



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**MISC APPLI 784 OF 2007**

**KENYA COMMERCIAL BANK LIMITED.....APPLICANT**

**Versus**

**THE COMMISSIONER OF POLICE & TWO OTHERS.....RESPONDENTS**

**RULING**

By a Chamber Summons dated 4<sup>th</sup> October 2007, the Applicant Benjoh Amalgamated Ltd., named as the 3<sup>rd</sup> Respondent in the main Judicial Review Application, seeks an order that Misc. Cause 784/07 be struck out for being scandalous, frivolous, vexatious and an abuse of the process of court and that costs be paid to the Applicant. The Application is brought pursuant to S. 3A Civil Procedure Act and Order VI Rule 13 (b) and (d) of the Civil Procedure Rules. The Application is premised on grounds found on the face of the Application and an Affidavit sworn by Samuel Kung'u Muigai, a Director of both Benjoh Amalgamated Ltd. and Muiri coffee Estate Ltd.

The Application was opposed and John Akello Ougo, Counsel in the firm of Oraro & Co. Advocate, who represent the ex parte Applicant in the main motion, swore an Affidavit in reply. Mr. Wohoro, Counsel representing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the main Notice of Motion did not respond to the Chamber Summons and left it to the ex parte Applicant. The Applicant (3<sup>rd</sup> Respondent) in the Chamber Summons was represented by Mr. Wachakana while Mr. Chacha Odera appeared for the ex parte Applicant/Respondent.

In his Affidavit, the Applicant depones that the Republic obtained a warrant to investigate Account No. 315 043 651 017 belonging to the 3<sup>rd</sup> Respondent. That investigations were carried out and two suspects were charged but they obtained prohibition orders ex parte to the detriment of the 3<sup>rd</sup> Respondent. On 19<sup>th</sup> August 2007, the Bank used a document that it had disclaimed to purport to sell the 3<sup>rd</sup> Respondent's/Applicant's property and that that order is meant to ensure that the property is sold which is an abuse of the court process. Further it was deponed that the Affidavit of Moses attached to Registrar's notice is not signed. Though the Applicant referred to documents numbered C1-06 exhibited to his Affidavit, none was actually annexed. The documents that were annexed were not marked.

Further Mr. Wachakana contended that the defect to the Affidavit is incurable. That the Statement to the Notice of Motion is signed by Halkano instead of Evans Mose who prepared the unsigned one and that therefore, there was no statement upon which an order of prohibition could issue. Counsel relied on the cases of **REP V GITHAE CA 11/02** where the court held that court should strike out any suit that is prejudicial to the other party. That in this case, the order prohibiting the investigation of the account is

prejudicial to the 3<sup>rd</sup> Respondent. Counsel also asked that the court vacate the ex parte orders.

In reply, Mr. Ougo deponed that the charges referred to in Paragraph 3 of the Affidavit of the Applicant, were terminated following the filing of a nolle prosqui by the Attorney General (as per annexure A) That he is the counsel who prepared the pleadings in this matter and that the statement and Verifying Affidavit were signed and commissioned and filed in court on 24<sup>th</sup> July 2007. On 23<sup>rd</sup> July 2007 Counsel had served notice on the Registrar and with the notice he lodged the Statement and Verifying Affidavit before they were filed. That the Statement and Verifying Affidavit were not signed as they were merely intended to notify the Registrar of their intention to file the Application. That the Chamber summons filed by the 3<sup>rd</sup> Respondent is incompetent as Civil Procedure Rules do not apply to these proceedings. Mr. Chacha Odera relied on the case of REP V COMMUNICATION COMMISSION OF KENYA

). EA 195 where the Court of appeal held that the Civil Procedure Rules do not apply to Judicial Review Applications. He said that there is no prejudice suffered by the Applicant by the filing of a Statement signed by Halkano Wako instead of one by Evans Mose.

Order 53 Civil Procedure Rules under which these proceedings are brought requires that upon service of the notice on the Registrar of the intention to file Judicial Review proceedings, a notice be filed along with a Statement and Verifying Affidavits that will be accompanying the Chamber Summons Application. Order 53 Rule 1 (3) reads:

“The Applicant shall give notice of the Application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the Statement and Affidavits;”

The Applicant complied with the said rule by serving the Notice on the Registrar on 23<sup>rd</sup> July 2007 and it was accompanied by a Statement and Verifying Affidavit. The 2 documents which should have been sworn and signed by one Evans Mose were not dated or signed.

The Applicant then moved to court on 24<sup>th</sup> April 2007 with the Chamber summons accompanied by a Statement and Verifying Affidavit as required by Order 53 Rule 1 (2) Civil Procedure Rules. This time, the Affidavit and Statement were signed by Halkano Molu, the credit Manager. Whereas Evans Mose was the legal officer in the Applicant company, Halkano is the credit Manager. Both the Statements and Verifying Affidavits filed with the Notice to the Respondent and with the Chamber Summons are similar. It is noteworthy that the Applicant is a Limited Liability company and different officers can depone to the same facts known to them by virtue of their positions in the company. It is the Statement and Verifying Affidavit filed with the Chamber Summons that are relied upon when the Notice of Motion is heard. The statement and Verifying Affidavit served with the Notice are merely meant to give Notice to the Registrar of the intended Application. It is apparent that failure to sign the Affidavit and statement renders them defective and valueless. Apart from giving notice, they do not serve any purpose. The 3<sup>rd</sup> Respondent has not complained that he was served with the unsigned documents. I find that there is no prejudice that will be suffered by the 3<sup>rd</sup> Respondent by the filing of unsigned Statement and Affidavit along with the notice to the Registrar. It seems to be an inadvertent mistake that would not affect the 3<sup>rd</sup> Respondent/Applicant in any event.

This Chamber Summons is brought pursuant to S. 3 A Civil Procedure Act and Order VI Rule 13 (b) and (d) of Civil Procedure Rules. The question is whether the Civil Procedure Rules apply to this Application. The substantive Notice of Motion is a Judicial Review Application brought pursuant to S. 8 and 9 of the Law Reform Act and Order 53 Civil Procedure Rules. Judicial Review proceedings are ‘sui generis’. They are neither a criminal nor civil jurisdiction. S. 8 of the Law Reform Act stipulates;

**“S. 8 (1) the High Court shall not, whether in the exercise of its civil or criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari.”**

The Court of Appeal affirmed this position in the case of **HOTEL KUNSTE LTD V COMMISSIONER OF LANDS CA 234/1995**, where it held that Judicial Review proceedings are

neither civil nor criminal proceedings but are a special jurisdiction under the Law Reform Act and Order 53 of the Civil Procedure Rules. Mr. Chacha Odera also cited the case of **REP V COMMUNICATION COMMISSION OF KENYA (2001) 1 EA 195** where the Court of Appeal said that they doubted that Order VI Rule 13 (1) of the Civil Procedure rules was applicable to proceedings instituted under Order 53 of the Civil Procedure Rules. Such an Application where there is no specific procedure provided under Order 53 Civil Procedure Rules for bringing it, would be brought under the inherent powers of the court. In the case of **NJUGUNA V MINISTER OF AGRICULTURE**, the Court of Appeal observed that the appropriate procedure for challenging of leave that has been granted is under the inherent powers of the Court to the judge who gave leave. There is no provision in Order 53 for setting aside or striking out and that is how the court was to be moved. Since the court is not properly moved to grant the orders sought, this court has no jurisdiction to grant them and the Application would be struck out for being incompetent.

The Chamber summons Application seeks the striking out of the Notice of Motion but by the time the Counsel argued his Application he sought totally different orders, to set aside the ex parte orders. It is not clear what the Applicant wants.

Further to the above, one of the grounds upon which this Application was preferred was that the Notice of Motion was wrongly brought in the name of the Republic. It is trite that once leave to bring a Judicial Review Application is granted, the Notice of Motion is brought in the name of the Republic. That is because prerogative writs which became Judicial Review orders were brought in the name of the crown on behalf of the citizenry. In 1964 on Kenya becoming a Republic, the Judicial Review proceedings are now brought in the name of the Republic.

Judicial Review is a machinery set in place by the state to check the excesses of its officers or authorities and so Judicial Review orders are sought in the name of the Republic at the instance of the affected party. That procedure has been in place since the **FARMERS BUS SERVICE & OTHERS V THE TRANSPORT LICENSING APPEAL TRIBUNAL CASE (1959) EA 779** where it was held that the Judicial Review Applications should be brought in the name of the Republic and should be properly intitled. There is now a host of case law on that point.

- 1) **JOTHAM MULATI WELAMONDI V CHAIRMAN ECK MISC APPLICATION 81/02**
- 2) **NDETE V COMMISSIONER OF LAND DISPUTES TRIBUNAL (2002) 1 KLR 392**

The Notice of Motion is properly before the court.

In conclusion, apart from the Chamber Summons being incompetent, and lacking in merit, the application raises issues of evidence that are for argument in the main Notice of Motion. In the result, I dismiss the chamber Summons Application with costs to the ex parte Applicant/Respondent.

Dated and delivered this 7<sup>th</sup> day of December 2007.

R.P.V. WENDOH

JUDGE

In the presence of:

Mr. Wachakana for the Applicant

Mr. Chacha Odera for the Respondent

Daniel: Court Clerk