



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISII**

**Misc 103 of 2009**

**IN THE MATTER OF AN APPLICATION BY SAMUEL MOSE BOBURA AND MICHAEL OMBONGI TO APPLY FOR LEAVE FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION)**

**AND**

**IN THE MATTER OF PUBLIC HEALTH OFFICER-KISII CENTRAL DISTRICT**

**AND**

**IN THE MATTER OF THE RESIDENT MAGISTRATE COURT AT KISII**

**AND**

**IN THE MATTER OF LANDLORD AND TENANT (SHOP, HOTELS AND CATERING ESTABLISHMENTS) ACT (CHAPTER 301 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF PUBLIC HEALTH ACT (CAP 242 LAWS OF KENYA)**

**BETWEEN**

**SAMWEL MOSE BOBURIA**

**MICHAEL OMBONGI.....APPLICANTS**

**-VERSUS-**

**1. PUBLIC HEALTH OFFICER, KISII CENTRAL DISTRICT**

**2. SENIOR RESIDENT MAGISTRATE**

**KISII LAW COURTS.....RESPONDENTS**

## RULING

On 7/10/2009 the applicants(they should actually be *ex parte* applicants) filed summons seeking leave to institute Judicial Review proceedings in the nature of Certiorari and Prohibition against the respondents, and also sought that the leave so granted do operate as an order of stay. The application came before me on 8/10/2009 . It was certified as urgent and an order made that it be served for the matter to be heard on 14/10/2009. The respondents and interested party were served, and all parties turned up on 14/10/2009 as ordered for *inter parte* hearing. That is when Mr. Bosire for the applicants raised objection to the respondents and interested party being heard at this stage of leave. He submitted that there was no provision for the hearing of the application for leave *inter partes*. He based his objection on *Order 53 rule 1(2) of the Civil Procedure Rules* and relied on the decision in *Republic .V. Commissioner of Cooperative Development & another ex parte Gusii Farmers Rural Sacco Ltd H.C.Mic.Application No. 32 of 2004* at Kisii. Counsel asked the respondents and the interested party to wait for the substantive application on which they can be heard.

Mr. Kemo for the respondents responded by saying that the court had invoked its wide and unlimited powers under the Constitution to seek that the affected parties be served and heard before order for leave is granted. He did not see anything wrong with the order the court had made. He asked that if the applicants were aggrieved by the order they should seek that it be set aside or they appeal against it. Mr. Minda for the interested party agreed with Mr. Kemo . He argued that the granting of leave was a discretionary matter and the court was right to seek that the parties to be affected by the order be served and heard before leave and stay are granted.

Mr. Bosire argued that this matter did not concern the Constitution. Further, that there were provisions in *sections 8 and 9 of the Law Reform Act (Cap 26)* on how to challenge order relating to leave or stay.

In the authority referred to by Mr. Bosire, the court had granted leave and further ordered that the leave to operate as stay. Persons affected by the order applied to be allowed to participate in the proceedings as interested parties and further sought to setting aside of the stay when leave was granted. The prayers were granted. The applicant thereafter sought review of the orders granted to the three. He complained that among other things, the orders had been heard *ex parte* to the interested parties in his absence. The Court held that interested third parties to a judicial review proceedings can be heard on the issue of stay if it is granted simultaneously with leave to institute judicial review even though the substantive motion has not been filed. It went on to hold that under *Order 53 rule 1(2) of the Civil Procedure Rules*, and application for leave shall be made *ex parte* to a judge in Chambers. This second holding was in response to the complaint by the applicant that the interested parties had obtained orders in its absence,. The interested parties response was that they had gone to court and obtained orders *ex parte* because the applicant had also gone for leave and stay *ex parte*. The court reacted in the following terms to that argument:

*“The other issue is the issue of proceeding in the absence of the applicant. First I find it cheeky for the respondent to submit since the applicant obtained leave and stay ex parte, they too were entitled to proceed ex parte-“tit for tat” as its is. Order 53 rule 1(2) is very candid. An application for leave “shall be made ex parte to a judge in chambers.....” That requirement is mandatory as the word “shall is used. The applicant was therefore following the law.....”*

The court was not faced with an objection similar to the one at hand. It did not therefore address its mind to the question whether an applicant for leave and stay may be heard *inter partes*, despite *Order 53 rule 1(2)*.

I have looked up several authorities of the Court of Appeal on this point. In *Republic .V. Commissioner of Cooperatives & another [1997] LLR 2227( CAK)* the Court was categorical that if the application for leave must be made *ex parte* under *Order 53 1(2)*, then it follows that it must be heard and

granted or refused *ex parte*. In *Shah & Another .V. Resident Magistrate & Another [2000] LLR 14427(CAK)* the court referred to *Republic .V. Commissioner of Cooperatives & Another* (above) but adopted the following dicta in *O'Reilly .V. Mackman[1982] 3 ALL ER 1124*:

*“On the other hand, as compared with an action for a declaration commenced by writ or originating summons, procedure under Order 53 both before and after 1977 provided for the respondent decision making statutory tribunal of public authority against which the remedy of certiorari was sought protection against claims which it was not in the public interest for courts of justice to entertain.*

*“First, leave to apply for the order was required. The application for leave, which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia the grounds on which the relief was sought and by affidavits verifying the facts relied on.....”*

Hon. Ole Keiwua, J.A (with whom the rest of the court agreed) stated as follows:-

*“In my respectful view, it is within the discretion of a judge, to adjourn the whole application for leave, and for that leave to operate as a stay of proceedings, for hearing inter partes.....”*

That decision was followed by the court in *Zakhem Construction (Kenya) Limited .V. Permanent Secretary Ministry of Roads And Public Works and another, Civil Appeal no 244 of 2006* at Nairobi, in which the decisions in *Shah's case* (above), *Republic .V. Commissioner of Cooperatives* (above) and *O'Reilly .V. Mackman* (above) were considered before it was held that there was power to adjourn an application for leave for hearing *inter partes*. However, in *Oil Com Kenya limited .V. The Permanent Secretary Ministry of Roads & Public works and another Civil Appeal no. 10 of 2007* at Nairobi, the Court, relying on *Republic .V. Commissioner of Cooperatives* (above), held that the application for leave is supposed to proceed *ex parte* and therefore that the Judge has no jurisdiction to conduct this application *inter partes*. No reference was made to *Zakhem* or *O'Reilly* cases (above). With respect, I consider this decision to be an isolated case as the same court had more than once found quite clearly that although *Order 53 1(2)* indicated that the application for leave to file judicial review proceedings should be dealt with *ex parte*, the court had jurisdiction to adjourn the application for the prospective respondents to be served and for the application to be heard *inter parties*. This was my understanding of the law when I asked that the respondents and the interested parties to be served. I would like to hear the application *inter parties*.

I agree with Mr. Kemo and Mr. Minda that the applicants should ideally have appealed against the order asking that the application be served. Or they should have sought its review. This is if they felt aggrieved. They opted for unorthodox method of raising the Preliminary Objection whose effect was to challenge the order and to force the court to justify its decision. I find the objection not sustainable, and dismiss it with costs.

Dated, signed and delivered at Kisii this 10th Day of November, 2009

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**

**10/11/2009**

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Leiteipa for exparte applicant

Mr. Masese for Mr. Minda

Mr. Kemo for respondents

**COURT:** Ruling in open court

**A.O.MUCHELULE**

**JUDGE**

**10/11/2009**