REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 517 OF 2016

IN THE MATTER OF: An Application by the applicant for judicial review by way of an order of CERTIORARI, PROHIBITION and DECLARATION pursuant to Order 53 of the Civil Procedure Rules, 2010

AND

IN THE MATTER OF: The Constitution of Kenya, 2010

AND

IN THE MATTER OF: The Commission on Administrative Justice Act, Cap 102A, Laws of Kenya

AND

IN THE MATTER OF: The Fair Administrative Action Act, 2015

BETWEEN

REPUBLIC.....……..…APPLICANT

-VERSUS-

COMMISSION ON ADMINISTRATIVE JUSTICE… RESPONDENT

EX-PARTE

YUSUF MAHAMED FAZUL

RULING

1. On 27th October, 2016, this Court granted leave to the applicant to commence judicial review proceedings and proceeded to direct that to avoid the implementation of the challenged report during the pendency of these proceedings, the said leave would operate as a stay of the Respondent' decision to investigate the Applicant, to publish the investigation report and/or issue the same to the relevant authorities within seven (7) days from 25th October, 2016 or at all pending the hearing and determination of the substantive Notice of Motion.

2. By an application dated 14th November, 2016, the ex parte applicant seeks staying the implementation

of the Investigations Report published by the Respondent relating to the Applicant pending the hearing and determination of this suit. He further seeks leave to amend the Notice of Motion filed herein to include appropriate reliefs to quash the Investigation Report released by the Respondent.

3. According to the ex parte applicant, the Respondent has been conducting investigations into his alleged abuse of power and official misconduct. According to the ex parte applicant the orders of this Court issued on 27th October, 2016 were effectively served on the Respondent on 1st November, 2016. It was however averred that despite being served and being aware of the said order, the Respondent proceeded to complete the said Investigations Report and forwarded the same to the Cabinet Secretary, Ministry of Devolution and National Planning as wel as other Government Office. Apart from that the Respondent issued a Press Statement dated 10th November, 2016 titled "Why Ombudsman wants NGOs Coordination Board boss out" which it caused to be circulated to the mainstream media and on its website.

4. The ex parte applicant averred that while he had the option of commencing contempt of Court proceedings, it was his view that the implementation of the Investigation Report would cause him great prejudice and irreparable harm and would render he entire proceedings before this Court nugatory.

5. It was submitted that the amendment of the application will enable the Court to completely and effectively determine the real issues arising herein without the necessity of filing a separate application to quash the report. To the ex parte applicant this Court has jurisdiction to issue the said orders and seek additional remedies. In support of its case the ex parte applicant relied on **Republic vs. Commissioner of Lands & Another Interested Party Masai Villas Limited Ex-Parte Jimmy Mutinda [2013] eKLR** where **Korir, J** expressed himself as hereunder:

> **"It should be noted that the application for leave is accompanied by a statement and affidavits verifying the facts relied upon. The leave is granted on the basis of the contents of the statement and affidavits. When a Court allows a statement to be amended, it follows that it has granted leave for commencement of judicial review proceedings in the terms of the amended statement. As such, if a relief sought in the statutory statement is amended, then the substantive notice of motion should be amended to take care of the amended relief in the statement. Once the Court grants an applicant leave to amend a statement and the substantive notice of motion, the court has, by that act, granted leave for an order of mandamus, prohibition or certiorari in the terms of the amended pleadings."**

6. It was the ex parte applicant's case that the applicant can demonstrate that the circumstances of the case have changed since the grant of leave hence necessitating an amendment.

7. In opposition to the application the Respondent filed a Notice of Preliminary Objection dated 16th November, 2016 in which it contended that the application was incurably defective, incompetent and bad in law.

8. Apart from the said objection the Respondent by way of a replying affidavit averred that by the time the Court issued the orders the subject of this application, investigations were already completed and the report already prepared but nonetheless the Respondent refrained from issuing the report within a period of seven days from 25th October, 2016 as ordered by the Court. However at the lapse of the said order, in the absence of any other orders extending the same, the Respondent released the report which act the Respondent contended did not contravene the existing order.

9. The Respondent submitted that judicial review proceedings being a special procedure the ***Civil Procedure Rules*** relied upon by the ex parte applicant are inapplicable. According to the Respondent, Order 53 of the ***Civil Procedure Rules*** which is the enabling provision upon which an amendment may be permitted is clear that the only document that can be amended is the statement and not the Motion.

10. In support of its position the Respondent relied on **Nyeri HCMA No. 112 of 2008 – Dickson Miricho vs. Central Provincial Land Disputes Appeal Committee & 6 Others**.

Determination

11. I have considered the application and the submissions made herein.

12.Order 53 rule 1(1) and (2) of the ***Civil Procedure Rules*** provides:

> ***(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.***

13.It is therefore clear that for an applicant to apply for judicial review the applicant is enjoined to apply for leave to do so. In my view, without leave being sought and obtained the Court has no jurisdiction to grant judicial review orders under sections 8 and 9 of the ***Law Reform Act*** as read with Order 53 of the ***Civil Procedure Rules***. Accordingly, Order 53 rule 4(1) of the said Rules provides that:

> ***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

14.In **Nyabira Oguta Diran Onkangi vs. Council of Legal Education [2016] eKLR** this Court expressed itself as hereunder:

> **"It must be emphasised that the statement referred to in the above rule is required to be filed with the application for leave. Where therefore the relief intended to be sought is not set out in the statement, the applicant cannot in his subsequent Motion seek the same. In my view, once leave is granted, save for an amendment, the applicant cannot go back to the application for leave and seek orders which he did not seek in the first instance. Similarly, the applicant cannot purport to substitute an application for leave and seek to replace the orders which were granted at leave stage by way of a subsequent application. In other words once permission to commence judicial review proceedings is granted the applicant must proceed to institute the Motion in accordance with the leave granted save for the limited avenue of amendment. Where the applicant feels that the permission granted nolonger covers what he seeks and that an amendment may not cure the defect as the applicant contends herein the only option is to go back to the drawing board and commence the process *de novo* vide a fresh application."**

15. The instant application was grounded on Orders 2 and 3 of the ***Civil Procedure Rules***, ***Law Reform Act***, the ***Fair Administrative Action Act*** and the inherent Jurisdiction of the Court and all the enabling provisions of the law. The nature of judicial review proceedings has been the subject of judicial pronouncements in this jurisdiction. In **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354,** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. Accordingly Orders 2 and 3 of the ***Civil Procedure Rules*** do not apply to judicial review proceedings. With respect to the ***Law Reform Act***, there is no provision thereunder that permits amendment of proceedings in judicial review save for Order 53 which I shall come to shortly. The rules of procedure under the ***Fair Administrative Action Act*** are yet to be promulgated. Accordingly there is similarly no provision under the said legislation that permits amendments to proceedings for judicial review.

16.The only provision that permits amendment is Order 53 rule 4(2) of the ***Civil Procedure Rules*** which provides as hereunder:

> ***The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavit.***

17. It is clear that the said provision expressly allows the amendment of the statement and the filing of further affidavits but only where they deal with new matters arising out of affidavits of any other party to the application. It is important to note that the provision deals with proceedings "on the hearing of the motion" which is a clear indication that the drafters of the rules were clear in their mind that at that time the Motion is already part of the record. Yet they did not deem it fit to expressly provide for the amendment of the Motion as well. In my view if it was intended that the Motion could be amended at that stage, nothing would have been easier than for the rules to provide for the same.

18.To my mind, the omission to expressly provide for the amendment of the Motion was intentional and was intended to avoid the introduction of other reliefs at the stage of the hearing of the motion for which leave was neither sought nor granted.

19. In this application the ex parte applicant seeks an order staying the implementation of the Investigation report. He however appreciates that the said report has been handed over to the implementing authorities. Those authorities are not parties to these proceedings. To grant such orders would itself amount to a violation of the rules of natural justice in so far as the said authorities are concerned. In my view to grant the said order would with due respect be a mischievous way of seeking leave against such persons yet no leave was sought and granted to commence judicial review proceedings against them. To allow the instant application would in my respectful view, turn these proceedings into a circus and render them a theatre of the absurd.

20. It is my view that the applicant cannot by way of panel beating his pleadings seek through the backdoor reliefs for which leave was never sought and granted.

21.Having considered the issues herein, the inescapable conclusion I come to is that the orders sought by the applicant in the instant application are incapable of being granted.

22. Accordingly, I dismiss the application dated 14th November, 2016 with costs to the Respondent.

23. It is so ordered.

Dated at Nairobi this 25th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwende for Mr Kashindi for the applicant

CA Mwangi