



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR CASE NO. 413 OF 2014

IN THE MATTER OF AN APPLICATION BY THE BOARD OF GOVERNORS OF GITUAMBA

SECONDARY SCHOOL FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

SENIOR PRINCIPAL

MAGISTRATE, LIMURU LAW COURT.....RESPONDENT

AND

TITUS MBURU CHEGE T/A NEW

HOPE CHILDREN CENTRE.....INTERESTED PARTY

EX PARTE

THE BOARD OF GOVERNORS GITUAMBA SECONDARY SCHOOL

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th November, 2014, the *ex parte* applicant herein, **The Board of Governors Gituamba Secondary School**, seeks an order of certiorari to remove into this Court and quash the order made by the Senior Principal Magistrate, **Mr G H Oduor**, dated 7th August, 2014 in Limuru SPMCC No. 25 of 2011.

Applicant's Case

2. According to the applicant, through a plaint dated 5th October, 2011 filed on 6th October, 2011 the interested party instituted Limuru SPMCC No. 25 of 2011 in which the applicant was cited as the defendant. Together with the said plaint the said interested party filed a Notice of Motion dated 5th October, 2011 under certificate of urgency which was heard and *ex parte* order issued on the same day.

3. It was contended that the said pleadings were however filed without summons and as the as the interested party did not take out the same as at 11th February, 2014, the defendant made an application seeking an order for declaration that the suit had abated since 27 months had passed since the filing of the plaint.

4. However the learned trial magistrate was not convinced and by an order dated 7th August, 2014, he revived the suit which had lapsed and abated as against the applicant. In the applicant's view the said decision was made without jurisdiction and was not tenable in law hence these proceedings.

Respondent's Case

5. In opposition to the application the Respondent filed grounds of opposition raising the following issues:

1. THAT the orders prayed for are not available to the Applicant and is otherwise an abuse of court process.

2. THAT the applicant has failed to pursue the available remedies in law for he has the right to appeal to the High Court if dissatisfied with the lower court decision.

3. THAT the order of certiorari directed against the respondent cannot issue as the court cannot question the decision of the lower court subject to the right of appeal which the applicant herein has opted not to explore.

4. THAT judicial review proceedings purely deal with the procedure and process of the decision making and not the merits and/or substance of the case.

5. THAT there are no clear reliefs sought as the application is neither here there and ought to be dismissed with costs.

6. On behalf of the respondent it was submitted that the learned magistrate acted within the law hence the decision is legal as the sole purpose of summons to enter appearance is for the person sued to be notified of the filing of the suit.

7. It was contended that the Court is given discretion to extend time fixed for the doing of any act under section 95 of the *Civil Procedure Act* as well as Order 5 rule 6 of the *Civil Procedure Rules*. According to the respondent Article 159(2)9d) of the Constitution cures the omission since the failure to serve the summons is a technicality which does not go to the root of the case and in any case any loss suffered by the applicant can be compensated in damages.

8. In the respondent's view to issue the orders sought herein would be akin to micro-managing the subordinate courts since the respondent carried out its statutory duties in accordance with the law. In the respondent's view the application does not meet the threshold of judicial review and ought to be dismissed with costs.

9. In support of the submissions, the respondent relied on Virgin Spirit Travel Ltd vs. Maasai Mara Koiyakilemeck Wildlife Trust [2012] eKLR, Tejprakashs Shem vs. Pertoafric Company Limited & 2 Others [2014] eKLR, Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43, Republic vs. Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] eKLR, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Seventh Day Adventist Church (EA)

Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR and Republic vs. Kenya Revenue Authority & Another ex parte Bear Africa (K) Limited.

Interested Party's Case

10. In opposition to the application the interested party filed a replying affidavit sworn by himself on 11th February, 2015.

11. According to him, the learned trial magistrate's decision was made within his mandate under the *Civil Procedure Act*, the Constitution and the *Civil Procedure Rules*.

12. It was deposed that since the paramount objective of the Court is to do justice to the parties and that is what the respondent did, these proceedings are unmerited.

13. It was submitted that the respondent had the jurisdiction to entertain the matter which was before it.

14. It was contended that Order 5 rule 1(6) which was relied upon by the ex parte applicant only applied to situations where there were summons placed in the court file and issued by the Court and which were not collected by the plaintiff for service within 30 days of notification. However that was not the case in the suit before the magistrate's court since the summons were not forwarded with the plaint.

15. It was submitted that by extending the time to extract the summons and serve the same the Respondent was merely exercising its inherent powers and cannot be faulted. Therefore since the Court exercised its discretion, it was submitted that the decision can only be challenged on appeal.

16. According to the respondent, if the applicant believed that the suit had abated the correct order to seek was for costs since there was no provision for declaring a suit as abated. In the respondent's view, these proceedings are being used to intimidate the Respondent.

17. It was therefore submitted that this was not a proper case for granting the orders sought. In support of this position the interested party relied on **Republic vs. Kenya Forest Service ex parte Clement Kariuki & 2 Others [2013] eKLR.**

Determination

18. Order 3 of the *Civil Procedure Rules* deals with "Frame and Institution of Suit" and rule 1(1) thereof provides:

Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

19. Rule 2 thereof provides for what ought to accompany all suits and these are the affidavit referred to under Order 4 rule 1 (2); a list of witnesses to be called at the trial; written statements signed by the witnesses excluding expert witnesses; and copies of documents to be relied on at the trial including a demand letter before action. Order 4 rule 1(2) of the same Rules on the other hand provides:

The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

20. Order 5 rule 1(3) of the said Rules on the other hand provides:

Every summons shall be accompanied by a copy of the plaint.

21. I have set out the legal provisions which are relevant to the issue of the institution of a suit under procedural legal regime. The question that needs to be determined is what constitutes a validly filed suit.

Order 3 rule 1(1) of the said Rules seems to suggest that a suit is filed when a plaint is presented to Court in a prescribed manner. Under 4 rule 1(2) thereof, the plaint is required to be accompanied by a verifying affidavit. However under Order 3 Rule 2 a suit is to be accompanied by the documents mentioned thereunder. It is therefore important to distinguish between a plaint and a suit. Whereas a plaint is the document that commences a suit where it is the mode prescribed, the documents mentioned in Order 3 rule 2 are not mandatorily required to accompany the plaint. What is required is that the suit itself must be accompanied by the said documents. It is therefore my view that the failure to accompany the plaint with the said documents is not necessarily fatal to the suit which is commenced by the filing of the plaint though the suit itself may be rendered incompetent if there is non-compliance with Order 3 rule 2.

22. Order 5 rule 1(3) on the other hand falls outside the title “Frame and Institution of Suit”. Order 5 deals with “Issue and Service and Summons” and rule 1(3) thereof provides for what is supposed to accompany the summons rather than what is to accompany the plaint. Under the said rule the summons are to be accompanied by a plaint. In other words one cannot purport to file summons contemplated under Order 5 without a plaint. It is however my view that a suit is not commenced by the summons to enter appearance.

23. What then is the purpose of the summons to enter appearance? In **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998**, the Court of Appeal expressed itself as follows:

“Service of summons to enter appearance sets on the clock for counting the time, within which to enter appearance, and no more. If, however the defendant becomes aware of the suit against him, otherwise than through formal service, there is nothing in law to preclude him from filing a defence to the claim against him. Where he does so time within which to file a reply starts running against the plaintiff and the proceedings are supposed to continue in the normal manner.”

24. Similarly, in **Satakam Industries Ltd. vs. Barclays Bank of Kenya Ltd & Another Kisumu HCCC No. 17 of 2003** the High Court cited with approval **Boyes vs. Gathure [1969] EA 385** and expressed itself as follows:

“Where summons to enter appearance though not filed with the plaint was subsequently filed and served and the defendant has not demonstrated any prejudice save for the non-compliance with the rule, it cannot be said that the suit is invalid as Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature and matters of procedure are not normally of a fundamental nature...Order 4 rule 3(3) and (5) of the Civil Procedure Rules are directory in nature and failure to comply with it should not result into invalidation of the proceedings especially where there has been no prejudice as the Court should do justice to all parties.”

25. In **Industrial and Commercial Development Corporation vs. Sum Model Industries Limited Civil Appeal No. 229 of 2001**, the Court of Appeal held:

“Service of the summons to enter though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case. On the facts and circumstances of this case, nothing turns on the issue.”

26. This Court must however appreciate that unlike in situations where a plaint is filed with the summons but the same is not collected for service within 30 days of notification, in which case the suit abates; in the instant case no summons were in fact filed with the plaint. I have already found that a strict reading of Order 5 rule 1(3) aforesaid does not expressly provide that a plaint be filed with the summons but simply provides that it is the summons which must be accompanied by a plaint. Where the plaint is not accompanied by the summons there are no sanctions provided for. In my view the provision for sanctions where summons have been issued and not served was meant to do away with suits which are filed for the

sake of speculation merely to beat the Statute of Limitations.

27. Circumstances where a legal provision provides for the doing of an act but without sanctions for failure to adhere thereto was dealt with in **Njagi vs. Kihara [2001] 1 EA 165**, where it was held:

“Whereas section 31 of the Advocates Act, forbids the unqualified person, that is, a person not qualified to act as an advocate which includes an advocate not meeting the requirements of section 9, from causing to issue any summons or process, or to institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction, the section is however very silent on the consequences of the actions so done in contravention of the section...The court would be condoning injustice if, merely because of an advocate’s defect in qualification at the time of putting pen to paper and appending the signature, on subsequent discovery that there was such a defect of qualification at the time, the Plaintiff’s or indeed either party’s claim or counterclaim application would wither away and be condemned to extinction.”

28. It therefore follows that where a legal provision requires that a process be taken but does not provide for the consequences of the failure to take such an action, the Court would be reluctant to interpret such an omission to be fatal to the suit if the same can be cured. It has been held before that rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. Where it is evident that a party has attempted to comply with the rule but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue. See **Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460; Oduor vs. Afro Freight Forwarders [2002] 2 KLR 652.**

29. In **Gathure vs. Boyes** (supra) it was held that using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed. Rules of procedure are designed to give effect to rights of the parties and once parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. It has to be made clear that this does not mean that the rules of procedure should not be complied with – indeed they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no prejudice has been done to the parties. See **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266; Mawji vs. Arusha General Store [1970] EA 137.**

30. In this case, it was not contended that there was any prejudice occasioned to the ex parte applicant by the failure by the plaintiff to file the plaint with the summons assuming that there was an express provision to that effect. It must always be remembered that the mere fact that a rule applies the word “shall” does not make the said requirement mandatory since the mere use of the word “shall” cannot oust the jurisdiction of the Court. In **Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) HCCC No. 462 of 1997 Ringera, J** (as he then was) held that the use of the word “shall” in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.

31. Since the ***Civil Procedure Rules*** do not prescribe sanctions for not filing a plaint with the summons as opposed to where the summons are not served within 30 days of notification, it is my view and I so hold that even if Order 5 rule 1(3) was to be read as meaning that the plaint must be accompanied by the summons, being a procedural rule, the failure to comply therewith is curable and is not fatal to the suit.

As to whether the Court was justified in curing the defect is a matter of discretion and merits of the case and cannot be the subject of judicial review unless it is contended that the discretion was exercised in an irrational manner. In this case the applicant had the option of appealing against the impugned decision if it believed the discretion was not properly exercised.

32. One must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by **Ochieng, J** in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003**, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort; the applicant however will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate.

33. Similarly, the Court agrees with the position taken in **Republic vs. National Environment Management Authority [2011] eKLR** that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

34. Therefore, unless due to the inherent nature of the orders granted to appeal against the same where there is a right of appeal would be less convenient or otherwise less appropriate, the adversely affected party ought to appeal against the said order.

35. Article 159(2)(d) of the Constitution it must be remembered enjoins the Court when exercising judicial authority to be guided by the principle that justice shall be administered without undue regard to procedural technicality. All decisions which were made before the promulgation of the Constitution must therefore be seen in this light.

36. Having considered the application herein it is my view and I hold that since the Respondent had discretion to make the orders he made, he had jurisdiction to do so and any challenge to the exercise of the discretion ought to have been challenged by way of an appeal to this Court.

Order

37. Consequently, the Notice of Motion dated 10th November, 2014 fails and is dismissed but in the circumstances of this case, where the genesis of the problem was the failure to comply with the procedural rules was occasioned by the interested party, with no order as to costs.

Dated at Nairobi this 27th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Munene for the Respondent

Cc Patricia