



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 1768 of 2005

SWAMI GUARDS LTD.....
APPLICANT

Versus

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

On 2nd June 2006, counsel for the applicant filed a notice of intention to amend the statutory statement dated 16th December 2005. When the Notice of Motion dated 6th January 2006 came up for hearing on 7th June 2006, Mr. Oriaro counsel for the applicant brought to the attention of the court, the existence of the notice to of the intention to amend.

Mr. Matuku counsel for the respondent applied for adjournment to enable him respond to the said notice. On 20th June 2006 the respondent filed a Preliminary Objection on a point of law. The grounds of objection were as follows:

- 1) That the notice is bad in law and given in bad faith.
- 2) That the said notice is a flagrant abuse of Order 53 Civil Procedure Rules.

The court took up the notice of Preliminary Objection first. Mr. Matuku counsel for the respondent argued that the notice does not state the law under which it was brought and hence has not invoked the court’s jurisdiction to look at it and in doing so he relied on the case of **KARIUKI V COUNTY COUNCIL OF KIAMBU (1985 – 1998) I EA 90** where the court held that statutory provisions invoke the jurisdiction of the court.

The 2nd submission by Mr. Matuku was that the amended statutory statement did not comply with Order 6A Rule of the Civil Procedure Rules in that all the proposed amendments were not shown in red ink.

A further submission is that an amendment of the statement should confine itself to new issues that have arisen from the affidavit of any other party and that no issues have been raised in the respondent’s affidavit.

For this submission counsel relied on the case of **REPUBLIC V COMMUNICATION COMMISSION OF KENYA (2001) I ea 198** where the court held that one can only argue the grounds

that are specified in the application.

Mr. Oriaro opposed the Notice of Preliminary Objection. His submission is that Order 53 4(2) allows amendment of the statutory statement and that failure to underline the amendments is not prejudicial to the respondents. It is also Mr. Oriaro's submission that the grounds have arisen from the replying affidavit of the respondent where the respondent refers to Section 31 of VAT Act and deny that the respondent can issue a notice of assessment under Section 31 of the said Act whereas the applicant says that they filed the jurisdiction under Section 31 and 32 A.

As regards failure to include the provisions of law under which the notice is brought, Counsel argued that it was not mandatory that they do so and in any event, they can be granted leave to amend and include the provisions if leave is granted to amend. Counsel relied on the case of **K.A.N.U V PRESIDENT OF THE REPUBLIC OF KENYA** where the court considered the principles that should guide the court in amendment of statements and use of further affidavits and that the most important requirement was the giving of notice to the other party and the court then exercises its discretion.

I have considered the rival arguments of the two counsels and authorities cited. As regards whether or not the applicant should have complied with Order 6A Rule 7 of the Civil Procedure Rules, this court is of the view that these being Judicial Review proceedings, provisions of the Civil Procedure Rules do not apply.

Section 8 of the Law Reform Act ousts the applicability of the Civil Procedure Act and Rules to Judicial Review. Though the court would expect to know what the proposed amendments to the statutory statement are, it will not insist that it must be amended in terms of Order 6A R 7 Civil Procedure Rules and the court would reject that objection.

Order 53 Rule 4 (2) Provides as follows:

“The High court may on the hearing of the motion order the statement to be amended, and may allow further affidavits to be used if they deal with the 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 his 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 further affidavits.”

Both counsel do agree that the statement can only be amended upon the raising of new issues in the respondent's affidavits. So, are there new issues raised by the respondents that should warrant an amendment of the grounds in the statement?

After considering the submissions of both counsel, I do agree that the respondent raised a new matter in para 4 of the replying affidavit. In that paragraph the respondent claims to have done a routine check on VAT transactions under the provisions of S.31 of VAT Act. The applicants had contended that it was done under S. 32 A of the Act. I tend to agree with the applicant's counsel that it seems the replying affidavit has raised a new issue as to what section is applicable and that would warrant the amendment of the statement.

The applicant gave notice of the intended amendment at the appropriate time. It was raised just before the hearing of the Notice of Motion as is required by Order 53 Rule 4(2) Civil Procedure Rules.

Does failure to cite the provisions of the law under which the application is brought render the application incompetent and a nullity? In light of the case of **KARIUKI** relied upon by Mr. Matuku, I do agree that the failure to invoke the court's jurisdiction is fatal to the application it means that the court has not been moved at all. The court cannot order that the applicant do amend the notice as filed before it can be heard. I uphold the objection raised by respondent. I accordingly strike out the notice dated 21st June 2006 with costs to respondent.

Dated and delivered this 14th day of July 2006.

R.P.V. WENDO

JUDGE

Read in presence of Twahir holding brief for Matuku for respondent

Ojijo: Court Clerk