

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. CIV. APPLI. 627 OF 2004

KASSIM HAMISI MWACHIKUNYA

- Versus -

THE ATTORNEY GENERAL & MOHAMED A. MUNJIRA

RULING

The Applicant, Kassim Hamisi Mwachikunya, seeks by his Notice of Motion filed herein under the provisions of Order 53 Rules 1 and 2 of the Civil Procedure Rules an order of mandamus to compel the Permanent Secretary in the Ministry of Agriculture (“the PS”) to pay him the decretal sum in Mombasa HCCC No. 430 of 1991 (“the decretal sum”). He claims that the PS, contrary to the legal duty imposed on him, has refused to pay the decretal sum prompting him to file this application.

The application was at leave stage supported by a statement to which were annexed copies of the decree and certificate of taxation and a supporting affidavit of the Applicant. The Notice of Motion is said to be “grounded on the annexed affidavit of Hamzaali Jiwaji and on further or other grounds to be adduced at the hearing hereof.” Hamzaali Jiwaji is the advocate for the Applicant. Annexed to his affidavit are copies of the decree, certificate of taxation and the order granting leave to apply for mandamus.

Both in his replying affidavit and submissions before me Mr. Mutungi, learned State Counsel, representing the Respondent contended that the application is fatally defective and is for dismissal. He further contended that the Notice of Motion is wrongly instituted; that the leave to apply for mandamus was improperly sought and obtained as it was not supported by any or any admissible evidence; that the affidavit of Hamzaali Jiwaji sworn on 10th November 2004 in support of the application for an order of mandamus is incompetent for having been filed without leave of the court; and that the Applicant’s similar application having been struck out on 22nd July 2004 the matter is now res judicata and that the plaintiff is guilty of laches.

To begin with I hold that the Applicant’s early similar application having been struck out and not dismissed, the matter is not res judicata and laches does not make the Application fatally defective. However, the rest of the grounds, save for the one on the intitlement of the application which I will deal with in due course are well founded.

The application for leave was fatally defective and leave should not have been granted. It was supported by a statement containing the facts relied on and to which the document in support, that is, the decree and certificate of taxation, were annexed. As I held in **Simon Waweru Vs the Director of GTI Mombasa & Another Mombasa HC Misc. Civil App. No. 728 of 2003** following the Court of Appeal decision in **Commissioner General Kenya Revenue Authority Vs Silvano Owaki Kisumu Civil Appeal No. 45 of 2000 (CA)** such a statement is worthless. It is the verifying affidavit and not the statement to be verified which is of evidential value in an application for judicial review.

As clearly stated in Order 53 Rule 1 (2) of the Civil Procedure Rules, the statement should contain nothing more than the name and the description of the applicant, the relief or reliefs sought and the grounds on which it or they are sought. It is wrong to state all the facts in the statement and then verify them by an affidavit.

My understanding of Order 53 Rule 4 (2) of the Civil Procedure rules is that the affidavit with the facts to be relied on is the one filed at leave stage. That is the one containing the facts upon which leave was

granted. Any other affidavit to be used at the hearing of the Notice of Motion must be one relating to or dealing with new matters arising out of the affidavits of any other party to the application and such an affidavit can only be filed with leave of the court. The affidavit of Hamzaali Jiwaji does not deal with any new matters arising from the affidavit of any party to the application and it was filed without leave of the court. I therefore order it struck out.

I now wish to revert to the ground on intitlement of the application. Mr. Mutungi citing the decision of Keiwua J (as he then was) in **Kariuki Vs County Council of Kiambu & Another [1994] LLR 1981** in which the learned Judge held that wrong intitlement of the application makes it fatally defective, urged me to so hold and strike out this application. In that case Keiwua J said he was following the Court of Appeal decision in **Farmers Bus Service & Others Vs The Trnasport Licensing Appeal Tribunal [1959] EA 779**. My understanding of the Court of Appeal decision in that appeal, and I have so held in **Republic Vs Minister for Transport & Communications & Others Ex-parte Waa Ship Garbage Collectors & Others Mombasa HCMisc.C App. No. 617 of 2003**, is that wrong intitlement of the application per se does not render the application fatally defective. In that case the Court of Appeal gave the appellant leave to amend the documents by properly intituling them. If the wrong intitulement had rendered the application fatally defective I do not think the Court of Appeal could have given leave to amend apparently without even an application by the appellant in that behalf. In the circumstances, I am unable to follow Keiwua J's decision in that case. I hold that wrong intitulement of the application without more does not render the application fatally defective.

In this case, however, the application is fatally defective for the reasons which I have already stated herein above. Consequently I strike out it with costs.

DATED and Delivered this 13th day of June 2005.

D.K. MARAGA

JUDGE