REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC. CIVIL APPLICATION NO.72 OF 2001

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW ORDERS

REPUBLIC……..…….APPLICANT
VERSUS
THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT…….....…RESPONDENT
AND
ISAAC WETOSI……EX-PARTE APPLICANT

R U L I N G

The Ex Parte applicant, by a Chamber Summons dated 1.3.2006, sought, through the Republic, the following reliefs:-

1. That leave be granted to the applicant herein to apply for orders of certiorari,
2. That leave be granted to the exparte applicant herein to apply for judicial review order of prohibition
3. That leave be granted to the ex parte applicant to apply for judicial review orders of mandamus
4. That the grant of leave aforestated do operate as a stay of enforcement of the said orders or proceedings until determination of this application.

The application was heard and by a ruling dated and delivered on 12.6.2006, Ombija, J granted all the four prayers, thus also granting leave to the ex parte applicant, to file a Notice of Motion seeking the judicial review orders of certiorari, prohibition and mandamus.

The grant of leave aforesaid however, aggrieved the Respondent in the said Notice of Motion, who as a result, filed a Notice of Preliminary Objection, dated 3.10,2008. It raised the following grounds:-

(a) That the application for leave granted (apparently) under Misc. Civil Application No.25 of 2006, was incorrectly instituted, incurably defective, bad in law and incompetent because the leave was sought and granted in the name of the Republic.
(b) That the leave granted, was incompetent and of no legal consequences because the court had no jurisdiction to grant it on an application that was incompetent for want of proper form.
(c) That the application that granted the leave is now unammendable or unwithdrawable and is liable only for striking out.

The counsel for both the interested parties and the ex parte applicant argued the preliminary objection points on 21.2.2011.

Mr Kraido for the interested party, argued that the application for leave to file a Notice of Motion seeking judicial review orders should have shown, the parties as the “Ex parte applicant”. He asserted that “Republic” should not have been shown as the applicant. Mr Kiraido then referred to the popular case of **Mohamed Ahmed v R (1957) E.A, page 523 and the Farmers Bus Services & others versus Transport Licensing Appeal Tribunal (1959) E.A, 779**. His argument was that in both cases, the application for leave to apply for judicial review orders, did not show or include the “Republic” as a party

and that they showed the Ex Parte applicant as the applicant at that initial stage. He further argued that only after the leave has been granted should the relevant Notice of Motion include the "Republic" as the applicant and the ex parte applicant, as ex parte applicant.

Mr Kiraido accordingly concluded that the application under which the court granted the leave, was incurably defective and the leave there under granted was itself null and void ab initio. That the Notice of Motion seeking judicial review orders aforementioned was filed with a "leave" which is not a "leave" and was therefore also incurably incompetent and should be struck out. Moreover, Mr Kiraido argued, since the defective leave application was exhausted during the hearing, it does not exist presently for the purpose of amendment.

Mr Makali for the ex parte applicant saw it a different way. He argued that a substantive application such as the Chamber Summons under which the leave was granted, and the leave itself, cannot possibly be set aside or be nullified by a mere preliminary objection. A substantive formal application to do so, was mandatorily required in order to achieve the purpose of the objector herein.

The second point by Mr Makali, if I understood him sufficiently, was that the granting of a leave aforesaid was done meritoriously after the court which had jurisdiction to grant it, considered the facts and the law placed before it. The leave cannot therefore at this stage, be set aside by another similar court which has no factual benefit or exposure that the sitting court had. Nor can the latter court appear to sit on appeal on the earlier similar court

The third point raised by Mr Makali is, that once a leave has been granted, under Order 53, on merit, it can only be set aside on merit through a substantive application or appeal to a higher court.

In respect to the instituting of the leave application, Mr Makali argued that all applications under Order 53, as was the said application, are presumed as brought by the Republic and must include the Republic as the applicant.

Mr Makali, then urged, that even if this court were to find the title used in the leave application to be incorrect, it still has power to grant leave to amend it to correct it, especially in respect to a merely technical issue, which does not go to the root or substance of the specific point in issue.

I will first deal with the Respondent's first ground of objection – that the Ex Parte Applicant's Notice of Motion for a judicial review order is incorrectly instituted, incurably defective, bad in law and incompetent for seeking leave and obtaining the leave in the name of the "***Republic"*** instead of its own name. Mr Kiraido made reference to the cases of **Farmers Bus Services and others v Transport Licensing Appeal Tribunal (1957) 1 EA, 779 and Mohamed Ahmed v R (1959) 1 EA, 523**, to demonstrate his point.

I have carefully perused the case reports above. What I gather from Mr Kiraido 's argument is that the applicant obtained leave through an application showing the ***"Republic"*** when at that stage the ex parte applicant should have shown himself as the applicant. Effectively therefore, Mr Kiraido was saying that there was a serious misjoinder of the ***"Republic"*** and a non-joinder of the ex parte applicant. He argued that this was a matter which went to the root or substance of the application rendering it incurably incompetent.

First, I do not lend credence to Mr Kiraido's argument that at that stage the ***"Republic"*** is not a party. In my view all proceedings under Order 53 of the Civil Procedure Rules are special proceedings. The judicial review orders are specifically declared not to be available or issuable, except through the manner therein provided. The Order does not categorically state that application for leave to seek a judicial review order must first be sought privately and separately before the Republic becomes a party through which the ex parte applicant can then sue. Nor is the process of seeking the said leave a separate process outside the said Order. Indeed, the process of seeking relief is a one continuous process which starts with leave application through to the issuance of a judicial order. In my view and finding therefore, the applicant herein was not wrong in procedure in bringing the leave application in the name of the ***Republic***.

If I am wrong in my above finding however, I would still find no reason to disturb the propriety of granting the "leave" which the court granted. This is because irregularity, if there was any, of bringing the Chamber Summons for leave in the name of the "***Republic",*** did not go to the substance or root of the process. In particular, I would hold that since Order 53 does not specifically lay down the actual form which should be used in the Chamber Summons for leave, the one used by the applicant herein cannot be easily condemned, so long as the substantive matters or issues required to be included were actually, included. I have not heard the respondent/objector state that such matters were not included or placed before the court by the form of the application used.

The principle involved was indeed aptly stated in **Shah v Resident Magistrate, Nairobi (2000) 1 EA 208 at 210** as follows:-

"**On the authority of the decision of the Court of Appeal for Eastern Africa, in *Mohamed Ahmed v R (1959) 1 EA 523*, in which that court allowed an appeal to proceed to hearing, despite the misjoinder of parties, and following the decision of that court in the case of *Farmers Bus Services and Others v Transport Licensing Appeal Tribunal (1957) 1 EA 779*, we were of the view that the misjoinder of the Attorney general and the Resident Magistrate and the non-joinder of the Chief Magistrate, Nairobi, were irregularities which were curable by amendment to the title to the application for leave to apply for an order of prohibition if the applicant's intended appeal was successful"**

It follows accordingly that if the applicant's Chamber Summons seeking leave was irregular, which I have ruled it was not, then this court has got power and discretion to allow an amendment to the same to regularize it, just as the appellate court did in the immediately aforecited case.

There is however another reason why the amendment discussed above may not become necessary. In my understanding the granting of any leave to file an application seeking a judicial review order, technicalities and formalities aside, is based on the facts and issues raised in the Chamber Summons before the specific court. The Chamber Summons must show arguable issues of fact or law or both which are intended to be canvassed in the intended application for the judicial review orders. The court granting the leave accordingly will do so on some prima facie merit and not merely as a formality.

How then, will the same or similar court find it easy later to set aside the leave so granted without trampling on the principle of jurisdiction in that the later court will appear to be sitting on appeal on the earlier court that granted the leave? In the earlier cited case of **Shah v Midco Holdings Ltd (2000) 1 EA, 208 (CAK),** the High Court Judge who had granted such leave purported to undo the granting of the leave without a formal application to that end and without giving reasons for purporting to exercise such discretion. The Court of Appeal ruled that:-

" Her decision thereafter to send the file and the very same application for leave, for hearing by another Judge of co-ordinate jurisdiction, was without foundation in as much as the order granting leave to the applicants could not be set aside by the Learned Judge without an application for that purpose".

The court further, expressed doubt over the point whether the same Judge or the co-ordinate Judge had propriety to embark on the further hearing of the application to probably end up either granting or refusing the leave which had earlier been granted. The case also asserted that a formal application will be required to invoke the jurisdiction and discretion of the court that intends to question or review the leave

earlier granted.
In **Njuguna v Minister for Agriculture (2000) 1 EA, 184 (CAK)** the court, though per curiam, also state that:-

> **"The appropriate procedure for the challenging of leave which has already been granted is to apply under the inherent jurisdiction of the court, to the Judge who granted the leave, to set it aside".**

It was further explained in **Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Kilach (2003) KLR 262** that the main basic reason why the court that granted leave to apply for a judicial review order has jurisdiction to revisit it to review or set it aside, is because the order is ex parte by its nature. Some of such orders are ex parte due to the urgency under which they are granted while others, like the one granted under Order 53, is ex parte because the statute makes it so. The practice, however, is that while the former can usually only be revisited for reviewing it because it was granted ex parte, the latter can be revisited both for review, as well as appealing against it by virtue of the provisions of the Law Reform Act which created judicial review orders.

It will once more be stressed however, that power and jurisdiction to revisit to review, a leave earlier granted, is not only rare but is discretion that is to be exercised sparingly and in very clear-cut cases. It was further stated by the Court of Appeal, in **Aga Khan Education Service Kenya v Republic and Others (2004) 1EA 1 (CAK) at page 5 as follows;-**

> "**…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 be contended that Judges of the superior court grant leave as a matter of course……".**

In the case before me the Judge who granted the leave, in my view did so on some prima facie merit. This court has no reason, and none has been given by the respondent, to revisit the same to review it or set it aside, considering the limited jurisdiction that is available to this court in such cases.

The general conclusion I come to therefore, is that the leave granted by this court under the Chamber Summons dated 1.3.2006 to file the Notice of Motion that followed, which is now before this court was competent. It also follows accordingly that the Notice of Motion aforestated is competent and fit to go into hearing.

The grounds of preliminary objection have no merit accordingly. They are hereby rejected. Costs are to the Ex Parte applicant.
Orders accordingly.

Dated and delivered at Bungoma this 25th day of may 2011.

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D.A. ONYANCHA
JUDGE