Kimunya v Registrar of Companies (Application 424 of 2018)
[2024] KEHC 10220 (KLR) (Judicial Review) (16 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 424 OF 2018

J NGAAH, J

AUGUST 16, 2024

BETWEEN

JOSEPH KIMUNYA ..... APPLICANT

AND

REGISTRAR OF COMPANIES ..... RESPONDENT

RULING

1. The application before court is the applicant's chamber summons dated 23 October 2018. It is expressed to be brought under sections 1A, 3A and 81 of the *Civil Procedure Act*, cap. 21 and Order 53 Rule 1(1),(2) and (4) of the *Civil Procedure Rules*. The applicant's prayers are as follows:

> " 1. That this application be certified urgent and heard ex parte at first instance, and
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> 2. That leave be granted to the ex parte applicants (*sic*) to apply for judicial review order of certiorari to quash letters dated 8th May, 2018 and 12th June, 2018 issued by the respondent.
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> 3. That leave granted herein do (*sic*) operate as stay prohibiting respondents from executing the contents contained in letters dated 8 May, 2018 and 12 June, 2018 issued by the respondent pending the hearing of this suit.
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> 4. That costs be provided for."

2. The application is based on a statutory statement dated 23 October 2018 and an affidavit verifying the facts relied upon sworn on even date by the applicant.

3. According to the applicant, a judgment was rendered by this Honourable Court in Judicial Review Application No. 479 of 2016 on 9 April 2018. A decree was subsequently extracted and served upon

the respondent. A copy of the judgment and decree exhibited to the applicant's affidavit shows that the suit was between the same parties in the instant application; the applicant was named as the applicant while the respondent was the respondent in that suit.

4. Upon service of the decree, the respondent responded vide letters respectively dated 8 May 2018 and 17 May 2018. It is these two letters that the applicant wants quashed if leave is granted.

The decree in application no. 479 of 2016 was in the following terms:

> " Decree
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> Claim For:
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> 1. That Judicial Review Order of Mandamus be granted to the exparte applicants to compel the respondent herein to register Stanley Kibuku Njoroge, Joseph Kinyanjui Muthoni, Teresiah Wangui Mathai, Ahmed Gikera Chege, John Rimui Waweru, Henry Wainaina Kihoro, Rahab Njoki Wanjohi, Elijah Ngugi Njoroge and Jane Njeri Kimani being persons elected at a special extraordinary meeting held at Kwihota Primary School play ground on 23rd May, 2015 as directors of Githunguri Constitutency ranching company limited.
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> This matter coming up for hearing on 27th February, 2018 before Hon. Mr. Justice G.V. Odunga and upon hearing counsel for the applicant, counsel for the respondent and counsel for the interested party. And whereas the matter coming up for delivery of judgment on 9th April, 2018 before Hon. Lady Justice P. Nyamweya:-
>
> It is Hereby Ordered and Decreed:
>
> 1. That an order of mandamus is granted compelling the respondent herein to consider the applicant's application for registration of the list of the directors/officials of Githunguri Constituency Ranching Company Limited as presented by the applicants based on the elections held on 23rd day of May, 2015 and furnish the applicant with reasons therefor if his decision is adverse to the interest of the applicant within 30 days from the date of service of this order.
>
> 2. That there will be no order as to costs."

The decree was issued under the hand of the deputy registrar of this Honourable Court on 16 April 2018.

5. My understanding of the applicant's quest for leave is that, by his letters respectively dated 8 May, 2018 and 12 June, 2018 the respondent ignored or, rather, he did not comply with this decree. The applicant is, therefore, seeking to enforce the decree through a suit the he would file if leave is granted.

6. This position of the applicant is firmed by an affidavit he swore in support of an application dated 19 December 2019 in which he sought for interim relief pending the hearing of the application for leave. In paragraph 3 of the affidavit, the applicant swore as follows:

> " 3. That I am aware that I filed his (*sic*) instant suit(*sic*) against the registrar of companies to enforce the judgment by the Honourable Justice G.V. Odunga in JR 479 of 2016 on 9th April, 2018."

7. Enforcement of the order of mandamus issued in application no. 479 of 2016 cannot be by way of a fresh suit. The danger with that approach is regurgitating the same issues that have otherwise been determined in the earlier instituted suit. If the applicant's case is that the respondent has disobeyed the order, the recourse open to him is contempt of court proceedings that he is entitled to institute under section 5 of the *Judicature Act*, cap. 8. This section reads as follows:

> (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

8. Details such as the form the application for contempt would take, the procedure for making such an application and the conditions that an applicant is expected to meet in making such application, among other things, are found in the English *Civil Procedure (Amendment No. 3) Rules*, 2020 which apply to this country by dint of this provision of the law.

9. For purposes of exercising my discretion whether or not to grant leave, it is sufficient that the applicant has an alternative means of enforcing the decree granted in application no. 479 of 2016.

10. Speaking of alternative procedure or remedy, in *R v IRC, ex p Opman International UK* [1986] 1 All ER 328 at 330, (1986) 1 WLR 568 at 571, Woolf, J. held that

> " applicants should bear in mind that an application for judicial review is the procedure, so to speak, of last resort. It is a residual procedure which is available in those cases where the alternative procedure does not satisfactorily achieve a just resolution of the applicant's claim."

11. But judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' (see *R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd* [1966] 1 QB 380 at 400) or 'where there is no other equally effective and convenient remedy (see *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] QB 720 at 728).

12. In the applicant's case, the question whether there is any other statutory remedy that is "convenient, beneficial and effectual" need not arise. To be precise, the question whether the order or decree granted in application no. no. 479 of 2016 can be enforced in a suit separate and distinct from the suit in which the decree was issued should not be an issue. Contempt of court proceedings against the respondent, assuming he disobeyed the court order, would not just be the most convenient, beneficial and effectual means of enforcing the decree but it is the only course available to the applicant.

13. Another serious omission that I have noticed in the applicant's application is that he has not brought out, in the statutory statement, the grounds upon which his application is made. What has been stated as grounds are the facts that have been repeated in the affidavit verifying the facts relied upon.

14. Without the grounds on which judicial review reliefs are sought, an application for judicial review would be fatally defective. I say so because, the point of entry for a judicial review court to intervene

and check the powers of subordinate courts or tribunals or such other bodies whose powers are subject to judicial review is the grounds upon which the application is made.

15. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. it reads as follows:

> (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. (Emphasis added).

And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

16. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law

by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

17. To a great degree, though not so expressly stated, these grounds are now codified in the *Fair Administrative Action Act*,2015 and in particular section 7(2) of the *Act*. My humble view is that any of the grounds prescribed by the *Act* can easily be canvassed under any of three heads illegality, irrationality procedural impropriety and, of course, such other grounds that have gained traction with time as further grounds for judicial review.

18. Even in enunciating the traditional grounds for judicial review, Lord Diplock was quick to add that further development of this area of law may yield further grounds on a case by case basis. The principle of proportionality, for instance, is an example of the later development of judicial review grounds. However, I would be hesitant to conclude that what we now refer as to the statutory grounds in section 7(2) of the *Act* could be seen in this light since, as I have noted, they are more or less, components of the traditional grounds of judicial review except that they now have a statutory underpinning.

19. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

20. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of
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> (a) potentially applicable grounds and
>
> (b) the time at which they arose.
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> Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

21. The 'new order' referred to in this passage is Order 53 of the *Rules of the Supreme Court* of England whose provisions are more or less in pari materia with our own Order 53 of the *Civil Procedure Rules*, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built.

22. Turning back to the applicant's application, what has been stated as "grounds" has been captured as follows:

> " 1. That the honourable Justice G.V. Odunga issued a judgment in JR 479 of 2016 on 9th day of April, 2018.
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> 2. That a decree was extracted on the said judgment on 16th April, 2018.
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> 3. That the decree was forwarded to the Registrar of companies on 26th April, 2018.
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> 4. That the Registrar of Companies responded to our letter on 8th May, 2018.
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> 5. That in response to the letter dated 8th May, 2018 we wrote another letter dated 17th May 2018.
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> 6. That the registrar of companies wrote another letter dated 19th June, 2018.
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> 7. That I am aware that the issues given is the exact are own included (*sic*) as were considered by Justice G.V. Odunga with writing the judgment. (*sic*).
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> 8. That leave to commence judicial review proceedings for a grant of orders of certiorari to remove to this court to quash the letter dated 8th May, 2018 and 12th June, 2018 issued by the respondent.
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> 9. That in the premises, it is in the interest of justice that this application, seeking leave to commence judicial review proceedings for the orders (*sic*) of certiorari be allowed."

23. These averments cannot be regarded as grounds for judicial review in light of the definition given by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* of what these grounds entail.

24. In the ultimate, and for reasons I have given, I find no merit in the applicant's application; it is hereby dismissed. In the wake of this order, the applicant's application dated 17 October 2023 seeking to bar Mr. Njenga, the learned counsel for the interested party, from acting for this particular party serves no purpose. It is equally dismissed. I make no orders as to costs in both applications. It is so ordered.

DATED, SIGNED AND POSTED ON THE CTS ON 16TH AUGUST 2024

NGAAH JAIRUS

JUDGE