REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JR MISCELLANEOUS CIVIL APPLICATION NO. 150 OF 2015

RICHARD KAGIRI & 399 OTHERS…….....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU.....RESPONDENT

RULING

1. On 2nd June, 2015, when this matter came before me, **Mr Nganga** appeared for the Applicant while **Mr Ngatia** indicated that he was appearing for the Respondent.
2. On the said date **Mr Ngatia** informed the Court that he required 7 days to "regularise" his position and sought for a mention date. **Mr Nganga** on his part opposed the said request while expressing the sentiments that his clients were being subjected to arbitrary arrests.
3. As there was no serious objection to the leave being granted, I proceeded to grant the applicants leave to commence judicial review application and directed that the same be filed and served within 3 days. Response to the said application was to be filed and served within 10 days of service of the Motion and the applicant was to file and serve submissions within 3 days of service of the response with the Respondent filing its submissions within 7 days of being served with the applicant's submissions. The matter was then fixed for highlighting submissions on 29th June, 2015.
4. However before that date, vide an application dated barely 5 days later on the 8th June, 2015, the Applicant moved this Court for orders that "this Honourable Court be pleased to strike out or expunge the proceedings orders and or direction issued on the 2nd day of June, 2015" and that the Court "be pleased to allow the applicants' prayers in Chamber Summons dated 14th May 2015 as the same remained unopposed." The said application was premised on the ground that the said orders and/or directions were made under the mistaken belief that the advocate who purportedly appeared for the Respondent had instructions to represent the respondent leading to several orders which cannot be executed. In the Applicant's view **Mr Ngatia** "cunningly and contemptuously managed to convince the court and upon some deliberation this Court granted several orders and or direction. On being "suspicious" of the conduct of **Mr Ngatia**, it was the Applicant's position that their advocates perused the court record and found that there was no notice of change of advocates hence the orders issued on the said day amounts to a nullity as the same were tainted with an illegality.
5. In response to the application a replying affidavit was filed sworn by **Mark Ngatia Mwau** in which he deposed that he was in fact an advocate in the firm of **Nchogu, Omwanza & Nyasimi Advocates**, the firm instructed by the Respondent in this matter. In support of his contention that

he had *locus standi* in this matter he exhibited a document from the Law Society of Kenya confirming that he was in fact an advocate with the said firm.

6. I have considered this instant application. First and foremost this being judicial review application, the provisions of the ***Civil Procedure Act*** and the Rules thereunder save for Order 53 of the ***Civil Procedure Rules*** are inapplicable. Section 3 of the ***Civil Procedure Act*** 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.

7. 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 the provisions of the ***Civil Procedure Rules*** do not apply to these types of proceedings. 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*** rendered the application wholly incompetent. Similarly 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.
8. It follows that there is no requirement for a notice of appointment of advocates. In any case even in ordinary civil proceedings a notice of appointment of advocate is only necessary under Order 9 rule 7 of the ***Civil Procedure Rules***, where a party having sued or defended in person, appoints an advocate to act in the cause on his behalf. In this matter, the respondent never sued nor has it ever defended this matter in person. Either way, the submission based on the notice of appointment of advocate is misconceived.
9. With respect to the allegation that **Mr Ngatia** misled the Court in granting the orders sought, what the Court gave apart from the prayer for leave which was a prayer sought by the applicants, and which surprisingly the applicant now seeks to expunge from the record, were directions which directions this Court could have given, the absence of counsel for the Respondent notwithstanding. There is no rule of either substantive law or of procedure that provides that where an application for leave and stay is unopposed the same must be granted. Such applications are in any case ordinarily heard and decisions made *ex parte* and on occasions dismissed at that *ex parte* stage. Therefore even where an application for leave and stay is unopposed the Court does not grant such orders as a matter of course. The application still has to be heard and determined on merits. As was appreciated by the Court of Appeal in **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003:**

   "We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct."

10. It must always be remembered that the decision whether or not to grant leave and to direct that the grant thereof will operate as a stay of the decision in question is discretionary hence It is not just a matter of course that since the Court has such a discretion it should exercise it at any time even where no reasons are given. This was the position adopted by the Court of Appeal in **Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350**, where it held that even if the application is to proceed *ex parte* the Court is still under a duty to consider the application on the merits, based on the usual principles.

11. I have considered the instant application and I have to agree with the Respondent that this was a grave abuse of the process of the Court. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

i. **Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.**
ii. **Instituting different actions between the same parties simultaneously in different courts even though on different grounds.**
iii. **Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.**
iv. ***Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness*.**

12. In this case it is clear from the supporting affidavit that the suspicions about **Mr Ngatia's** *bona fides* when he appeared before this Court emanated from the applicant's advocate.
13. I wish to remind parties and their legal counsel of the Court of Appeal decision in **Rafiki Enterprises Ltd. vs. Kingsway Tyres & Automart Limited Civil Application No. Nai. 375 of 1996** where the Court held:

"With due respect to Mr Mwenesi we cannot help but remark that the application was reckless and impertinent...Right from the beginning of the appeal itself they saw Mr Justice Bosire sitting and despite the fact that the applicant was represented by counsel, they never raised the issue of Mr Justice Bosire not being qualified to sit. They only raised it after they had lost and we are far from convinced that the application was brought in good faith. As reasonable people, Mr Mwenesi and his clients must have known that the application would constitute a grave embarrassment to Mr Justice Bosire personally and to the Judicial Service Commission whose duty it is to advice the President on judicial appointments. We think, the application is simply and purely an abuse of the process of the Court. We order that it be and is hereby dismissed. On costs, we think Mr Mwenesi should personally take responsibility for them but before we make any order against him, we shall call upon him at a later stage to show cause why he should not pay them."

14. It is similarly my view that the instant application was reckless and impertinent. The application was made without confirming in which firm **Mr Ngatia** was practising. It is clear that it was made purely to embarrass **Mr Ngatia** as no meaningful benefit would have accrued to the applicant as setting aside the said orders would have resulted in the rehearing of the application for leave. It is therefore highly doubtful that the instructions to make the instant application emanated from the applicants as it is difficult to believe that the applicants would have given instructions whose effect would have been to deprive them of the leave already granted.
15. In the premises I find no merit in the application dated 8th June, 2015 which I hereby dismiss. As the supporting affidavit was sworn by the applicant, I will give **Mr Nganga** the benefit of doubt when in comes to costs and direct that the Applicants will pay the costs of the application assessed at Kshs 15,000.00 to be paid before the next hearing date.
16. It is so ordered.

Dated at Nairobi this 15th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nganga for the Applicant

Mr Ngatia for the Respondent

Cc Patricia