REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 472 OF 2016

NYABIRA OGUTA

DIRAN ONKANGI.....APPLICANTS

VERSUS

COUNCIL OF LEGAL EDUCATION..... RESPONDENT

RULING

1. On 5th October, 2016, this Court granted leave to the applicant to apply for judicial review orders pursuant to Chamber Summons dated 3rd October, 2016. The substantive motion was to be filed and served within 10 days from the date of the grant of the said leave.

2. On 17th October, 2016, the applicant through a different firm of advocates filed yet another application dated 14th October, 2016, seeking leave to apply for judicial review though in respect of different orders from the ones sought in the earlier application. The same day the applicant filed a Notice of Motion seeking orders for substitution of the chamber summons dated 3rd October, 2016 with the new application. On 18th October, 2016, there was a Notice of Change of Advocates filed by the firm of Akusala & Company Advocates seeking to come on record in place of Evans & Company Advocates which had made the first application. It is however noteworthy that even before the notice of change of advocates was filed the firm of Akusala & Company Advocates is the firm that filed the two applications dated 14th October, 2016.

3. By yet another application dated 18th October, 2016, the applicant through the new firm on 18th October, 2016 sought orders for the substitution of the Notice of Motion dated 3rd October, 2016 with an alleged Motion which was purportedly annexed thereto. Suffice it to say that no such Motion was annexed.

4. Substantially what the applicant seeks though in a rather convoluted manner is that this Court substitutes an application for leave which was heard and granted. According to **Mr Akusala**, learned Counsel for the applicant, this Court has the power under section 3A of the ***Civil Procedure Act*** to grant the said orders.

5. If I understood learned counsel correctly, it is not possible to amend the earlier application due to the fact that such an amendment will entail the deletion of the orders sought therein and that such deletion would not in any case be of use as the earlier application was filed by an unqualified person under the

Advocates Act.

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

7. 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.***

8. 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.***

9. 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.

10. To make matters worse whereas the original application was commenced by only one applicant, **Nyabira Oguta**, the fresh chambers summons which is sought to substitute the original one now has two applicants with an additional name of one **Diran Onkangi**, yet the effect of the substitution is to confer favourable orders on the newly introduced applicant as well. This with due respect is clearly a mischievous way of seeking leave as the intention of the applicant is to have this Court grant leave to the 2nd applicant through the backdoor. To do so would turn these proceedings into a circus and render them a theatre of the absurd.

11. In other words, the applicant cannot by way of panel beating his pleadings seek through the backdoor reliefs for which leave was never sought and granted. It ought always to be remembered that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal hence the principles of civil proceedings applicable under the ***Civil Procedure Act*** and ***the Rules*** thereunder apart from Order 53 thereof do not necessarily apply to judicial review proceedings. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995.**

12. Though the applicant has relied on section 3A of the ***Civil Procedure Act***, it is my view that while both the inherent jurisdiction and overriding objective as enacted in sections 3A and 1A are a reflection of the central importance the court must attach to the administration of justice, in exercising the power to give effect to these principles, the Court must do so judicially and with proper and explicable factual

foundation. The said principles will, no doubt, serve us well but it is important to point out that they are not a panacea for all ills and in every situation. A foundation for their application must be properly laid and the benefits of their application judicially ascertained. See **M S K vs. S N K Civil Appeal (Application) No. 277 of 2005** and **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. NAI. 6 of 2010 [2010] 1 KLR 226.**

13. As was appreciated by **Waki, JA** in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009:**

> **"The provisions of sections 3A and 3B of the Appellate Jurisdiction Act [which are similar to sections 1A and 1B of the Civil Procedure Act] have been embraced positively by the court which will continue to apply them for the attainment of the goals envisaged by Parliament. The Court has, however, sounded a timely caution in all its decisions so far that the new provisions are not a panacea for all ills in civil litigation. The new thinking does not totally uproot well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application. The objective is to guard against "*railway ticket judgments*"- good for that day and train only."**

14. Apart from the foregoing, it is clear that the application herein has a comedy of errors as shown by a plethora of applications filed herein seeking to correct procedural irregularities. It seems that the applicant has completely failed to get his act right. Having considered the issues raised herein, I find that whereas any one of the foregoing errors and omissions may, taken alone, be capable of being cured under the provisions of Article 159(2)(d) of the Constitution, the several errors disclosed in the application constitute a comedy of errors and omissions which without any explanation being offered cannot be excused. The decision whether or not to excuse an error is an exercise of discretion and like any other discretion must be exercised upon reason and must not be capriciously done or done on the whims. See **Masefield Trading (K) Ltd. vs. Francis M Kibui Nairobi (Milimani) HCCC No. 1796 of 2000 [2001] 2 EA 431.**

15. In my view the orders sought by the applicant in the instant application are incapable of being granted.

16. Accordingly, I dismiss the applications seeking to substitute the chamber summons and the motion but with no order as to costs.

17.17. It is so ordered.

Dated at Nairobi this 31st day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Akusala for the Applicant

Mr Oduor for the Respondent

CA Mwangi