



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
MISC. APPLI. 186 OF 2006

JOHN HARUN MWAU.....APPLICANT

VERSUS

DR. ANDREW K. MULLEI.....1ST RESPONDENT

CENTRAL BANK OF KENYA.....2ND RESPONDENT

MINISTER OF FINANCE.....3RD RESPONDENT

CLERK TO THE NATIONAL ASSEMBLY.....4TH RESPONDENT

JUDGMENT

This is a Judicial Review application, dated 18th April 2006, brought by John Harun Mwau, the ex parte Applicant, who seeks several orders against Dr. Andrew Mulei, Central Bank of Kenya (CBK), Minister for Finance and Clerk to the National Assembly:

The orders sought are as follows:

1. (i) That this Honourable court be pleased to issue Judicial

Review by way of an order of mandamus directed at the Respondents jointly and severally to compel the Respondents, their servants, agents or each of them to produce before the court for purposes of scrutiny or directions the alleged investigation or inspection reports or letters allegedly written by the 1st and 2nd Respondents linking the Applicant to a Commercial Bank or otherwise accusing the Applicant of commission of diverse acts of fraud or criminal offences.

(ii) That the court do issue an order of mandamus directed at the Respondents jointly or severally to compel them, their servants or each of them to produce before the court for scrutiny evidence of all or any cases reports and or letters written by the Respondents jointly and/or severally regarding tax evasion and/or investigations against the Applicant and anyone associated with the Applicant;

(iii) That the court be pleased to issue an order of mandamus directed at the 4th Respondent to compel the 4th Respondent to produce before this court all the Hansard proceedings, reports for 4th April 2006 or any other date soon thereafter touching on the Applicants alleged link to a Commercial Bank in Kenya, particularly on commission of diverse criminal offences.

2. (i) That the court do issue an order of certiorari, to bring before this court for purposes of being quashed any such investigations, or inspection reports or letters drawn, written or issued by the Respondents jointly or severally of or concerning the Applicant or any other person in respect of the matters complained of herein;

(ii) That this court be pleased to issue an order of certiorari to bring before this court for purposes of being quashed any proceedings in or made in parliament linking the Applicant to a Commercial Bank to Commission or criminal offences.

3. (i) The court be pleased to issue an order of prohibition to prohibit the 3rd Respondent from acting on the said investigation or inspection reports or letters in relation to the Applicant or any other person in any manner whatsoever;

(ii) An order of prohibition to prohibit the Respondents either jointly or severally from investigating or further investigating the Applicant in matters allegedly concerning a commercial Bank or other alleged criminal activities;

(iii) An order of prohibition to prohibit the Respondent either jointly or severally, servants or agents from publishing or causing to be published articles, words or statements which are false and which adversely affect the Applicant and or any person unjustly and without being afforded the opportunity to be heard;

(iv) This court be pleased to issue an order of prohibition to prohibit the Respondents either jointly and/or severally their servants or agents from further maliciously injuring the Applicant's character and dignity without any justification whatsoever;

(v) Lastly, the applicant asks for costs of the application.

The application was supported by a statutory statement dated 10th April 2006 and grounds set out therein and a verifying affidavit of the same date which has various annexures; and a further affidavit sworn by the Applicant on 19th October 2007 and skeleton arguments filed in court on 16th October 2006, Mr. Odera Obar advocate appeared on behalf of the Applicant.

The application was opposed and Andrew Mulei the 1st Respondent swore a replying affidavit dated 23rd October 2006 and skeleton submissions dated 25th October 2007 and was represented by Kilonzo Junior Advocate.

Mr. Chacha Odera appeared for the 2nd Respondent and filed an affidavit dated 27th September 2006 sworn by Gerald Arita Nyaoma and skeleton arguments on 16th October 2006.

The 3rd Respondent was represented by Mr. Mutinda who opposed the motion. He filed grounds of opposition on 12th November 2007.

Waruhiu, Kowade & Ng'ang'a filed grounds of opposition on behalf of the 4th Respondent dated 8th September 2006. They did not however appear at the hearing.

It is the Applicant's case that from the 2nd April 2006, various media publications have been featured linking him to a local Commercial Bank allegedly under investigations and they were published by the 1st and 2nd Respondent. He exhibited the publications as J H I. The publications allege that he owns the said

Commercial Bank which is linked to criminal activities and that persons linked with the bank have been under investigations. The Applicant denies ever having been questioned nor has he been shown any investigation report or letters yet the media have reported that the 1st Respondent has recommended to the Minister of Finance, the 3rd Respondent, to take action against him but he has not been shown any such letters or reports. He wrote to the Respondents 'JH 2' requesting for the said reports and letters but the letter has not elicited any response. He also read from the Hansard, the proceedings in parliament that he was accused of malpractices (The transcript JH3). He deponed that the powers of the 1st Respondent as Governor of CBK, 2nd Respondent do not include investigating the Applicant as an individual (private).

That the Respondents have discussed him publicly yet he is not aware of the reports or investigations and in view of their silence over the report they, should be stopped because they are acting unreasonably, grossly and in bad faith concerning him. That the 1st Respondent is acting ultra vires his powers by trying to conduct tax evasion investigations. That the report which links him to drugs has condemned him without giving him a hearing and hence offends rules of natural justice and that the 1st Respondent is dragging his name in his own wars.

Mr. Odera further submitted that the 1st Respondent purported to write the letter dated 20th March 2006 (J HM1) referring to the status of Charter House Bank Ltd. investigations and it indicated that accounts linked to the Applicant and Nakumatt were not fully examined. He urged that it is the Governor who wrote the letter that casts aspersions on the Applicant. That the 1st Respondent had no powers to carry out investigations as the 2nd Respondent is only a regulator of Commercial Banks as per the Banking Act. That all this was done without according the Applicant a chance to be heard and these acts were ultra vires and in breach of rules of natural justice. The applicant alleges bad faith on the 1st and 2nd Respondents for purporting to investigate him when they had no powers to do so. Counsel relied on the case of **SMITH V RURAL DISTRICT (1956) AC 736**, Lord Redcliffe on procedural page 715 that of right act that affects rights of an individual can be quashed. That the Respondents flouted provisions of Section 22 and 32 of the Banking Act by purporting to investigate an individual and it is also an abuse of power. As regards the reply by Mr. Mulei, Counsel submitted that it is scandalous and contradictory as he admits on one hand and denies in the same breath.

In his replying affidavit, the 1st Respondent denied publishing the media publications mentioned at paragraph 5 of the Applicant's affidavit. He denied having been mandated to investigate any individual and he denied writing any letter to the 3rd Respondent. He denied having control of the Hansard report which is published by parliament. That since 29th March 2006 he has not been at the CBK having been charged in CRC 20/06. He denied knowledge of any tax evasion report or allegations linking the Applicant to drugs. He deponed that the application is incompetent and asks for speculative orders since the person who made publications has not been sued, and that pending the inspection the orders sought cannot be issued against him.

In addition Mr. Kilonzo Junior urged that an order of certiorari cannot issue because there is no specific report brought before the court for quashing and that the letter of 20th March 2006 cannot be quashed because it is not specified and besides that letter does not refer to the application but refers to John Mwau Group and that the letter dated 20th March 2006 was confidential and addressed to the Minister. That when the 1st Respondent was charged, it is the prosecution who produced the said letter and that the letter was a result of investigations done by the due diligence team which found questions that needed addressing. That when action was taken on the letter the 1st Respondent was no longer governor. It is the 1st Respondent's case that the Applicant has no locus in the matter. That in any event investigations under S.32 & 33 of the Banking Act are confidential and the application is baseless. Counsel also submitted that Judicial Review is only concerned with the decision making process and it is only the process leading to closure of Charter House by the team created by the Minister that can be questioned and quashed by certiorari. Reliance was made on the case of **COMMISSIONER OF LANDS V KUNSTE HOTEL CA 243/1995** on the scope of Judicial Review orders.

Counsel urged that on 20th March 2006 the 1st Respondent had been charged with offences of abuse of office but was acquitted as he has no case to answer and he could not be personally liable. According to Counsel, Charter House Bank is trying to get orders against the Applicant through the back door which should not be allowed.

Mr. Chacha Odera for the 2nd Respondent submitted that none of the orders prayed for can issue. He relied on the **KENYA NATIONAL EXAMINATION COUNCIL V JOHN GATHENJI CA 266/96** in which the Court of Appeal considered the scope and efficacy of the Judicial Review Orders. He urged that there is no statutory duty imposed on the 2nd Respondent to release any report. That the applicability of Order 53 is specific, narrow and strictly interpreted. For an order of mandamus to issue, Counsel submitted that one must point to a specific public duty and the person under which it is obligated.

On certiorari, Counsel submitted that it presupposes a decision exists which must be placed before the court for quashing. As for prohibition Counsel submitted that there is no evidence before the court that the Respondent was going to act in excess of its mandate.

Mr. Mutinda, Counsel for the 3rd Respondent agreed with submissions of 1st and 2nd Respondents but added that the order of mandamus cannot issue because it is directed at the Respondents jointly and severally and yet each performs different functions and the Applicant has not specified what each was required to do. On certiorari, Counsel urged that the reports and letters were not produced in court which is contrary to order 53 Rule 7 Civil Procedure Rules.

On the 3rd prayer of prohibition it was submitted that the Applicant has not demonstrated that the 3rd Respondent did not have power to order for investigations.

I have now considered the Application before me, the affidavits filed both in support and in opposing the application, the grounds of opposition, the submissions by all Counsel and the case law that has been relied upon. The ex parte applicant's case is founded on media publications which were exhibited as JHM 1 in which the Applicant has been named and linked to a Commercial Bank under investigation. He distances himself from the bank and denies having ever been questioned in connection with the bank nor has he ever been given any reports relating to those investigations and that the Respondents have remained silent despite those reports. That is what has prompted him to bring this application, so that he can protect his otherwise good reputation being a law abiding citizen. The Respondents have denied knowledge of the said investigations, reports or letters. In Judicial Review, one challenging a particular decision, report or order has to be very specific as to the decision, order or report he wants brought before the court for purposes of it being quashed. Or if he is challenging a verbal decision, the same has to be very specific so that the court is clear on what is under challenge or so as to enable the other parties respond.

Order 53 Rule 7 requires a party who seeks to have an order or decision quashed by certiorari to lodge it with the court, verified by an affidavit before or on the hearing of the motion. In absence of the decision, and if the party is unable to produce the decision for good reason, for example if the decision is verbal or it is in the possession of the Respondent, then the applicant has to give a satisfactory explanation as to why the said decision cannot be lodged with the court. In my view, it would be dangerous for courts to proceed to quash decisions or orders without such orders or decisions being seen by the court or unless the Respondents do not deny their existence. The lack of an identifiable decision would not be fatal to a Judicial Review application because all parties to the challenge have an obligation to respond or produce the decision. They owe that duty to the court. The court considered that issue in **R V LANCASHIRE COUNTY COUNCIL ex parte HUDDLESTON (1986) 2 ALL ER 9451** when at page 9459 Sir John Donaldson observed.

“Judicial review is a process which falls to be conducted with all cards face upwards on the table and where the vast majority of the cards will start in the public authority's hands..... the defendant should set out fully what they did and why so far as necessary, fully fairly to meet the challenge.”

Again in **R V SECRETARY OF STATE FOR TRANSPORT ex parte LONDON BOROUGH OF RICHMOND UPON THAMES (No. 3) (1995) LR 409** Sedle J. held **“the want of an identifiable decision is not fatal to an application for Judicial Review.”** The above view is correct because indeed in some instances a decision may not be identifiable. In this case however, the Applicant should have endeavoured to be specific as to what reports or letters they refer to by giving the dates, the author or the exact subject. The existence of such decision or order should not be in doubt. In this case, the Applicant refers to unknown or unidentifiable investigation reports and when they were authored, by who or where they were authored is unknown. The court would not want to find itself in a position where it was issuing an order in vain. The court will not speculate or do guesswork. If any reports were produced in the proceedings before the court in Cr. case 200/06 where the 1st Respondent was charged with abuse of office, Mr. Odera was Counsel in the matter and is aware of the offensive reports and should have specified which ones should be brought up for quashing.

In the instant case the Applicant has not satisfied the requirement that there has to be a decision, report, order in existence for Judicial Review order of certiorari to issue and an order of certiorari cannot issue.

The only letter that has been mentioned by the Applicant is that dated 20th March 2000 (JNMI-annexed and further affidavit) which was allegedly authored by the 1st Respondent who was then Governor of the 2nd Respondent. At paragraph one of the letter, the author indicated that it is an update of the findings by the Due Diligence Team set up by the CBK to investigate the status of Charter House Bank. At the 4th last paragraph, the letter indicated that Kingsway Tyres and its associate companies as well as the John Mwau Group had multiple accounts with Nakumatt network but they were not fully examined. It was the Applicant's contention that the said letter casts aspersions on him. The only link between the letter with the Applicant is that it mentions the relationship between Kingsway Tyres and John Mwau Group which were not clarified. I find that no aspersions were cast on the Applicant. The Applicant is a legal person and John Mwau Group another different person. The Acts of the Group are not necessarily those of the Applicant. The Applicant was not mentioned as a separate individual in that letter at all.

And that brings me to the question of locus. Does the Applicant have the necessary locus to bring this application? I find that the Applicant having not been mentioned in the letter of 20th March 2009 or any other for purposes of this application, he has no locus standi to bring this application. He may have an interest in John Mwau Group but that is a different legal person. If the Group felt injured it is that group that should have moved this court for these Judicial Review Orders.

I note that the letter dated 20th March 2006 was marked as secret and was addressed to the Hon. Amos Kimunya, Minister for Finance. The question is whether it was published by the Respondents. The 1st Respondent was charged with the offence of abuse of office soon after the letter of 20th March 2006 was written. He appeared in court on 23rd March 2006. On 10th May 2006 the court issued an order for the prosecution to produce several documents, which included the letter of 20th March 2006. The said letter was then produced by the prosecution upon request by the Applicant. The 1st and 2nd Respondent have denied ever giving the said letter to the press and it has not been demonstrated that it is either the 1st and 2nd Respondents who gave it to the press. It is the Applicant who requested for its production and once it was with the court, it became a public document. That must be how the press got the letter. The Publication of the letter of 20th March 2006 cannot therefore be attributed to the Respondents.

In this application, the 1st Respondent was described as the Governor of the Central Bank of Kenya whose duties and powers are spelt out in Section 3 of the Central Bank of Kenya Act which include, being the Chief Executive Officer of the Bank and the principle representative of the bank. On the other hand, Central Bank of Kenya is a public body established under the Central Bank of Kenya Act Cap 491 Laws of Kenya, to perform public functions. It is created under S. 3 of the Act and its objects are spelt out in Section 4 of the Act and they include regulation of the operations of all Commercial Banks in Kenya.

At the time this application was filed, the 1st Respondent had been removed as the Governor of the Central Bank of Kenya. Judicial Review orders are public law remedies which issue against public officers or public bodies performing public duties but not private individuals. The 1st Respondent is enjoined to these proceedings as an individual and Judicial Review orders cannot issue against him in such capacity. Perhaps at this stage I must restate the jurisdiction of Judicial Review Orders of certiorari and prohibition.

Lord Atkin in **R V ELECTRICITY COMMISSIONER (1923) ALL ER 161** said thus of the two writs **“the operation of writs (of prohibition and certiorari) has extended to control the proceedings of bodies which do not claim to be and would not be recognized as courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.”**

The application for Judicial Review orders was further extended and Lord Diplock in **OREILLY V MACKMAN (1982) 3 ALL ER 1129** said that such orders would lie to quash decisions for errors of law in making a particular decision or for failure to act fairly towards the person who may be adversely affected.

As pointed out above, Central Bank of Kenya is concerned with regulation of operations of commercial banks. S. 32 (1) of the Banking Act provides for inspection of any Banking institution, and its Books of account. The 2nd Respondent’s duty being to public institutions, the question is whether they have any kind of statutory duty owed to an individual, like the Applicant to produce reports or letters: The answer is in the negative.

In the Notice of Motion, the Applicant seeks an order to quash some unnamed investigation or inspection report or letters that were allegedly written by the 1st and 2nd Respondents. An order of certiorari issues to quash a decision made without or in excess of jurisdiction, for errors on the face of the record or where there is a breach of rules of natural justice. Since it is presupposed that there is a decision, it was upon the Applicant to exhibit that impugned decision, but since there is dispute as to existence of a decision an order of certiorari cannot issue.

An order of certiorari is sought jointly and severally against the Respondents. The Respondents are different persons or bodies performing different functions. I have earlier observed that the 1st Respondent is not a public body or officer. I have also considered the functions of the 2nd Respondents above. No Public duty is owed to the Applicant as an individual. The Applicant has also failed to show what duty the 3rd and 4th Respondents under the Banking Act of CBK Act that would be the subject of Judicial Review orders. It was upto the Applicant to specify what statute governed each Respondent and what their duties were under the particular statute and how each Respondent has acted in excess of or without jurisdiction.

The Applicant also seeks an order of prohibition to issue jointly and severally against the Respondents to prohibit them from investigating the Applicant in matters concerning a Commercial Bank or alleged Criminal activities. The scope of the order of prohibition was considered in the **KENYA NATIONAL EXAMINATION COUNCIL V REP - CA 266/96**. The court said **“what does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from rules of natural justice.”**

The Applicant has not demonstrated that the investigations are ongoing and how they are in excess of the Respondent’s jurisdiction or in contravention of any particular law or that there is a departure from rules of natural justice. Since the Respondents perform different functions, it has not been shown they are carrying out any investigations jointly for that order to issue. An order of prohibition cannot therefore lie.

The Applicant also seeks to prohibit the Respondents jointly and severally from publishing or causing to be published words or statements which are false or are malicious or which may adversely affect or injure his reputation or malign his character. Both 1st and 2nd Respondent have denied engaging in such activity nor has the Applicant demonstrated that. In any event, the issue of protection of reputation and character are not issues of a public law nature but are matters of a private nature which are outside the purview of Judicial Review. If the Applicant has such complaint, then he is before the wrong forum. He should have sought reprieve in the ordinary Civil courts for defamation or such claim. Such challenge would be relating to the merits of the claim which is not within the purview of Judicial Review. The scope of Judicial Review was also considered in **COMMISSIONER OF LANDS V KUNSTE HOTEL (1995-1996) 1 EAI**

“Judicial Review is concerned not with the private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected.”

The Applicant also seeks an order of mandamus compelling the Respondents jointly and severally to produce in court for scrutiny directions, inspection of the reports/letters or reports regarding tax evasion, accusing the Applicant of Criminal acts or linking the Applicant to a Commercial Bank. Again the **KENYA NATIONAL EXAMINATION COUNCIL CASE (supra)** considered the scope and efficacy of an order of mandamus. The court said;

“To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same.”

It was upon the Applicant to demonstrate that the Respondents owed him a public duty which they failed to perform to his detriment and that a demand was made by the Applicant for the performance of that duty. The Applicant has not demonstrated that any of the Respondents owe him any duty to produce any investigation or inspection report or any letters to anybody else or to this court for scrutiny or directions by this court. In respect to the 2nd Respondent Section 32 (2) (c) provides as follows;

“S.32 (2) (C) all information obtained in the course of the inspection shall be treated as confidential and used solely for the purposes of this Act of the Central Bank of Kenya Act.”.

Even if the reports or letters that the Applicant wants produced existed, this court cannot compel the Central Bank of Kenya to release them to an individual for scrutiny or investigation. The said reports and letters are received confidentially and are for purposes of the Central Bank of Kenya whose functions are the regulation and control of banking businesses in Kenya and connected purposes (See preamble of the Banking Act Cap 488 Laws of Kenya). There is no statutory duty imposed on the 2nd Respondent to produce such inspection reports to an individual and none of the orders sought would be available against the Central Bank of Kenya.

Prayer 1 (III) of the Notice of Motion is directed at the 4th Respondent, Clerk to the National Assembly, to be compelled by this court to produce before this court the Hansard Proceedings/Reports for 4th April or any other date, touching on the Applicants alleged link to a Commercial Bank in Kenya. In their grounds of opposition filed in court on 8th September 2006, Counsel for the 4th Respondent state that the court cannot grant that prayer in view of the clear provisions of the National Assembly (Powers and Privileges) Act Cap 6 Laws of Kenya. S.4 thereof provides that no civil or criminal proceedings shall be instituted against any member of parliament for words spoken before or within a report to the Assembly or a committee, or by reason of any matter or thing brought to him therein by petition, Bill or resolution.

S. 12 of the Act also provides that no proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court. In **REP V THE JUDICIAL COMMISSION OF INQUIRY TO THE GOLDENBERG AFFAIR ex parte SAITOTI HMSC APPLCIATION 102/06** the court held that a court of law cannot question the decision covered

by S. 4 & 12 of the National Assembly (powers and privileges) Act. That court relied on the case of **PREBBLE V TELEVISION NEW ZEALAND (1994) 3 ALL ER 407** where this court explained Parliaments privileges and why the courts cannot interfere. The court said;

“The important public interest protected by the privilege was to ensure that a member or witness when he spoke was not inhibited from stating fully and freely what he had to say. That principle complied with the wider principle that the courts and Parliament were both asked to recognize their respective constitutional roles and that the courts would not allow any challenge to be made to what was said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges, undoubtedly prohibited any suggestion being made in court proceedings (whether by way of direct evidence cross examination or submission) that statements made in the House were lies or were motivated by a desire to mislead and also prohibited any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of an alleged conspiracy. The collective privilege of the House to be the sole judge of such matters, since they lay entirely within the jurisdiction of the House. If a suggestion in cross examination or submission that a member or witness was lying to the House were to be allowed that could lead to exactly the conflict between the courts and Parliament which the principle of non-intervention by the court was designed to avoid.”

I need not add anything to the above quotation. I find that the Applicant cannot question the parliamentary proceedings in this court of law stemming from the privilege given by Cap 6 Laws of Kenya and this court would not call for the Hansard as prayed.

The upshot of this matter is that this court cannot grant any of the prayers sought for reasons given in this judgment. The motion is hereby dismissed with the Applicant bearing the costs.

Dated and delivered this 22nd day of May 2009.

R.P.V. WENDOH

JUDGE

Present

Ms Migiro holding brief for Odera for Applicant

Mr. Mwangi holding brief for Kilonzo Jnr. For 1st Respondent

Mr. Chacha Odera for the 2nd Respondent

Muturi: Court Clerk