



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Appeal 407 of 2004

HENZLON KAMAU WAITHAKA and

JAMES GACHUHI WACHIRA (Practising in

the firm of Waithaka Kiarie Mbaya & Company APPELLANT

VERSUS

REGISTRATION OF ACCOUNTANTS BOARD RESPONDENT

IN THE MATTER OF THE ACCOUNTANTS ACT

(Chapter 531 of the Laws of Kenya)

AND

IN THE MATTER OF APPEAL AGAINST A DETERMINATION OF THE

REGISTRATION OF ACCOUNTANTS BOARD

RULING

This appeal was lodged by the Appellants who are Certified Public Accountants against the Respondent pursuant to Section 33 of the Accountants Act (Cap 531). Subsequently, the Appellants filed an application for interlocutory relief which was opposed by the Respondent. When the application came up for hearing, Mr Kariuki, for the Respondent, raised a Preliminary Objection based on two limbs namely:

(a) That the Respondent was wrongly sued;

(b) That the affidavit in support of the application was defective.

According to Mr Kariuki, the affidavit in support of the application disclosed that the matters complained of were done by another institution (the Institute of Certified Public Accountants of Kenya - hereinafter referred to as "ICPAK") other than the named Respondent. Secondly, he argued, that the affidavit in support of the application was defective in that it did not comply with the provisions of Order XVII Rule 3 of the Civil Procedure Rules (hereinafter referred to as "the Rules") and Section 5 of the Oaths and Statutory Declarations Act (Cap 15).

Mr Ambani, who appeared for the Appellants, had an impressive response to the objections. He pointed out correctly that although ICPAK was involved in the matters complained of, it is the Respondent which holds final authority and which alone could mete out the punishment which prompted the appeal (See

Section 32 of the Accountants Act). Indeed, Section 33 (1) of the said Act provides that an appeal to this court can only be granted against the decision of the Respondent and not the preliminary activities of ICPAK which themselves do not amount to decisions capable of being challenged. As Mr Ambani pointed out, ICPAK is only involved in carrying out investigations and making recommendations and thereafter it is left to the Respondent to decide the future course of action. It is the Respondent that actually makes the decision that is capable of enforcement, and, indeed, may form the basis of an appeal to this Court.

As to the competence of the Affidavit, Mr Ambani said that at the time it was sworn, his clients did not have proceedings of the Respondent Board and could only rely on what they believed. When they got the proceedings, they swore a Supplementary Affidavit to state properly the matters to which Mr Kariuki took issue with. I do not believe that Mr Kariuki was serious in this point. The Appellants had been saddled by a decision which touched on their livelihood. They were the ones directly affected by it and they were fully entitled to advance their reasons which they believed gave rise to the complaint before this Court. On the last point relating to the non-compliance with the provisions of Section 5 of the Oaths and Statutory Declarations Act, I will say as follows. The first and primary function of the Court is to seek to do justice to the litigants who come before it. It would be a terrible thing if the Court were to stultify that function by resorting to legal technicalities which do not go to its jurisdiction. Yes, although the affidavit complained of does not expressly state where it was sworn in the jurat as required by the strict construction of Section 5 of the Oaths and Statutory Declarations Act, I do not think that that is sufficient ground to entitle this court to expunge it. There is a stamp of the Commissioner for Oaths before whom the affidavit was sworn which gives his address and it is only natural to assume that it was sworn at the place where the Commissioner is based. In fact, if one were to go further, a look at the Exhibits annexed to that affidavit clearly discloses that it was in fact sworn at the same place as the address of the Commissioner. Finally, Order XVIII Rule 7 of the Rules permits this court to admit any affidavit "notwithstanding any defect by mis-description of the parties or otherwise in the title or other irregularity in the form thereof". So, applying my discretion conferred upon me by that rule, I hereby order that the affidavit complained of be admitted notwithstanding the defects complained of.

In the result, the Preliminary Objection must fail and I so find with costs to the Appellants.

Dated and delivered at Nairobi this 11th day of May, 2005.

ALNASHIR VISRAM

JUDGE