



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

Misc Civ Appli 1739 of 2005

INTECH EAST AFRICAN LTDAPPLICANT

VERSUS

IN THE MATTER OF LOCAL GOVERNMENT ACT RESPONDENT

JUDGMENT

On 14th December, 2005 this court granted the ex parte applicant, Intech East Africa Ltd, leave to bring an application for Judicial Review against the Town Clerk City Council of Nairobi. On 15th December, 2005 the applicant filed the substantive notice of motion in which the applicant sought an order of mandamus to issue directed against the Town clerk as the Executive Officer of the City Council of Nairobi compelling him to satisfy the entire decree inclusive of interest and costs, issued by the High Court of Kenya at Milimani Commercial Court in Nairobi Chief Magistrate Court Case No.1244 of 2002. The application was supported by a statutory statement filed in court on 13th December, 2005 and a verifying affidavit of the same date. The requisite notice to the Registrar was filed on 13th December, 2005.

Though served the Respondents did not file any papers in reply nor was there any appearance at the hearing.

Mr. Mungu appearing for the applicant told the court that they have a decree which has not been settled by the Respondents and that the Town Clerk as Chief Executive Officer of the Nairobi City Council is the one authorized to make such payments as per section 263 A of the Local Government Act Cap 265.

The Counsel also filed skeleton arguments.

I have considered the application before me. The Respondent's appearance notwithstanding, this court has to consider whether the applicants' application is properly before this court.

This is an application for Judicial Review brought under Order 53 Civil Procedure Rules. It is section 8 of the Law Reform Act that donates power to order 53 to make orders of Judicial Review. When exercising jurisdiction under order 53 Civil Procedure Rules the court is neither exercising civil nor criminal jurisdiction (Section 8 law Reform Act). The applicant cannot therefore invoke section 3A of the Civil Procedure Act. The Court of Appeal has held that the provisions of the Civil Procedure Act do not apply to Judicial Review proceedings in **KUNSTE HOTEL v. REP 1995 E.A. 243**;

(2) COMMUNICATION COMMISSIONERS OF KENYA V. R. C.A 270 OF 2000.

I have seen the statutory statement filed by the applicant, it contains the;

- (a) **Names and description of the applicant**
- (b) **Facts relied upon**
- (c) **Documents relied upon**
- (d) **The relief sought and**
- (e) **The grounds upon which the relief is sought.**

The statutory statement offends provisions of Order 53 Rule 1(2).

That rules provides that the statement shall set out the name and description of the applicant, the relief sought, and the grounds on which it was sought and must be verified by affidavits verifying the facts relied upon. The statement is not supposed to contain facts or evidence of documents. The facts or evidence and annexures should be in the verifying affidavit.

The court will therefore strike out the part of the statement containing facts or evidence and documents.

Now coming to the verifying affidavit, it is sworn by one Joseph Kang'ong'a. It is made of 6 paragraphs, the 1st three paragraphs introduce the deponent. In the 4th paragraph, the deponent adopts averments in the statement and paragraph 5 annexes a bundle of documents 'JK' and the 6th paragraph, he depones that what he has deponed to is the truth.

There is totally no evidence contained in the affidavit that supports the application and there is nothing for the court to look at or consider in support of the application. This court cannot rely on the applicants' submissions as evidence. In the case of **COMMISSIONER GENERAL KENYA AUTHORITY THRO' THE REPUBLIC v. SILVANO ONEMA OWAKI CA 45/00**, the Court of Appeal held that evidence in support of application for Judicial Review must be contained in the affidavit but not the statement.

I find this application fatally defective and this court has no option but to strike it out.

Applicant bears their own costs.

Dated and delivered at Nairobi this 7th day of June, 2006

R.P.V. WENDOH

JUDGE