



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

JUDICIAL REVIEW NO. 10 OF 2015

SUSAN GACHERI KITHINJI.....APPLICANT

VERSUS

- 1. OCPD DADAABRESPONDENT**
- 2. THE HON. ATTORNEY GENERAL RESPONDENT**

RULING

Following The Filing Of An Application For Leave To File Judicial Review Proceedings And Leave Being Granted, This Court Ordered That The Request For Stay Pending The Hearing Of The Main Motion Be Argued Interpartes.

After Service Of The Application For Leave, On The 29th Of October 2015, The Attorney General Filed A Notice Of Preliminary Objection To The Application On The Following Grounds:-

1. That The Application Herein Is Fatally Defective, Frivolous And Vexatious As It Offends The Provisions Of Order 53 Of The Civil Procedure Rules 2010.
2. That Order 53 Rule 2 Provides That An Application For Leave To Commence Judicial Review Shall Be By Way Of Chamber Summons Accompanied By A Statement Setting Out The Name And Description Of The Applicant, Relief Sought And The Ground On Which It Is Sought And By An Affidavit Or Affidavits Verifying The Facts Relied On.
3. That There Are No Judicial Review Orders Sought In The Application.

The Preliminary Objection By Consent Of Counsel, Proceeded Through The Filing Of Written Submissions And Also Highlighting.

On The Hearing Date For The Po Counsel For The Respondents Mr. Munene Was In Court And Adopted His Written Submissions And Did Not Wish To Add Anything. Counsel For The Applicants Was Not Present.

In Summary, The Written Submissions Of The Respondents Were That The Issues Raised In The Preliminary Objection (Po) Fell Within The Definition Of A Preliminary Objection As Stated In The Case Of ***Mukisa Biscuits Manufacturing Company Ltd Vs. West Ends Distributors Ltd [1969] Ea 696*** Wherein Sir Charles Newbold Stated That A Preliminary Objection Is In The Nature Of What Used To Be A Demurrer. It Raises A Pure Point Of Law Which Is Argued On The Assumption That All Facts Pleaded By The Either Side Are Correct. It Cannot Be Raised If Any Fact Has To Be Ascertained Or If What Is Sought Is The Exercise Of Judicial Discretion.

Counsel Submitted In The Written Submissions That, The Application For Leave Violated The Mandatory Provisions Of Order 53 Rule 2 Of The Civil Procedure Rules 2010 Which Provides That The

Application Shall Be Made Exparte 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.

Counsel Emphasized That The Word Shall Was Used By The Law, And As Such The Requirement Was Mandatory. Non Compliance Thus Rendered The Application Defective. In Addition, No Judicial Review Orders Were Sought In The Application And It Was Not Known Whether The Applicant Was Seeking An Order Of Mandamus, Certiorari, Or Prohibition. Counsel Argued That The Application Ought To Be Struck Out For Being Incompetent And Defective.

The Applicants Counsel In The Written Submissions, To The Po, Stated That The Respondent Should Have Invoked The Provisions Of Order 45 Rule 1 Of The Civil Procedure Rules, And Come To Court For Revision, If They Wanted The Orders Of The Court To Be Reviewed Since Leave Had Already Been Granted. Counsel Submitted Further That The Applicant Had Already Complied With The Court Order Allowing Them To File The Main Notice Of Motion.

Counsel Also Relied On Order 51 Of The Civil Procedure Rules, And Submitted Further That The Constitution Under Article 159 (1) (D), Provides That Justice Should Be Administered Without Undue Regard To Procedural Technicalities. Counsel Urged That The Matter Be Heard And Resolved On Merits, And As Such The Court Should Find That The Po Has No Merits.

I Have Considered The Po Raised By The Hon. Attorney General. It Is Indeed On A Pure Point Of Law As Whether The Application Should Have Been Brought By Way Of Chamber Summons, And Secondly That No Relief Was Sought In The Application For Leave.

The Applicant's Advocate Does Not Dispute The Facts Of The Matter. He Merely Argues That Leave Has Already Been Granted And That The Request For Striking Out The Application For Leave Was Made Too Late In The Day. He Also Argues That, Since A Decision Has Been Made By The Court To Grant Leave, The Proper Approach Was For The Attorney General To Come To Court Through Revision Procedures Under Order 45 Of The Civil Procedure Rules.

Indeed, This Court Granted Leave To The Applicant To File Judicial Review Proceedings. It Also Ordered That The Request For Stay Made By The Applicant In The Same Application Be Argued Interpartes.

In My View The Fact The Application For Leave Was Made Through A Notice Of Motion Rather Than Through A Chamber Summons Is A Defect Of Form Rather Than Substance. That Defect Is Curable Under The Provisions Of Article 159 (1) (D) Of The Constitution Of Kenya 2010, As The Heading Could Just Have Been A Typographic Error. The Substance Is In The Actual Contents Of The Application. I Dismiss That Objection.

This Court However, Deliberately Ordered That The Request For Stay Be Determined Interpartes. Such Stay Can Only Be Granted If The Orders Sought Are In The Form Of Certiorari Or Prohibition. The Rules Exclude Mandamus From The Grant Of Stay.

In This Regard Order 53 Rule 1 (4) Specifically Provides As Follows:-

1 (4) The Grant Of Leave Under This Rule For An Order Of Prohibition Or An Order Of Certiorari Shall, If The Judge So Directs, Operate As A Stay Of The Proceedings In Question Until The Determination Of The Application, Or Until The Judge Otherwise Orders”

I Have Perused The Application For Leave As Filed. It Does Not On Its Face Have Any Specific Judicial Review Orders. More Importantly, It Does Not Have A Statutory Statement, In Which The Law Requires That The Name And Description Of Parties, The Relief Sought And The Grounds On Which The Said Reliefs Are Sought Should Be Contained. The Fact That There Is No Statutory Statement Filed With The Application For Leave, Actually Rendered The Application Fatally Defective Ab Initio Because It Is

Only Those Reliefs That Are In The Statutory Statement And The Grounds Thereof, That Can Be Used In Arguing Or Prosecuting The Main Motion To Be Filed. Order 53 Rule 4 (1) Of The Civil Procedure Rules Is Quite Clear On This, As It Provides As Follows:-

4 (1) 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.

I Observe That After The Notice Of Preliminary Objection Was Filed, The Applicant's Counsel On 4th November 2015 Filed The Main Notice Of Motion As Allowed By The Court. On The Face Of That Application, He Requests For Certiorari Orders To Quash A Decision Of The 1st Respondent Made On 1st October 2015 To Lock Out The Applicants Businesses.

No Leave Was Granted For The Applicant To Seek Certiorari Orders And Therefore That Request For Certiorari Hangs In The Air. It Has No Basis To Stand. More Importantly, That Request For Certiorari Is Merely Wishful Thinking Because The Law Required That The Relief Sought Be Contained In The Statutory Statement. The Grounds For The Relief Are Also By Law Required To Be Contained In The Statement. Neither The Application For Leave, Nor The Application Filed After Leave Was Obtained Contains A Statutory Statement As Required By Law. On That Account, Even The Application Which Was Filed After Leave Was Obtained, Was Fatally Defective And Stands No Chance Of Salvation.

In Addition To The Above, The Notice Of Motion Filed After Leave Was Granted Also Names Susan Gacheri Githinji As The Applicant. In Judicial Review Proceedings The Substantive Application Is Filed In The Name Of The Republic As The Applicant. This Omission Also Renders The Application Defective.

It Is Apparent That The Applicant Is Confusing Judicial Review Proceedings With Constitutional Applications. In Constitutional Applications, The Applicant Is A Petitioner. The Procedure For Pursuing Constitutional Petitions Is Different From That In Judicial Review Proceedings. The Applicant Should Have Made A Proper Election To Either Bring To Court Judicial Review Proceedings, Or Proceedings Seeking Constitutional Reliefs.

With All The Above Fatal Errors, I Find That Both The Leave Application And The Notice Of Motion Filed After Leave Was Granted Are Fatally Defective. They Are All For Striking Out As They Cannot Be Salvaged.

Though The Applicant's Counsel Has Suggested That The Attorney General Should Have Challenged The Applications Through Revision Procedure, In My View The Procedure Of Preliminary Objection Was Also Appropriate In The Present Case. A Preliminary Objection Can Arise At Any Time In Proceedings. The Earlier It Is Raised The Better Otherwise The Court's Time Will Be Wasted And The Futile Proceedings Will Only Increase Costs To Parties Rather Than Facilitate Dispensing Substantive Justice.

To Conclude, I Find That Both The Application For Leave And The Substantive Application Filed Herein After Leave Was Granted By The Court, Are Fatally Defective. I Therefore Strike Them Both Out With Costs To The Respondents.

Dated And Delivered At Garissa This 26th Day Of April, 2016

George Dulu

Judge