



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO 151 OF 2012
REPUBLIC.....APPLICANT
VERSUS
CITY COUNCIL OF NAIROBI.....1ST RESPONDENT
ETHICS & ANTI CORRUPTION COMMISSION...2ND RESPONDENT
EX-PARTE
SHITAL BHANDARI
RULING

When this matter came up for mention on 12th May, 2014, Mr. Rimui for the ex-parte applicant informed the Court that he had filed and served a supplementary affidavit sworn on 2nd May, 2014 and he was therefore ready to take a date for highlighting of submissions. Mr. Okoth for the 1st respondent urged the Court to strike out the said affidavit on the ground that it had been filed without the leave of the Court. He pointed out that certain documents, whose veracity his client could not confirm had been annexed to the affidavit and that it would be prejudicial to his client if those documents were relied upon by the Court. He also argued that the said documents ought to have been in the custody of the applicant at the time of filing this judicial review application and no reason had been advanced as to why the documents were not exhibited at that time.

Ms Shamallah for the 2nd respondent also supported the striking out of the supplementary affidavit. She asserted that the supplementary affidavit had been filed subsequent to the filing of supplementary submissions on 10th March, 2014. In those submissions the contents of the supplementary affidavit had been alluded to. It is therefore her argument that the filing of the supplementary affidavit is un-procedural. She also argued that the documents being exhibited ought to have been in the custody of the applicant all along and no explanation has been offered as to why they had not been filed at the commencement of this matter.

In reply, Mr. Rimui pointed out that leave to file the supplementary affidavit was granted on 11th February, 2014 and the respondents were given corresponding leave. He further informed the Court that when the matter came up on 12th March, 2014 he notified the Court that the supplementary affidavit

could not be filed since it had not been signed by the applicant. He also informed the Court that he filed the supplementary submissions at that time as the signature of the applicant was not required. He asserted that since the respondents had been given corresponding leave they would not suffer any prejudice as they can challenge the veracity of the exhibits in their replies. He submitted that it was in the interests of justice that all issues are placed before the Court for determination.

I have perused the Court file and note that on 11th February, 2014 Mr. Rimui applied for leave to file a supplementary affidavit. He informed the Court that he had just taken over the matter from another firm of advocates and in the process of drafting submissions he realized that he needed to file a supplementary affidavit. Mr. Ogula who was holding brief for Ms Shamallah for the 2nd respondent informed the Court that he had no objection to the application. There was no appearance for the 1st respondent on that day. Leave was granted to the applicant to file a further affidavit and supplementary submissions.

When the matter came up for mention on 12th March, 2014, Mr. Rimui told the Court that he had not filed a further affidavit as the applicant had been out of the country and when he came back he was bereaved and had therefore not signed the affidavit. Mr. Rimui also informed the Court that he had filed supplementary submissions. He further informed the Court that Mr. Machira who was holding brief for Ms Shamallah for the 2nd respondent could put in a further reply and submissions within 21 days once he filed and served the affidavit. Mr. Machira in response stated: **“That is confirmed.”** Again on that day there was no appearance for the 1st respondent. The Court adopted the agreement of the advocates and fixed the matter for mention on 12th May, 2014 to confirm compliance.

Therefore, the claim by the 1st respondent that no leave to file a supplementary affidavit was granted is unfounded. It is noted that the Court record does not show that Mr. Rimui had disclosed the contents of the proposed supplementary affidavit. It can therefore be assumed that the leave granted to him did not have fixed boundaries. The 2nd respondent consented to the grant of leave. Mr. Rimui told the Court that he had discovered that he needed to file a supplementary affidavit upon taking over the matter. I suspect he cannot be in a position to explain to the Court why the documents exhibited in the supplementary affidavit were not exhibited at the time leave to commence these proceedings was sought. In any case, as leave to file a supplementary affidavit has been granted, it would be unfair to ask the applicant at this stage to explain why the documents were not exhibited at the beginning.

The respondents claim the veracity of the documents cannot be ascertained. They have been granted leave to put in responses. They will say what they know about the documents in their replies. They control or have access to the core records and they can always verify them.

In short, the interests of justice favour the admission of the supplementary affidavit. The objection of the respondents is therefore dismissed.

Dated, signed and delivered at Nairobi this 10th day of June, 2014

W. KORIR,

JUDGE OF THE HIGH COURT