REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. MISCELLANEOUS APPLICATION NO. 128 OF 2003

KENYA AFRICAN NATIONAL UNION ……(K.A.N.U.)

V E R S U S

THE PRESIDENT OF THE REPUBLIC OF KENYA, HIS EXCELLENCY HON. MWAI KIBAKI

& SIX OTHERS.....……..... DEFENDANTS

R U L I N G

Introduction

The Applicant, the Kenya African National Union (***hereinafter called "KANU"***) filed an application on 13th February, 2003 by way of summons in chambers and under a certificate of urgency, under the provisions of, inter alia, sections 8 and 9 of the Law Reform Act, Chapter 26 laws of Kenya and Order 53, Rules 1, 2, 3 and 4 of the Civil Procedure Rules. The Applicant claimed that at all material times it was the registered owner of all that piece of land known as Land Reference Number 209/11157 and the building thereon known as the Kenyatta International Conference Center (KICC) and sought, leave to apply for orders of Judicial Review for inter alia, -

> ***(a) CERTIORARI directed at the 4th Respondent, the Minister for Tourism and Information the Hon. Raphael Tuju to bring to the High Court to be quashed the purported decision, order and/or declaration in the written and signed press releases and/or press statements, radio and television announcements, declarations and/or press statements, announcements appearances and/or otherwise of the 4th Respondent on 11-02- 2003 and/or 12-02-2003 purporting to declare or announce a purported "EXECUTIVE ORDER" of the and/or the 1st Respondent purporting to take over and/or repossess property known as Land Reference Number 209/11157 (L.R. No.209/11157) AND OR the building thereon known as Kenyatta International Conference Building (K.I.C.C.) property of the Applicant.***
>
> ***(b) CERTIORARI directed against the 1st 2nd 3rd and 4th Respondents to bring to the High Court to be quashed the said decisions, declarations, public radio and television announcements, releases, statements purporting to take over the said K.I.C.C. building.***
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> ***(c) PROHIBITION directed at the 1st Respondent, his agents, servants, and the 2nd,3rd 4th ,5th and 6th Respondents from occupying, taking over and vandalizing and/or purporting to occupy, take over alienating or including revoking cancelling allocating approving allocation, charging or dealing with the land known as L.R.No.209/11157 or K.I.C.C.***
>
> ***(d) DECLARATIONS that the Government had through its agents, servants and/or any of the 1st to 4th Respondents trespassed on K.I.C.C. and L.R. No. 209/11157 and to pay damages for the said trespass, and that the court do order an inquiry as to damages and costs.***

(e) EVICTION of the Government agents, and/or servants from K.I.C.C. pending the determination of the application.

There were other prayers sought including an order that the Government's agents and/or its servants should desist from interfering with the Applicant's property, and an order for the maintenance of the Status quo pending the determination of the application, and that the costs be in the cause.

The Respondents in the application were named as the President of the Republic of Kenya, His Excellency Hon. President Mwai Kibaki, the Attorney General, the Minister for Justice & Constitutional Affairs, Hon. Kiraitu Murungi, the Minister for Tourism and Information, Hon. Raphael Tuju, the Commissioner of Lands, the Registrar of Titles and the Commissioner of Police.

2. THE GRANT OF LEAVE

The Application aforesaid for leave to apply for the aforesaid orders was heard and urged before the Hon. Mr. Justice Kuloba, (now retired) at the first instance on the said 13th day of February, 2003 who made the orders following-

(1) Certified the application as urgent.

(2) Granted leave to the Applicant to file an application for Judicial Review seeking orders of prohibition, mandamus and certiorari.

(3) The President and Minister for Justice and Constitutional Affairs be omitted from the application allowed to be made under this leave;

(4) The Minister's announcement is not to be quashed but is to remain a declaration of intent;

(5) The implementation of the Minister's declaration is suspended for the time being unless after an unreasonable delay in instituting or presenting the application, the court is moved to vacate or vary the order suspending the implementation;

(6) the application be filed within 21 days.

3. THE APPLICANT'S NOTICE OF MOTION DATED 20-02-2003 FILED ON 26-02-2003, SUPPORTED BY THE AFFIDAVIT OF JULIUS SUNKULI SWORN ON 26-02-2003.

The Applicant in compliance with the orders of leave duly filed the substantive Notice of Motion on 26th February, 2003 seeking the various orders of certiorari, prohibition and mandamus set out in the statement dated 12th February, 2003 filed on the same day as the application for leave as required under the provisions of Order 53, of the Civil Procedure Rules. This Notice of Motion is expressed to be made between the Applicant –Republic Ex-parte K.A.N.U. against five Respondents,(1) Hon. the Attorney General, (2) the Minister for Tourism and Information (Hon. Raphael Tuju) (3) the Commissioner of Lands, (4) the Registrar of Titles and (5) the Commissioner of Police. The application is expressed to be taken out pursuant to leave of court granted on 13-02-2003 by the Court.

Besides the aforesaid Order for judicial review, the Applicant included an additional prayer for amendment of its statement in the following terms:-

8. " That leave be granted to the Applicant (through KANU) to amend its statement dated 12th February, 2003 and to refer and rely on the same during the hearing of this Application."

The said No tice of Motion dated 20th February, 2003 was supported, inter alia, by an affidavit sworn by the Acting Secretary General of the Applicant, Mr. Julius Sunkuli. Annexed as an exhibit to the affidavit was the proposed draft Amended Statement. The Applicant on the same date when filing the Notice of Motion filed a Notice of Amended Statement under the provisions of Order 53, Rule 4 of the Civil

Procedure Rules. It read as follows:-

> ***"TAKE NOTICE that the Applicant shall at the hearing of its Notice of Motion Application for Judicial Review Orders against the Respondents, seek leave of this Honourable Court to amend the parties against whom relief is sought, the relief sought and the grounds for relief in its statement dated 12th February, 2003 and shall refer and rely on the same at the hearing thereof. The Amended Statements is filed and served herewith."***

4. RESPONDENTS APPLICATION (NOTICE OF MOTION) DATED 25-02-2003

The Respondents being aggrieved with the aforesaid Ex parte Orders immediately lodged in this court an application by way of Notice of Motion on 25th February, 2003 under Certificate of Urgency. They applied for the following orders:- "

1. That the Order granting leave to the Applicant to apply for judicial review seeking the orders of prohibition, mandamus and certiorari dated 13-02-2003 be set aside;

2. That the Order dated 13th February, 2003 suspending the implementation of the Minister's declaration be set aside.

3. That pending the hearing of prayers 1 and 2, Order No. 5 of the Orders made on 13th February, be stayed.

4. That costs of this application be provided for."

The Respondents' application dated 25th February, 2003 was placed before Mr. Justice Kuloba (now retired) on 27th March, 2003. After hearing various objections and preliminaries and after making a ruling regarding the right of counsel in private practice representing the Respondents rather than the Attorney General, the Honourable Judge gave the Directions following with regard to the hearing of the aforesaid Application and the substantive Notice of Motion dated 20th February, 2003 filed by the Applicant:-

5. "THE SECOND DIRECTIONS BY HON. MR. JUSTICE KULOBA"

> ***"In the interests of justice, saving costs and saving time, all the applications pending on this file, namely, the principal one or judicial review, and the one on setting aside leave to apply for judicial review, will be heard together on the same day in that order. Consequently all these applications will by consent of all counsel be heard or begin to be heard `on 22nd May, 2003. Accordingly, the whole litigation is to commence on 22-5-2003, the court reserving the right to control the order of presentation at that hearing."***

The hearing did not commence on 22nd May, 2003 as contemplated for reasons which are on record. On the 27th July, 2004, Justice Nyamu referred this matter to the Honourable Chief Justice for his further directions as to the hearing. On 31st May, 2005, the Honourable Chief Justice directed that the application herein be heard by a bench of three judges to be nominated by himself. The Honourable Chief Justice subsequently nominated the present bench of three judges and fixed the hearing for 28th, 29th and 30th September, 2005.

On the 28th September, 2005 when the matter came before us for hearing of the two applications as directed by Justice Kuloba, the Applicant's Counsel, Miss Kilonzo applied to the court that the Application for leave to amend the statement and a second one for leave to file a Further Affidavit be heard first before any other matters. The proposed Further Affidavit had already been lodged in court on 6th March, 2003 though leave had not been granted at the time.

After a brief hearing of counsel for the parties and deliberations thereon, the court directed that the two applications by the Applicant be heard first and determination thereof made.The application for leave to

amend the statement formed part of the substantive Notice of Motion as indicated earlier besides a written Notice in respect thereof being filed. The application for leave to file a Further Affidavit and for the Respondents to rely on it was made orally.

Counsel then presented their submissions and referred to their respective authorities. We propose to deal with the two applications one after the other hereunder. However, before we delve into this application, there is the Respondents' Preliminary Objection dated 27-09-2005 and filed on the same day.

6. THE RESPONDENTS' PRELIMINARY OBJECTION DATED AND FILED ON 27-09-2005

According to both Miss Kilonzo who agitated the Applicants cause and Dr. Kamau Kuria, for the Respondents, the issues raised in this Preliminary Objection are identical to those first raised in the Respondents' Notice of Motion dated 25-02-2003. Dr. Kuria had however departed upon one point, on the issue of jurisdiction, whether in an application for judicial review the court has power to amend a fatally defective application so as to allow an applicant to proceed in a manner prescribed by law for the grant of such leave, and orders.

In Dr. Kuria's view, the court does not have that power, and that being an issue of jurisdiction this preliminary objection should be determined first.

If the answer to the above issue is in the negative the next question is whether the court has power to allow an amendment under Order L III rule 4 (2) of the Civil Procedure Rules to permit an Applicant to make further amendment to validate an application that was invalid ab initio

The other issues of jurisdiction were whether this court has jurisdiction to entertain an application for judicial review combining public law and private law remedies before our Order LIII (53) is amended as the English Order 53 was amended in 1977 to allow the court to make orders relating to private law remedies in applications for judicial review and finally whether in an application for judicial review an applicant can substitute the statement supporting the Application with another one which complies with the provisions of Order LIII.

On the issue whether in an application for judicial review a Court has jurisdiction to amend a fatally defective application so as to allow an applicant to proceed in a manner prescribed by law, Miss Kilonzo, learned counsel for the Applicant did not share the views raised by Dr. Kuria on issues of jurisdiction because:-

> ***(a) the leave granted had not been set aside;***
>
> ***(b) the application for leave was spent;***
>
> ***(c) the application for leave was against seven respondents, and the court had declined to give leave in respect of two Respondents.That refusal was not an amendment of the application for leave. There were now five Respondents in the current application.***
>
> ***(d) The application for leave sought 8 orders, the court gave leave to proceed in respect of orders for judicial review sought and the prayer for costs.***
>
> ***(e) No leave was granted to proceed with regard to trespass, damages declaration, and this is reflected in the Notice of Motion of 20-02-2003.***

On these grounds therefore, Miss Kilonzo sought leave of the court to urge the application for Amendment of Statement and to file a Further Affidavit sworn on 5-03-2003 of which notice was given on 5-03-2003.

7. AMENDMENT OF STATEMENTS OF FACTS - ORDER LIII, RULE 4 (2) CIVIL PROCEDURE RULES

After listening and considering the rival parties arguments on that matter, this court gave leave to Miss Kilonzo to address us on the issue of amendment of the Statement of Facts, and the use of further Affidavit, and this Ruling shall therefore restrict itself to considering the application for amendment of the statement of facts, and the use of further Affidavit.

8. THE LAW FOR AMENDMENT OF STATEMENT OF FACTS AND USE OF FURTHER AFFIDAVITS

Order LIII, rule 4 (1) (2) of the Civil Procedure Rules are in these terms:-

> ***" 4 (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except on the grounds and relief sought in the said statement.***
>
> ***(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.***
>
> ***(3) Every party to proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing"***

This rule is made pursuant to section 9 (1) (c) of the Law Reform Act, (***Chapter 26, Laws of Kenya***), which says-

> ***9 Any power to make rules of court to provide for any matter relating to the procedure of civil courts shall include power to make rules of court-***
>
> ***(a)……..***
>
> ***(b)……...***
>
> ***(c) requiring that, where leave is obtained, no relief shall be granted and no grounds relied upon, except with leave of the court; other than the relief and grounds specified when the application was made."***

9. ANALYSIS OF THE LAW AND AUTHORITIES

Perhaps starting with the provisions of section 9 (1) (c), this provision in our understanding requires that a party will only rely upon, and seek relief for which the court has granted leave, and will only rely on the grounds specified in the application for leave. A party will rely on further grounds and seek other relieves only with leave of the court.The said section 9 (1) (c) is an exact replica /or as the esoteric are wont to say, is in pari materia with section 10 (1) (c) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of England, and thus English decisions on this point are of great persuasive authority.

The direct result of this section 9 (1) (c) is rule 4 (2) of Order LIII, of the Civil Procedure Rules, and the direct result of section 10 (1) (c) of the Administration of Justice Act (aforesaid) is rule 4 (2) of Order 53 of the Rules of the Supreme Court which again are word for word with our rule 4 (2) of Order LIII of the Civil Procedure Rules, thus again making English court decisions on this point very persuasive.

However the English Supreme Court Rules cited above were changed in 1977 by the replacement of the entire former order 53 with a new and comprehensive public law remedy of "judicial review" which

according to the authors of the Supreme Court Practice 1999 Edition Vol. 1 page 598, paragraph 53/14/1-

> ***" created a uniform flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons or bodies who perform public duties or functions. It at the same time eliminated procedural technicalities relating to machinery of administrative law, namely by removing procedural differences between the remedies which an applicant was required to select as the most appropriate to his case".***

The new English Order 53 of the Supreme Court Practice, retained in substance provisions of the former Rule Order 53 rule 4 (2) in the new order 53 rule 6 (2) which provided

> ***"The Court has power to grant an applicant leave to amend his statement or to allow him to rely on further affidavits (0.53,r 6 (2);***
>
> ***the applicant must give notice of any such request/r. 6 (3));***
>
> ***if an applicant intends to amend grounds for applying for judicial review or the relief sought, or to rely on further affidavits notice of such intention must be given to the other party (i.es) and crown office (state law office – AG in our case)…..***

Although the new Order 53 of the Supreme Court Practice Rules expanded the scope of judicial review, and the remedies which the High court may grant relief in, the basic rules relating to amendment of statement, and the use of further affidavits remain the same as formerly contained in the old Order 53 rule 4 (2) of the Supreme Court Practice. The rules give the court unfettered discretion to grant leave to an applicant to amend his grounds or facts filed with the Notices of Motion under Order LIII rule 3 (1) of the Civil Procedure Rules.

Dr. Kuria submitted to us that the discretion of the court under rule 4 (2) aforesaid was not unlimited. He was right in terms of section 9 (1) (c) of the Law Reform Act, and indeed the rule itself, that an applicant will not, except with the leave of court, rely on grounds and seek relief other than those first sought under the application for leave. This is why (because the application is in the first instance ex parte) it behoves the applicant to prepare the statement which must be contained in his notice of application and the supporting affidavit which must verify the facts relied upon fully, clearly and carefully, so that the judge reading these documents will have before him all the relevant material relied upon to support the application.

So great care and circumspection will therefore be necessary in the preparation of these documents. Thus in R. JOCKEY CLUB LICENSING COMMITTEE, exp. Wright (1991} C.O.D. 306 QBD, on application of the respondent, the grant of leave to move for judicial review was set aside on the grounds of material non-disclosure on the part of the Applicant.

Indeed the Court itself in granting an ex-parte order was expected to be vigilant and if any clarification or further facts were needed at an exparte hearing before the court could make a decision, those facts had to be on record. Moreover, Order LIII rule 4 (2) of the Civil Procedure Rules allowed and did not curtail the court's general powers to grant leave to amend pleadings at any stage of the proceedings. Rawal J, considering these provisions in the case of (**RESLEY –VS- NAIROBI CITY COUNCIL (2002) E A,** 233), the learned judge said that the said rule 4 (2), did not curtail the court's power to grant leave to amend a statement or use further affidavits in judicial review proceedings.

In the case of ***R. -Vs- BOW STREET*** Stipendiary ***Magistrates, ex-parte Roberts & Others, {1990} 3 ALL ER. R. 48***7 the court held that-

> ***"an applicant for judicial review who wished to rely on the substantive hearing of the application on grounds other than those for which leave was granted did not need to renew his application for the purpose of obtaining leave in respect of those other grounds but instead had to give***

notice to the respondent that he intended to rely on other grounds at the substantive hearing. The respondent could then file any affidavit on which he wished to rely. And it followed that since the defendants did not need leave in respect of the grounds on which they had been refused then application would be dismissed".

Watkins L.J. and Potts J. explained the practice on reliance on grounds other than those which have formed the basis for the leave to move given by the single judge to an applicant for judicial review, this way-

"where an applicant has made an application for judicial review on a number of grounds and is given leave to move expressly on one of them for example, it is unnecessary for him to review his application to this court for the purpose of relying on the other grounds on which he had not been specifically given leave to move provided, and this is of the utmost importance that he gives notice to the respondent whoever he may be, and if there is more than one then each of them that he intends at the substantive hearing to rely on one or more of the other grounds in which he has not been expressly given by the single judge leave to move.That is so that the Respondent shall have ample opportunity to consider his position in respect of the other grounds which the applicant seeks to rely".

Now, this is not good law or precedent in Kenya, firstly because the law in England is different from that in Kenya. In England, the new Order 53 Rule 3 (4) expressly empowers an Applicant to renew an application for leave. Secondly, Order 53 rule 1 (1) (a) & (b) and Order 53 rule 2 of the Supreme Court Rules besides allowing judicial review application for orders of mandamus, prohibition and certiorari also allows application for an injunction under section 30 of the Supreme Court Act 1981, to restrain a person from acting in any office in which he is not entitled to act, and for joinder of claims for reliefs which arise out of or relates to or is connected with the same matter.We do not have equivalent provisions in either the Law Reform Act (Cap 26, Laws of Kenya), or Order LIII of Civil Procedure Rules.

It is thus not possible to pursue the remedies of which the case of ***R. VSBOW STREET Stipendiary Magistrates, ex parte*** Roberts and others dealt with. An Applicant in Kenya can thus only rely upon grounds for which leave was granted to move the court.

In addition, reliance upon other grounds is not synonymous with leave to amend a statement of facts, and thus rely on those facts as amended, that is, if the court grants leave to amend the statement.

Dr. Kuria also relied upon the case of O' REILLY -Vs. MACKMAN & OTHERS {1982} 3 ALLIED 1124, 1130, that an applicant for judicial review must put forward the entire case, and the application be prosecuted timeously Lord Diplock observed at page 1130 f, g, h and j -

"…….. Again under Order 53 evidence was required to be on affidavit. This in itself is not an unjust disadvantage; it is a common feature of many forms of procedure in the High Court, including Originating Summonses; but in the absence of any express provision for cross-examination of deponents (in the pre- 1977 procedure) an application for crossexamination of deponents were unknown,

and at h-J (P. 1130)

On the other hand, as compared with an action for a declaration by writ (plaint) or originating summons, the procedure under Order 53 both before and after 1977 provided for the respondent decision -making statutory tribunal or public authority against which the remedy of certiorari was sought protection against claims which it was not in the public interest for courts of justice to entertain, first, leave to apply for the order was required, the application which was ex-parte but could be, and in practice was, adjourned to enable the proposed respondent to be represented, had to be supported by a statement setting out inter alia, the grounds on which the relief was sought and by affidavit verifying the facts relied on.So that a knowingly false statement of fact would amount to the criminal offence of perjury. Such an affidavit was also

required to satisfy the requirements of uberrime fides, with the result that failure to make on Oath a full and candid disclosure of material facts was itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit.

This was an important safeguard which is preserved in the new order 53 of 1977. The public interest in good administration of justice requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision- making powers for any longer period than is absolutely necessary to the person affected by the decision.In contrast allegations made in a statement of claim or endorsement of an originating summons are not on oath, so the requirement for a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity……." (underlining ours)

In the Commissioner **GENERAL of KENYA REVENUE AUTHORITY -VS- SILVANO OKEMA OWAKI T/a Marenga Filling Station (Civil Appeal No. 45 of 2000**), the Court of Appeal relying upon the case of R. Wandsworth, JJ. exp Read {1942} K.B. 283, stated 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 went on to quote from the speech of Viscount Caldecote C.J. who at page 283 said that where there has been a denial of justice the only way in which that denial of justice can be brought to the knowledge of the court is by way of affidavit, and for that reason the court is entitled, indeed bound, if justice, is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction. The Wandsworth, ex parte Read case did not really decide whether the facts should be contained in the Affidavit or in the statement. It is the Court of Appeal which in its construction of Order III Rule 1 (2) which decided in the Owaki case that it is the verifying Affidavit, and not the statement which it verifies which is of evidential value. In our opinion, the decision of the English Court in O' RELLY -vs- Mackmann & Others {1982} 3 ALL ER 1124, sets the proper grounds why the Affidavit, and not the statement, which is of evidential value.

11. CONCLUSION

Turning therefore to the case at hand, Miss Kilonzo urged us to distinguish the decision of the Court of Appeal and say that it was decided upon its peculiar facts. Having however considered the argument, and indeed the decision in the Owaki case itself we are convinced that the OWAKI case was properly decided, and is in addition binding upon this court.

The English Rules of the Supreme Court preserve in Order 53 Rule 6 (2), the same former rule 4 (2) of Order LIII in the former Order 53, which rule was identical to our current Rule 4 (2). The English decisions made after the 1977 legislation on that similar rule, such as O'Reilly –Vs- Mackman are therefore of great persuasive authority to us and we would adopt the speech of Lord Diplock to this case in relation to the use of Affidavits. Whereas indeed remedies in judicial review have widened in scope in England since the 1977 amendment to Order 53 of the Rules of Supreme Court, the rules subject of the relief sought in this application, namely, an amendment of the statement of facts and the use of further affidavits, are still identical Rule 4 (2) of Order LIII of the Civil Procedure Rules, that is, leave to amend such statement and use further Applicant must first be sought and obtained from court.

We therefore agree with Miss Kilonzo that the Court's discretion to grant leave to amend and use further affidavits is not restricted provided an applicant fulfils the conditions for the grant of such leave; that notice of intention to amend is given and the intended amendments are included in such notice. The notice will in our view always be given in writing even if intention to do so is first intimated orally. We reject the view expressed by Dr. Kuria that such an application should be made orally. Oral notice may lend itself to ordinary civil proceedings but not judicial review where a respondent must be able to see and ascertain from the record of the intended amendments before him whether such proposed amendments either violate the statute or rules under which it is purportedly made, or is otherwise prejudicial to the Respondent if leave to bring such an amendment is granted.

It is correct as Miss Kilonzo urged that parties to judicial review proceedings in England have access to the application of ordinary rules of Civil Procedure even prior to the 1977 amendments to Order 53 of the Rules of Supreme Court, whereas we in Kenya rely upon a mere 2 sections under the Law Reform Act. The courts should therefore approach an application for leave to amend a statement and use of further affidavits with a wide and open spectrum than the circumscribed rules now provide. The court should look at the nature of the application for amendment, the extent and purpose of the amendment, that no prejudice will be suffered if leave to amend is granted that where leave is denied, it is the applicant who may suffer prejudice.

Miss Kilonzo urged further that if leave to amend is denied, the description of the parties and their reference will not agree in the Notice of Motion, the reliefs and grounds upon which the reliefs are sought will not agree, more so because the order granting leave has not been set aside, on the contrary it has been acted upon, and the fact that not all prayers sought under the application for leave were denied should not be ground for denying the Applicant leave to amend the statement.

On the use of further supporting Affidavit, Miss Kilonzo urged the court to take judicial notice of the unwritten rule of practice to use supporting Affidavit in support of Notice of Motions, that it is a good practice; that the supporting affidavit is not a different document from the Notice of motion because it is made in support of the motion. Whereas again, Miss Kilonzo urged that an applicant at the leave stage should disclose everything to the court, particularly as the application is at that stage ex parte, this does not change the nature of the leave stage, for it's a threshold stage. It is not all. It is merely prayers for leave. If therefore one prayer fails, it does not mean that all the prayers fail.

The court is supposed to see the good from the bad, and to satisfy itself that there is a prima facie case. Consequently any application to introduce amendments to assist the court to deal with the substantive motion, should be granted to ensure that the mischief caused by an exparte application is not repeated, the Respondent is given notice to avoid further ambush, the amendments, if granted will cure any defects that were in the application for the defects are curable and are not fatal; and an Applicant should be rewarded for vigilance and not punished for seeking to cure those defects.

Miss Kilonzo further urged that where there is an application like in this case, challenging the application for review both in form and substance, such application is itself a new matter as is envisaged by Order LIII, Rule 4 (2), and need not arise from merely a Replying Affidavit. While we appreciate the force of Miss Kilonzo's argument, there is one fundamental omission in her argument, and we were unable to say whether this was by design default or inadvertence. This omission relates to what ought to be contained in a Statement of Facts or grounds relied upon, and what ought to be contained in a verifying affidavit.

The Applicant has put all the facts in the statement of facts and grounds relied upon for the reliefs sought. In our view, all the references in part B of the Amended Statement), paragraph 9 (to a letter of allotment), paragraph 14 (to a reissued letter of allotment), paragraph 15 (to a copy of a title deed), paragraph 21 (a copy of press statement), paragraph 29, (affidavit of Mr. Joseph Kamotho) paragraph 29 (affidavit of Mr. Wilson Gachanja – then Commissioner of Lands) are matters according to the decision of the Court of Appeal in the OWAKI case, which ought to be contained and set out in the Affidavit which is required to verify the matters stated in the Statement of Facts.

In our view, the Statement of Facts, is not, unlike a plaint, a statement of claim which the verifying affidavit confirms in a very few lines. The verifying affidavit in judicial review proceedings is the evidence upon which the application is founded. It must consequently contain those facts and exhibits. It cannot merely say as Hon. Sunkuli's Affidavit purports to say, I confirm the statements. Secondly, the proposed Amended Statement of Facts brings into focus new and disputed facts which, in our respectful view, are only justiciable by way of either a plaint, or a constitutional reference under the Bill of Rights or Chapter V of the Constitution, rather than by way of judicial review.

Evidence of facts as was decided in the OWAKI case is to be given in an affidavit. Our rules on judicial review do not yet, unlike the post 1977 Supreme Court Rules in England, provide for either cross examination, interrogatories and discovery of documents and therefore for the trial of issues of fact, so

this court cannot make orders for those procedures. If the question here solely depended upon a disputed point of law, it would be convenient for us to determine it. But where as it is here, the dispute turns on questions of fact and about which there are sharp differences, the issues do not lend themselves to resolution by judicial review.

The disputed facts, claims and contentions of the Applicant are set out in the new paragraphs 39,41,43,46 – 47, 49-68 of the proposed Amended Statement and these can only, in our again respectful view be resolved upon a protracted hearing. The Applicant's claim is not merely that the Respondents have not acted according to law, the Applicant's claim is that the Respondents have infringed upon the Applicant's fundamental right to the protection of property and to deprivation of that property without compensation contrary to the provisions of Section 75 of the Constitution.

This too is very obvious from the Notice of Motion itself dated 20-02- 2003 and filed on 26-02-2003. The motion combines public law reliefs, with private law claims and reliefs, which the judicial review court has no jurisdiction to determine under the provisions of section 8 and 9 of the Law Reform Act, and Order LIII Rules 1 (1) and (2) and 3 thereof of the Civil Procedure Rules. The Notice of Motion is also expressed to be brought not just under the Law Reform Act, but also Section 75 of the Constitution of Kenya, Section 23 of the Registration of Titles Act, the Government Lands Act (Chapter 281, and 280 of the Laws of Kenya) which provisions give rise to findings in the nature of declaration of rights as to property with which again the judicial review court is not invested with jurisdiction.

In view of the clear provisions relating to the court's judicial review jurisdiction, the question of invoking its inherent powers under section 3A of the Civil Procedure Act, does not apply. The situation here is complicated even more by the fact that the property (The Kenyatta International Conference Centre), the subject of these proceedings, was by the Kenyatta International Conference Centre Order 2004 (L.N. No. 77 of 2004) made pursuant to the provisions of the State Corporations Act (Chapter 446, Laws of Kenya) converted into a state corporation under that Act. These are matters which require detailed examination than is available under the current rules of judicial review under our law.

Indeed, as the Court of Appeal held in the case of the COMMISSIONER OF LANDS -VS- HOTEL KUNSTE LTD, that in matters of judicial review, the court exercises a special jurisdiction which is neither civil nor criminal. The court enquires whether due process was observed in arriving at a decision by a subordinate court or inferior tribunal. The jurisdiction is thus clear cut. The court will therefore not combine or mix public law remedies (that is Certiorari's prohibition or mandamus), with a private law remedies such as the right to private property. The Court does not as yet, unlike in England, since 1977 as outlined in the previous pages of this Ruling, have or enjoy that jurisdiction.

In the upshot therefore, allowing the Applicant to amend its statement in its current form, would not only fly into the face of the Court of Appeal decisions in the KUNSTE, and the OWAKI cases, but would also amount to usurpation of a jurisdiction (to combine public and private law remedies) as set out in the application (Notice of Motion of 20-02-2003), and the intended Amended Statements) which this court does not have.

12. FINAL ORDERS

We therefore decline to grant the application to amend the Statement of Facts, and for similar reasons decline the use of further Affidavits and strike out the further Affidavit of Julius Sunkuli sworn on 5-03-2003. As this is not the end of this matter each party shall bear its own costs at this stage. There shall be orders accordingly.

Dated and delivered at Nairobi this 29th day of November, 2005.

J.G. NYAMU

JUDGE.

MOHAMMED IBRAHIM

JUDGE

M.J. ANYARA EMUKULE

JUDGE