



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KIHARA KARIUKI (PCA), OKWENGU & J. MOHAMMED, JJ.A.**

**CIVIL APPEAL NO. 247 OF 2004**

**BETWEEN**

**SAMUEL WANGAI MUGO ..... APPELLANT**

**AND**

**THE ESTATE AGENTS REGISTRATION BOARD ..... RESPONDENT**

**(An appeal from the ruling and order of the High Court of Kenya at Nairobi (GBM Kariuki, J) dated 19<sup>th</sup> December, 2003**

**in**

**HC MISC APPLN NO. 341 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. By an *ex parte* Chamber Summons application dated 7<sup>th</sup> April, 2003 and filed in the High Court of Kenya at Nairobi in Miscellaneous Civil Application No. 341 of 2003, the appellant, as the applicant before the High Court, sought and obtained leave to commence Judicial Review proceedings against the respondent in the nature of Prohibition and Mandamus. The appeal before this Court is from the ruling of the High Court, (G.B.M Kariuki, J), [as he then was], delivered on 19<sup>th</sup> December 2003, arising from those judicial review proceedings.
2. A brief background of this appeal is that **SAMUEL WANGAI MUGO**, [hereinafter referred to as the appellant], applied to the **ESTATE AGENTS REGISTRATION BOARD**, [hereinafter referred to as the 'Board'], seeking to be registered as an Estate Agent and allowed to practice as such.
3. The Board invited the appellant to appear before it for an interview on 16<sup>th</sup> August, 2001. However due to prior commitments that took the appellant outside of the country, the appellant could not attend the interview. The appellant therefore requested for the interview to be postponed to another date. Acknowledging the request, the Board re-scheduled the interview to 20<sup>th</sup> June, 2002.

4. After the interview was conducted, vide its letter dated 10<sup>th</sup> July, 2002 the Board informed the appellant that he did not qualify for registration as an Estate Agent.
5. Dissatisfied with the Board's decision, the appellant through his advocates, sought from the Board, the reasons considered for arriving at their decision. The appellant was convinced that the Board's decision to disqualify him from registration as an estate agent was illegal, *ultra vires* and against the provisions of **Section 13 of the Estate Agents Act Cap 533 Laws of Kenya, (Cap 533)**. The appellant was of the view that this statutory provision did not provide for summary rejection of an application for registration as an estate agent.
6. Despite the demand, the appellant was not supplied with the reasons. In March 2003, it came to the attention of the appellant that the Board had an unwritten policy to reject the registration of applicants who were also registered as auctioneers and/or court brokers. Having been registered as an auctioneer and court broker, the appellant sought reasons for the rejection since the requirements for registration of a court broker, auctioneer and estate agent are similar.
7. When the Board failed to supply the appellant with the reasons demanded, the appellant filed an application for judicial review seeking orders of:
  - **Mandamus** – to order the Board to supply the reasons for their rejection of registration; and
  - **Prohibition** – to prohibit the Board from prosecuting the appellant when carrying on the business of an estate agent.
8. The Chairman of the Board, Michael Sebastian Kibui, on behalf of the Board, swore an affidavit in reply to the application filed by the appellant. He deponed that the appellant had been practising as an estate agent without a licence which is an offence under **Cap 533**. The Chairman further averred that the principal objective of the Board is to ensure that only those persons whose interests do not conflict with the profession are registered. As a result, the Board could not register the appellant as he was also a registered auctioneer and there was likely to be a conflict of interest. Based on these reasons, the Board exercised its discretion to reject the appellant's application. Due to its wide discretionary powers, the Board was of the view that it was not obliged to give reasons for their rejection of the appellant's application.
9. The learned Judge was called upon to determine whether, in light of the circumstances, the appellant was entitled in law to the orders he sought; and whether the Board's decision violated the law.
10. The learned Judge considered the provisions of **Section 13(1)(e) of Cap 533** which stipulates that a person not qualified under paragraphs (a)(b)(c) or (d) of **section 13 of Cap 533**, but is of good character and satisfies the Board that he has not been convicted of an offence involving fraud or dishonesty is entitled to be registered as an estate agent under **Cap 533**.
11. The learned Judge questioned whether the Board found the appellant to be of good character and whether it was satisfied that he had not been convicted of an offence involving fraud or dishonesty.
12. The learned Judge found that it had not been alleged that the Board had violated the law in reaching its decision; that under the provisions of **Cap 533**, the Board was not bound to supply its reasons; that in any event, in its affidavit the Board revealed that its decision had been guided by the fact that the appellant had been illegally practising as an estate agent; and that being a registered auctioneer, a conflict of interest was bound to arise.
13. The learned Judge was satisfied that the Board had discharged its public duty in accordance with the law, and that the appellant had failed to prove that the Board was under a statutory duty to provide reasons for their decision. The learned Judge concluded that the appellant had not made a case for an order of mandamus as the Board could not be compelled to provide reasons when

provisions of **Cap 533** do not mandate it to do so.

14. Further, the learned Judge determined that the appellant's statutory statement which had evidentiary documents attached to it had no evidentiary value, as the statement did not contain averments on oath.

The learned Judge ruled that it is the verifying affidavit that should have contained the facts and evidence to be relied on and to which annexures ought to have been attached.

The learned Judge ruled that it was not enough to make reference to the veracity or accuracy of the statutory statement in the verifying affidavit, but that the sworn evidence should be in the affidavit and not in the statement.

15. Consequently, the High Court ruled that there was no competent application before it and dismissed the application with costs.

16. Aggrieved and dissatisfied with the entire ruling, the appellant now brings this appeal to this Court. The appellant's Memorandum of Appeal contains eight grounds of appeal which he relies on to illustrate that the learned Judge erred in fact and law in:

- i. *failing to appreciate that the Board had not performed its duty when it disqualified the appellant though he had satisfied the conditions precedent to registration under Cap 533;*
- ii. *failing to find that the Board was required to give reasons for the appellant's disqualification;*
- iii. *failing to find that the court had discretion to compel the Board to give reasons for the appellant's disqualification;*
- iv. *failing to appreciate that the Board did not comply with the provisions of Cap 533;*
- v. *dismissing the application for mandamus and prohibition because the statutory statements annexed to the application for leave to file for the judicial review remedies had no evidentiary value;*
- vi. *failing to recognise that without the Board's reasons the appellant cannot appeal against its decision since the appellant would not have any grounds of appeal on which to rely;*
- vii. *failing to appreciate that the courts have the duty and power to ensure that justice is meted to aggrieved parties; and*
- viii. *failing to appreciate the facts before him thus coming to a determination that was against the weight of the facts and evidence.*

### **Submissions by Counsel**

17. When the appeal came for hearing on 23rd April 2015, learned counsel Mrs Caroline Chirchir represented the appellant. There was no appearance for the respondent, though it had been duly served with the

hearing notice.

18. In her submissions, counsel cited **Section 13(1) & (2) of Cap 533** and argued that the appellant had fulfilled the pre-requisites for registration and faulted the ruling of the High Court in failing to grant the orders sought. Counsel sought to rely on **Article 47(1) Constitution of Kenya** which provides for fair administrative action in support of the appellant's case. Counsel submitted that the rules of natural justice required that the Board supply reasons for its disqualification of the appellant's application to enable him remedy the inadequacies/shortcomings of his application.

Counsel contended that the Board failed to consider that being a registered court broker and auctioneer he was an officer of the court and therefore of good character.

19. Counsel argued that the learned Judge erred in determining that the statutory declaration filed had no evidential value, as in doing so the learned Judge placed undue regard to procedural technicalities

thereby occasioning prejudice to the appellant's case. Counsel urged the Court to consider the substance of the application and not have undue regard to technicalities.

Counsel argued that the evidence was in favour of the appellant and urged us to allow the appeal with costs.

### **Determination**

20. In considering the record before this Court, we take cognisance of the fact that judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application

for judicial review is made, but the legality of the decision making process. In judicial review, the High Court has special jurisdiction to issue orders of *mandamus*, *prohibition* and/or *certiorari* as remedies against

acts or omissions by public entities. This was re-emphasized by this Court in the case of **BIREN**

### **AMRITLAL SHAH & ANOTHER V REPUBLIC & 3 OTHERS, [2013] eKLR.**

21. In the instant appeal, the public entity is the Estate Agents Registration Board, which rejected the appellant's application to be registered as an Estate

Agent. The appellant sought orders of ***mandamus*** to compel the Board to reveal their reasons for their decision to reject the appellant's application.

The appellant was seeking an order of *mandamus* compelling the respondent to give reasons for its decision; he was not seeking an appeal or review of the respondent's decision. The following are the issues for determination by this court:

- i. *whether the learned Judge erred in determining that the respondent was not under a legal obligation to give reasons for its decision;*
- ii. *whether the learned Judge erred in determining that the application before him was incompetent due to the appellant's failure to file a verifying affidavit setting out the evidence in the application.*
- i. **Whether the learned Judge erred in determining that the Respondent was not under a legal obligation to give reasons for its decision**

22. **Section 13 of the Estate Agents Act Cap 533 Laws of Kenya** provides

as follows:

#### ***“Conditions and qualifications for registration***

1. ***Subject to this Act, a person who is a citizen of Kenya shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register if he is-***

- a. *a full member of the Institution of Surveyors of Kenya in the chapters of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors; or*
- b. *a corporate member of the Royal Institution of Chartered Surveyors (in the General Practice or Land Agency or Agriculture sections) and he is qualified to be or is a full member of the Institution of Surveyors of Kenya in the chapters of Valuation and Estate Management Surveyors, Building Surveyors and Land Management Surveyors;*
- c. *the holder of a degree, diploma or licence from any university or college or school which is recognized for the time being by the Board; or*
- d. *a person who-*
  - i. *is the holder of a degree, diploma or licence of a university or college or school or a member of an institution the membership of which is recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training for practice as an estate agent; and*
  - ii. *has had, to the satisfaction of the Board, practical post-qualification experience in such practice of not less than two years of which not less than six months has been in Kenya; or*
- e. *a person who is not qualified under paragraphs (a), (b), (c) or (d) but is of good character and satisfies the Board that he has not been convicted (whether in Kenya or elsewhere) of an offence involving fraud or dishonesty.*

2. *Notwithstanding the fact that he has sufficient qualifications under subsection (1), the Board may require an applicant for registration as an estate agent under this Act to satisfy it that his professional and general conduct has been such that, in the opinion of the Board, he is a fit and proper person to be registered under this Act and the Board may direct the registrar to postpone the registration of an applicant until it is so satisfied.”*

23. *Section 14* then provides for acceptance for registration. It states as follows:

*“(1) Upon application being made to the Board in the prescribed form by a person claiming to be qualified for registration under section 13 and upon payment of the prescribed fee the Board shall consider the application and, if it is satisfied that the person is so qualified, it shall accept that person for registration and shall direct the registrar to enter his name on the register.*

2. *The consideration of an application under this section shall be undertaken by the Board and shall not be delegated to any committee of the Board.”*

24. It is clear from the wording of these provisions of the law that there is no obligation on the respondent to give reasons for a decision it makes with regard to an application for registration as an estate agent.

25. The appellant had sought for the judicial review orders of mandamus and prohibition. These are remedies granted to persons aggrieved by the exercise of administrative power. This Court in the case of COMMISSIONER OF LANDS VKUNSTE HOTEL LIMITED, [1997] eKLR, stated as follows:

*“But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; R v. Secretary of State for Education*

*and Science ex parte Avon County Council [1991] 1 ALL ER.282, at p. 285.). The **Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155, by Lord Hailsham of St.***

**Marylebone, thus:**

***"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court."***

26. In his judgment, the learned Judge held that:

***"It is not alleged that the Board violated the law in reaching the decision whose reasons is now sought. Under the provisions of Cap 533 the Board is not bound to give reasons for its decision. All that it is required to do is to comply with the law in making its decision. The ex parte applicant was accorded a right to be heard. He produced documents which the Board perused before reaching its decision. In its own view, the ex parte applicant did not qualify under section 13(1)(e)...The reasons which the ex parte applicant seeks now emerge in the Board's replying affidavit."***

27. We concur with the holding of the learned Judge that there is no duty imposed upon the Board by statute (**Cap 533**) to inform the appellant of its reasons for rejecting his application.

28. In this instant appeal, the reasons sought by the appellant were manifested in the Board's replying affidavit and canvassed at trial. The reasons were that the appellant's good conduct was in question since he had been conducting business as an estate agent without being registered, which is an offence under **Cap 533**; and that as the appellant was a registered auctioneer there was bound to be a conflict of interest if the appellant was registered as an estate agent. It is evident from the record before the Court that the appellant did not deny practising as an estate agent without a licence.

29. This argument is further fortified by this Courts' prior decisions which have examined the order of mandamus and when it does issue. The Court in **MAKUPA TRANSIT SHADE LIMITED & ANOTHER V KENYA**

**PORTS AUTHORITY & ANOTHER, [2015] eKLR** re-emphasised the law on mandamus, certiorari and prohibition as first stated in the Court of Appeal case of **KENYA NATIONAL EXAMINATION COUNCIL**

**V REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, CIVIL APPEAL NO. 266 OF 1996 [1997] eKLR.** On mandamus, this Court stated:

***"...an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."***

In the circumstances of this case, this ground of appeal, therefore, fails. 30. The appellant has also sought from the court an order of prohibition, to prohibit the Board from prosecuting the appellant when carrying on the business of an estate agent. This Court in the case of **Kenya National Examination Council V Republic Ex-Parte Geoffrey Gathenji Njoroje & 9 others, (supra)** stated as follows on the order of prohibition:

***"What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal***

**or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition, Vol.1 at pg.37 paragraph 128. ... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued.**”

31. It is therefore clear that this order is only available in cases where there is an excess of jurisdiction or an absence of it as well as a departure from the rules of natural justice. The appellant failed to prove that the

Board acted in excess of its jurisdiction, or against the principles of natural justice. The appellant failed to prove that the decision-making process of the Board was flawed.

**(ii) Whether the learned Judge erred in determining that the application before him was incompetent due the Appellant’s failure to file a verifying affidavit setting out the evidence in the application**

32. This Court has had opportunity to consider this issue and stated as follows in **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY THROUGH REPUBLIC V SILVANO ONEMA OWAKI T/A**

**MARENDA ... FILLING STATION, [2001] eKLR:**

**“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7: "The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see R. v. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit." [Emphasis added]**

33. This Court’s position is clear that it is the verifying affidavit and not the statement which is of evidential value. The appellant did file a verifying affidavit which sought to verify the statement. However, it did not set out

his evidence but appears to merely play the role of verifying the statutory statement. It follows, therefore, that the verifying affidavit and not the statement should contain the annexures with the evidence to be proffered.

What is now important to consider is the effect of failing to file a proper verifying affidavit. The appellant argues that this being a procedural technicality it should not prejudice his case.

34. The learned Judge determined that the appellant’s application was not competent in view of the fact that his statutory statement had no evidential value. The appellant annexed documents to be relied upon in the statutory statement and not in the verifying affidavit. The learned Judge determined that the affidavit should contain the facts and evidence to be relied on. Accordingly, sworn evidence should have been in the affidavit and not in the statutory statement. The learned Judge declined to accept that it was sufficient for a verifying affidavit to simply confirm the correctness of the facts stated in the statutory statement. The appellant has urged this Court to treat this as a procedural technicality and not to condemn the appellant for its error.

35. **Order LIII Rule 1(2) of the revoked Civil Procedure Rules**, provided that:

***“(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.”***

36. Considering all the facts before the court, the verifying affidavit as filed by the appellant is defective. We are of the view that the courts should adopt a cautious approach in dealing with procedural irregularities. Article 159(2)(d) of the Constitution should not become, as the court stated in ***WILLIS EVANS OTIENO V LAW SOCIETY OF KENYA & 2 OTHERS, [2011] eKLR*** “a panacea for improper pleadings”. This Court in ***COMMISSIONER OF INCOME TAX V WESTMONT POWER (K) LTD, [2010] eKLR*** while acknowledging that the court has a duty to give effect to the so-called ‘Oxygen Principles’ also recognized the long-standing principles which guide the courts discretion. The court held:

***“It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away well-known and established principles of law hitherto in place before the said amendment.***

***We, accordingly, uphold the applicant’s objection that the notice of appeal is incurably defective and that such defect could not in the circumstances we have outlined above, be cured by invocation of \*sections 3A and 3B of the Appellate Jurisdiction Act. This to our understanding means sections 3A and 3B of Cap. 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this Court.***

\*Sections 3A and 3B are the Court of Appeal’s **equivalent** of sections 1A and 1B of the

Procedure Act, **which provide for the Oxygen**

**Principles.**

37. It should also be noted that when the appellant filed his application, the current Constitution had not been promulgated and there was not in existence a provision similar to **Article 159(2)(d)** under the

repealed constitution. The Constitution cannot be applied retrospectively, therefore, in the premises, the verifying affidavit as filed by the appellant, excluding any attachments of evidence, is fatally defective.

38. In the circumstances of this appeal, we are satisfied that the learned Judge’s decision to dismiss the appellant’s application and refuse to grant the orders sought of mandamus and prohibition was properly grounded in law. Accordingly, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2015.**

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR