



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
JUDICIAL REVIEW No. 27 OF 2011

BONIFACE MULAMA.....1ST APPLICANT

GIDEON KYALO KAVOO.....2ND APPLICANT

MICHAEL MULWA.....3RD APPLICANT

VERSUS

KENYA ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

THE CHIEF MAGISTRATE’S COURT AT EMBU.....4TH RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY.....INTERESTED PARTY

R U L I N G

When the *ex-parte* Applicants were served with bonds by the Kenya Anti-Corruption Commission (the 1st Respondent) to appear before the Chief Magistrate’s Court at Embu (4th Respondent) to be charged with unlawful disclosure of confidential information relating to evaluation of tenders under sections 44(1) (c), 44(4) and 137(1)(a) of the Public Procurement and Disposal Act No.3 of 2005, they came before this court seeking leave to bring judicial review proceedings in the nature of Certiorari and Prohibition to quash the decision to charge them and to prohibit the preferring of the charges. They also sought that the leave granted do operate as a stay. The application was eventually heard *inter-partes* by Justice Dulu who on 19th May 2011 granted leave to bring proceedings in the nature of Certiorari. The *ex-parte* Applicants had withdrawn the request in respect of the order of Prohibition. There was withdrawal because charges had already been filed in court and the criminal proceedings had

begun. Regarding the issue whether the leave granted would operate as a stay of the criminal proceedings, the court observed that the court hearing the criminal case had not been named as a party to the judicial review application and therefore stay would not be granted.

What the *ex-parte* Applicants have done is to amend the same application for leave by seeking both the orders of Certiorari and Prohibition and to seek that the leave does operate as a stay of the now pending criminal proceedings. The amended summons have now named the Attorney General, the Director of Public Prosecutions and the Chief Magistrate at Embu as parties. They have also amended the statutory statement to include the parties and the prayers. The ground upon which the application is being made is that stay was not granted with the leave and that was because they had not named the Chief Magistrate and that the request had therefore been overtaken by events. Without stay, it was deponed, the *ex-parte* Applicants shall be hamstrung, manacled, prejudiced and unable to present a coherent and substantial case.

I asked that this application be served for *inter-parte* hearing. The 1st Respondent responded through its advocate Mr. Waudo by filing a notice of preliminary objection whose grounds were that the court lacked jurisdiction to entertain the application because a similar application had been heard and leave granted; and that the application was incurably defective. Counsel prosecuted this objection which Mr. Amolo for the *ex-parte* Applicants defended.

The Application was stated to be brought under order 54 rules 1 and 4 of the Civil Procedure Rules. Mr. Waudo correctly pointed out, and Mr. Amolo conceded that, the jurisdiction to bring judicial review proceedings is conferred by sections 8 and 9 of the Law Reform Act (Cap.26) and Order 53 of the Civil Procedure Rules. Order 54 deals with the revocation of the previous Civil Procedure Rules and also with transitional provisions. Mr. Amolo submitted that Order 54 had been invoked out of plain human error which error could be rectified by the court using its inherent powers. I suppose that counsel was making reference to section 3A of the Civil Procedure Act. Counsel also invoked Article 159(2)(d) of the Constitution of Kenya, 2010. Mr Waudo relied on the decisions in **LITHOTECH EXPORTS (PTY) LIMITED –V- ELECTORAL COMMISSION OF KENYA HC MISC. CIVIL APPLICATION NO. 999 OF 2007 AT NAIROBI** and **PETER GITAHU KAMAITHA –V- SECRETARY, PUBLIC SERVICE COMMISSION AND OTHERS HC. JR. NO.22 OF 2009 AT NYERI** to submit that the application was incurably defective when it was grounded on Order 54 and could not be cured by the belated attempt to rely on the inherent powers of the court or on the Articles of the Constitution. My view is that it is now settled that judicial review proceedings are a special kind of proceedings under sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules and it was therefore incompetent to invoke section 3A of the Civil Procedure Act or any other provisions of the Act and Rules. It was equally incompetent to invoke the provisions of the Constitution. The result is that jurisdiction of the court has not been properly invoked.

But the more serious issue regards whether or not the court has jurisdiction to reopen the issue of leave or stay. The *ex-parte* Applicant obtained leave to bring judicial review proceedings in the nature of Certiorari. They had withdrawn the request for leave for an order of Prohibition. The request that the leave operates as a stay was declined. This followed the *inter-parte* hearing of the application. Where does the court get the powers to re-open the issue of either leave or stay? Secondly, under Order 53 rule 4(2) the court may allow a statement to be amended but that has to be during the hearing of the substantive motion. Such motion has not come for hearing. There is no provision that allows the amendment of the statement during the hearing of the summons for leave. Further, there is nowhere under Order 53 that the amendment of either the summons or the motion is provided for.

The result is that the application is incompetent and incurably defective. It is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 7TH DAY OF SEPTEMBER 2011.

A.O. MUCHELULE

JUDGE