



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Miscellaneous Application 486 of 2009**

**IN THE MATTER OF: AN APPLICATION BY LINO STATIONERS (K)**

**LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (Prohibition and Mandamus)**

**IN THE MATTER OF: STANDARDS ACT CAP 498, LAWS OF KENYA**

**MISCELLANEOUS AMENDMENT 2002, NO. 2**

**SEIZURE NOTIFICATION DATED 19/05/2009 and**

**20/05/2009**

**LINO STATIONERS (K) LIMITED.....APPLICANT**

**VERSUS**

**THE DIRECTOR**

**KENYA BUREAU OF STANDARDS.....1<sup>ST</sup> RESPONDENT**

**PERMANENT SECRETARY**

**MINISTRY OF INDUSTRIALIZATION.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Chamber Summons dated 12/08/2009 and filed on 14/08/2009 by Okao & Company Advocates on behalf of the Applicant LINO STATIONERS (K) LIMITED. The Respondents are named as the Director of the Kenya Bureau of Standards and the Permanent Secretary Ministry of Industrialization. The application is brought under Order LIII Rule 1(2) (3) of the Civil Procedure Rules. The Orders sought are:-

- (a) ***THAT leave be granted to the Applicant to file an application for PROHIBITION prohibiting the 1<sup>st</sup> Respondent from taking any or any further steps toward selling, disposing, destroying the consignment of 125, 312 pieces of Nataraj ball points seized on 19<sup>th</sup> May 2009 and 20<sup>th</sup> May 2009.***
- (b) ***THAT leave be granted to the Applicant to file an application for Mandamus directed to the 1<sup>st</sup> Respondent directing it to release to the Applicant for re-export the consignment of 125, 312 pieces of Nataraj ball point pens seized on 19<sup>th</sup> May 2009 and 20<sup>th</sup> May 2009.***
- (c) ***THAT such leave to file for orders of prohibition and mandamus do operate as a stay of the sale disposition and/or destruction of the Nataraj ball point pens seized on 19<sup>th</sup> May 2009 and 20<sup>th</sup> May 2009.***
- (d) ***THAT costs be in the cause.***

2. The application was filed under the Vacation Rules for the reasons that it seeks orders restraining the 1<sup>st</sup> Respondent from taking any or any further steps towards selling, disposing or destroying the consignment of 125312 pieces of Nataraj ball points pens seized on 19/05/2009 and 20/09/2009. The Applicant, through Miss Othieno advocate on behalf of M/s Okao & Company Advocates appeared before me on 21/08/2009. I certified the application urgent for the reasons given on the face of the application and proceeded to hear the Chamber Summons for leave.

3. It is to be noted that the application was not accompanied with the Verifying Affidavit or the Statement of Facts as required by Order LIII Rule 1 (2). Order LIII Rule 1(2) of the Civil Procedure Rules provides as follows:-

**“(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving of security as he thinks fit.”** (Emphasis is mine).

4. In the instant case, it is the Notice to the Registrar dated 12/08/2009 and filed on 14/08/09 that appears to have annexed to it the Statement of Facts pursuant to Order LIII Rule 1(2) of the Civil Procedure Rules and a Verifying Affidavit sworn by one **Nalikant V. Hindocha** on the 12/08/2009. Under Order LIII Rule 1(3) of the Civil Procedure Rules, the Notice to the Registrar shall be accompanied with copies of the Statement of Facts and affidavits accompanying the application for leave. My understanding of both rules 1(2) and 1(3) of Order LIII is that the Statement of Facts and Verifying Affidavits must accompany the application for leave and copies thereof are to be served upon the Registrar together with the Notice of the application for leave. The Applicant did not comply with Rule 1(2) of Order LIII.

5. I also note that the notice to the Registrar does not appear to have been served since there is no acknowledgement thereon to that effect. It is my considered view that service of a document is not synonymous with the filing of that document. It is therefore my belief that the Notice to the Registrar was not served as required under Order LIII Rule 1(3) of the Civil Procedure Rules. No good cause for failure to serve has been given by the Applicant.

6. Without going into the merits of the application for leave,

it is to be noted that the Applicant has not brought this application under sections 8 and 9 of the Law Reform Act Cap 26, Laws of Kenya. The two sections which fall under PART VI – MANDAMUS, PROHIBITION AND CERTIORARI of the Act provide as follows:-

**“8(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.**

**(2) In any case in which the High Court of England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.**

**(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final subject to the right of appeal therefrom conferred by subsection (5) of this section**

**(4) In any -----**

**(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.**

**“9(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court?**

**(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;**

**(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order**

**(c) requiring that, where leave is obtained no relief shall be granted and no ground relied upon, except with the leave of the court other than the relief and grounds specified when the application for leave was made**

**(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings be made within six months, or such shorter period as may be prescribed, after the act or period as may be prescribed, after the act or omission to which the application for relief relates.**

**(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding, or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appeal has expired.”**

7. It is clear from the above provisions that the power and jurisdiction of this court to deal with the application before it is derived from the Law Reform Act. The Applicant herein has omitted the very provisions, namely sections 8 and 9 above cited from its entire application. This omission, coupled with the fact that the application itself is not accompanied by the mandatory Statement of Fact and Verifying Affidavit renders the Applicant’s application incompetent and devoid of the bedrock upon which this court can exercise its discretion in favour of the Applicant. The above being the position, I find and hold that this application ought to be struck out.

5. In the result, the Applicant’s exparte Chamber Summons dated 12/08/2009 and filed in court on 14/08/2009 be and is hereby struck out for non-compliance. The Applicant is however at liberty to file another application in compliance with the law and the rules. If the Applicant elects to file another application, it must do so within the next 7 (seven) days from the date of this ruling otherwise the leave to do so lapses. Costs of this application shall be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 27<sup>th</sup> day of August, 2009.

**R. N. SITATI**

**JUDGE**

Delivered in the presence of:-

Miss Othieno holding brief for Okao for the Applicant

..... for the Defendant

Weche – court clerk