



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 198 of 2006

FRANCIS KAIMURU GITU.....APPLICANT

Versus

MINISTER FOR FINANCE.....1ST RESPONDENT

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

HOUSING FINANCE OF KENYA LIMITED.....INTERESTED PARTY

RULING

On 20th April 2006 the ex parte Applicant Francis Kamuiru Gitu filed the Chamber Summons dated 19th April 2006 seeking the following orders;

1. This Application be certified urgent and heard ex parte in the first instance;
2. The Applicant be allowed to commence Judicial Review proceedings without the requisite notice to the Registrar due to the urgency of the matter;
3. That leave be granted to the Applicant to apply for an order of mandamus against the Respondents to compel them to perform their statutory duty to supervise the Interested Party to follow the laid down regulations of the law in particular to this account;
4. That leave be granted to the Applicant to apply for an order of prohibition to prohibit the Respondent from proceeding to carry out business without following the laid down procedure of the law;
5. That the grant of leave do apply as a stay of the execution and sale of property LR NBR Block 125/836 Imara Daima Estate by the Interested Party;
6. That the cost of this application be provided for.

Mr. Ndegwa, Counsel for the ex parte Applicant appeared before Justice Kubo who heard Counsel ex parte and granted prayers 3 and 5 of the Chamber Summons and he was ordered to file the Notice of Motion within 21 days. The Notice of Motion was filed on 10th May 2006.

In the Notice of Motion, the Applicant seeks the following orders:-

1. That an order of mandamus do issue against the Respondent to compel them to perform their statutory duty to supervise the Interested Party to follow the laid down regulations of the law and

regularize this account to eliminate the excessive illegal charges;

2. That an order for prohibition do issue to prohibit the Respondent from licensing the Interested Party until they comply with the laid down regulations of the law with particular reference to this mortgage account;
3. Costs be in the cause.

The Respondents were named as the Minister of Finance and Central Bank of Kenya, while Housing Finance Company of Kenya Ltd. are the Interested Party. On 10th August 2006, the Interested Party filed the Notice of Motion dated 7th August 2006 seeking orders that the court do vacate and discharge the ex parte orders granting leave to the Applicant to institute Judicial Review proceedings against the Respondents, that the court do discharge the ex parte order of leave operating as a stay against the Interested Party and the Notice of Motion dated 10th May 2006 be dismissed and that the ex parte Applicant do pay the costs of the Application.

In addition to the above application, both the Respondents filed notices of Preliminary Objection. The 1st Respondent filed the Notice of Objection dated 6th December 2006. The grounds of objection are that:-

1. The matter before this court is in the realm of private law and not public law;
2. That the 1st Respondent is non suited;
3. That the Applicant has no locus standi to seek orders directing the 1st Respondent to perform his duties as against the Interested Party;
4. That the Application is otherwise an abuse of the court process.

The 2nd Respondent's notice of Preliminary Objection is based on the following grounds:-

- a) That the Application for Judicial Review does not lie on facts stated by the Applicant;
- b) That the issues raised are matters of contract between the Applicant and the Interested Party;
- c) The Application offends provisions of the Law Reform Act.

Since the Interested Party's Application dated 7th August 2006 would have the same effect as the Preliminary Objections raised, that is to strike out the Notice of Motion, it was agreed that the same be argued within the Preliminary Objection.

Mr. Oraro, Counsel for the 2nd Respondent urged that the matter before the court relates to a contract between the Interested Party and the Applicant. That the issue of interest which the Applicant seeks the court to issue mandamus against the Respondents to supervise the Interested Party is a contractual issue. That the Applicant is complaining that the Interested Party has unjustifiably hiked interest which is a contractual issue and that the Applicant is trying to resolve a private dispute between him and the Interested Party by way of Judicial Review but Judicial Review is not concerned with private rights or the merits of a decision but with the decision making process. Counsel relied on the decision of **KUNSTE HOTEL LTD. V COMMISSIONER OF LANDS CA 243/1995** where the Court of Appeal observed as above.

2ndly, Counsel submitted that the Applicant has not shown any relationship between the Applicant and either the 1st or 2nd Respondents or any obligation owed by the Respondents to the Applicant.

Counsel further urged that the jurisdiction under S. 33 of the Banking Act which the Applicant seeks to invoke is limited to the statutory powers of the 2nd Respondent to ensure that a bank complies with the Act but it is not, for enforcing the contractual rights between the Bank and its customers. That failure by a bank to carry out an inspection under S.33 of the Banking Act has reliefs provided for under Section 33 (a) of the Act and they are not reliefs that relate to breach of contract. That in any case, S.52 of the Banking Act excludes the intervention of the 2nd Respondent in matters arising out of a contract between the Bank and its customers. That the reliefs sought cannot lie against the Minister because a licence once granted can only be revoked under S.6 of the Banking Act and it cannot be due to breach of a contract between the Bank and its customer.

Relying on the case of **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96**, Counsel submitted that the reliefs sought cannot be granted because they are contrary to statute. As for an order of prohibition, it was submitted that the Banking Act provides for licensing of the Interested Party and the court would be acting contrary to statute if it were to prohibit the licensing.

Mr. Waigi Kamau, Counsel for the 1st Respondent adopted Mr. Oraro's submissions as their objections were basically the same. Mr. Waigi added that the matter in issue is purely of a private law nature and there are no public duties which the 1st and 2nd Respondent were supposed to perform and they failed to.

That the Applicant has not demonstrated that there have been any increases in the charges in order to invoke S. 44 of the Banking Act. That the same would only be invoked if the Bank were asking the Minister to perform his duties but it has not been shown which duty the Minister has failed to perform.

Mr. Sagana, Counsel for the Interested Party adopted in their entirety, the submissions by the Respondents. In support of the Notice of Motion dated 7th August 2006, Counsel urged that leave was sought against the 1st and 2nd Respondent but not the Interested Party and therefore the order of stay that was granted could not apply to the Interested Party and it was therefore granted in the vacuum. Counsel also argued that there has been material non disclosure by the Applicant in that he had filed HCC 120/06 seeking orders of injunction but the same was dismissed on 13th April 2006 by Justice Kasango. That the issues raised in the plaint and Verifying Affidavit to this Judicial Review Application are similar to those in HCC 120/06. Mr. Sagana relied inter alia on the following authorities;

UHURU HIGHWAY DEVELOPMENT LTD V CENTRAL BANK OF KENYA LTD CA 140/95 on material disclosure, **NJUGUNA V MINISTER FOR AGRICULTURE (2000) I EA 184** and **AGAKHAN EDUCATION SERVICE KENYA V REP (2004) 1 EA 1**; on inherent powers of the court to set aside ex parte orders.

In opposing the Preliminary Objection and the Notice of Motion filed by Mr. Ndegwa, Counsel for the Applicant urged that the Interested Party has breached S.44 of the Banking Act by increasing interest while the 1st and 2nd Respondents stood by. That S. 33 mandates the Central Bank to advice and direct any institution to comply with the Banking Act so that it operates in the best interests of depositors and the public which overflows to the arena of public law. That the Applicant wrote to the Minister of Finance over the issue but there has been no response. That under S. 6 (b) of the Banking Act, the Minister may revoke a licence and that since the Interested Party has breached the law by increasing interest rates without authorization, that Section can be invoked.

Counsel also said that though S. 52(1) ousts the jurisdiction of the court, S. 52 (3) places an administrative duty on the 1st and 2nd Respondents to determine whether the bank acted within the law. It was Mr. Ndegwa's view that the order sought in HCC 102/06 are different from those sought in this case and that in any case the said suit was disclosed in the Applicant's Affidavit dated 10th May 2007.

I have considered the Preliminary Objection, the Notice of Motion seeking to set aside the ex parte orders dated 20th April 2006 and the replying affidavit of the Applicant dated 9th October 2007 in reply to the Interested Party's motion and all submissions by counsel. Before I proceed to consider all the points

raised, I wish to point out that on 20th April 2006, when the Applicant moved the court for leave to commence Judicial Review proceedings, Justice Kubo only granted prayer 3 and 5 of the Chamber Summons Prayer 3 sought leave to bring an order of mandamus to compel the 1st and 2nd Respondents to perform their statutory duty to supervise the Interested Party to follow the laid down regulations in reference to this account. Prayer 5 prayed that leave so granted do operate as stay of execution and sale of the property in issue. No leave was granted to seek an order of prohibition and that is evidenced by the order that was extracted, dated 20th April 2006. However, in the substantive Notice of Motion, the Applicant seeks a prayer of prohibition (prayer No 2). No leave was granted to seek an order of prohibition. Order 53 Rule 1 (1) Civil Procedure Rules is clear, it provides that no Application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted. The prayer for an order of prohibition which is contained in the Notice of Motion is irregular and must be struck out from the onset.

In Judicial Review the grounds to be relied upon are those found in the statutory statement and Affidavits accompanying the Application. Order 53 Rule 4(1) provides;

“4(1) copies of the statement accompanying the Application for leave shall be served with the Notice of Motion, and copies of any affidavits accompanying the Application for leave shall be supplied on demand and no grounds shall, subject as hereafter, in this rule provided, be relied upon or any relief sought at the hearing of the motion except grounds and relief set out in the said statement.”

The grounds that this court should consider are those set out in the statement but not in the body of the application. I find no grounds set out in the statement filed with the Chamber Summons upon which the application for Judicial Review could have been predicated. The grounds relied upon are

(4) That the Applicant is on the verge of having his property auctioned by the Interested Party and the Regulatory waterlog;

(5) That the Regulatory authorities have made the Bank Sector to operate in an seemingly unregulated environment which does not augur well for the Kenyan economy”

In Judicial Review, there are three broad grounds upon which an Application will be preferred i.e. irrationally, procedural impropriety and illegality. The above quoted statements are not grounds that can fall within those three broad grounds. The Respondent and Interested Party considered what the Application included on the face of the Application as grounds. This is not an Application under the Civil Procedure Rules and those “grounds” on the face of the application are misplaced. Having been argued, this court will however consider them later in this ruling.

As observed above, leave was only granted to bring an application for an order of mandamus. That order was ultimately sought against the Respondents. This being an order of mandamus the grant order of stay does not arise in any event. What would one be staying since the duty sought to be has not yet been performed. An order for leave to operate as stay can only issue where leave is sought to bring an Application for an order of certiorari or prohibition. I also do agree with Mr. Sagana’s submission that the order of stay was issued in the vacuum in that leave to seek Judicial Review orders was directed against the 1st & 2nd Respondent but not the Interested Party. So an order of stay could not have been obtained against the Interested Party when leave was never granted to bring any Judicial Review orders against the Interested Party. I uphold that objection.

Of material non-disclosure, it is Counsel for the 1st Respondent and Interested Party who alleged that HCC 102/06 was filed in the High Court seeking injunctive orders, it was dismissed it is then that the Applicant moved this court for the Judicial Review orders. The Interested Party exhibited the pleadings and ruling in HCC 102/06 (JKI). In sum, the Applicant had sued the Interested Party for breach of an agreement; levying illegal interest and charges and failing to issue the mandatory 3 months notice. He sought a declaration that the realization of the security was illegal and unjustified and sought an

injunction to restrain the Defendant from disposing of his property.

On 13th April 2006 Justice Kasango dismissed the prayer for interim injunction for reasons that the same had been declined by Justice Azangalala before. In the instant Application, the Applicant was seeking a stay of the sale of the property as well as seeking to prohibit the licensing of the Interested Party and compelling the Respondents to supervise the Interested Party to comply with Regulations as relates to this Account. The matters are closely interrelated with the order of stay having the same effect as the injunctive prayers. They related to the same parties and same property. In effect what the Applicant was trying to do is prevent the sale of his property. It was imperative on the Applicant to disclose to the court that granted leave and stay order that she had filed HCC 102/05 and a prayer for injunction had been refused. I have read the Verifying Affidavit of the Applicant dated 19th April 2006 and there was no mention of the existence of a civil suit. It is the Applicant's contention that disclosure was made at paragraph 16 of the Affidavit dated 10th May 2005. That Affidavit is filed along with the Notice of Motion and there is no evidence that the said Affidavit was filed with the leave of the court. Under Order 53 Rule 4 (2) Civil Procedure Rules, at the hearing of the motion, the court will only rely on Affidavits filed with the Chamber Summons seeking leave to bring the Judicial application and the statutory statement and one has to seek the court's leave to use any further Affidavits and such further affidavits will only deal with new matters arising out of the Affidavits of any other party to the Application. No leave was sought to file the Affidavit of 10th May 2007 and in any case it is not a reply to any new matter raised in the Affidavits of the Respondents or Interested Party as none of them had filed any Affidavit in reply to the main motion. The Affidavit of 10th May 2006 is irregularly on record and is hereby struck off. The sum total is that the Applicant had failed to disclose the existence of the Civil Suit. It was pertinent to disclose the existence of the earlier suit at the leave stage, not late in the matter when other parties have reference to it.

In R V METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL ex parte LAWRENCE EWHC ADAMS 588, the court observed;

“It is essential that parties who seek to move for Judicial Review should appreciate that they have a duty to make full disclosure of all potentially material matters to the court.”

Again, in Judicial Review 3rd Edition at page 352, Professor Michael Fordham reiterates the above principle that in ex parte applications a claimant is under a duty to make a full and frank disclosure to the court of all material facts since the application is made ex parte and the other party is not given a hearing, it is important that all material be disclosed so that the court can decide whether or not to grant the orders sought ex parte. In the instant case, it was very important that the Applicant do disclose to the court that there was pending a civil matter where a prayer for injunction had been denied by the court. Failure to disclose such material facts disentitles the Applicant to the orders that were issued by the court ex parte.

The dispute between the Applicant and the Interested Party arises out of a mortgage agreement where the Applicant secured a legal charge over LR No NRB Block 125/836 Imara Daima Estate. That is the property that the Applicant seeks to salvage from sale by the Interested Party who wants to realize their security. It is a private contract and it is the Respondent's and Interested Party's contention that Judicial Review jurisdiction cannot be invoked. Judicial Review is a public law remedy and would not apply to private law rights arising out of a contract. In **COMMISSIONER OF LANDS V KUNSTE HOTEL LTD (1995-1998) I EA 1 OR CA 243/1995** the Court of Appeal observed that Judicial Review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. The Applicant seeks to enforce his private rights as between a borrower and a lender. That is a private contract which attracts a private remedy Judicial Review is not available to him. Besides, the Applicant has not shown that there is any relationship between him and either the 1st or 2nd Respondent. The Applicant's remedy lies in the ordinary Civil Courts where he can enforce his private rights under the mortgage in the law of contract.

As observed earlier in this ruling, the Applicant has not shown any grounds upon which this Judicial Review Application may be grounded as required by Order 53 Rule 4 (2) Civil Procedure Rules. I will

however still go ahead and consider the points raised by the Respondent and Interested Party on the grounds that were found on the face of the Notice of Motion which ideally are not grounds recognized in Judicial Review. The Applicant complains that the Respondents were in breach of S. 33 (1) of the Banking Act which provides for protection of a customer's account to the extent determined by the minister. The Applicant has not demonstrated how that Section was breached. If there was any breach, that can only be proved by way of evidence in a civil suit not by way of Judicial Review.

Section 33 of the Act mandates the Central Bank to advise and direct any banking institution. That Section reads:

“S 33 (1) if at any time the Central Bank has reason to believe that,

(a) the business of an institution is being conducted in a manner contrary to or not in compliance with the requirements of this Act, or if any regulation made there under or in any manner detrimental to or not in the best interest of its depositors or members of the public; or

(b) an institution, any of its officers or other person participating in the general management of the institution is engaged in any practice likely to occasion a contravention of any of the provisions of this Act or any regulations made thereunder;....”

Under the above section the Central Bank mandate is to advise, issue directions or appoint a person to advise banking institution. I do agree with the Respondent's submission that the jurisdiction under S. 33 is limited to the 2nd Respondent Supervisory powers over the banks to ensure compliance with the Act. The reliefs under that Section would not be available to the Applicant for breach of contract. S. 52(2) of the Banking Act prohibits any Banking institution from recovering in any court of law interest and charges which exceed the maximum permitted under the provisions of the Act or Central Bank Act. The Applicant would need to show that the maximum chargeable interest has been exceeded for there to be a breach. Such proof cannot be by way of Judicial Review proceedings. It would be in a civil case where the Applicant had rightfully gone for redress in HCC 102/05 and where evidence would be adduced by the Applicant to prove that allegation. In addition to the above there is no provision that mandates the 1st Respondent to supervise the Banking Institution and the orders of mandamus cannot issue against the 1st Respondent.

As to revocation of a Banking Institution's licence, that can only be done by the Central Bank under S. 6 of the Banking Act for reasons given thereunder and they include, an institution going into liquidation, failing to comply with the Act & regulations, or ceases to carry on business in Kenya and those reasons do not include breach of contractual rights between the bank and the customer.

An order of mandamus would issue to compel performance of a statutory duty that the Respondent may have refused or neglected to perform **KENYA NATIONAL EXAMINATION COUNCIL V R CA 266/1996**. The Applicant has failed to show the provision that has been breached or a duty that the Respondent has failed to perform.

For all the reasons given in this ruling, the court upholds the Preliminary Objections raised by both Respondents, grants the Notice of Motion dated 7th August 2007. The ex parte orders issued by the court on 20th November 2006 be and are hereby set aside and the Notice of Motion dated 10th May 2006 is hereby struck out with the Applicant bearing all the costs of the Preliminary Objections, Notice of Motion dated 7th August 2006 and that dated 10th May 2006.

Dated and delivered this 13th day of March 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Ndegwa for the Applicant

Mr. Sagana for Interestd Party and holding brief for Mr. Ougo for the 2nd Respondent

Daniel: Court Clerk