REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT MISC. APP. NO. 283 OF 2000

JOSEPH MWANGI ……...APPLICANT

V E R S U S

THE DIRECTOR OF SURVEY & ANOTHER…….RESPONDENTS

R U L I N G

This application for Judicial Review is intituled as follows:-

"IN THE MATTER OF THE PHYSICAL PLANNING ACT

AND

IN THE MATTER OF: THE SURVEY ACT, CHAPTER 299 LAWS OF KENYA

AND

IN THE MATTER OF: REGISTERED LAND ACT, CHAPTER 300 LAWS OF KENYA

- V E R S U S –

1. THE DIRECTOR OF SURVEY…… RESPONDENTS THE DIRECTOR OF PHYSICAL PLANNING…..INTERESTED PARTY EXPARTE: JOSEPH MWANGI."

In it, an order for mandamus is sought against the Director of Survey compelling him to re-survey named lands in accordance with the Physical Planner's map dated 1/9/61 – 65. At the outset I would like to deal with some preliminary technical points raised by Mr. Okello for the Respondent and the Interested Party.

To begin with, Mr. Okello relied on the case of **National Bank of Kenya Ltd. V. Ndungu Njau** NAIROBI C.A. Civil Appeal No. 211 of 1996 (Unreported) (KWACH, AKIWUMI & PALL, JJ.A) to challenge the application on the basis that it did not state the grounds it was based on. The decision in that case on the point has been overturned by **Unga Ltd v. Amos Kinuthia & Gabriel Mwaura t/a Budget Spray Works** NAIROBI C.A. Civil Application No. NAI 175 of 1997 (NAI 71/97 UR) (Unreported) (SHAH, PALL & OWUOR, JJ.A). In the latter decision, the Court of Appeal said as follows:-

> **"Mr. Muigai relied on a decision of this Court in the case of National Bank of Kenya Limited v. Ndungu Njau. Civil Appeal No. 211 of 1996, (Unreported) where this Court said:-**
>
> ***'We are of the view that the appellant's notice of motion did not comply with the mandatory requirements of Order L r. 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 notice of motion is grounded on the grounds of opposition which had been filed i n opposition to the said earlier application of the respondent.'

This Court in the National Bank of Kenya case said further: -

> ***'Although this in our view was a fatal omission, yet in the broad interest of justice we asked Mr. Njuguna to say on which ground under Order XLIV he had argued the said notice of motion in the Superior Court……'***

We think the words "a fatal omission" were used per incuriam in the National Bank case. A five judge bench of this Court (Chesoni C.J., Gicheru, Omolo, Shah & Bosire JJ.A) IN THE CASE OF Echaria v. Echaria, Civil Appeal No. 247 of 1997, (Unreported) said:-

> ***'We agree that he 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 notice of motion so as to comply with the requirements of Rule 42(1) of the Rules of the Court.'***

It must be borne in mind that in The National Bank case the issue arose out of a H igh Court form not being followed. It also must be borne in mind that in the Echaria case, the effect of section 72 of the Interpretation and General Provisions Act, Cap 2 was not considered. Deviation from forms is not fatal if the deviation does not affect the substance of the form, or which is not calculated to mislead. [H]owever, in the peculiar circumstances of this application, namely that the objection was not taken for one year and two months, and in view of Mr. Muigai's own candid state ment that he himself is for substance rather than form we think it is not proper to dismiss the application for want of form, particularly when Mr. Muigai has not been misled in any way and has suffered no prejudice.

Mr. Inamdar has verbally applied for amendment of the notice of motion to include the grounds on which the motion is based. [T]his Court, either in The National Bank case or the Echaria case was not referred to The case of Castelino vs. Rodrigueys [1972] E.A. 223 wherein the prede cessor of this court held that irregularities of form may be ignored or cured by amendment. The court said at page 224:

> ***"The respondent could not possibly have been prejudiced by the form of the notice, since he had before him all grounds on which leave to defend was being sought.***
>
> ***In these matters of procedural irregularities, it is the question of prejudice that that is all important. If there is no possible prejudice, the wide power to allow amendment confirmed by s. 103 of the Civil P rocedure Act (Uganda) should normally be exercised.'"***

Mr. Okello said that the irregularity in this case had caused prejudice as he did not know the grounds on which the application was based. One may then ask, how was he then able to argue this case on its substance? Mr. Okello was not candid in this respect. The basis of the application can easily be gleaned from the statement filed with the application.There was no prejudice caused whatsoever by the irregularity which did not go to the substance of the application.

Secondly, Mr. Okello challenged the verifying Affidavit on the grounds that it did not show what had been deponed to on information and what on knowledge and also that it did not comply with section 5 of the Oaths and Statutory Declarations Act as it did not state where the Affidavit had been sworn. As to the first objection, I find it very hard to understand Mr. Okello's argument that the affidavit did not state what had been deponed to on information and what on knowledge. The verifying Affidavit was brief and was in the following terms:-

> ***"1. THAT I am a male adult of sound mind and the applicant herein.***

2. THAT I have read and understood the statutory statement filed with this application and state that all the facts set out therein are true and solemnly swear the same herein and state aver and verily that the same are true to the best of my knowledge and belief.

3. THAT I swear this affidavit in support of the application herein.

4. THAT all that is deponed to herein is true to the best of my information, knowledge and belief."

In the case of ***Assanand and Sons (Uganda) Ltd v. East Africa Rocords Ltd*** [1959] E.A. 360 relied on by Mr. Okello, FARREL, J. said as follows at p. 364.

> ***"The affidavit of Mr. Cam pbell was deficient in three respects. First, it did not set out the deponent's means of knowledge or his grounds of belief regarding the matters stated on information and belief, and secondly, it did not distinguish between matters stated on infor mation and belief and matters deponed to from the deponent's knowledge (see O. XVIII, r. 391) and Standard Goods Corporation Ltd v. Harakhchand Nathu & Co (1) [1950], 17 E.A.C.A. 99). The Court should not have acted upon an affidavit so draw***n."

That is obviously not the case here. In the verifying Affidavit, it is clear that the deponent is the applicant and knows as a matter of course the matters of his application. On the point that the affidavit did not comply with section 5 of the Oaths and Statutory Declarations Act, I have found it very difficult to follow my brothers who decided the following cases:

(a) Jayant Kumar Vrajilal Shah v. Chandulal Mohanlal Shah & Another NAIROBI HCCC NO. 1280 of 1997 (unreported) (OLE KEIWUA, J (as he then was)).

(b) The Eastern and Southern African Development Bank v. African Greenfields Ltd & 2 Others NAIROBI HCCC NO.1189 of 2000 (MILIMANI) (Unreported) (HEWETT, J); and

(c) James Franers Kariuki & Another V. United Insurance Co. Ltd NAIROBI HCCC NO. 1450 OF 2000 (MILIMANI) (Unreported) (OTIENO,J).

In Agip (K) Ltd v. Jimmy Komo T/a Kiambu Stores NAIROBI HCCC NO. 1738 OF 2000 (unreported), I had the opportunity to consider the question and I said as follows:

The question can be simply put in other words as follows: Is an Affidavit that does not comply with section 5 of Cap 15 fatally defective? That sections reads as follows:

> "***5. Every Commissioner of oaths before whom any oath or Affidavit is taken or made under this Act shall state truly in the jurat or attestat ion at what place and on what date the oath or affidavit is taken or made."***

"Although the language of section 5 Cap 15 is couched in mandatory language, I do not think that it changes the Court's power in relation to receiving affidavits. Order XVII I rule 7 of the Rules provides as follows:

> ***"The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form t hereof."***

On the same point, volume 15 of HALSBURYS LAWS OF ENGLAND (3 rd edition) states as follows at page 469):

> ***"Unless a Commissioner to administer oaths expresses the time when, and the place***

where, he takes an affidavit, it will not be permitt ed to be filed or enrolled without the leave of the Court or a Judge….. The parties can not waive irregularities in the form of a jurat, but in a case where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity may be overlooked."

In view of these matters, I am, with utmost due respect, unable to agree with my learned Brother HEWETT, J.'s decision in <u>The East and Southern African Development Bank</u> case supra. This Court is minded to accept the affidavit complained of in exercise of the power conferred upon it vide order XVIII rule 7 of the Rules in an effort to meet the ends of justice. The irreg ularity complained of is in no way prejudicial to the Defendant's case."

The stamp of the commissioner before whom the Affidavit was sworn clearly indicates that his address is at Nairobi. It is taken, therefore, that the Affidavit was sworn there. In this respect, I was supported by RINGERA, J in a decision delivered by him at Milimani Commercial Courts sometime this year when he upheld my decision in the Agip case supra.

Mr. Okello argued further that the court cannot act suo moto in receiving a defective affidavit under Order XVIII. He did not cite any authority to support that contention and for my part I do not agree with him.

Mr. Okello pointed out that this application was defective as it was not brought in the name of the Republic. He relied on the case of **<u>Farmers Bus Service & Others v. The Transport Licensing Appeal Tribuna</u>**l [1959] E.A. 779. It is quite clear that that application is improperly intituled. In the **<u>Farmers Bus</u>** case supra the Court of Appeal said as follows:

"The record of the appeal which was before us (Mr. Kean for the applicant intimated that a supplementary record would be filed in due course) thus does not contain the original application to a judge of the Supreme Court for leave to apply for an order of certiorari in pursuance of r. 1 of O. LIII of the Civil Procedure (Revised) Rules, 1948, but from the "Amended statement" which appears in the record it would appear that the application was …:

"In the matter of: The Transport Licensing ……

and

In the Matter of : An application for an Order of Certiorari directed

to

The Transport Licensing Appeal Tribunal 1 (to) (the applicant) …….. Applicants 19

Similarly, the present record does not contain a copy of the notice of motion for the order of Certiorari, but, from the formal order embodying the decision of the Supreme Court on the motion, it would appear that the hearing of the notice of motion was the same as that of the application for leave to apply which is set out above. From the judgment of the Supreme Court, it would appear that the appeals before the Transport Licensing Appeal Tribunal to which the application relates are Nos.11 -16 inclusive, 30, 32 -35 inclusive, 37, 39, 41 -43 inclusive and 46 -48 inclusive, all of 1958.

The appeal to this court is headed:

1

(to)(the applicants)

19 …..Appellants and

The Transport Licensing Appeal Tribunal…..Respondents"

In our opinion the forms of heading used are incorrect. This court had occasion to comment on the forms to be used in applications for prerogative orders in Mohamed Ahmed v. R. (1) [1957) E.A. 523 (C.A.). In that case the then learned President of the court, after setting out the forms of heading employed in that case and accepting as correct the form of heading for the ex parte application to a judge for leave, continued (at p. 524):

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court.

The Appellant's advocates appears to have failed entirely to realize 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 persons who are to comply ther ewith. Application for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent In the same matter.

"When proceedings in the High Court by originating summons or originating motion are inter partes, it is not sufficient to intitule them as "In the matter of: etc. This must be followed by names of the applicants and respondents. If this had been done in this case, the error would have been obvious on the first draft."

There is no mater ial difference between the rules relating to prerogative orders in force in Uganda and those in force in Kenya. The ruling in Mohammed Ahmed's (1) case therefore applies in Kenya, and, following that ruling, we are of opinion that the ex parte application for leave to apply for an order should (on the assumption that the applicants could properly join in one application) have been intituled:

"In the matter of an application by (the applicants) for leave to apply for an Order of Certior ari

and

In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41 -43 inclusive and 46 -48 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal."

We may say we entirely agree with the view expressed by the lea rned judge of the Supreme Court that the application concerned nineteen separate and distinct appeals, which should not have been joined in one application. As in Mohamed Ahmed's (1) case, if the proper form had been used, the error would have been obvious.

Leave having been granted, the notice of motion should have been intituled:

"R

. v.

The Transport Licensing Appeal Tribunal Ex parte (the applicant)"

So far as the appeal to this court is concerned, the persons really interested in re sisting the appeal are the Overseas Touring Co. (E.A.) Ltd. and the Kenya Bus Service Ltd, who were the

objectors before the Transport Licensing Appeal Tribunal. In the circumstances we think they should be added to the heading as interested parties . The appeal should therefore be intituled: "R …….Appellant v. The Transport Licensing Appeal Tribunal ……..Respondent and The Overseas Touring Co. (E.A.) Ltd) The Kenya Bus Services Ltd)……Interested Parties ex parte (the applicants)"

The notice of appeal and other documents in the appeal should be amended accordingly."

Here, Mr. Okello argued that the application having been heard and there being no application to amend the defects, the application ought to be refused. I am unable to agree with him. This Court is empowered under Order VIA rule 5 of the Civil Procedure Rules to order the amendment of any document for the purpose of determining the real questions in controversy between the parties or to correct any defect or error in any proceedings. Mr. Okello did not tell this Court what prejudice would be suffered if the application was amended. Applications for judicial review are important and it would not be in the interests of justice and the general public if they were disposed off on technicalities.

This Court is enjoined to ensure as much as practicable that justice is delivered in a manner that would satisfy the interests of the litigating public without undue regard to technicalities of procedure. Although there is a strict requirement that applications for prerogative orders must be brought in the name of the Republic, I do not think that failure to do so renders an application fatally defective. I considered this matter on 9th March this year in **Matic General Contractors Ltd v. The Attorney General NAIROB**I H.C.C.C. No. 1614. In that case, the application for judicial review was also not brought in the name of the Republic. I had the occasion to say as follows on the question:-

> ***"What 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 Plainti ff, 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 o mission is rectified and the parties are enabled to be heard on merit.***

In the Farmers Bus Service case supra, the Court of Appeal did the same.

Based on this conclusion, I do not see the need to consider the substance of the application. I, therefore, order that this application be amended provided the Applicant shall pay the costs thrown away.

DATED and DELIVERED at NAIROBI this 28th day of June, 2001.

ALNASHIR VISRAM

JUDGE.