



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 1226 of 2004

FRIENDS OF TAIWAN & TIBET INTERNATIONALAPPLICANT

Versus

NON-GOVERNMENT ORGANISATION BOARD.....RESPONDENT

JUDGMENT

Before me is the Notice of Motion dated 8th October 2004 and filed in court on 12th October 2004. It is brought pursuant to Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England.

The Applicant, Friends of Taiwan and Tibet International seek that an order of certiorari do issue to bring to the High Court and quash the decision of the Non Governmental Organization Co-ordination Board, which revoked the registration of the Applicant and also prays for costs of the Application.

Mr. Gacheru who urged the Application on behalf of the Applicant relied on the Statement of Facts dated 15th September 2004 and filed in court on 17th September 2004 and the affidavit of Walter Kimani M'muguna also dated 15th September 2004 and filed in court on 17th September 2004. He also filed skeleton arguments.

The Respondents opposed the Application and a replying affidavit was sworn by David Isoe, the Acting Executive Director of the Respondent. Mr. Bitta Counsel for the Respondent also raised a preliminary point of law on the competence of the Application.

I wish to deal with the preliminary issue before delving into the merits of the Application.

Mr. Bitta observed that the Applicants filed the Chamber Summons dated 16th September 2004, filed in court on 17th September 2004. It was supported by a statement and verifying affidavit, both dated 15th September 2004 and filed in court on 17th September 2004. That on the same date of filing the Chamber

Summons, that is 17th September 2004, the Applicants filed a notice of withdrawal of the Chamber Summons dated 17th September 2004.

On 20th September 2004, the Applicants filed another Chamber Summons dated the same date but it was not accompanied by any statement or verifying affidavit. It is Mr. Bitta's submission that the Chamber Summons dated 16th September 2004 having been withdrawn, so was the statement and verifying affidavit filed with it and there is no affidavit or verifying affidavit in support of the Notice of Motion before court.

Mr. Gacheru conceded that indeed the Chamber Summons dated 16th September 2004 was withdrawn but that the verifying affidavit, statement, the notice to the Registrar were not withdrawn and that Justice Nyamu who granted leave to the Applicant was satisfied that the documents were properly on record and therefore the Respondent cannot challenge the court's order granting leave so late in the day.

I have perused the court file and it is true that the Chamber Summons dated 16th September 2004 was withdrawn vide a notice of withdrawal dated 17th September 2004 and filed in court on same date. The question is, does it mean that the Applicant only withdraw the document written on Chamber Summons and left the statement, verifying affidavit and notice to Registrar. Order 53 Rule 1 (2) Civil Procedure Rules provides;

“(2) 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. The judge may, in granting leave, impose such terms as to costs and as to giving of security as it this fit.”

The Chamber Summons that was before the court includes the Application which sets out the orders sought, the statement, the verifying affidavit and the notice which would have been served on the Registrar. It is sometimes referred to as a Chamber Summons Application. One cannot remove the affidavit or the statement and claim to have an Application before the court. All the documents listed in Order 53 Rule 1 (2) form the Chamber Summons Application for leave to bring Judicial Review proceedings and I do agree with Respondent's Counsel that once the withdrawal notice was filed on 17th September 2004, the whole Chamber Summons was withdrawn and nothing remained. In fact in my view, the whole file was done away with and if any other Application were to be made, it should have been in a fresh file but not the present.

The Applicant then filed a Chamber Summons on 20th September 2004 upon which Justice Nyamu granted the leave to bring Judicial Review proceedings. Even if the judge did, which must have been an oversight or error, the fact is that there is no affidavit or statement filed with the Chamber Summons dated 20th September 2004 upon which the Notice of Motion dated 12th October 2004 can be premised. The statement should contain the grounds upon which the Application is sought and the reliefs, while the affidavit contains the evidence.

Order 53 R 4 (1) provides that it is the affidavits accompanying the Application for leave and the grounds contained in the statement that will be relied upon when arguing the Notice of Motion.

I find and hold that the Chamber Summons dated 20th September 2004 is incompetent in that it does not comply with Order 53 Rule 1 (2) Civil Procedure Rules and consequently there is no evidence in support of the Notice of Motion there having been no statement or verifying affidavit to be relied upon. The Notice of Motion is therefore incompetent and is hereby struck out.

Though Counsel for the Respondent did not take up this point, I have noted that the Notice of Motion dated 12th October 2004 is brought pursuant to Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England. This is a Judicial Review Application. In Kenya the substantive law that gives this court jurisdiction to grant orders of Judicial Review is Sections 8 and 9 of the Law Reform

Act, while Order 53 Civil Procedure Rules provides for the procedure adopted in seeking Judicial Review orders. The courts jurisdiction is not invoked under the Law Reform Act and Order 53 Civil Procedure Rules and the orders sought cannot be granted.

Having reached the above conclusion, I find no need to go into the merits of this Application as it is a non starter. The Notice of Motion dated 12th October 2004 is hereby struck out with the Applicant bearing the costs.

Dated and delivered this 23rd day of March, 2007.

R.P.V. WENDOH

JUDGE