



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW CASE NO. 39 OF 2015

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE FOR JUDICIAL REVIEW
ORDERS**

AND

**IN THE MATTER OF AN APPLICATION TO FILE FOR ORDERS OF CERTIORARI,
MANDAMUS & PROHIBITION**

AND

**IN THE MATTER OF THE DOCTRINE OF ULTRA VIRES, IMPROPORTIONALITY AND
UNREASONABLENESS**

AND

**IN THE MATTER OF THE RIGHTS, PRIVILEGES AND MANDATE OF THE DEPUTY
GOVERNOR**

AND

**IN THE MATTER OF SECTIONS 8 AND 9B OF THE LAW REFORM ACT CHAPTER 26
LAWS OF KENYA**

AND

IN THE MATTER OF THE PRINCIPLE OF NATURAL JUSTICE

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT

AND

AND IN THE MATTER OF THE PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

BERNARD MUIA KIALA.....APPLICANT

VERSUS

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT

DR. ALFRED N. MUTUA.....2ND RESPONDENT

RULING

Introduction

1. On 6th February, 2015, **Korir, J** granted leave to the applicant herein, **Bernard Muia Kiala**, to apply for judicial review orders and directed the said applicant to file and served the substantive motion together with skeleton submissions and list of authorities within 15 days from the date of the grant of leave. The matter was then fixed for mention on 25th February, 2015 for confirmation of compliance and further directions. Subsequently the matter came up on 25th February, 2015 and 21st April, 2015 on which date **Dr Khaminwa**, learned counsel for the applicant informed the Court that he had not served the respondents and the matter was stood over to 18th May, 2015 for further directions.

2. On 18th May, 2015 **Dr Khaminwa** informed the Court that he had just been served with a replying affidavit and sought for a mention date which the Court granted and scheduled the same for 15th June, 2015 with liberty to the applicant to file further affidavits. On 25th June, 2015, **Ms Mogire** learned counsel for the Respondents informed the Court that the Respondents had filed an application seeking that the leave granted herein be vacated on the ground that the motion had never been filed. Subsequently the applicant filed an application seeking to regularise the proceedings. The two applications were eventually heard on 12th April, 2016 and vide his ruling delivered on 28th May, 2016, the Learned Judge found that the ex parte applicant had no interest in pursuing the proceedings and that enlarging time would amount to abuse of the court process. He then proceeded to dismiss the ex parte applicant's motion dated 17th January, 2017.

3. With respect to the application dated 23rd June 2016 by the Respondents seeking to dismiss these proceedings, the learned Judge found that since the 21 days provided under Order 53 rule 3(1) of the **Civil Procedure Rules, 2010** for filing the motion had expired, the leave similarly lapsed. He therefore proceeded to declare that these proceedings ceased to exist when the applicant failed to file the substantive motion within 21 days from the date of grant of leave.

4. It is that decision that provoked these proceedings which were commenced by way of a Notice of Motion dated 3rd June, 2016 in which the ex parte applicant seeks the following orders:

- 1. That this matter be certified as urgent and service of the same be dispensed with in the first instance.**
- 2. That this honourable court be pleased to review the orders of the honourable Justice Weldon Korir made on the 24/5/2016 which dismissed the application seeking leave to file the substantive notice of motion out of time.**
- 3. That the above orders be deemed as set aside.**
- 4. That costs in the cause.**

5. According to the ex parte applicant, this matter involves constitutional issues which should not be dismissed due to procedural technicalities. It was therefore his contention that given the dismissal is clearly an error apparent on the face of the record hence the need to grant the orders sought herein by

setting aside the orders of dismissal.

Respondents' Case

6. In response to the application the Respondent filed the following grounds of opposition:

1. **This honourable court lacks jurisdiction to entertain this application as it cannot hear an appeal from a court of concurrent jurisdiction.**
2. **Judicial review proceedings are not subject to the Civil Procedure rules, 2010 and as such the rights of review of orders under Order 4, 5 is not available in judicial review proceedings.**
3. **The orders sought herein are not available for the exercise of discretion to review.**
4. **The application herein is a non-starter and the same ought to be dismissed with costs to the respondents.**

Determinations

7. I have considered the material placed before me in the instant application.

8. The instant application is expressed to be brought under the provisions of Article 159(2)(d) and (e) of the Constitution, Section 3, 3A and 80 of the **Civil Procedure Act**, Order 45 rule 1, 2, 3 & 4 of the **Civil Procedure Rules** and all enabling provisions of the law.

9. The known provisions which deal with review are section 80 of the **Civil Procedure Act** and Order 45 of the **Civil Procedure Rules**, both of which however do not apply to judicial review matters since judicial review proceedings are neither civil nor criminal. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the **Civil Procedure Rules** render the application wholly incompetent.

10. However in order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the **Civil Procedure Rules**, certain requirements must be met. The said provision provides as follows:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

11. In the instant case the decision sought to be reviewed was made on 24th May, 2016 while the instant application was filed on 10th June, 2016 which period in my view was not inordinate.

12. The first issue for determination is whether this Court has jurisdiction to entertain an application for review of a decision made on judicial review. The Court of Appeal in **Biren Amritlal Shah & Another vs. Republic & 3 Others [2013] eKLR** expressed itself on section 8(5) of the *Law Reform Act* as follows:

“It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore, in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that, in exercising its special jurisdiction under the *Law Reform Act*, the High Court had no jurisdiction to review its previous order.”

13. The same Court however held in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**, as follows:

“Counsel for the respondent in his submissions, seems to suggest that where a law is silent on whether review is permissible, then courts must decline jurisdiction where a review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is, otherwise, not to blame for circumstances he finds himself in. The Court in *Aga Khan Case* expressed the view, that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear-cut cases...In the present case it was the Superior Court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdictions should be exercised to obviate, more so if it is shown that the applicant did not contribute to that state of affairs. The case of *Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Kilach [2003] KLR 249*, does not hold that review is not available under Order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before the court where the court precipitated a situation for the same court to turn round and say it lacks jurisdiction to correct what is obviously a wrong decision, more so where, as here, the court was not addressed on the merits or otherwise of the application for leave. The court *suo moto* raised the jurisdictional issue without asking the applicant’s counsel to address it on the matter... There has been a debate as to whether or not Order 44 of the Civil Procedure Rules applies to proceedings under Order 53. Whether or not Order 44, above, applies is a matter which should await another occasion. What is important is that the Superior Court in the matter before the court had the residual power to correct its own mistake. It may be that the appellant had cited the wrong provision of the law in its application for review. That *per se* would not deprive the court the power of correcting its own mistake which that court itself acknowledged it made...In the result the appeal is allowed, the order of the Superior Court dated 27th June 2003, is set aside and in place thereof an order allowing the application dated 10th June 2003, the dismissal order set aside and the appellant granted leave to bring an application for orders of certiorari and mandamus as prayed in Chamber Summons dated 14th May 2003.”

14. The essence of the Court of Appeal’s decision was that this Court has jurisdiction in appropriate cases to set aside its orders where to decline to do so would occasion an injustice.

15. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction. In my view where a mistake has been brought to the attention of the Court which is capable of being remedied, be it by review

or otherwise, I do not see any bar to the Court invoking its inherent powers to do so.

16. Accordingly, to the extent that the Court has no powers under Order 45 of the **Civil Procedure Rules** to review its orders made on judicial review, I agree that the Court of Appeal's decision in **Biren Amritlal Shah & Another vs. Republic** (supra) cannot be faulted. In light of a different view taken by the same Court in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax** (supra) this Court is free where there is a conflict of authorities to choose between the two especially and as it seemed to have been the position in this case where the second decision is given in ignorance of the former without being fully analysed. See **Major Joseph Mwateri Igweta vs. Mukiri M'ethare & Another Civil Application No. Nai. 8 of 2000.**

17. It is therefore my view that whereas the Court has no power to review a decision made on judicial review pursuant to section 80 of the **Civil Procedure Act** and Order 45 of the **Civil Procedure Rules**, it has a residual jurisdiction pursuant to its inherent powers to correct its mistakes and this may, where merited, include granting orders whose effect may amount to a review. That the Court may not review its decisions under the **Civil Procedure Act** is in my view informed by the provisions of section 3 of the **Civil Procedure Act** which provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

18. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the **Civil Procedure Act** are inapplicable. It must be remembered that apart from Order 53 of the **Civil Procedure Rules**, the provisions of the **Civil Procedure Act** and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 45 of the **Civil Procedure Rules** would similarly not apply to these type of proceedings. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the **Civil Procedure Act** and Rules do not apply unless expressly provided by such an Act and the provisions of the **Civil Procedure Act** and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the **Civil Procedure Rules** render the application wholly incompetent.

19. However, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the **Civil Procedure Act** which strictly speaking does not apply to judicial review proceedings. That section it has been held time and again does not confer inherent jurisdiction on the Court but only reserves the same. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice and inherent power is not donated by Section 3A of the **Civil Procedure Act**. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the **Civil Procedure Act** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

20. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

21. Similarly, in The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J (as he then was) expressed himself *inter alia* as follows:

“It is....accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

22. I therefore hold that this Court has powers to review its decisions made in judicial review proceedings pursuant to its inherent powers.

23. The decision whether or not to review a Court's decision was well captured by the Court of Appeal in Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002, where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

24. In this case, the ex parte applicant contends that since the issue herein revolves around an allegation of fundamental rights this Court ought to set aside the decision dismissing the application taking into consideration the provisions of the Constitution of Kenya, 2010.

25. It is not lost to this Court that this was the same position adopted by the ex parte applicant in the proceedings that gave rise to the decision sought to be reviewed in these proceedings. In Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002, the Court of Appeal expressed itself as follows:

“Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof... Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self evident on the part of the court and should not require elaborate argument in order to be established... There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error.”

26. Similarly in National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249, the same Court expressed itself as follows:

“In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court's view, a fatal omission, yet the court in the broad interest of justice, asked counsel for the appellant on which ground under Order 44 he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court... A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law... Misconstruing a statute

or other provision of the law is not a ground for review... In the instant case the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise the learned Judge would be sitting in appeal on his own judgement which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

27. It is clear that even at the time the Court dismissed these proceedings, the Court was alive to the issues being raised in the instant application. In fact the grounds upon which the instant application are grounded are the very same grounds upon which **Dr Khaminwa** sought to have the ex parte applicant's application allowed. It is therefore my view that what the ex parte applicant has set out to do is to have this Court sit on appeal on the decision of **Korir, J** a judge of concurrent and concomitant jurisdiction. This Court, with due respect has no such powers.

28. Having considered the grounds relied upon by the applicant in this application can only be raised in an appeal against the decision sought to be reviewed and cannot be granted.

29. However, it is clear that the ex parte applicant's application was never heard on merits. In my view the proper order ought to have been the striking out of the application rather than dismissal. See **Mtali Vs. Mtali [2008] 2 EA 229.**

30. In **Ngoni-Matengo Co-Operative Marketing Union Ltd vs. Alimahomed Osman [1959] EA 577,** the East African Court of Appeal expressed itself as hereunder:

“A failure to extract and to lodge with the memorandum of appeal a copy of the relevant formal order or decree is not a mere procedural defect, but goes to jurisdiction and renders the appeal incompetent, unless the municipal law gives a right of appeal notwithstanding that such order or decree has not been drawn up. Therefore what the court ought to do is to “strike out” the appeal as being incompetent, rather than to have it “dismissed”; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used and since the appeal was incapable of being dismissed, that is to say of being treated as something properly before the court, each must be treated as if it had been struck out, which in effect it was.”

31. What the Court was saying is that where a case is terminated on the grounds of incompetency such as lack of jurisdiction or failure to comply as was the case before the Learned Judge, such matter not having been heard on merits cannot be “dismissed” but can only be “struck out” though for the purposes of the doctrine of res judicata, it is not the word used but the substance of the decision that is to be looked at.

32. According I vary the order dismissing the ex parte applicant's application dated 17th January, 2016 and substitute therefor an order striking out the same.

Order

33. Save for what I have stated hereinabove the Notice of Motion dated 3rd June, 2016 fails and is dismissed but with no order as to costs.

34. Orders accordingly.

Dated at Nairobi this 31st day of July, 2017.

G V ODUNGA

JUDGE

Delivered in the absence of the parties

CA Mwangi