. Njeru holding brief for Mr. Mbugua for applicant.**Mr. Mwadilo holding brief for Prof. Muigai for 2nd respondent.**