



JUDICIAL REVIEW

- Further Affidavits when allowed
- Notice to the other party
- Civil Procedure Rules do not apply
- AKO v SPECIAL DISTRICT COMMISSIONER FOR KISUMU applied

REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Civ Case 317 of 2005

REPUBLIC

VERSUS

THE COMMISSIONER OF INCOME TAX RESPONDENT

EX-PARTE

DHL WORLWIDE EXPRESS KENYA LIMITED THE APPLICANT

RULING

This is an application brought under section 3A of the Civil Procedure Act and Order 18 rule 1 of the Civil Procedure Rules and Order 53 rule 4(2). It is supported by the affidavit of Ahmed Ali Abdi sworn on 15th September 2005. In brief the applicant states that the respondent has introduced new matters in paragraph 5 – that the applicant is a subsidiary of DHL Operations B V and that this is not correct and that the respondent has introduced inaccurate and misleading statements in paragraphs 11 and 12 of the affidavit in reply. Finally that the method of calculating network fees as set out by the respondent in para 10 of the affidavit is inaccurate. The applicant contends that what it seeks to prove by way of a further affidavit is factual and can only be set out in a further affidavit.

The respondent has vide grounds of opposition dated 7th October 2005 opposed the application on the following grounds.

- a) That the application is incompetent, bad in law, and inaccurately defective
- b) That the application offends O 53 rule 4(2) by not annexing the proposed affidavit for court's consideration
- c) The application seeks to call unwarranted evidence other than restricting itself to the tenets of Judicial Review as enshrined in the Law Reform Act and O 53 and court decisions
- d) The application is just but a blatant abuse of the court process in that the substantive Notice of Motion is grounded on the statutory statement and verifying Affidavit which the court relied upon in granting leave.

- e) The application is meant to delay the hearing and disposal of this matter.
- f) It is evident that the applicant has not deposited any security for the tax due to the respondent.
- g) The alleged new matters are not in any way prejudicial to the substantive application at all.

The court has considered the reasons given for leave to file a further affidavit and also the grounds as outlined above. The court has taken the view that the respondent has introduced factual matters in para 5,10,11 and 12 of the affidavit in reply and that the applicant should be given an opportunity to explain its standpoint by a further affidavit. However the court would like to take this opportunity to restate that Civil Procedure provisions do not apply to judicial review and that for the purpose of invoking this court jurisdiction the only relevant provision is O 53 rule 4(2) of the Civil Procedure Rules see the case of *AKO v SPECIAL DISTRICT COMMISSIONER FOR KISUMU C.A.* There is no doubt that the hearing in Judicial Review applications are conducted on the basis of affidavit evidence and provided a party is able to bring itself under the provisions of O 53 rule 4(2), there is no reason why the court should not allow further affidavits especially in a situation such as the current one where the subject matter is taxation and both parties have adopted different positions in support of their respective arguments on tax liability.

The court's interpretation of O 53 rule 4(2) is that where an applicant intends to ask to be allowed to amend his statement or use further affidavits he shall give notice of intention and shall supply on demand copies of any such further affidavit.

It is therefore clear to the court that where the court is satisfied that one party has introduced a new matter the court can grant leave for the filing of further affidavit and since I am so satisfied as stated above I do grant leave for a further affidavit to be filed and served within 15 days. In view of the wording of O 53 rule 4(2) a formal application appears unnecessary and only a notice in terms of the rule is necessary but I have in my discretion treated this application as sufficient notice in terms of the rule. It is so ordered.

DATED and delivered at Nairobi this 19th day of December, 2005.

J G NYAMU

JUDGE

19/12/2005