



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILLIMANI LAW COURTS

Judicial Review 227 of 2011

**CONSUMERS FEDERATION OF KENYA (COFEK)
suing through its officials namely STEPHEN MUTORO, EPHRAIM GITHINJI KANAKE and
HENRY MESHACK OCHIENG APPLICANTS/PETITIONERS**

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

MINISTER OF STATE FOR PLANNING, NATIONAL

DEVELOPMENT & VISION 2030 2ND RESPONDENT

VISION DELIVERY BOARD 3RD RESPONDENT

PAUL CHRISTOPHER MUGO KIBATI INTERESTED PARTY

RULING

The applicant/petitioner in the main proceedings is Consumers Federation of Kenya (COFEK) suing through its officials. The Attorney General; the Minister of State for Planning, National Development and Vision 2030; and the Vision Delivery Board are the 1st, 2nd and 3rd respondents respectively. Paul Christopher Mugo Kibati is an interested party. This ruling is in respect of two applications. They are both dated 14th November, 2011. The applicants in respect of those applications are the 3rd respondent and the interested party. The respondent in respect of the two applications is the applicant/petitioner in the main proceedings. So as to avoid confusion in this ruling, I will henceforth refer to the parties by their names. The two applications seek one main prayer namely the discharge and setting aside of the leave granted to COFEK by this court on 21st September, 2011 to commence these judicial review proceedings.

The said applications are based on among other grounds, the ground that the decision which COFEK

seeks to have quashed was made two years prior to the grant of leave and therefore goes against the provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010. The Vision Delivery Board and Paul C.M. Kibati also argue that there was inordinate delay before the application was filed. They also argue that the decision sought to be quashed has not been exhibited. They finally argue that the application is ill-conceived and unmerited.

In response to the applications, COFEK argues that this court has no jurisdiction to set aside leave granted by a court of similar jurisdiction and the Vision Delivery Board and Paul C M Kibati ought to have appealed against the grant of leave. COFEK also argues that Order 53 Rule 2 of the Civil Procedure Rules, 2010 does not apply to the decision sought to be challenged in this case. COFEK further submits that even if the time for bringing the application had lapsed, this court has inherent jurisdiction to enlarge time.

Looking at the arguments placed before this court by the parties, it is clear that the only issue for determination is whether leave ought to have been granted in the circumstances of this case. However, before tackling this issue, I must decide whether I have jurisdiction to decide on the applications in the first place.

COFEK has argued that the only way the Vision Delivery Board and Paul C M Kibati could have challenged the grant of leave was by way of an appeal. COFEK argues that this court has no jurisdiction to set aside leave granted by a court of equal jurisdiction. I will answer this argument using the words of the Court of Appeal in **AGA KHAN EDUCATION SERVICE KENYA V REPUBLIC AND OTHERS E.A.L.R [2004] 1 E.A.1 (CAK)** where the Court stated that:-

“So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature ex-parte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the superior court-see for example Secretary of State for the Home Department ex-parte Begum [1989] 1 Admin LR 110.”

Leave to commence judicial review proceedings was granted to COFEK ex-parte by Gacheche, J on 21st September, 2011. The said judge has since been transferred to another station. I therefore have jurisdiction to entertain the applications.

Leave once granted should be challenged sparingly. A party challenging grant of leave must have good reasons for doing so. This caution was given by the Court of Appeal in the already cited **Aga Khan Education Service Kenya** case in the following words:-

“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 in very clear-cut cases, unless it is contented that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there are, therefore no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.”

It is clear from the observation of the Court of appeal that a party who seeks to set aside leave already granted sets for himself a monumental task. It must be borne in mind that before granting leave, a judge will have gone through the application and established that there is an arguable case. Sometimes however important matters may escape the attention of the judge. That is why a party who seeks to set aside leave

should be heard. As observed by the Court of Appeal in the **Aga Khan Education Service Keya** case, leave should not be granted:-

“where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there are, therefore, no prospects at all of success.”

In the case of **AKO v SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER 163[1989] KLR** the Court of Appeal expressed its opinion on the provisions of Section 9(3) of the Law Reform Act in the following words:-

“It is plain that under sub-section (3) of Section 9 of Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of Section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of sub-section (3) of section 9 of the Law Reform Act.”

It is clear therefore that an application for an order of certiorari must be made within six months from the date of the decision being challenged. It must be noted that Rule 2 of Order 53 of the Civil Procedure Rules is a replica of Section 9(3) of the Law Reform Act. COFEK cannot therefore succeed in its plea to this court to enlarge time using its inherent jurisdiction. The question would then be whether the COFEK complied with Section 9(3) of the Law Reform Act. The 1st prayer in the notice of motion dated 7th October, 2011 is:-

“THAT an order of certiorari be and is hereby issued to move to this honourable court for purposes of being quashed the Respondents’ decision to appoint Mr. Paul Christopher Mugo Kibati to be the Director-General of the Vision Delivery Secretariat.”

According to the supporting affidavit sworn on 19th September, 2011 by Stephen Mutoro the Secretary General of the applicant, Paul C M Kibati was appointed as Director General of the Vision Delivery Board sometime in July, 2009 – see paragraph 9 of the said affidavit. Leave to commence judicial review proceedings was granted in September, 2011 over two years after the appointment. The grant of leave was therefore in breach of Section 9(3) of the Law Reform Act since the applicant did not move the court within six months after the appointment. Even if the decision to appoint Paul C M Kibati is not subject to the six months rule, I believe that the act of COFEK of coming to court over two years after the act smacks of inordinate delay. Where a party wishes to challenge administrative action, he should do so promptly so that a decision can be made to enable the parties involved move forward. Paul C M Kibati is already firmly in charge of the Vision 2030 bus and COFEK’s attempt to have him removed can only mean that Kenya’s development goals will be delayed.

The prayers for orders of prohibition and mandamus in the notice of motion are anchored on the prayer for an order of certiorari. As already stated, the grant of leave in respect of the prayer for an order of certiorari was not proper and the applications of the Vision Delivery Board and Paul C M Kibati must succeed. The prayers for orders of prohibition and mandamus must therefore die with the prayer for an order of certiorari. That being so, the leave to commence judicial review proceeding granted to COFEK on 21st September, 2011 by this court is set aside and the subsequent proceedings struck out. The Vision Delivery Board and Paul C M Kibati will have the costs of the applications and the entire proceedings from COFEK.

Dated and signed at Nairobi this 26th day of **September** , 2012

W.K. KORIR, J

