



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 34 of 2006

REPUBLIC
.....APPLICANT

VERSUS

**KENYA ANTI-CORRUPTION COMMISSION1ST
RESPONDENT**

**CHIEF MAGISTRATE’S ANTI-CORRUPTION COURT2ND
RESPONDENT**

**EX-PARTEJOSEPHERT
KONZOLO**

R U L I N G

Josphert Konzolo (“**the Applicant**”) brought a Notice of Motion on the 25th January 2006 under Section 8 of the Law Reform Act [Cap.26] and Order 53 of the Civil Procedure Rules seeking, *inter alia*, Orders to quash the charge sheets in Kenya Anti-Corruption Case File No. KACC/INQ/44/1.10.2003. The Application relies on the Amended Statutory Statement dated the 7th February 2006 and filed on the 9th February 2006. The Application is supported by the Applicant’s own Verifying Affidavits as follows —

- a) that sworn and filed on the 25th January 2006 (“the Applicant’s First Affidavit”);
- b) that sworn on the 7th February 2006 and filed on the 9th February 2006 (“the Applicant’s Second Affidavit”); and
- c) that sworn and filed on the 13th February 2006 (“the Applicant’s Third Affidavit”).

The First Respondent opposes the Application and on the 22nd February 2006 filed the affidavit of George Gicibu Makendo sworn on the same date.

The Second Respondent, also in opposition to the Motion, filed the Replying Affidavit of James Mungai Warui made on the 14th February 2006 together with the Grounds of Objection/Opposition and the Notice of Preliminary Objection respectively of even date therewith.

As all three Judges in the Constitutional and Judicial Review Division were for reasons recorded unable to hear the Application, Visram, J ordered on the 9th February 2006 that the Motion be heard on the 15th

February 2006 by any Judge in the Civil Division. His Lordship, on application by the Applicant, also granted **“leave to the Applicant to amend Statement and serve the same by 10.2.06. Respondents shall be at liberty to submit on the amendment of the Statement.”**

When the matter first came up for hearing before me on the 15th February 2006 and upon considering submissions of all learned counsel, I granted the First Respondent leave to file and serve its Replying Affidavit by the 23rd February 2006 and by consent, the Application was stood over for hearing, *inter parties*, on the 1st March 2006 by any Judge.

It was in the course of my hearing the Application on the 1st March 2006 that Mr. Too, learned counsel for the 1st Respondent, raised two objections, namely that —

- a) the Applicant, having failed to seek or obtain leave of the court to file the Applicant’s Third Affidavit was not at liberty to refer thereto as such affidavit was not properly on record; and
- b) the Applicant cannot refer to the Actuarial Directory annexed marked **“A”** and referred to in paragraph 8.1 of the Amended Statutory Statement because evidence may be introduced only by way of affidavit.

In support of his submissions, which were also supported by Mr. Mungai, learned counsel for the 2nd Respondent, Mr. Too referred me to the provisions of Order 53 rules 1(2) and 4(2) of the Civil Procedure Rules.

In reply, Mr. Lubullellah, learned counsel for the Applicant, contended that there is no application before the court for the striking out of the said Actuarial Directory and as the document is already on record, the court cannot ignore it.

With regard to the Applicant’s Third Affidavit, Mr. Lubullellah argued that the Applicant having been granted leave to amend the Statutory Statement, the provisions of Order 53 rule 1(2) of the Civil Procedure Rules contemplated that the Amended Statement be accompanied by a verifying affidavit and the Applicant’s Third Affidavit was therefore properly on record pursuant to and in satisfaction of the presumption in that sub-rule. Further, learned counsel took the view that the First Respondent had waived its right to object to the Applicant’s Third Affidavit by referring to it in the said Replying Affidavit of George Gicibu Makembo made and filed on the 22nd February 2006 as in any event, the First Respondent had raised no objection thereto when the Application came up for hearing before me on the 15th February 2006 and I gave directions on the hearing thereof. Mr. Lubullellah also submitted that the Applicant’s Third Affidavit seeks to place before the court crucial material evidence in the absence of which there would be a miscarriage of justice.

I have considered both these submissions in light of the provisions of Order 53 rule 4(2) of the Civil Procedure Rules in particular which sub-rule reads thus —

“The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend the statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.”

With profound respect to Mr. Lubullellah, it is not every amendment to a statement that would require a verifying affidavit. For instance, an amendment to correct a typographical error would require no such affidavit, whereas, an amendment to introduce a new matter arising out of the affidavits of any party to an application would require a verifying affidavit and the sub-rule expressly requires notice of the proposed amendment to be given.

In the present application, the Applicant not only failed to give notice in accordance with Order 53 rule

4(2) of the Civil Procedure Rules but also failed to seek leave to file a verifying affidavit when the matter was placed before Visram, J on the 9th February 2006. The fact that the Respondents have not moved the court to strike out the Applicant's Third Affidavit by formal application or otherwise does not cure this grave irregularity which the court cannot ignore.

Accordingly, I find and hold that the Applicant's Third Affidavit sworn and filed on the 13th February 2006 was filed without leave of the court. Consequently, I order that the same be and is hereby struck out and expunged from the court record.

Having so found and held, and as there is no affidavit on record to introduce the evidence contained in the Actuarial Directory annexed to the Amended Statutory Statement, I also find and hold that the Applicant is precluded from using this annexure as evidence in support of his Application as **"it is the verifying affidavit and not the statement to be verified, which is of evidential value in an application for judicial review"**: Commissioner General, Kenya Revenue Authority Through Republic -v- Silvano Onema Owaki T/a Marenga Filing Station (Civil Appeal No. 45 of 2000 (CA at Kisumu)) (unreported).

Finally, the Respondents are still at liberty to submit on the amendment of the Statutory Statement as ordered by Visram, J on the 9th February 2006.

Orders accordingly.

Dated and delivered at Nairobi this Third day of March 2006.

P. Kihara Kariuki

Judge