



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CIVIL APPLICATION (JR) NO. 126 OF 2013**

**REPUBLIC..... APPLICANT**

**VERSUS**

**1. CABINET SECRETARY RESPONSIBLE FOR  
LABOUR AND MICRO AND SMALL ENTERPRISES**

**2. PRINCIPAL SECRETARY RESPONSIBLE FOR  
LABOUR AND MICRO AND SMALL ENTERPRISES**

**3. THE ATTORNEY GENERAL OF THE REPUBLIC OF  
KENYA.....RESPONDENTS**

**EX PARTE**

**1. NELSON NG'ANG'A SUING AS THE SECRETARY  
OF THE NATIONAL ASSOCIATION FOR THE  
FINANCIAL INCLUSION OF THE INFORMAL SECTOR;**

**2. MATHEWS ASHERS OCHIENG SUING AS THE SECRETARY/CHIEF EXECUTIVE  
OFFICER OF PROUDLY**

**KENYAN.....SUBJECTS**

**RULING**

1. On 3<sup>rd</sup> June 2013, I delivered a judgement in this case in which I found that the Notice of Motion dated 29<sup>th</sup> April 2013 lacked merits and proceeded to dismiss the same.
2. At the time of writing of the said judgement there were no submissions on record.
3. By a Notice of Motion dated 6<sup>th</sup> June 2013 filed in this Court on 7<sup>th</sup> June 2013 expressed to be brought under the provisions of Order 45, Rules 1, 2, 3 and 5 of the Civil Procedure Rules, the ex parte applicant now seeks the following orders:

**1 That due to the urgency of this matter, the same be heard ex parte in the first instance and fixed for hearing inter partes before the Honourable Court at the earliest date.**

2 That the Judgement of this Honourable Court dated and delivered on the 3<sup>rd</sup> day of June 2013 by Hon. Justice G V Odunga be reviewed and the orders made therein set aside.

3 That the Honourable Court does re-enter judgement herein upon considering and taking into account the written submissions of both parties.

4 That the costs of these proceedings be provided for.

4. The grounds for seeking the said orders are that there were submissions filed by the parties which were not taken into account in delivering the said judgement hence there is a sufficient reason for reviewing the judgement since the omission to consider the same is unfair and unjust to the applicants and contrary to the overriding objective of the Court which is to facilitate and uphold just determination of proceedings.
5. Section 3 of the *Civil Procedure Act* on the other hand 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.*

6. 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 does not apply to these type of proceedings. The overriding objective in section 1A on the other hand does not give the Court jurisdiction but is a case management tool meant to ensure that justice is attained by the Court in the process of determining the proceedings before the Court. In any case that section only applies to strictly civil proceedings pursuant to the preamble to the Act which provides that it is “*An Act of Parliament to make provision for procedure in civil courts*”. 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. In fact in *Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003*, it was held that the Court has no powers to vary, review or set aside the *ex parte* order firstly because under Section 9 of the *Law Reform Act*, the procedure has been prescribed and Order 53 does not give any such powers and secondly because the purpose of the special jurisdiction has not been said to have been defeated by lack of such powers to enable the Court invent any such procedure the only relief being the statutory right of appeal against the judicial orders and thirdly the *Civil Procedure Rules* do not apply to judicial review in view of the clear provisions of section 3 of the *Civil Procedure Act* concerning special jurisdiction. Similarly in *Republic vs. Lutta Kasamani Ex Parte United Insurance Company Limited Nairobi HCMCA No. 1047 of 2004*, it was held that in exercising its powers under section 8(2) of the *Law Reform Act*, the High Court is exercising its Civil jurisdiction though the jurisdiction is undoubtedly special in the sense that it is created pursuant to section 8 of *Law Reform Act*. The Court further held that although the Court in judicial review proceedings would be exercising civil jurisdiction, it is a special jurisdiction which in itself does not mean that the *Civil Procedure Act* and the rules made thereunder are applicable as where an Act of Parliament confers special jurisdiction, *Civil Procedure Act* and the Rules made thereunder do not apply.
7. However, the mere fact that a party cites the wrong provisions of the law ought not to deprive the

Court of a jurisdiction where such jurisdiction exists. The Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** held that the superior court in the matter before the court has the residual power to correct its own mistake. 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 and not necessarily under section 3A of the ***Civil Procedure Act*** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same.

8. The applicant's case is that though the parties filed submissions in this matter the said submissions were not considered. What is ordinarily the role of submissions in litigation? **Mwera, J** (as he then was) in **Nancy Wambui Gatheru Vs. Peter W. Wanjere Ngugi Nairobi HCCC No. 36 Of 1993** held:

**“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”**

9. Accordingly, the mere fact that a Court makes a decision after hearing the evidence without affording parties an opportunity to submit or without considering submissions is not necessarily a ground for reviewing the decision. In judicial review, evidence is ordinarily contained in the affidavits hence submissions have no evidential value.
10. It is however my view that where the Court makes an order that parties in judicial review proceedings do file submissions the Court ought to consider the same since the said submissions take the place of address to the Court and unless the parties opt not to address the Court, the Court ought to afford parties an opportunity to hear them either orally or by way of written submissions. In **Abdi Nassir Nuh vs. Abdureheman Hassan Halkano & 2 Others Civil Appeal (Application) No. 226 of 2008**, the Court of Appeal held that submissions by counsel, whether written or oral, are an integral part of the proceedings, and an important consideration by a judge in arriving at his or her decision.
11. In arriving at my said earlier decision I expressed myself *inter alia* as follows:

**“I have considered the foregoing. Although the applicants allege that the Chairman of the Board was appointed by the Minister and not the President, the alleged Gazette Notice appointing the Chairman is not part of the record. Accordingly the Court is unable to find who between the Minister and the President appointed the Chairman in light of the contention by the Respondents that the appointment was done by the President..... Apart from that it is clear that the appointees were not made parties to these proceedings. That the orders sought herein are likely to adversely affect them if granted is not in doubt. Accordingly, by granting the orders sought herein the Court would be contravening the provisions of Article 50(1) of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

12. It is important to note that the impugned Gazette Notice is Gazette Notice No. 2934 and not No. 2240. Whereas in Gazette Notice No. 2240 the Minister purported to appoint *inter alia* the Chairman of the Board of Micro and Small Enterprise Authority, a power which the applicant contends that the Minister did not have, in Gazette Notice No. 2934 only the members were appointed. In other words the impugned Gazette Notice does not purport to appoint the Chairman. It follows that the applicant's complaint with respect to the appointment of the Chairman by Minister is not supported by the Gazette Notice No. 2934.
13. Section 30(1)(g) of the ***Micro and Small Enterprises Act***, provides:

*(g) seven persons nominated as follows and appointed by the Cabinet Secretary—*

*(i) four persons nominated by the umbrella organization from the following national sectoral associations—*

*(aa) manufacturing;*

*(bb) traders;*

*(cc) services;*

*(dd) agri-business;*

*(ii) one person nominated by the most representative association of women engaged in micro and small enterprises;*

*(iii) one person nominated by the most representative association of youth engaged in micro and small enterprises;*

*(iv) one person nominated by the most representative association of persons with disability engaged in micro and small enterprises;*

14. It is clear that apart from the Chairperson who should be appointed by the President the other members are to be appointed by the Minister/Cabinet Secretary.

15. On the issue of whether the appointees were from the bodies which were entitled to nominate the persons who were appointed I held as follows:

**“In this case the Respondents have annexed copies of the letters indicating that there were nominations carried out by certain bodies and it is not contended by the applicants that the said bodies were not entitled to make recommendations for appointment of the persons appointed. The mere fact that the applicant’s views did not carry the day in the said appointment is not a ground for quashing the said appointments since having received the nominations the discretion was left to the appointing authority to make the final determination and that discretion cannot be interfered with unless it is shown that the same was abused.”**

16. Having so found, the only recourse available to the applicant is to appeal against the said decision since to arrive at a different finding would amount to my sitting on appeal on my said decision.

17. It follows that even after consideration of the submissions filed herein I am unable to reach a different decision from that arrived at earlier.

18. Accordingly I find no merit in the Notice of Motion dated 6<sup>th</sup> June 2013 which I hereby dismiss with costs to the respondents.

**Dated at Nairobi this 16<sup>th</sup> day of August 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of Miss Olando for Mr Oluoch for the applicant**