



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

MISC. APP.NO. 65 OF 2008 (JR)

IN THE MATTER OF AN APPLICATION BY REUBEN CHERUIYOT YEGON AND EZEKIEL KIPKOECH RONO

FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

**REPUBLIC.....
APPLICANT**

AND

**THE CHAIRMAN CIS-MARA CONTROL BOARD & 9 OTHERS.....1ST
RESPONDENT**

RULING

In their Preliminary Objection dated 25th May, 2010, the 5th, 8th to 10th Respondents in these judicial review proceedings urged the court to strike out the Notice of Motion filed herein pursuant to **Rule 3 of Order 53** of the Civil Procedure Rules by **Messrs Reuben Cheruiyot Yegon, Ezekiel Kipkoech Rono**, the ex parte Applicants. The said Respondents stated in the Preliminary objection thus:

1. *That Judicial Review applications are applications against Public bodies wherein the Attorney General must be enjoined as a party. The Attorney General has not been enjoined in the instant application.*
2. *That failure to enjoin the Attorney General makes the instant application fatally defective and incurably incompetent.*

3. That the 1st -4th Respondents are Public bodies and officers which can only be represented in this court through the inclusion of the Attorney General.
4. That further proceedings herein amounts to an abuse of the court process since the issue in dispute had been determined by this court in its Ruling dated 8th July, 2009.
5. That the 2nd ex parte Applicant “Ezekiel Kipkoech Rono” is a non-existent person and there is an ongoing criminal case regarding the forgery of the name “Ezekiel Kipkoech Rono”.
6. That the application herein lacks merits and ought to be struck out in limine with costs on a higher scale.

In his submission on 8th November, 2010, Mr. Amadi, Learned Counsel for the said Respondents urged the court to strike out the application by Notice of Motion dated 22nd May, 2007 because the Attorney General had not been joined or given Notice under **Section 13A** of the **Government Proceedings Act**.

In reply, Mr. W.R. Kiprono, learned Counsel for the ex parte Applicants contended that the Attorney General did not have to be joined because **Section 13A** of the **Government Proceedings Act** does not apply to Judicial Review proceedings under the **Law Reform Act, Cap 26**. He contended that judicial review proceedings are not subject to the Civil Procedure Act.

I have perused the Notice of Objection and considered the submissions of both counsel. Applications for orders of certiorari, mandamus or prohibition are not proceedings against the state as a legal or corporate entity. They are against public bodies and public officers. The law governing proceedings in judicial review for orders of mandamus, certiorari, and prohibition is found in the Constitution and **Section 8** of the **Law Reform Act, Cap 26**. The authority of the court is derived from **Section 165(6)** of the Constitution which vests in the High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function (**but not over a superior court**). **Section 165(6)** of the Constitution states:

Section 165(6) “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”

The argument that judicial review proceedings are bad unless the Attorney General is made a party does not hold water. If that were so, the right to challenge executive action and public excesses would undermine and whittled down to meaninglessness the Constitutional right under **Section 165(6)**. At any rate, it would be preposterous to argue that the act of challenging executive or public action would be rendered bad unless the Attorney General is made a party. One must bear in mind that the orders of mandamus, prohibition and certiorari relate to public law as opposed to private law. Judicial review proceedings are not concerned with private rights or merits of decisions of inferior bodies or tribunals but rather with public rights and decision making process. The High Court is entrusted under the law with the task of ensuring that an individual does receive fair treatment and that the authority concerned does act within the law. As was said by **Lord Atkin** in **R.V. Electricity Commissioners [1924] 1KB171**, **“whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law which affects the common law or statutory rights of other persons as individuals, it is amenable to the remedy of judicial review of its decision either for error of law in so acting or for failure to act fairly towards the person who will be adversely affected”**.

Contrary to the contention in the Preliminary Objection, the process of judicial review seeks to address the legality of the decisions by public bodies Authorities or executive action with a view to promoting public interest in good administration by ensuring that public bodies and authorities do not act outside the

plenitude of their legal authority or with impunity. The argument that judicial proceedings sanctioned by the Constitution would be rendered bad in law if the Attorney General is not joined is incorrect. The correct position is that the Attorney General is not a necessary party. As the Government legal adviser, the Attorney General is entitled to represent public officers in judicial proceedings just like any other advocate would a client. In tortuous actions against the Government, the Attorney General is entitled under **Section 13A** of the Government Proceedings Act to be given notice of intended legal action and to be joined as a Defendant or Respondent. **Section 13A** of the Government proceedings Act does not apply to proceedings under the provisions of **Section 8** of the **Law Reform Act**.

The Preliminary Objection has no merit. I dismiss it with costs.

DATED at **KERICHO** this 8th day of December 2010

G.B.M. KARIUKI, SC

RESIDENT JUDGE

C OUNSEL APPEARING

Mr. Kiprono Advocate for ex parte applicant

Mr. Amadi Advocate for Kenta Moitalel for 5th to 10th Respondent.

No appearance by P.W. Nguyo for 1st to 4th Respondents

Court Clerk – Mr. Bett