



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC CIV APPLI 185 OF 2006

REPUBLIC.....APPLICANT

Versus

ATTORNEY GENERAL.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT KEHANCHA.....2ND RESPONDENT

RULING

The Interested Party to this Application, Philip Oyieyo Adongo, filed a Notice of Preliminary Objection dated 29th July 2007, to the Notice of Motion dated 23rd March November 2007. The said Notice of Motion was filed by the ex parte Applicant, Glory Car Hire Tours and Safaris Ltd, While the Respondent was named as the Chief Magistrate's court at Kehancha. In the Notice of Motion, the Applicant sought the following orders:

- (1) That an order of certiorari do issue directed at the Hon. Resident Magistrate, Mr. Serem, of Kehancha Law courts to remove into this court and quash the proceedings/Ruling/Orders made by the said Resident Magistrate on 8th August 2006 in CRC 1184/06 ordering the forfeiture of the Applicant's motor vehicle Registration No. KAQ 357B;
- (2) That an order of mandamus directed at the Attorney General and the Resident Magistrate Kehancha Law Courts, to order the release of motor vehicle KAQ 357B to the Applicant.

The Application was supported by the supporting affidavit of Fanuel Chamwoma who describes himself as the Operations Manager of the Applicant and the Affidavit, is dated 9th October 2006. There is also a Statutory Statement dated 6th October 2006 and a Verifying Affidavit dated 6th October 2006.

Though the Respondent had appeared and filed grounds of opposition on 22nd July 2007, there was no representation at the hearing and since the hearing date had been taken in the presence of all Counsel, the Court proceeded in absence of the Respondent's Counsel.

I will now consider each ground that was raised in the Preliminary Objection:-

1. That the Notice of Motion is premature , mischievous , misconceived and legally untenable.

Mr. Otiso submitted that the Notice of Motion is filed outside the mandatory 21 days period and that it offends Order 53 Rule 1 Civil Procedure Rules. That the order of the court of 22nd November 2006 granted leave to bring Judicial Review proceedings and allowed the Notice of Motion Application to be filed within 21 days but it was filed on 20th December 2006, 7 days outside the time allowed.

In opposing that objection, Mr. Maina, Counsel for the Applicant argued that this court has discretion under Order 53 of the Civil Procedure Rules to hear the Application for the interests of justice to be met.

The court granted leave to the Applicants to bring Judicial Review proceedings on 22nd November 2006. The court ordered that the substantive Notice of Motion be filed within 21 days. That is in conformity with Order 53 Rule 3 (1) Civil Procedure Rules which provides that when leave is granted to apply for Judicial Review Orders, the Notice of Motion shall be filed within 21 days unless the court orders that the Notice of Motion be filed within a shorter period than 21 days. The Notice of Motion was filed on 20th December 2006, 28 days after leave was granted. The Notice of Motion was therefore filed 7 days after the time allowed. This court has no jurisdiction to enlarge the time. The Civil Procedure Act and Rules do not apply to Judicial Review and so order 49 of the Civil Procedure Rules on extension of time does not apply because Judicial Review is a special jurisdiction whose procedure is provided for under the Sections 8 & 9 of the Law Reform Act and Order 53 Civil Procedure Rules. The Court of Appeal so held in **CA 234/1995 THE COMMISSIONER OF LANDS V KUNSTE HOTEL LTD.** In the case of **THOMAS AKO V SPECIAL DISTRICT COMMISSIONER KISUMU, MINISTER OF LANDS & SETTLEMENT CA 27/1989**, the Court of Appeal held that Order 49 Rule 5 Civil Procedure Rules which provides for enlargement of time did not apply to Judicial Review. So, even in its inherent jurisdiction this court cannot enlarge the time allowed to file a Notice of Motion in Judicial Review proceedings Order 53 does not provide for enlargement of time.. The instant Notice of Motion is brought outside time allowed and is therefore incompetent, improperly on record and is hereby struck out.

2. The 2nd limb of the Preliminary Objection is that the Statement and Verifying Affidavit dated 6th October 2006 are fatally defective and invalid and that renders the Judicial Review Application void. Mr. Otiso submitted that the Verifying Affidavit does not contain any facts capable of sustaining the Application. Counsel relied on the case of **COMMISSIONER GENERAL V SILVANO ONEMA OWAKI CA 45/00** where the Court of Appeal held that the evidence in support of a Judicial Review Application should be contained in the Affidavit which verifies the Statement of facts but the facts should not be in the statement. In opposing that objection, Mr. Maina submitted that the objection raised is premature as the defect is curable by way of an amendment. He relied on the case of **SCHIFBAU-UND ENTWICKLUNGSELSCHAFT TANGERMUNDE & CO. K.G. V THE PUBLIC PROCUREMENT COMPLAINTS REVIEW & APPEALS BOARD & ANOTHER CA 174/05** where the Court of Appeal held that such a defect can be amended.

In response to Mr. Maina's submission that the Affidavit can be amended, I find no provision in Order 53 or any other law that provides for amendment of Affidavit because an affidavit contains statement of facts or evidence which cannot be amended. Order 53 Rule 4 (2) provides for amendment of the Statement and filing of Further Affidavits but not amendment.

In the **SCHIFBAU CASE** the Court of Appeal dealt with Order 53 R 7 where a party could be allowed to file a Verifying Affidavit when lodging the order or decision impugned if it had not been lodged at the filing of the Application. It also dealt with amendment of the statement.

I have perused the court file and I find that the Applicant filed the Chamber Summons on 11th October 2006. That Chamber Summons was accompanied by a Supporting Affidavit dated 9th October 2006, sworn by Fanuel Chamwoma, and it had annexures to it. On 6th October 2006, the Applicant had a filed Notice to the Registrar with the Statement and a Verifying Affidavit. It means that all the documents placed on record with the Chamber Summons are the documents that support the Notice of Motion. Order 53 Rule 4 (1) Civil Procedure Rules provides that copies of the Statement accompanying the Application for leave shall be served with the Notice of Motion and copies of any Affidavits accompanying the Application for leave. Further, under Order 53 Rule 1 (2) Civil Procedure Rules, an

Application for leave can be accompanied by more than one affidavit. The said Rule reads.

“R 1 (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 security as he thinks fit.”

Order 53 Rule 1 (2) and 4 (1) Civil Procedure Rules do allow a party to file more than one Affidavit in support of the Chamber Summons Application which the Applicant did. It seems the Interested Party did not see the Affidavit dated 9th October 2006. There is therefore no limit as to how many Affidavits can be filed with the Chamber Summons. However, any other Affidavits filed after the Notice of Motion is filed have to be filed with the leave of the court.

I find that the Supporting Affidavit dated 9th October 2006 and Verifying Affidavit dated 6th October 2006 to be properly on record. The Interested Party should not have looked at the Affidavit titled ‘Verifying Affidavit’ alone. The Applicant has the discretion to file ‘**Affidavits**’ together with the chamber Summons which are later used as the evidence in support of the Notice of Motion.

What I find irregularly on record is an Affidavit dated 27th November 2006 and filed with the Notice of Motion. It is also sworn by Fanuel Chamwoma. Under Order 53 Rule 4 (2) Civil Procedure Rules the Applicant is not allowed to use any further Affidavits apart from those filed with the Chamber Summons unless it is with the leave of the court. And the further Affidavit so filed has to be in reply to matters raised by the opposing party in their replying affidavit. In the instant case, there was no Replying Affidavit on record as of 20th December 2006 when the Applicant filed another Affidavit dated 27th November 2006. The Affidavit dated 27th November 2006 is irregularly on record and it is hereby struck out. However, I find no merit in the 2nd objection and it is dismissed.

3. The third ground of the objection is that the Applicant lacks the necessary locus standi in this matter because the subject motor vehicle is registered in the names of Mohamed Ali Ahmed whereas the Applicant is Glory Car Hire, Tours & Safaris. In reply, Mr. Maina has urged that the issue of locus standi cannot be raised as a Preliminary Objection but has to await the main hearing. I do not agree with the Applicant’s Contention. The issue of locus standi is a point of law which has to be determined at the earliest time possible. There would be no point proceeding with a matter where one has no interest. For the court to grant the orders sought it would have to establish who indeed is the owner of the motor vehicle at the centre of the controversy and that the right party is before the court. It means that there would be need for the calling of evidence to establish that fact but it cannot be done by way of affidavit evidence. The issue of ownership can only be resolved in an ordinary Civil Case where the Applicant would have sought an order of injunction pending the determination of the issue of ownership. Though this point is not raised by the Interested Party, the person named in the log Book as the owner is Mohamed Ali Ahmed and is a person who would be affected by orders of the court. On the other hand; Mohamed Ali Ahmed would have shed light on whether indeed he sold the vehicle to the Applicant or not. Order 53 R. 3 Civil Procedure Rules requires that the Notice of Motion be served on any party that may be affected by the court’s order. The said Mohamed should have been enjoined to these proceedings as an Interested Party and failure to do so renders the Application fatally defective as the court might make orders that may adversely affect another party who has not been given a hearing by this court thus contravening rules of natural justice.

Another point that was not raised is the fact that the Attorney General was not enjoined to these proceedings as a party. The Resident Magistrate cannot be sued in his own capacity as the Applicant purported to because under S.6 of the Judicature Act, Cap 7 Laws of Kenya, a judicial officer is protected from any Civil proceedings for an act done or ordered by him in the discharge of his judicial duty. Even though the Resident Magistrate was named in the proceedings, the Attorney General should have been enjoined as the legal Representative of Government Officers and institutions. Infact the 2nd prayer of mandamus is directed against the Attorney General yet he was not made party to these proceedings. The

omission to join the Attorney General to the Application renders it fatally defective. I do uphold the third objection that the Applicant has not shown the necessary locus standi in the matter and it is basically because he did not join the necessary parties to this Application

Even without considering all the points raised in the Preliminary Objection, it is obvious that the Notice of Motion cannot be sustained due to the various defects and shortcomings in the Notice of Motion and the same is therefore struck out with costs to the Interested Party.

Dated and delivered at Nairobi this 31st day of October 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of

Mr. Otiso for the Interested Party

Daniel: Court Clerk