REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO.23 OF 2009

IN THE MATTER OF AN APPLICATION BY BEAUTY LINE LIMITED FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW IN THE NATURE OF AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ORDER LIII CIVIL PROCEDURE RULES, CAP 21 LAWS OF KENYA

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 AND ALL THE ENABLING PROVISIONS OF THE LAW

IN THE MATTER OF THE JUDGMENT AND DECREE OF HON. JENIFFER THUITA WRITTEN WHILE UNDER INTERDICTION AND DELIVERED BY HON. ONYIEGO (PM) IN NAKURU CMCC NO.886 OF 2006 – JOSEPH NGOMERO VS JAMES MBUGUA & BEAUTY LINE LTD.

BETWEEN

JAMES MBUGUA

BEAUTY LINE LTD.....APPLICANTS

AND

CHIEF MAGISTRATE COURT, NAK.....1ST RESPONDENT
JENNIFER THUITA.....2ND RESPONDENT
HON. ONYIEGO.....3RD RESPONDENT
REGISTRAR, HIGH COURT OF KENYA.....4TH RESPONDENT

AND

JOSEPH NGOMERO.....INTRESTED PARTY

RULING

A notice of preliminary objection was filed by the interested party on 4th September, 2009, giving notice of three points of objection to the application for judicial review. The three points relate to the affidavits filed with the application, the notice annexed to the application and the fact that the impugned judgment

has been settled in full.

Before I set out the arguments in respect of the objection it is necessary to give a brief outline of the application. Leave to bring a substantive motion having been granted the applicants, James Mbugua and Beauty Line Limited brought a motion challenging the judgment of Jenniffer Thuita, then a Senior Principal Magistrate delivered on her behalf following her interdiction on 7th August, 2008 by Mr. Onyiego, Principal Magistrate. Both Ms Thuita and Mr. Onyiego are named in the application as 2nd and 3rd respondents. Also sued are the Chief Magistrate, Nakuru (1st respondent) and the Registrar, High Court (4th Respondent). The applicant's contention in the motion is that the judgment written by Ms Thuita was delivered by Mr. Onyiego during the period the former was under interdiction contrary to the provisions of the **Magistrate's Courts Act** and was for that reason a nullity. The applicant seeks the quashing of the judgment.

Arguing the notice of preliminary objection, counsel for the interested party addressed only two issues; that the judgment has been satisfied fully and certiorari for that reason is not available to the applicant. Secondly, he submitted that the applicant having filed an appeal in the High Court to challenge the judgment in question, it was an abuse of the court process to bring this application for judicial review.

In response counsel for the applicant conceded the existence of an appeal in the High court but argued that while this application challenges the process, the appeal challenges the merit of the decision. He also admitted that there has been execution of the decree.

I have considered the submissions and hold the following view of the matter.

This being a preliminary objection it must relate to a pure point of law, which if argued as such is capable of disposing of the suit. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

See **Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd** (1968) EA 696.

The two points raised in this objection are clearly points of law which if argued successfully are able to dispose of the suit. They raise the question of jurisdiction.

I start with the last point, that the applicant has challenged the decision of the court below on appeal. It is trite learning and as a general rule the existence of an alternative remedy *perse* is no bar to institution of judicial review application. But before a litigant decides to institute judicial review proceedings he must satisfy himself that it is the most efficacious remedy in the circumstances.

In the case of **R v Birmingham City Council exparte Ferrero Ltd** (1993) 1 All ER 530 it was held that:

"Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only exceptionally that judicial review would be granted. In determining whether an exception should be made and judicial review granted it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory provisions was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it"

A similar sentiment was expressed in **R v Horsham District Commission exparte Wenmah** (1995) 1 WLR 680.

Locally in the case of the **Speaker of National Assembly v Njenga Karume** (1990-94) EA 546 the Court of Appeal said:

"Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Order 53 cannot oust clear constitutional and statutory provisions."

Clearly after the applicant elected the option of an appeal and has indeed filed a Memorandum of Appeal in Nakuru High Court **Civil Appeal No.170 of 2008**, it is an abuse of the process of the court to have to burden the court with this application.

Indeed ground 5 of the appeal challenges the judgment on the very ground raised in this application. That is sufficient point to dispose of this matter and I have no intention of considering the 1st ground. The objection is sustained. The application is struck out with costs.

Dated, Signed and Delivered at Nakuru this 26th day of July, 2010.

W. OUKO

JUDGE