REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.1313 OF 2002

JEREMIAH OKOTH OWITI……..……..……1ST PLAINTIFF

JOHN O. UDALANG ……..2ND PLAINTIFF

HUDSON SHIVERENJE…….3RD PLAINTIFF

RAYMOND MUISYO KITEVU ……..…..4TH PLAINTIFF

V E R S U S

CONSTITUTION OF KENYA REVIEW COMMISSION…….DEFENDANT

R U L I N G

This is a Notice of Motion dated 7.10.2002 made under Order 50 Rule 1 & 2 of the Civil Procedure Rules and Section 3A of the Cap 21 asking for an order that the order of Court on 24.9.2002 be set aside that supplementary affidavit filed on 27.9.2002 by Plaintiff pursuant to the said order be struck off and expunged from record. Reasons of support is in the affidavit of John Akello Ougo sworn on 7.10.2003. That Respondent was given opportunity to file supplementary affidavit when he appeared exparte before this Court without giving opportunity to the Respondent.

Mr. Ougo for the Applicant says the order was obtained without following procedure but the Respondent opposed this application saying it is misconceived. That the order was not made pursuant to application made.

It is common ground that the Court made exparte order here by allowing Respondent herein to file supplementary affidavit. Under Order 50 Rule 17, the Court has power to set aside exparte order. This rule seems to me to be discretionary and the question is when can it be exercised. The Applicant has substantial reason when he says that the order was made on occasion for mere mention. In such a situation, the Court of Appeal has said in Civil Appeal No. 13 of 1995 RAHAB WANJIRU EVANS vs. ESSO KENYA LIMITED that: -

> "…..where a matter is fixed for mention, as it was in this case, the Learned Judge had no business determining on that date the substantial issues in the matter. He can only do so which was not the case here, if the parties so agree, and of course after complying with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties…"

The passage has been followed by the Court of Appeal in several decisions subsequently. These pronouncements bind this Court but only where the ratio hold But I think the situation here can be distinguishable.in my respectiful view, exparte leave to file further supplementary affidavit is not a "determination of a substantive issue". It is just opportunity to bring evidence to the fore to enable the opposite party to know the case he has to meet. This is an affidavit evidence and is subject to the attributes stated under Order 18 where under Rule 7 and 9 the power of the Court in receiving evidence is allowed and the Court should not reject it so easily besides the opposite party would not be prejudiced as he would have the right to call for its rejection and even cross examine on it.

I think Order 50 Rule 17 which allows the Court to set aside exparte and can be exercised where it appears that the opposite party has suffered prejudice as a direct consequence of the irregularity, but the Court should only exercise this to enhance justice. I also think that the Court should direct itself on the grounds set down by Harris J., in SHAH vs. MBOGO (1967) EA 116 where he said as a general principle

in setting aside exparte judgements when the Court said that the discretion is to be exercised..

> "..to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

As I observed above, to my mind, there is no prejudice hardship that would be occasioned requiring setting aside of the exparte order allowing supplementary affidavit to be filed.

Lastly, there must be a latitude within which the Court can exercise its inherent jurisdiction in conducting hearings and so to allow a supplementary affidavit to be filed should be within exercise of inherent jurisdiction of the Court to exercise exparte. Where there is no injustice occasioned and where the Court just intends that hearing of the case before expedite Courts should not use discretion to clog the inherent jurisdiction to aid quick movement of cases.

Application is disallowed. There will be no order as to costs.

DATED this 11th day of July 2003

A.I. HAYANGA

JUDGE