REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS CIVIL APPLICTAION NO. 12 OF 2010

REPUBLIC ……APPLICANT

VERSUS

KENYA ANTI-CORRUPTION COMISSION …..1ST RESPONDENT

HON. ATTORNEY GENERAL …….2ND RESPONDENT

AND

CROSSLEY HOLDINGS LTD ……..…….EX-PARTE

(On Preliminary Objection)

RULING

The Notice of Preliminary Objection dated 27th October 2010 was filed by the first respondent, Kenya Anti-Corruption Commission. It raises four grounds of objection to the hearing of the application by the applicant, **Crossley Holdings Ltd**, dated 29th September 2010.

The application is by way of a notice of motion and is made pursuant to Order 50 Rule 1, Order 53 Rule 4 of the Civil Procedure Rules. Section 1A, 1 B and 3A of the Civil Procedure Act and the Constitution of Kenya. The application was filed under certificate of urgency and was heard ex-parte in the first instance on the 30th September 2010 when interim orders in terms of prayer (2) and (3) of the application were granted.

Prayer (2) was to the effect that:-

"Pending inter-parties hearing of this application, this Honourable Court be pleased to grant a temporary order re-instating the stay order in terms of the order granted on 11th February 2010 directed at the respondents in respect of the report, findings, recommendations and decisions set out by the KACC in its report in Gazette Notice No. 353 of 2010 published in the Kenya Gazette of 15th January 2010 on page 94 in paragraph KACC /INQ/AT/08/2008 (a)relating to the applicant Crossley Holdings Ltd, its directors, servants and any other person affected by the said Report".

Prayer (3) was that:-

"Pending inter-parties hearing of this application this Honourable Court be pleased to grant a temporary order of stay of proceedings in Kisumu CM's Criminal Case No. 429 of 2010, Republic =vs= Ian Gakoi Maina & others arising from the report, findings, recommendations and decisions set out by the KACC in its report Gazette Notice No. 353 of 2010 published in the Kenya Gazette of 15th January 2010 on page 94 in paragraph KACC/INQ/AT/08/2008 (a) relating to the applicant, Crossley Holdings Ltd, its directors, servants and any other person affected by the said report".

Prayer (4) and (5) are for the confirmation of the aforementioned prayers but to operate pending the hearing and determination of the notice of motion dated 2nd March 2010 which was filed pursuant to leave granted by this court on the 11th February 2010.

The leave granted was to operate as stay. However, the stay order was vacated on the 20th September 2010. The application dated the 29th September 2010 is intended to have the stay order granted on 11th February 2010 and vacated on 20th September 2010 reinstated. This explains the reason for the preliminary objection to the application by the first respondent.

Learned Counsel **Mr. Olola**, argued the objection on behalf of the first respondent while learned counsel, **Mr. Nowrojee**, opposed it on behalf of the applicant.

The learned Assistant Deputy Public Prosecutor **Mr. Gumo**, appeared for the second respondent and the Learned Counsel, **Mr. Bundotich**, appeared for the proposed interested party.

Both Mr. Gumo and Mr. Bundotich associated themselves with the first respondent's submissions in support of the objection. Mr. Bundotich is however, yet to attain the necessary "**locus – standi**" in this matter.

In his submissions, Mr. Olola stated that this court had no jurisdiction to entertain the application dated 29th September 2010 or even to grant the ex-parte orders sought therein as jurisdiction is conferred by law and the application filed on 11th February 2010 was for judicial review orders and was made under the court's special jurisdiction conferred by Section 8 and 9 of the Law Reform Act. Therefore, the court could not purport to sit in exercise of its criminal and civil jurisdiction under the civil procedure provisions in a judicial review matter. In that regard, reference was made to the decision in the case of **Commissioner of Lands =vs= Kunste Hotel Ltd [1995 – 98] 1EA 1.**

Mr. Olola submitted that the application dated 29th September 2010 is improperly brought under Order 50 and 53 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act as well as the Constitution of Kenya. He therefore contended that the application is fatally defective and ought to be struck out at this point. It was also submitted by Mr. Olola, that the order made by this court on the 20th September 2010 was a final order. Therefore, this court became "**functus officio**" and could not have granted orders which it vacated.

Mr. Olola made reference to the decision in the case of **Mohamed Noor =vs= Attorney General Civil Appeal No. 800 of 2007** and contended that where a court finds an irregularity, it ought to vacate irregular orders in the interest of justice. He reiterated that the disputed application is an omnibus application as it is brought under the Civil Procedure Rules other than Order 53. He pointed out that the Constitution is cited but not the specific provisions. Mr. Olola, wondered what was to be stayed as the application seeks a reinstatement of previous orders which had been issued before the applicants and others were charged in a criminal case which was due for hearing on 8th November 2010 and which was preferred after the stay order was discharged on the 20th September 2010. Therefore, the order being sought in relation thereto cannot be granted.

In conclusion Mr. Olola urged this court to strike out the orders granted ex-part on the 30th September 2010.

On behalf of the applicant, Mr. Nowrojee submitted that ground one of the objection does not specify why the application is bad in law or it is misconceived or it is a gross abuse of the court process. Further, the ground does not comply with grounds for a preliminary objection. In that regard, reference was made to a quotation from the decision in **Rangal Lameiguran & others –vs Attorney General High Court Civil Application No. 305 of 2004**. However, the first respondent objected to the reliance on the quotation without production of the entire decision and intimated that it would not accept an undertaking from Mr. Nowrojee that the decision would be availed at a later stage.

The court upheld the objection by asking Mr. Nowrojee to withhold his submissions on the basis of the quotation until such time that the full decision is availed. The full decision was never availed during or at the Conclusion of the applicant's submissions.

Be that as it may, Mr. Nowrojee continued to submit that ground one is not a preliminary objection as it has not been particularized and has to be substantiated so that it is known what is bad in law.

Mr. Nowrojee, submitted that if grounds two, three and four are the reasons for ground one then ground one is the conclusion dependant on grounds two, three and four and therefore not an objection in itself.

On ground two, Mr. Nowrojee, submitted that the application dated 29th September 2010 was made within the judicial review and was made by a party standing as the first applicant. The court may refuse or grant the application but it is certainly seized of the jurisdiction to consider the application.

Mr. Nowrojee went on to submit that no law was cited to show that a court cannot hear an application in this matter.

In conceding that the Civil Procedure Act does not apply in judicial review, Mr. Nowrojee, stated that the notice of motion also cites the inherent jurisdiction of the court which is invoked along with Order 53 of the Civil Procedure Rules.

Mr. Nowrojee contended that this court has jurisdiction to deal with this matter and that the orders of stay were against a subordinate court. In that regard, reference was made to the decision in **Guthunguri =vs= Republic 1986 KLR 1.**

On ground three, Mr. Nowrojee submitted that a party granted leave to appeal is not precluded from applying to the same court to vacate an order. Therefore the aspect of "functus –officio" would not apply.

Mr. Nowrojee, submitted that no authorities were provided showing why and how on a fresh application the court is "functus –officio". Further, the court has not acted on its own motion nor did it act on its own motion after the decision made on 20th September 2010 vacating the stay order.

Mr. Nowrojee contended that the court acted upon afresh application by a party to the proceedings. The determination of the application does not create "functus-officio" as there is no final determination of the judicial review neither is there a final order. No application has been made by the respondent to set aside the orders granted ex-parte. Mr. Nowrojee , further submitted that the court has inherent powers unless there is a final order and even where there is a final order, the court may recall the order in appropriate circumstances. Also Order 53 of the Civil Procedure Rules does not prevent the application and order objected to.

Mr. Nowrojee contended that it is a practice for an aggrieved person to apply to the court to vacate orders made against him and if an application can be granted inter-partes it can only be granted ex-parte.

On ground four, Nowrojee submitted that it is not a preliminary objection but a submission. It is an expression by the respondent that something is unjust and that orders be vacated. It contains prayers and arguments and is suitable as a reply and is indeed a reply.

In his rejoinder, Mr. Olola, contended that it has been shown why the application is bad in law and

misconceived. That the applicant has cited Order 53 Rule 4 of the Civil Procedure Rules which does not exist. That, there is no proper application before this court that the applicant applied for leave to appeal yet came back later and asked for reinstatement of the vacated Order. That, the application is not grounded on the original application filed in February 2010. That, the court dealt with stay at the stage of granting leave and having set aside the stay order, it is "functus-officio" with regard to the stay. That, the court has jurisdiction in the interest of justice to set aside orders irregularly obtained. That, the case of Guthuguri dealt with the High Court's supervisory role on other tribunals. That Section 8 and 9 of the Law Reform Act do not confer jurisdiction in this matter and that no law has been cited showing that the court has authority to reverse its orders.

The first issue that emerges for determination from the foregoing submissions by both the applicant and the first respondent is whether the notice of preliminary objection raises points of law.

In the case of **Oraro =vs= Mbaja [2005] 1KLR 149**, the High Court (Ojwang. J) examined the principle laid down in the case of **Mukisa Biscuit Manufacturing Co Ltd =vs= West End Distributors Ltd [1967] EA 696** and made the following observation:-

"I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified and declared to be a point of law, which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principal, a true preliminary objection which the court should allow to proceed ……..... where a court needs to investigate facts, a matter cannot be **raised as a preliminary point".**

Undoubtedly, the Mukisa Biscuit case (supra) is the leading decision on preliminary objections and is more often than not cited with approval in most application on the subject. The celebrated statement was that made by **Sir Charles Newbold. P** when he said:-

"**The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and on occasion confuse the issues. This improper practice should stop".**

In the same case Law J. A. stated that:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit refer the dispute to arbitration".

This court readily agrees with the observations made by Ojwang. J in the Oraro case (supra). What comes out clearly from the Mukisa Biscuits case is that the courts would more often than not frown at preliminary objections which do not raise pure points of law.

Therefore, in applying the principle laid down in the Mukisa Biscuits case, this court would find that other than ground four of the notice of preliminary objection by the first respondent, the rest of the grounds are based on points of law. Mr. Nowrojee, rightly noted that ground four is not a preliminary objection in as much as it is a submission laden with arguments and prayers.

Although ground one does not state the particulars as it should, it does raise issues of law on the legal validity and sustainability of the material application. Ideally, a preliminary objection should set out the

exact points of law being taken up with details or clarity so that the court and the other party may know and understand from the outset, the issues of law involved.

In the case of **Kashibai =vs= Sempagama [1967] EA 16**, the High court in Uganda (Bennett. J) stated that:-

"**Where the defendant contends that the suit or application is misconceived he must specify or particularize why he contends that the suit or application is misconceived. If he relies on any facts for those purposes he must state those facts in his pleadings, if it is merely the position in law which he relied on he must set out with sufficient particulars the position in law upon which he ultimately bases his submission".**

Herein, the first respondent has endevoured to explain in its submissions why the material application is in its opinion bad in law. In the circumstances, ground one of the preliminary objection is proper for consideration by this court notwithstanding the failure to set out with sufficient particulars the position in law.

Ground two questions this court's jurisdiction in judicial review matters while ground three invokes the concept of "**functus-officio".** All these are issues of law.

As regards grounds two the objection is to the effect that this court in the exercise of its judicial review function has no jurisdiction to entertain the material application.

It was the contention by the first respondent that jurisdiction is conferred by law and that the judicial review application filed on 11th February 2010 was under the court's special jurisdiction donated by Section 8 and 9 of the Law reform Act. This contention reflects the actual position. In essence, the first respondent is saying that since this is a judicial review matter the court has no powers to hear and determine the application dated 29th September 2010 for reason that it is made under the Civil Procedure Rules. With respect to the first respondent, the contention is misplaced in so far as it is made in support of ground two of the objection rather than ground one.

In **Commissioners of land =vs= Kunste Hotel Ltd [1995-1998]** 1 EA1, it was indicated that Section 8 (1) of the law Reform Act denies the High Court the power to issue orders of mandamus prohibition and certiorari while exercising civil or criminal jurisdiction. Further, in exercising the power to issue or not to issue an order of certiorari, the court is neither exercising civil nor criminal jurisdiction but exercising special jurisdiction.

Section 8 (2) of the law Reform Act enabled the High Court in Kenya to issue orders of mandamus, prohibition and certiorari in situations where the High Court of Justice in England would have a similar power. By legal notice No. 164 of 1992 the heading **"Orders for mandamus prohibition and certiorari " was substituted for "applications for judicial Review".**

Being special, proceedings under Order 53 of the Civil Procedure Rules derive the force of law from the law Reform Act.Other than being misplaced, ground two of the objection cannot be sustained for reasons that firstly, the disputed application is made within the judicial review application. It is not an independent application. Its intention is clearly to have the stay order earlier granted by this court reinstated. The said stay order was granted within the judicial review application when an ex-parte application for leave to apply for judicial review orders was made on 11th February 2010. The order was subsequently vacated by this court on the 20th September 2010 when the actual judicial review application came up for hearing. The court acted on its own motion to vacate the order. If the order had not been vacated, the respondents in the application would have challenged the grant of the order at the hearing of the main application had they deemed it fit to do so. It would not have been open for them to challenge the jurisdiction of the court to grant or not to grant the order as the power to order leave to operate as stay of proceedings is given by Rule 1 (4) of Order 53 of the Civil Proceedings Rules. The stay order is provisional and therefore reviewable prior to the hearing and disposal of the substantive application.

In that regard, this court would associate itself with remarks made by the High Court (Khaminwa. J) in the case of **In the matter of Kenya Sugar Board MSA MISC APP No. 192 of 2004**, in that "**under the provisions of the law Reform Act Cap 26, Sections 8 and 9 and under Order 53 Rule (1) (4), the High Court has jurisdiction to review, vary, discharge or set aside orders of stay granted under sub-rule (4) and an aggrieved party has the option of returning to the judge who issued the orders or to file an appeal to the court of appeal".**

While Order 53 of the Civil Procedure Rules is the procedural law in judicial review applications, Section 8 and 9 of the law Reform Act provide the substantive law.

To go further and at the same time cover ground three of the objection, this court would pose the questions that follow:-

(a) If a stay order is provisional in terms of Order 53 Rule 1 (4) of the Civil Procedure Rules, how then can it be a final order for the concept of "functus-officio" to apply?

(b) If the court was not "functus-officio" when it vacated the stay order on the 20th September 2010, why would it be "functus-officio" in reinstating the same order on the 29th September 2010?.

Clearly, the argument by the first respondent that the court was "functus-officio" when it reinstated the stay order is self defeatist for the simple reason that the court having granted the stay order on 11th February 2010 was "functus-officio" when it vacated the order on 20th September 2010. Ground three of the objection is a misconception and cannot be sustained whatsoever.

The second reason why ground two cannot also be sustained is that it ought to be questioning the competence of the disputed application in as much as it is made within another application rather than the jurisdiction of this court to entertain the disputed application. This again would be a matter within ground one of the objection.

Ground one of the objection is to the effect that the disputed application is bad in law, misconceived and amounts to a gross abuse of the court process.

In the attempt to show that the application is bad in law and misconceived, the first respondent submitted that the appropriate notice of motion dated the 29th September 2010 was made pursuant to Order 50 and 53 of the Civil Procedure Rules, Sections 1A and 1B and 3A of the Civil Procedure Act and the Constitution of Kenya thereby resulting in an unpermissible mix of various provisions of the law.

The first respondent contend that to the extent that the provisions of Constitution and those of the Civil Procedure Rules other than Order 53 have been cited the application is fatally defective. Further, in so far as the application seeks a reinstatement, of previous order, there is nothing to stay as criminal charges were preferred against the applicants and others. The applicant readily conceded that the Civil Procedure Act does not apply to judicial review application but contended that the application is also made under Order 53 of the Civil Procedure Rules and the inherent powers of the court.

In effect, the applicant implied that the defect, if any, was not fatal and that in any event, the court has inherent powers to exercise jurisdiction over judicial review matters. The case of Githunguri [supra] was cited in that regard.

Basically, the acceptable position in law is that Civil Procedure Rules and the Civil Procedure Act do not apply to judicial review and by comparison the entire civil procedure.

The only part of the Civil Procedure Rules applicable to Judicial Review is Order 53 enacted pursuant to powers donated under Section 9 of the Law Reform Act. The law Reform Act is the force of law behind Order 53 of the Civil Procedure Rules such that proceedings under Order 53 are special proceedings (**See,**

the Hotel Kunste case [supra]). Being special in nature Order 53 Civil Procedure Rules as was rightly observed in the case of **Mr. Justice H. M. Ole Keiwua & Another =vs= Prof Yash Pal Ghai, chairman Constitution of Kenya Review Commission & two others High Court Misc Case No. 1110 of 2002,** stands on its own with its own Rules.

The aforementioned decision was by a two judge High Court Bench (Hayanga and Visram JJ). It was further stated therein that the Civil Procedure Rules do not apply to judicial review and that the fact is clearly acknowledged in Section 3 of the Civil Procedure Act which states that:-

"In the absence of any specific provision to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed by or under any other law for the time being in force".

This court agrees with the foregoing findings which affirmed the position that Order 53 of the Civil Procedure Rules create that special jurisdiction envisaged in Section 3 of the Civil Procedure Act, having its own rules and procedures.

Moving further in showing the acceptable legal position was the case of **Republic =vs= Kenya Bureau of Standards & 2 others [2006] e KLR,** in which the High Court (Nyamu J) [as he then was]) associated itself with the decision of the High Court [Ringera. J] in the case of **Welamondi =vs The Chairman Electoral Commission of Kenya [2002] 1KLR 486,** and stated:-

"It follows that the extent the application has invoked the Civil Procedure jurisdiction the application is incompetent and ought to be thrown out on this ground alone. However, the applicant has also invoked the inherent power of this court, Obviously, it is perfectly in order to invoke the jurisdiction especially in situations where no specific procedure has been provided by the parent Act i.e. the law Reform Act Cap 26 of the laws of Kenya or Order 53 in judicial review. But is it right, logical or proper for this courts inherent power to be invoked so as to apply the provisions of the Civil Procedure and Rules on contents of affidavit, where parliament has provided for what in many ways is an exclusive means to access the remedies of judicial orders? The answer to this is a clear "NO" because Judicial Review Jurisdiction is a special jurisdiction and was from its introduction intended to remain special and set apart from the other jurisdiction including the Civil Procedure Jurisdiction".

This court is in full agreement with the foregoing observation which is very powerful and is essentially a **"re-edition**" of the earlier similar position taken by the Court of Appeal in the Hotel Kunste case [supra].

In the Welamondi case [supra], the court held "inter-alia" that:-

(1) …….

(2) Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure which are invoked whenever orders of certiorari, mandamus and prohibition are sought in either criminal or civil proceedings.

(3) In exercising powers under Order 53 the court is exercising neither Civil nor a Criminal jurisdiction in the sense of the word. It is exercising jurisdiction "sui-generis". It therefore follows that it is incompetent to invoke the provisions of Section 3A and Order 1 Rule 8 of the Civil Procedure Act and Rules and Sections 42, 79 and 80 of the Constitution of Kenya.

In **Ako =vs= Special District Commissioner Kisumu & Another [1989] KLR 163**, the Court of Appeal observed that "Prohibition is statutory and absolute and is not therefore challengeable under procedural provisions of the Civil Procedure Rules……." In **Republic =vs= Communications Commission of Kenya ex-parte East African Television Network ltd [2001] KLR 82**, the Court of Appeal held that the power to issue judicial review orders of mandamus prohibition and certiorari is given to the High Court by a separate Act of parliament namely the Law Reform Act. Sections 8 and 9 of the Law Reform Act

set out in full the circumstances under which the High Court is entitled to issue the orders and what factors the High Court is bound to take into account. The law Reform Act does not say that these provisions are subject to the provisions of any other Act of parliament. The High Court sitting as a three Bench Constitutional Court in the case of **Republic =vs= Commissioner of Police ex-parte Karia [2004], 2 KLR 506,** when confronted with a notice of motion brought under Section 8 and 9 of the Law reform Act, Order 50 & Order 52 of the Civil Procedure Rules, Sections 60, 70 and 75 of the Constitution, Section 6 & 7 of the Civil Procedure Act, the inherent jurisdiction of the court and all other enabling provisions of Law had the following to say:-

"……it is improper for the applicant to have combined judicial review application with a constitutional application.

(i) Because both judicial review jurisdiction and constitutional jurisdiction are special and each jurisdiction has a set of special rules. The first jurisdiction is donated by an Act of Parliament namely the Law Reform Act Cap 26 and the second constitutional jurisdiction springs directly from the Constitution itself with rules made pursuant to Section 84 (6) of the Constitution.

(ii) The Constitution is the supreme law and all other laws must conform to the Constitution. The rules of interpretation are different and the methods of amendment or repeal of ordinary laws are different from those of the ordinary Acts of parliament. See Njoya & 6 others =vs= Attorney General & 3 others (No. 2) (2004) 1KLR 261.

(iii) At the moment although desirable it is not statutory possible in judicial review proceedings to grant declarations, injunctions and damages whereas under Section 84 of the Constitution, the court has a wide discretion to grant such orders as may be appropriate.

A combination as in this case unnecessarily muddles up and confuses both the parties and the court and we hold that such a combination is fatal to the application as well.

The court of Appeal had occasion to make a finding on the importance of adhering to the prescribed rules in the case of Speaker of the **National Assembly =vs= Njenga Karume Civil Application 92 of 1992** in these words:-

"In our view, there is considerable merit in the submission that where there is clear procedure for re-dress of any particular grievance prescribed by the Constitution or an Act of parliament that procedure should be strictly followed".

It is clear from all the foregoing authorities that the ordinary provisions of the Civil Procedure Act and Rules do not apply in Judicial Review. Neither do the provisions of the Constitution (New or Old) nor the inherent powers of the court donated by Section 3A of the Civil Procedure Act.

Consequently, a combination of provisions applicable to Judicial Review with those not applicable to Judicial Review such as in the present circumstances would be improper.

There is no place for a mixed grill of the Constitution, the Civil Procedure Act and the Judicial Review. The notice of motion dated 29th September 2010 is defective as presented. If allowed to stand, it would be misconceived.

It is also doubtful whether a notice of motion can be filed within a notice of motion. In the case of **Abercrombie & Kent Ltd & others =vs= Republic Civil Application No. 195 of 1994,** the Court of Appeal found it strange that a notice of motion was filed within a notice of motion.

In sum, the first ground of the preliminary objection is merited to the extent that the applicant's notice of motion dated 29th September 2010 be and is hereby struck out for being incompetent and misconceived but without prejudice to the applicant's right to properly apply for the reinstatement of the stay order during the hearing of the substantive notice of motion dated 2nd March 2010 on a date to be agreed here

and now between the parties and in any event, prior to the forthcoming vacation of the superior courts. Since leave granted ex-parte may be challenged at the hearing of the substantive application, it would follow that an order of stay may also be challenged at the time. Similarly, re-instatement of a stay order vacated prior to the hearing of the substantive application may be applied for at the time of the hearing.

Delivered, dated and Signed at Kisumu this 16th day of November 2010

J. R. KARANJA
J U D G E

JRK/aao