



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 658 OF 2016

IN THE MATTER OF AN APPLICATION BY JEBESS FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1,

47,227 AND 232 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT & ASSET DISPOSAL ACT, 2015

AND

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

NATIONAL GOVERNMENT CDF

EMGWEN CONSTITUENCY.....1ST INTERESTED PARTY

FEMJI ENTERPRISES LIMITED.....2ND INTERESTED PARTY

JEBESS CONTRACTORS.....EX-PARTE APPLICANT

RULING ON PRELIMINARY OBJECTION

1. This ruling determines the preliminary objection argued this morning as filed by the 2nd interested party's counsel Mr Masika to the effect that the chamber summons dated 28th December 2016 filed on the even date is bad in law, misconceived and plainly non sustainable and the same should be struck out forthwith with costs as the application is in flagrant breach of the salient and mandatory provisions of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya and the Judicature Act, Cap 8 Laws of Kenya.

2. In his oral submissions, Mr Masika submitted that the annexures filed by the exparte applicant offends Rule 9 of the Oaths and Statutory Declarations Rules as they have not been properly identified save by stickers. He relied on the **Rajput Vs Barclays Bank of Kenya [2004] KLR 393** where the court held that failure to comply with Cap 15 Provisions and Rules goes to the substance of the matter.

3. It was further submitted that the application was filed in the vacation yet it was not properly before the court thereby offending the Judicature Act. Counsel urged the court to strike out the application.

4. In response, Mr Apollo Mboya counsel for the exparte applicant opposed the preliminary objection and submitted that the same was not merited. First, that the application was brought under the vacation Rules under the High Court Organization and Administration Rules, 2016 and that what was raised was form and not substance.

5. Further, that at the leave stage, the application was exparte hence the interested parties cannot seek for its dismissal. In addition, it was submitted that the matter being raised can only be canvassed once leave is granted.

6. In a rejoinder, Mr Masika submitted that at the leave stage the court must be satisfied that there is a proper application before the court which does not offend the law and that in this case Article 159 of the Constitution would not come to the aid of the exparte applicant.

7. I have carefully considered the preliminary objection as filed and argued. The issue for determination is whether the chamber summons dated 28th December 2016 is bad in law, misconceived and plainly unsustainable.

8. A preliminary objection must be based on a pure point of law which when raised does not require the discretion of the court. It determines the pleading or proceeding in limine. See **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696.**

9. Rules 9 and 10 of the Oaths and Statutory Declarations Rules made under Cap 15 Laws of Kenya provides that:

9. All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.

10. The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.

10. The question is whether the exhibits annexed are securely sealed and marked with serial letters of identification. The answer is in the negative. A casual look at the annexures shows that they are simply filed and separated by stickers marked SK B1, SK B2 and SK B 3. The exparte applicant did not dispute that fact of omission.

11. The next question is whether failure to comply with Rules 9 and 10 of the Statutory Declarations Act Cap 15 Laws of Kenya is fatal to the chamber summons.

12. The Rules made under Section 5 and 6 of the subject Act have been interpreted severally to the effect that they are directory and not mandatory. In **Litein Tea Factory Company Ltd & Another vs**

Davis Kiplangat Mutai & 5 Others [2015] e KLR Gikonyo J dealing with the same issue was clear and I concur that:

“although non compliance with Rules 9 and 10 of the Act was apparent on the exhibits before him, but that the affidavit clearly tendered the exhibits as a bundle and it referred to the particular exhibits as a bundle...In any event, at worst, the matter complained of the annexure in question would be a mere irregularity which is a matter of form rather than substance, and such technicalities were deprecated by Article 159 of the Constitution.”

13. The learned Judge found the affidavit competent.

14. In the instant case, what is being challenged are exhibits which are not properly sealed and or marked for identification as required by Rules 9 and 10 of the Oaths and Statutory Declarations Rules. Ringera J (as he then was) in **Milimani HCC 462/97 Standard Chartered Bank Ltd vs Luncton(K) Ltd** (unreported) and **HCC 26/2004 - Patrick Thinguri & 1006 Others V KTDA Company & Another**(unreported) was clear and I adopt that holding that:

“There appears to be a common belief that the use of the word “shall” in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one.

*As I understand the canons of statutory interpretation, the use of the word ‘shall’ in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. As long ago as 1861 in the case of **Liverpool Borough Bank V Turner [1861] 30 L.J ch 379 pages 380-381** Lord Campbell had laid it down that:*

“ No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered. And from principles of statutory interpretation by Justice G.P Singh a former CJ Madhya Pradesh HC in India, the following instructive passage appears at page 242:

*“ The use of the word “shall” raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such object flowing from such construction. There are numerous cases where the word ‘shall’ has, therefore, been construed as merely directory.” In **Milimani HCC 26/2004 (supra)** the court stated:*

“Turning to the defects conveyed in the jurat, it is important to consider whether the defect as described is as to form or is fundamental and is likely to touch on jurisdiction. Firstly it is alleged that apart from appearing on a separate page, there is any other defect like in the name or place of swearing for example. The court finds that this is not a fundamental defect in irregularity and is both curable under the order and affidavits namely Order 18 Rule 7 which reads: 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 file or other irregularity in the form thereof:

15. In addition, Section 72 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides:

“72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law on instatement or document which purports to be in that form shall not be void by

reason of a deviation there from which does not affect the substance of the instrument or document or which is not calculated to mislead.”

16. In the present case, albeit the exhibits are not sealed and properly marked, the defect does not go to the jurisdiction or substance and moreso, the court has wide powers under Section 100 of the Civil Procedure Act and Order 8 Rule 5 of the Civil Procedure Rules to, on its own motion, or on application, to order that the application or any part of any document be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

17. Rules are designed to facilitate access to justice and further its ends, although they cannot be entirely ignored.

18. In the circumstances of this case, the court has latitude to order that properly sealed and marked exhibits be filed since the verifying affidavit identifies those exhibits.

19. Accordingly, I decline to strike out the application on the ground of breach of Rule 9 of the Oaths and Statutory Declarations Act and order that the applicant files freshly sealed and marked exhibits for identification together with a verifying affidavit.

20. On the other objection as to the filing of the application during the vacation, I find the objection unfounded as leave was properly sought and granted under Rules 18 and 19 and the High Court Organization and Administration Rules, 2016.

21. On whether Mr Masika's client has audience in an ex parte chamber summons, Order 53 Rule 1(4) the proviso thereto is clear that the court can either grant leave ex parte or direct service and the matter be considered inter partes within 7 days hence Mr Appollo Mboya's submission has no merit.

22. In the end, I decline to uphold the preliminary objection and dismiss it with no orders as to costs.

23. The ex parte applicant to file and serve sealed and marked exhibits within 2 days from today. The 2nd interested party to file their replying affidavit within 2 days from date of service. Hearing of the application for leave to be on 10th January 2017. Interim stay granted until then.

Dated, signed and delivered in open court at Nairobi this 4th day of January 2017.

R.E. ABURILI

JUDGE

In the presence of Mr Appollo Mboya counsel for the Applicant

Mr Masika Counsel for the 2nd interested party

N/A for the respondent

N/A for the 1st interested party

CA: Lorna