REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 320 of 2010

REPUBLIC.....APPLICANT

VERSUS

THE CONSTITUENCY DEVELOPMENT FUND BOARD.....1ST RESPONDENT

THE ACCOUNT MANAGER, LAISAMIS CONSTITUENCY DEVELOPMENT FUND.....2ND RESPONDENT

MEMBERS OF LAISAMIS CONSTITUENCY DEVELOPMENT FUND COMMITTEE NAMELY:

HON. JOSEPH LEKUTON.....1ST INTERESTED PARTY

MUMA ARBELLE.....2ND INTERESTED PARTY

JOSEPH LOBOYO.....3RD INTERESTED PARTY

JENIFFER MAJELON.....4TH INTERESTED PARTY

FRANCISCO NAIAD.....5TH INTERESTED PARTY

FR. ISAIAH EKALO.....6TH INTERESTED PARTY

ADAN LCHAGI.....7TH INTERESTED PARTY

SUJO WAMBILE.....8TH INTERESTED PARTY

MARK EKALE.....9TH INTERESTED

PARTY

ANNE MARIA ALYARO.....10TH INTERESTED PARTY

EDWARD LENTOROR.....11TH INTERESTED PARTY

SATIM ETHIMOLE.....12TH INTERESTED PARTY

GEORGE OBARA.....13TH INTERESTED PARTY

EX-PARTE

ROBERT ILTARAMATWA KOCHALE

LESIANTAM AARON ILTELE

MATAHWEN GABANAI

BERNARD BARHUMA ARBELE

ABDI LORUJA GALBORIAH &

MEITEKII OLE SANGE

RULING

The notice of motion application dated 25th February, 2011 presents itself for consideration by this court. The same is brought under sections 1A and 3A of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the Civil Procedure Rules (CPR). In brief the applicants led by Robert Iltaramatwa Kochale seeks the permission of this court to cross-examine Boniface Makongo, the Legal Officer of the Constituencies Development Fund (the respondent) and Elema Huka, the Fund Account Manager of the respondent's Laisamis Constituency Development Fund (CDF) in respect of the contents of certain affidavits. The affidavits of Boniface Makongo were sworn on 23rd November, 2010 and 30th November, 2010 whereas those of Elema Huka were sworn on 23rd November, 2010 and 29th November, 2010. The application is supported by the grounds on its face and the supporting affidavit together with the supplementary affidavit of Robert Iltaramatwa Kochale. The applicants' case is that the two deponents made assertions in their affidavits which are actually false and untrue and which appear to have been made with a view to misleading the court. It is therefore their case that the truth can only be known if the deponents are cross-examined and hence the need to have them summoned for cross-examination.

The application is opposed through a replying affidavit sworn on 17th March, 2011 by Boniface Makongo. The respondents attack the application on three grounds. In the first place it is argued that the application is misconceived and incompetent in that it is brought outside Order 53 CPR and sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya which govern judicial review proceedings. The respondents argue that the CPA and the other provisions the CPR have no place in judicial review proceedings. To them this application is therefore incompetent and ought to be dismissed.

Secondly, the respondents argue that Order 53 CPR contemplate that judicial review proceedings should be considered and determined on affidavit evidence and there is therefore no provision for taking of oral evidence or cross-examination of deponents of affidavits filed in the cause. In support of this contention the respondents cited the ruling of J. K. Mitey, J (Retired) in **EAST AFRICA SAFARI AIR LIMITED**

v THE HON ATTORNEY GENERAL, NAIROBI HIGH COURT MISC. APPL. NO 1360 OF 1998 where he observed that:-

"After the claimant filed his supporting affidavits the interested party filed replying affidavits which in my view adequately covered the matters in issue. If the interested party felt that the affidavits of the claimant don't sufficiently bring out the matters in issue, he had a right to apply under Order LIII Rule 4(2) to file further affidavits to deal with new matters arising out of the affidavits sworn and filed by the claimant. The interested party has not disclosed what it genuinely contests in the claimant's affidavit. I also wish to point out that an application for judicial review is hinged on the statement of facts. The opposing party can only challenge the same either by filing grounds of opposition, which are not mandatory or by affidavits."

Thirdly the respondents argue that, even if, the prevailing position in England were to be transplanted to our jurisdiction so that cross- examination would be allowed then the application would still not succeed in that cross-examination is exercised sparingly and the applicants herein have not established the grounds which would make this court summon the two deponents for cross-examination. On this point the ruling of J G Nyamu, J (as he then was), M. K. Ibrahim, J (as he then was) and Anyara Emukule, J in **KENYA AFRICAN NATIONAL UNION (K.A.N.U) v THE PRESIDENT OF THE REPUBLIC OF KENYA, HIS EXCELLENCY HON. MWAI KIBAKI & SIX OTHERS, NAIROBI HIGH COURT MISC. APPLICATION NO. 128 OF 2003** was cited. In that case the learned judges quoted Sir William Wade & Christopher Forsyth at Page 648 of the 9th Edition of Administrative Law where they stated thus:-

"A feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit; i.e. by sworn statement in writing rather than orally. It is possible but exceptional, for the court to allow cross-examination on the affidavits."

I will start by addressing the issue of the competency of the application. It is not disputed that judicial review jurisdiction is one of its kind. It is neither civil nor criminal in nature. Special self-contained rules have been designed for judicial review proceedings. Any application must therefore be brought under sections 8 and 9 of the Law Reform Act or Order 53 CPR. Where an application is not contemplated by the above quoted provisions, then a party is advised to bring the application under the inherent jurisdiction of the court. The respondents are therefore correct that the law cited in the application by the applicants is irrelevant. The question would then be whether that alone should lead to the dismissal of the application for being incompetent. I do not think so. The current judicial policy is that substantive justice should be done without undue regard to technicalities. This policy is grounded on Article 159(2)(d) of the Constitution which provides that justice should be administered without undue regard to technicalities. In my view, the fact that a party has cited the wrong provisions of the law in an application is a minor mistake which can be ignored so that the substance of the application can be dealt with. In any case, Section 3A of the CPA buttresses the requirement that the court should use its inherent power to make orders for the ends of justice. I therefore reject the respondents' argument that this application is incompetent for citing the wrong provisions of the law.

The second argument is that the law and rules governing judicial review proceedings in Kenya do not contemplate cross-examination of deponents on the contents of their affidavits. I agree that indeed there is no provision for cross-examination in our laws. That, however, does not mean that this court cannot exercise its inherent jurisdiction and allow cross-examination if such a step would serve the interests of justice. I believe that the court can invoke its inherent jurisdiction and order for cross-examination where it has been established that there is need to cross-examine a deponent on the contents of an affidavit. I, however, believe that the position which prevails in England is the correct position so that allowing applications for cross-examination should be done sparingly. The logic behind this policy is that judicial review proceedings are meant to be a fast and quick fix to challenges encountered by citizens in their interactions with the administration. Allowing cross-examination would therefore lead to unnecessary delays. In any event, judicial review proceedings are ideally meant to proceed on undisputed facts.

Have the applicants provided enough reasons for allowing the application? The applicants have pointed

out what they claim to be contradictory and misleading information in the affidavits of the deponents. They seem to clearly know what is not right about those affidavits. What they should have done is to seek leave so that they can file further affidavits to countermand the falsehoods in the affidavits. In my view, they have not advanced any good reason for wanting to cross-examine the deponents.

The end result therefore is that this application fails. The same is therefore dismissed with costs being in the cause.

Dated and signed at Nairobi this 28th day of November , 2012

W K KORIR
JUDGE