REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Misc Civ Appli 40 of 2004

REPUBLIC ……. APPLICANT

VERSUS

DISTRICT SOCIAL DEVELOPMENT OFFICER – MACHAKOS

HONOURABLE ATTORNEY GENERAL …….. RESPONDENTS

R U L I N G

The Notice of Motion dated 30/3/04 is brought pursuant to Order 53 Rule 3 (1) of Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act seeking an order of certiorari to remove into this court and quashing of the order made by the District Social Development Officer, Machakos on 17/1/04 cancelling certificate No.1483 which was issued to Mavoko Municipal Council Land Trust Self Help Group. The application is accompanied by a statement, a verifying affidavit and notice to the Registrar filed in court on 19/3/04 and there are annextures to the statement.

The Respondents had been served with this application and on 10/2/05 there was an appearance by the state counsel, Machakos, Mr O'Mirera who appeared and sought more time. Later the applicant's counsel was directed to serve Attorney General's Office in Nairobi which they did. There is evidence that they were served with the Hearing Notice but there was no appearance at the hearing. The application proceeded ex parte.

It is the applicant's case that they were issued with a certificate pursuant to certain conditions but without any notice to the applicants, the Respondents cancelled the certificate which the applicant contends is a breach of rules of natural justice and that is why they have moved this court to have the decision canceling the certificate quashed. I have considered the Notice of Motion as filed, the statement of facts and verifying affidavit and the submissions by counsel. Even though the Respondents did not appear the court has to consider whether the orders sought can be granted.

I do note that in the body of the application the applicant purported to include grounds upon which the application is premised which in my view is wrong. In an application for Judicial Review, grounds upon which the application is brought will only be contained in the statement accompanying the application. Grounds will normally be included in the body of an application under the Civil Procedure Rules but an application for Judicial Review has been held to be a special jurisdiction where the Civil Procedure Rules do not apply save for Order 53 and Sections 8 and 9 of the Law Reform Act. In the case of ***REPUBLIC versus COMMUNICATIONS COMMISSION OF KENYA & OTHERS C.APP.175/00***, the court of Appeal considered whether Order 6 Rule 13 (1) of Civil Procedure Rules was applicable in proceedings instituted under Order 53 Civil Procedure Rules and it held that Civil Procedure Rules did not apply. In another case of ***COMMISSIONER OF LANDS versus KUNSTE HOTEL LTD C.APP.234/95*** the Court of Appeal held that Section 8 (1) of the Law Reform Act, denies the High Court power to issue orders of Mandamus, certiorari and prohibition while exercising Civil or Criminal Jurisdiction and it went ahead to refer to the jurisdiction granted under Order 53 a special jurisdiction.

The statement filed by the applicant contains facts to be relied upon, reliefs sought, names of the parties and even grounds upon which the application is brought. There is no affidavit verifying the facts as required under Order 53. The annextures are annexed to the statement. The verifying affidavit is made up of 4 paragraphs and merely contends that the contents of the statement are correct. Order 53 Rule 1 (2) provides as follows:

> ***"An application for such leave as aforesaid, shall be made ex parte to a Judge in Chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on ….."***

The provision above clearly shows that facts relied on should be in the verifying affidavit or the affidavits accompanying the application but not in the statement. In the case of ***COMMISSIONER GENERAL KENYA REVENUE versus SILVANO OWAKI C.A 45/00 IT WAS HELD:***

"**We would observe that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for Judicial Review."**

The Court of Appeal in that case merely confirmed the Supreme Court Practice 1976 Vo. 1 Paragraph 53/1/7:

"The application for leave, "By a statement" – The facts relied on should be stated in the affidavit. (See Republic versus Wondsworth J5) ex parte, Read 1942 I KB 281) "The statement should containt nothing more than the name and the description of the applicant, the relief sought, the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."

In the present case, the applicant lodged a statement of all the facts verified by an affidavit which is incorrect. As this matter stands there is totally no evidence in support of the application as the statement was of no evidential value and so is the verifying affidavit. There is nothing for the court to consider in support of the prayer for an order of certiorari and consequently the court is unable to exercise its discretion in favour of the applicant and the application is hereby dismissed with the applicant bearing its own costs.

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005

R.V. WENDOH

JUDGE