



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

JUDICIAL REVIEW NO.1 OF 2017

**IN THE MATTER OF ARTICLE 10, 157, 165 AND 251 (1) OF THE CONSTITUTION OF
KENYA, 2010**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

ECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

EX PARTE EMMANUEL KIPLANGAT KIRIOR

RULING

1. The applicant filed the present matter on 2nd February 2017 seeking leave to institute judicial review proceedings against the respondents. Through his Counsel, Mr. Taliti, the applicant appeared before the Deputy Registrar of this Court and was granted leave to file judicial review proceedings pursuant to Order 53 of the Civil Procedure Act.

2. He then filed an application by way of Notice of Motion dated 10th March 2017 in which he sought the following orders:

1. That an order of mandamus be granted to compel the 1st respondent and 2nd respondent to investigate and tender a report to the public on all dealings relating to the Siwott Dan Project.

2. That an order of Mandamus be granted to compel the 1st respondent and 2nd respondent to investigate and tender a report to the public on Ainamoi Constituency CDF Accounts and all its procurement.

3. That costs of this application be provided.

3. Upon service of the application on the respondents, the 1st respondent, the Director of Public Prosecutions (DPP), filed a notice of preliminary objection dated 31st March 2017. The preliminary objection was to the effect that the suit is incompetent, premature, misguided and an abuse of the court process, and that the suit does not comply with the mandatory provisions of Order 53 rule 1(1) and (2) of the Civil Procedure Act.

4. When the matter came up for hearing on 6th April 2017, Mr. Taliti for the applicant conceded that the Deputy Registrar had granted leave without having the power to do so under Order 53 of the Civil Procedure Act. He contended, however, that this was a procedural mistake which does not go into the substance of the application and can be cured by this court.

5. He asked the court to regularize the irregular leave granted by the Deputy Registrar, noting that the court has wide discretion with respect to granting leave in judicial review applications. He further urged the court to regularize the matter by granting the applicant leave based on the grounds set out in his Chamber Summons application dated 1st February 2017. The applicant further prayed that the substantive application dated 10th March 2017 and filed on 15th March 2017 be deemed as correctly filed and served.

6. With respect to the legal basis for his submissions, Counsel relied on Article 159 (2) (b) and (d) of the Constitution. It was his submission that the respondent will not be prejudiced in any way, and the court's time would thereby be saved.

7. Mr. Mutai, Learned Prosecution Counsel, observed that the applicant has conceded that the application is not properly before the court as leave was not granted, or that the leave purportedly granted is improper. He submitted that under Order 53 (1) (2), before an application for judicial review is made, an application for leave shall be made *ex parte* to a judge in chambers. His submission was that the Deputy Registrar is not a judge in chambers. Consequently, since there was no leave granted by a judge in chambers, the application before the court brought by way of notice of motion had no basis. In his view, there were no judicial review proceedings before the court.

8. In response to the argument by the applicant that the grant of leave by the Deputy Registrar was a procedural error, the DPP argued that on the contrary, the application for leave is not just a matter of procedure, nor administrative in nature. Rather, it is a fundamental prerequisite in making an application for judicial review, intended to, among other things, filter out frivolous applications. According to the respondent, the application involves the exercise of judicial discretion and is therefore a judicial function. The DPP relied on the decision in **Civil Appeal No.131 of 2005- Meyner & Another vs AG** holding no.1, a page 190 and **Misc.161 of 2015 – John Wachira Wambugu vs LSK** in support of the submission that leave to file judicial review is fundamental.

9. I have considered the application before the court and the preliminary objection lodged by the respondent. I note that the applicant, through his Counsel, appeared before the Deputy Registrar and sought, and was granted, leave to file judicial review proceedings under Order 53 of the Civil Procedure Code. The leave sought was with respect to orders of mandamus to compel the respondent to undertake certain investigations.

10. The applicant then went on to file a substantive motion pursuant to the leave issued by the Deputy Registrar. It is this application, as well as the leave initially granted by the Deputy registrar, that the applicant wishes this court to regularize.

11. Order 53(1) and (2) provide as follows with respect to applications for judicial review:

1.(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(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.

12. The Deputy Registrar, as is evident from the express provisions of Order 53 and Order 49 with respect to the powers of the Deputy Registrar, clearly had no jurisdiction to grant leave to the applicant. In the words of Nyarangi J in **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1:**

“Jurisdiction is everything. Without it, a court has no power to make one more step.”

13. In its decision in **Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others Civil Appl. No. 2 of 2011**, the Supreme Court of Kenya expressed itself as follows:

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011.* Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. (Emphasis added)

14. In the present case, as the applicant concedes, the Deputy Registrar had no jurisdiction to grant leave under Order 53. What he did, and the resultant proceedings, were therefore a nullity. Is there anything for this court to regularize? I think not. Order 53 vests jurisdiction in judicial review matters in the High Court. Such matters are the tool that the law grants to the High Court in the exercise of its supervisory jurisdiction over inferior bodies and tribunals, including subordinate courts. That being the case, it cannot be open for the Deputy Registrar to grant leave under the order. And it follows also that the leave granted by the Deputy Registrar without jurisdiction cannot be regularised by this court.

15. With regard to the argument by the applicant that the grant of leave by the Deputy Registrar was a procedural technicality that does not cause any prejudice and does not go to the substance of the application, I believe that the words of the Supreme Court in the **Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd** case adequately answer it:

“...the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

16. In the circumstances, the preliminary objection by the respondent succeeds, and the notice of motion dated 10th March 2017 is hereby struck out.

Dated Delivered and Signed at Kericho this 31st day of May 2017.

MUMBI NGUGI

JUDGE