



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MISC. APPLICATION NO.180 OF 2004

**IN THE MATTER OF: AN APPLICATION BY M.A.G. RASOOL
FOR ORDERS OF CERTIORARI & MANDAMUS**

AND

**IN THE MATTER OF: THE ACCOUNTANTS ACT CHAPTER 531
OF THE REGISTRATION OF ACCOUNTS
BOARD DATED 20TH NOVEMBER, 2003.**

BETWEEN

REPUBLIC

AND

THE REGISTRATION OF ACCOUNTANTS BOARD

MOHAMED A. G. RASOOL

R U L I N G

This Ruling relates to a Notice of Preliminary Objection that was filed by the Registration of Accountants Board. The said Notice is dated 23rd June, 2004 and is based on the following grounds:-

- (1) The Application dated 9th June, 2004 is incurably defective and does not meet the requirements of the Civil Procedure Act and Rules made thereunder*
- (2) The application is hopelessly time-barred.*
- (3) The Application flies in the face of the express provisions of the Accountants Act, Cap 531 of the Laws of Kenya.*
- (4) There is no proper affidavit in support of the Application.*
- (5) The Application is wrongly brought against the Registrar of the Registration of Accounts Board.*

According to Ms. Orieko, Counsel for the Respondent, under Order 53(1)(2) of the Civil Procedure Rules, an application for Judicial Review must be accompanied by the statement setting the name, and description of the Applicant, the relief sought, the grounds on which it is sought and affidavits verifying the facts relied on .

Ms. Orieko submitted that the application does not have any affidavit as contemplated under the above sub-rule. Besides the above, Ms. Orieko submitted that what the Applicant has filed is a verifying affidavit as envisaged in a situation of a Plaint - but not an affidavit verifying facts. In support of her submissions, she quoted the case of

Commissioner General of Kenya Revenue Authority

-vs-

Silvano Owako

She explained that in the above case, the Court of Appeal set aside the award in the High Court. Apart from the above, Ms. Orieko also submitted that under Order 53 Rule (2) – leave can only be granted within 6 months.

Ms. Orieko was of the view that the Application here is time barred since the same is challenging a decision that was made on 21st February, 1991. She further submitted that even if the Court was to consider the letter dated 23rd November, 2003 – Ex “J” as a decision, the application would still be time barred. That is because no order for enlargement has been sought anywhere. To support the above submissions she quoted the case of

Weda and 13 Others

-Vs-

Council for Legal Education

Misc. Application No.5 of 1993.

In that case, it was stated that no application for certiorari can be brought after 6 months unless time has been enlarged. Further to the above, Ms. Orieko has submitted that the application contravenes Order 53 Rule 7 which states that in case an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, then the Applicant shall not question the validity of any order unless before the hearing of any motion he has lodged a copy with the Registrar for his failure to do so.

She submitted that the Applicant has not lodged any Order before the Court and hence appears to be challenging an unidentified decision. In conclusion she submitted that no order for review can be made against the Registrar since the body dealing with the issue is the Registration Board as stipulated under Section 21 of the Accountants Act.

On the other hand, Mr. Kisila has opposed the objections on the ground that they are mischievous and that they were only intended to scuttle the hearing. According to Mr. Kisila, leave was granted on 28th May, 2004 and hence the issues related to leave were spent in the above file. We further submitted that the Respondent cannot question the validity of the leave since the Court is already functus officio. Besides the above, Mr. Kisila submitted that the decision being challenged was made on 20th November, 2003, and that six months had not elapsed before the application was made.

In addition to the above Mr. Kisila submitted that Order 49 Rule 3(A) of the Civil Procedure Rules provides that time stops running between 21st December and 6th January in the following year. He concluded that the period is less than 6 months even if the above dates are not frozen. As far as the affidavit is concerned Mr. Kisila submitted that if the original verifying affidavit is not sufficient then the

Court had granted them leave to file another affidavit and hence any defect has been cured by the said supplementary affidavit. This court has carefully perused the submissions by both Counsels. In addition to the above, it is apparent that on 28th May, 2004, Hon. Justice Kimaru had granted the applicant leave to apply for an Order of certiorari. The Court has called for the file Miscellaneous Suit No. 128 of 2004 and confirmed the above information. Besides the above, the attention of the Court has been drawn to Order 49 R. 3A of the Civil Procedure Rules which states as follows:

“Except where otherwise directed by a Judge for reasons to be recorded in writing, the period recorded in writing, the period between the 21st December, in any year and the 6th January in the year following, both days included, shall be omitted from any computation of time (whether under these Rules or any Order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this Rule shall not apply to any application in respect of a temporary injunction.”

In this case, the applicants have stated very clearly that the decision that they are challenging was made on 20th November, 2003. The application that he has brought to Court is dated 9th June, 2004. Given the provisions of Order 49 R. 3(A) of the Civil Procedure Rules – the period of 6 months has not yet expired. Having stated the above, I would have expected that the respondent would be patient till the hearing of the application where he would prove that the decision had actually been made several years ago as they have intimidated the above.

As far as the affidavit is concerned, I hereby note that I had granted the applicant leave on 9th July, 2004 to file a further affidavit. It is therefore incumbent on the applicant to comply with the above to enable him file a proper affidavit.

In view of the above, I hereby dismiss the preliminary objection since the same has no merit. Costs to the applicant in any event.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence

MUGA APONDI

JUDGE

31st MARCH ,2005.