



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 569 of 2006

IN THE MATTER OF AN APPLICATION BY GEORGE WAMBUA FOR LEAVE TO INSTITUTE PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265, LAWS OF KENYA

AND

IN THE MATTER OF KIBERA SENIOR PRINCIPA MAGISTRATE’S COURT CRIMINAL CASE NO. 4271 OF 2006

REPUBLIC APPLICANT

VERSUS

THE KENYA ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

KIBERA SENIOR PRINCIPAL MAGISTRATE’S COURT.....2ND RESPONDENT

EX-PARTE GEORGE WAMBUA

RULING

Counsel have agreed that what is before the court for determination is the Notice of Preliminary objection dated 23rd October, 2006 filed by the 1st Respondent KACC. The P.O. raises 4 objections namely:

1. The decision of 1st August 2006 is not of the Commission but by persons not parties to this application
2. The Applicant is precluded from relying on fresh matters not brought before the court at the time of seeking leave to file the present application
3. The Applicant cannot seek to join the Attorney General as a party at this stage when leave to file proceedings for judicial review against him had not been sought
4. The application dated 6th October 2006 is fatally defective

The Respondent filed skeleton arguments on 31st October, 2006 with a list and a bundle of authorities.

In opposition the Applicant filed written skeleton Arguments respectively with a list and a bundle of authorities.

I have considered the arguments and the bundle of authorities provided by each party. Due to constraints of time I intend to touch on what I consider to be the key points for determination:

(1) **Amendments to the Statement and use of further affidavits**

What a party needs to do at the hearing according to O 53 rule 4(2)

1. Give notice of his intention to amend the statement or use further affidavits and any proposed amendments to the statement. Since the Statement is the pleading in judicial review proceedings it is the amended statement which should accompany the notice.

When the court allows the filing of the further affidavit it should be served although the rule seems to suggest that they should be supplied on demand. Surely if they are not served they could introduce an element of surprise or ambush at the hearing which must be avoided. In addition for obvious reasons and the need to case manage judicial review matters a party who needs to amend need not wait until the hearing date. It is logical to seek amendments before the hearing date by giving notice and serving the amended Statement and further affidavit.

I must of course concede that the rule seems to give the court powers to allow amendments at the hearing and also to allow service of the further affidavits upon demand. This with respect to the draughtsman does not make good sense nor is it conducive to good case management if preliminaries such as amendments and further affidavits are applied for and heard during the hearing. Promptness and speed are the hallmarks of judicial review jurisdiction. Judicial Review application have to be filed within the stipulated periods and also heard promptly otherwise the process would lose its effectiveness and in some cases become oppressive. For this reason I wish to reiterate my holdings in the case cited by the applicants.

REPUBLIC v PERMANENT SECRETARY

MINISTRY OF PLANNING

AND NATIONAL DEVELOPMENT

Ex-parte MWANGI

KEMENYI [2006] KLR

The scope or ambit of amendment have not been spelt out in O 53. I reiterate that the overriding considerations are:

- (1) Whether the proposed amendments are aimed at helping the court to determine the real questions between the parties or affected parties
- (2) Whether they are likely to cause prejudice to any of the parties (especially if introduced late in the course of the hearing and not giving sufficient time to the opposite or affected parties to respond)
- (3) The court has unfettered discretion to allow amendments on such terms as it may deem fit in the interest of justice.

Taking the above considerations into account since the 1st respondent has been notified that the applicant desires to join the Attorney General I am unable to sustain her objection to the amendment. The real

issue in this case is who made the decision to charge. And it must not be forgotten that judicial review pre-occupies itself principally with the decision making process. In my view failure to allow the amendment would not assist the court in determining the real issue before it. The fact that leave was only given once, was extensively addressed by this court in Prof KIMENYIS case (supra). Perhaps it is important to mention that in judicial review as far as the parties are concerned what is necessary is to serve all persons directly affected see O 53 rule 3(1). The Attorney General is directly affected because according to the 1st Respondent he is the maker of the challenged decision. Whether or not he is joined the important thing is service on him and he has already been served in this matter.

Perhaps I should also add that it is the responsibility of the parties on record and also the court to ensure that the affidavit of the names and addresses under O 53 rule 3(3) focus on all affected parties and the affidavit is worded as per the rule. If an affected party surfaces at the hearing or was left out, the court cannot shut him/or her out of the hearing as clearly set out in Rule 3(4). If he is identified at the hearing a notice has to go out to him and the matter adjourned to allow him to participate. It is for the above reasons that I respectfully depart from the holdings of my sister and brother Judges in the Konzolo decision and the PEREIRA cases to the extent indicated herein.

I would allow the amendment as proposed.

Further Affidavit

As counsel for the 1st respondent does not seriously oppose this, taking into account her stand during the past mention dates, the further affidavit may be served.

Notice of Motion & Grounds

In Judicial review grounds are as set out in the Statement or Amended Statement. Failure to reproduce them in the Notice of Motion is not fatal. The pleadings are complete as at the leave stage in Judicial Review. O 50 of the Civil Procedure Rules does not apply.

In the result the application may be set down for hearing on merit.

DATED and delivered at Nairobi this 17th day of November, 2006.

J.G. NYAMU

JUDGE

ADVOCATES

M. Kitulu for applicant

S.N. Kingori for respondent