



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

Misc Appli 386 of 2005

**AFRICAN AUTO SUPPLIES LTD.....
.....PLAINTIFF**

VERSUS

**THE ATTORNEY GENERAL (ON behalf of PERMANENT SECRETARY
MINISTRY OF LANDS AND SETTLEMENT AND THE REGISTRATION OF TITLES)
.....DEFENDANT**

JUDGMENT

The Notice of Motion dated 31st of March 2005 is an application for Judicial Review brought under Order 53 Rule 3 Civil Procedure Rules, Section 3A Civil Procedure Act and Section 8 Law Reform Act. The applicant seeks an order of prohibition to issue against The Attorney General, his agents or servants from nullifying, rectifying or in any way interfering with the applicant's certificate of title over LR 209/12870/NAIROBI or interfering with the applicants rights of ownership as guaranteed by the Constitution of Kenya and Registration of Titles Act without any lawful court order and on the basis of the letter of 1st March 2005. He also asks for costs of the application.

The application is supported by a statutory statement dated 18th March 2005 and a verifying affidavit of Keshavlal Mavji dated the same date. The grounds upon which the application is premised are that the applicant is the registered proprietor of LR NO. 209/12870; that he purchased it from **KABOBO LTD and MAINLINE INTERNATIONAL LTD** on 28th June 1996 and a transfer was duly registered in their favour and they are a bona fide purchaser for value without notice of any of any fraud and the title is therefore indefeasible in law; that the applicant paid a lot of money for the plot and stands to suffer irreparably.

The Respondents did not file any papers in reply to the application but opposed the application on points of law. The issues raised by the Respondent are; whether the application is fatally defective for reasons that there was no verifying affidavit filed with the Notice of Motion and whether the verifying affidavit filed in court on 18th March 2005 is of any evidential value in this application.

The other issue raised by Mr. Mwaniki is whether the grounds set out in the statement can support an application for Judicial Review.

Before arguing the application Mr. Wena, counsel for the applicant applied to have the affidavit dated 30th March 2005 struck off the record and it was so struck. He therefore relied on the statement of facts dated 5th March 2005 and the verifying affidavit of Keshavlal V. Mavji dated the same day. The

verifying affidavit consists of 5 paragraphs. Mr. Mwaniki referred to it as a verifying affidavit by reference. The contents of the affidavit are as follows:

The 1st paragraph introduces the deponent; In the 2nd paragraph the deponent states that he is conversant with the matters in issue, the 3rd paragraph states that he has read and understand the application and believes the facts set out to be the truth and what he knows to be true; in the 4th paragraph he annexes documents which he intends to rely upon and the 5th paragraph, he confirms that what he has deponed to is true.

It is apparent that there is no evidence supporting the application contained in the said affidavit. Annexing of documents to the affidavit does not tell the court anything. It does not amount to any evidence. Order 53 Rule 1(2) provides as follows:

“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.”

The above provision is clear as to where the applicant is supposed to place his evidence, in the verifying affidavits but not in the statutory statement. The statutory statement should only contain the names and description of the parties, the relief sought and grounds relied upon by the applicant. The statutory statement filed by the applicant does contain the names and description of the parties, the relief sought, facts relied upon, the grounds and documents relied upon.

The facts relied upon by the applicant and the documents were obviously misplaced in the statutory statement. They should have been in the verifying affidavit. In the case of **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY VS. SILVANO ONEMA OWAKI CA 45 OF 2000**, the CA said that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for Judicial Review. They were interpreting Order 53 Rule 1(2) and further confirmed it by the Supreme Court Practice 1976 Vol.1 par 53/1/7 which reads:

“The application for leave “by a statement”, the facts relied on should be stated in the affidavit (see **REPUBLIC VS. WANDSWORTH J ex parte Reid (1942) 1KB 281**) “the statement” should contain nothing more than the name and the description of the applicant, the relief sought and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by affidavit.”

The above is what the applicant did. He placed the facts in the statement and verified them by an affidavit which was incorrect. From the foregoing the court holds that the verifying affidavit has no evidential value, the Notice of Motion dated 30th March 2005 is naked and has no evidence in support thereof.

Mr. Mwaniki made an interesting submission, that the Notice of Motion was fatally defective because no verifying affidavit had been filed along with the Notice of Motion and that the verifying affidavit of 18th March 2005 had been spent having been filed with the Chamber Summons. With all due respect to counsel, that was a wrong argument. Without seeming to be repetative, Order 53 R 1 (2) which I have considered above provides that an applicant will file the Chamber Summons seeking leave, the statement and affidavits verifying the facts.

Order 53 R 4 (1) then goes on to state as follows:-

“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 shall be supplied on demand and no grounds shall subject as in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”

What the above rule means is that there is no requirement that the applicant files other affidavits to accompany the Notice of Motion. All that is required is the affidavits filed with the Chamber Summons to be served with the Notice of Motion. In this case the verifying affidavit that the court would rely on is that filed on 18th March 2003 and any other subsequent affidavit had to be filed after due notice was given as to the filing in terms of Order 53 R 4 (2) and they would only relate to new matters that may have been raised by the other party.

Lastly Mr. Mwaniki had submitted that it is now settled law that the grounds upon which an application for Judicial Review will be brought are illegality, impropriety and irregularity i.e. the 3 'I's and that none of the grounds cited in the statement fall under that category. I do agree with counsel that the grounds relied upon would not be used to invoke Judicial Review jurisdiction. The applicants claim relates to land whose ownership or title seem to be in dispute. Proof of ownership of the said land cannot be done by way of Judicial Review. It would require that evidence be adduced by both sides, if necessary, viva voce evidence. Judicial Review would not be an effective remedy in the circumstances. Besides, the applicant would have had to show that the respondents are acting illegally irregularly or with impropriety which was not alluded to by applicant in his application.

In sum, I do find that the application before court is fatally defective and even if it were not, the remedy of Judicial Review would not have been the most efficacious in the circumstances.

The application is dismissed with costs to the respondent.

Dated and delivered this 20th day of July 2006.

R.P.V. WENDO

JUDGE