REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO.1267 OF 2003

KENYA TELECOMMUNICATIONS INVESTMENT GROUP LTD …… ……..… …..PLAINTIFF

VERSUS

TELECOMMUNICATION COMMISSION OF KENYA ..…..DEFENDANT

RULING

On the hearing of the Notice of Motion filed by the Applicant herein of the 24/10/2003 the Respondent and Interested Party took a preliminary objection to the application, notice of which had been given by the interested party.

Three points were raised and argued initially by Mr. Inamdar for the Respondent. I shall take them in order.

> 1. The Application was defective due to non observance of the Provisions of O.53 rule 1(3) of the Civil Procedure rules which requires that the Applicant shall given notice of the application for leave not later than the proceeding day to the registrar and shall at the same time lodge with the Registrar copies of the statement and affidavits. The Proviso gives the Court power to extend the period or excuse the failure to file the notice of the application for good cause shown. Mr. Inamdar relied on the case of Kariuki –vs- County Council of Kiambu Misc. Application 1446 of 1994, in which Mr. Justice Ole Keiwa held that no notice given as required by O.53 rule 1(3) was fatal to the application.
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> He relied on a ruling of two Judges in HC Misc. App.No.93 of 1990 Ndungu v Muturi in which it was held that notice to the Registrar is a mandatory requirement.

I would only say that it was always open to the Appellant in this case to apply for either an extension of time to file the Notice or to excuse the failure to file it for good cause shown. However the applicant has made no such application. There is no evidence in this matter that the notice was given nor is there any notice to the Registrar in the Court record. Mr. Orengo for the Applicant showed me a stamp in his copy of the application for leave which he stated was notice to the register, however there is no evidence of this which should have been set out in an affidavit, nor does it conform to the rule which envisages a written notice to be given. This first point seems to be well taken.

> 2. The second point is that there is no evidence before the court to support the Application. O.53 rule 1 (2) states as follows: An application for such leave as a foresaid shall be made ex-parte to a Judgment in chambers, and shall be accompanied by a statement setting and the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavit verifying the facts relied on. This Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.

In this present application the verifying affidavit sworn by Titus Ndundu on the 23/10/2003 for the Applicant on paragraph 2 states as follows

> "That I have read the statutory statement accompanying the application for leave to apply for the Orders of certiorari mandamus and prohibition and state that all the facts set out herein are true and I repeat the same herein and verify the same as true to my knowledge, information and belief, the sources of which information and the basis of my belief being duly disclosed."

Although he stated that he repeats the same the same are not set out in the affidavit. Both Mr. Inamdar and Mr. Regeru relied on the case of KRA v Owaki C.A. No.45 of 2000 in which a joint Judgment the Learned Court of Appeal stated at page 7 as follows:

> "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.
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> What appears to be the meaning of rule 1(2) of the order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7.
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> "The application for leave "By a statement". The facts relied on should be stated in the affidavit (see R.V. Wandsworth JJ, ex. P. Read {1942} IK.B. 281) "The statement should contain nothing more than the name and the description of the applicant, the relief sought. It is not correct to lodge a statement of all the facts, verified by an affidavit".

Mr. Orengo relied on outline of Judicial Review in Kenya by Mr. P. Lumumba and Mr. Norwrojee in which is set out a precedent for a verifying affidavit. This merely states that the facts contained in the statement filed with the application {for leave to apply for Judicial Review} are true.

He also submitted that the ratio of the Wandsworth case referred to above was that a Court is entitled to look at an affidavit to determine the facts.

In the Owaki's case referred to above the Learned Court of Appeal cited with approval a passage from the Supreme Court Practice 1976 Volume 1 at paragraph 53/1/7 in which it is stated "It is not correct to lodge a statement of all the facts verified by an affidavit"

I accept that the Judgments in the Wandsworth case were not dealing with the procedures in cases of Judicial Review, Lord Caldecote C.J. stated in his Judgment

> "The only way in which that denial of Justice can be brought to the knowledge of the court is by way of affidavit"

I understand the ratio of the Court of Appeal in the Owaki case to be that under O.53 rule 1(2) it is necessary for the facts relied on to be verified by an affidavit. That is the affidavit should contain the facts and not merely that the statements of facts should be verified in a verifying affidavit.

Can the lack of an affidavit setting out the facts be dispensed with in an application of this kind. The answer is I think it cannot. The Applicant had the chance of withdrawing the Notice of Motion and filing a fresh one to which is annexed an affidavit, which sets out the facts. The Problem lies in the wording of O.53 rule 3(1), which in mandatory terms, states that the Notice of Motion pursuant to leave being granted must be filed within 21 days. Does the court have a discretion to extend that time is not a matter that I will consider here as there has been no withdrawal of the Notice of Motion and Application for a extension of time. In the result I am bound by the Court of Appeal's decision to say that this Application is defective for want of evidence.

3. Mr. Inamdar supported by Mr. Regeru submitted that there was an alternative remedy, which should be exhausted before the application for Judicial Review was filed.

This alternative remedy is to be found in section 102(1) of the Kenya Communications Act which established an Appeal Tribunal for the purpose of arbitrating in cases where disputes arises between the parties under this Act. The word “dispute ” is not defined in the Act but I take it that it would include a refusal to grant a licence to anyone under section 25 of the Act.

Indeed the Applicant must have been of this mind as it filed an appeal to the Appeals Tribunal, which it subsequently withdrew.

Mr. Inamdar relied on the case of R.V Eppring and Harlow General Commission ex-parte Goldstones (1983) 3 ALL E.R.p.257, which held that an application for Judicial Review was within the remedies jurisdiction of the Court but save in exceptional circumstances, that jurisdiction would not be exercised where other residues were available. A number of other cases were cited where this Principle was laid down including RV Birmingham City Council, ex-parte Ferrero Ltd (1993) 1 ALL ER page 530, which decided that in cases where parliament had provided a statutory appeal procedure. Judicial Review would only be granted in exceptional cases.

I am of the view that there is an alternative remedy in this case is this is one of those exceptional cases where a Judicial Review proceeding should be invoked. Nothing has been shown to me that is exceptional in this case. It might I suppose he considered to be a speedier procedure however that in itself would not be sufficient.Parliament has under the Act provided a Tribunal, which can deal with the question of the refusal of a licence. That Tribunal has special expertise in dealing with such matters. It is only if this Tribunal itself fails in some ways to dispense justice that a case for Judicial Review could be preferred against its decision.

For these reasons I allow the preliminary point with costs to the Respondent and Interested party and dismiss the application for the reasons given.

Dated and delivered at Nairobi this 5th day of March 2004

P.J. RANSLEY

JUDGE