REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 105 OF 2001

IN THE MATTER OF: AN APPLICATION BY NTEMI LIMITED FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE COMMISSIONER LANDS & THE DIRECTOR OF SURVEYS through THE HONORABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE GOVERNMENT LANDS ACT (CAP. 280); THE REGISTRATION OF TITLES ACT (CAP. 281) & THE SURVEY ACT (CAP. 299)

AND

IN THE MATTER OF: LAND REFERENCE NUMBER 209/ 14329, NAIROBI & THE SURVEY (DEED) PLAN NUMBER 233589

BETWEEN

REPUBLIC……APPLICANT

AND

THE HON. ATTORNEY GENERAL ……..… …RESPONDENT

R U L I N G

This is an application for judicial review. However, before I go into the substance of the application, it is quite clear, as counsel for the Respondent pointed out, that it is wrongly intituled as it is not directed at the officer against whom the orders are sought.

The body of the application however, seeks an order of certiorari to quash the decision of the commissioner of Lands and the Director of Surveys and orders of Mandamus and Prohibition against them. Clearly the application is not against the Attorney General. The intituling of this application is clearly wrong and cannot be dealt with in its present form. The Plaintiff's Advocate argued that the defect in form did not invalidate this application. About two months ago, I had the opportunity to deal with this question in **Matic General contractors Ltd. V. The Attorney General** NAIROBI H.C.C.C. NO. 1614 of 1994 (Unreported) and for good reason, I am compelled to reproduce what I said in that case here:

"Several issues were raised in view of the submissions made by counsel. However, going to first principles first, I must accept Mr. Njoroge's objection that there is an irregularity in form apparent

from the record of the Plaintiff's application. [I]n the case of Farmers Bus Service & Others v. The Transport Licensing Appeal Tribunal [1959] E.A. 779 (FORBES, Ag. P., WINDAM, J.A. & TEMPLETON, J.) the Court of Appeal at Nairobi commented on the form of proceedings and the healings of applications for Judicial Review and held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled, FORBES, Ag. P., in delivering the Ruling of the court, quoted with approval the following statement by SIR NEWNHAM WORLEY, p. in Mohamed Ahmed v. P [1957] E.A. 523 (SIR NEWNHAM WORLEY, P., BIGGS, Ag V. – P. & FORBES, J.A.)

> ***"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioner's offices and in some registries of the High Court. The appellant's Advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The crown cannot be both Applicant and the Respondent in the same matter. [W]hen proceedings in the High court by originating summons or originat ing motion are inter partes, it is not sufficient to intitule them as "in the matter of: etc." This must be followed by the names of the Applicants and the Respondents. If this had been done in this case, the error would have been obvious on the fir st draft."***

[T]he **Farmers Bus** case supra the Court held that the **Mohamed Ahmed** case supra was good law in Kenya. Although there have been amendments to our civil Procedure Rules since the **Farmers Bus** case supra that decision is still good law today. The Plaintiff's Amended Notice of Motion is intituled as follows:-

> ***"Matic General Contractors Ltd…….Plaintiff - versus – Attorney General ……Defendant In the matter of an application for an order of mandamus directed to Francis Kibii Tilitei pursuant to having been granted on 18 th June, 1999."***

[T]he defect intituling is obvious. It has not been brought in the name of the Republic; and it is not clear who is the applicant and who is the Respondent. Mr. Njoroge's objection, therefore, that the application was improperly intituled is right. However, the more important question is this: what is the effect of that default? Does it render the application incompetent? This must take us back to a matter that comes up once and again in this court and that is this: what is the effect of not complying with forms provided for in statutes and subsidiary legislation? This question has been the subject of great judicial consideration. There are different views that have been expressed by different Judges but the landmark decision on the point is the now famous case of **Boves v. Gathure** [1969] E.A. 385 (SIR CHARLES NEWBOLD, P., SIR CLEMENT DE LESTANG, V. – P. & SPRY, J.A.). In that case, the respondent moved the court by a wrong procedure. The Court of Appeal at Nairobi held that irregularities that do not go to jurisdiction and which do not cause prejudice to the other party are not sufficient to invalidate proceedings before the Court. There are some decisions of the Court of Appeal which seems to suggest that failure to comply with mandatory requirements of the rules will amount to a fatal omission. In **National Bank of Kenya Ltd. V. Ndung'u** Njau Civil appeal No. 211 of 1996 (Unreported) the Court of Appeal said as follows:

> ***"We are of the view that the Appellan t's Notice of Motion did not comply with the mandatory requirements of order L rule 3 of the Civil Procedure Rules according to which every notice of motion must state in general terms the grounds of the application, It is also not enough to say the N otice of Motion is grounded on the grounds of opposition which had been filed in opposition to the said earlier application of the Respondent …[t]his in our view was a fatal omission……"***

(Quote reproduced from **Unga Ltd. V Amos Kinuthia & Another t/a Budget Spray Works** Civil Application No. NAI 175 of 1997 (NAI UR 71/97) (Unreported) (SHAH, PALL & OWUOR, JJ.A)) (underlining supplied) [I]n the case **Njagi Kanyuguti alias Karingi Kanyuguti v. David Njeru Njogu** NAIROBI Civil Appeal No. 181 of 1994 (Unreported) (KWACHI, PALL, JJ.A & BOSIRE, Ag. J.A. (as

he then was)) the Court of Appeal held that an application which had been brought under an incorrect provision of law was incurably defective. [I]n two Ugandan cases, these are:

> **(a) Salume Namukasa v. Yosefu Bukya [1966] E.A. 433; and**
>
> **(b) George Kigoya v. Attorney General of Uganda,** [1966] E.A. 463, SIR UDO UDOMA, the Learned Chief Justice struck out applications on the ground that they were brought under wrong procedures. In the first case (a) above he said as follows at page 435:
>
> ***"Counsel must understand that the rules of this Court were not made in vain. They are intended to regulate the practice of the court. Of late a practice seems to have developed of Counsel instituting proceedings in this court without paying due regard to the Rules. Such practice must be discouraged. In a matter of this kind, might the ends of justice not be better served by this defective, disorderly and incompetent application being struck out?"***

The latest decisions of the court of Appeal have been a movement back to **Boyes v. Gathura** supra (see for example the **Unga Ltd case** supra and **Johnson Joshua Kinyanjui & Another v. Rachel Wahito Thande and Richard Njogu Thande (the administrators of the Estate of the late Henry Thande & Another** Civil Appeal No. 284 of 1997 (Unreported) (AKIWUMI, TUNOI & SHAH, JJ.A.)). **The Unga Ltd case** supra infact overrules both the **National Bank** and the **Njagi Kanyunguti** cases supra to the extent that they hold that non-compliance with the rules of procedure is a fatal omission. What has driven a wedge between those for allowing a wrong procedue and those against is the value attached to the function of the rules. Some requirements of the rules are so prime that failure to comply with them will no doubt leave a party without remedy. But others are not. The unfortunate thing is that all rules have been treated like they are the same. No analysis has been done of which rules are "fundamental" and which are "just rules." As I say this, I would like to consider what SPRY, J.A. said in the **Boyes v. Gathure** case supra when he distinguished the decisions of SIR UDO UDOMA, C.J. in the **Salume Namukasa and George Kigoya** cases supra.

> ***"Certain remarks in those judgments taken in isolation, might appear to suggest that a c ourt lacks jurisdiction if the initial step in the proceedings is in a form contrary to a statutory requirement, but reading the judgments as a whole, and having regard to references of possibility of amendment I am satisfied that that was not what the Learned Chief Justice intended."***

I think that what SPRY, J.A. meant is that no omission is fatal that can be saved by amendment and that is the law. Can the reverse be said to be also true? This is likely. An omission that cannot be rectified by an amendment is therefore fatal. Does this mean that rules whose wrong procedure can be salvaged by amendment are not fundamental? It should be noted that even the use of words like "shall", "must" and "may" among others is not sufficient guide to the value of a particular rule. In these matters, the court has to weigh each rule to determine the principle behind it to be able to come to a conclusion as to its value. We are then left with another problem: will the court entertain every omission? It has been said of the rules to be a good servant and a bad master. Shall we allow the servant to be exploited and not require the master have his place? As was observed by SIR UDO UDOMA, C.J., in the **Salume Namukasa** case supra the rules of this court were designed to regulate the practice of the court. Non-compliance with the rules complicates the function of the Judge who today is overwhelmed by the duty to deliver justice. Everyday cases are delayed by objections of this nature and I am not ready to rule that they have no place. I accept the rule in **Boyes v. Gathure** supra and I also accept SIR UDO UDOMA, C.J.'s position that the ends of justice are better served by an effective orderly, and competent application. [I]n a ruling delivered recently in the case of **Agip (K) Ltd. V. Jimmy Komo t/a Kiambu stores** NAIROBI HCCC No. 1738 of 2000 (unreported), I considered the question of any improper form in detail and although I accepted fully the **Boyes v. Gathure Rule**, I observed that it is always proper to amend the wrong as soon as it was pointed out. Not to do so would amount to a flagrant abuse of the rules. In that case I had the occasion to say as follows at p. 7:

> ***"The Defendant did not take the opportunity to seek amendment once the irregularity in his***

applica tion had been pointed out. If I may repeat myself, I think that the proper procedure is for the offending party to seize the opportunity to apply for amendment once an irregularity has been pointed out. However, I must go back to the first principle s laid down and ask myself whether the irregularity is fundamental and whether it prejudiced the Plaintiff. Nothing of that sort was shown and the Plaintiff's objection on the ground that this application was brought by an improper mode must fail."

Having done that, I then proceeded to consider the defendant's application on merit. As observed, the increased number of cases not complying with the rules is not helpful to the administration of justice. With SIR UDO UDOMA, C.J., I think that conduct must be discouraged. Today lawyers qualifying from universities worldwide have had wide training in procedure. The young lawyer is then trained by an Advocate for not less than 6 months on the practice of law. I am aware that some get trained for two years as they await admission to the roll of Advocates. The practice has been around for much longer now and there are numerous "precedents" to follow. There is sufficient case law on these matters and the bar should be more polished now. Let it not be mistaken; I still follow the first principles in **Boyes v. Gathure** but there must be some development from that point. In **Echaria v. Echaria** Civil Appeal No. 247 of 1997 (unreported) (CHESONI, C.J., GICHERU, OMOLO, SHAH & BOSIRE, JJ.A.), a five bench of the court of Appeal said as follows:-

"We agree that the Notice of motion is defective but the defect is curable, and for that reason, and Ms. Karua having applied for leave to amend the Notice of Motion, we grant leave for the Respondent to amend the Noti ce of Motion so as to comply with the requirements of Rule 42(1) of the rules of the court." (Reproduced in Unga Ltd. Case supra)

In the Farmers Bus Service case supra the court ordered that the defective notice of appeal and other documents in the appeal to be amended to conform to the rules. For the reasons given I agree with my Learned Brother AGANYANYA, J.'s decisison in **Kenton Kijabe Hill Farmers Co. Society v. The District Officer (Naivasha)** H.C. Misc. App. No. 280 of 1996 to the extent that applications for prerogative orders must be brought in the name of the Republic. However, I am unable to accept that non-compliance with that requirement was fatal to the whole application sufficient to warrant it to be struck out. [W]hat can this court do in the circumstances of this case? The matter of the application for judicial review is important. The Plaintiff has obtained a lawful judgment and it has been denied the fruits of that judgment. That judgment was obtained more than 6 years ago. The Plaintiff, in an attempt to enforce that judgment, has brought this application. It is incorrectly intituled as has been seen. That omission is **NOT** fatal. But it is an omission that can be cured by amendment. The ends of justice will be better served if the omission is rectified and the parties are enabled to be heard on merit. [I], therefore, order that the Plaintiff shall amend its application provided that the Defendant's costs thrown away are paid by the Plaintiff forthwith. The (main) application shall then proceed after amendment, (and be heard on its merit)"

I cannot make any better orders here. The Plaintiff must amend his pleadings before this matter can be allowed to proceed. The Plaintiff shall be liable for the Defendant's costs thrown away which must be paid forthwith.

DATED and DELIVERED at NAIROBI this 3rd day of May, 2001.

ALNASHIR VISRAM

JUDGE.