



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

Misc. Appli. 259 of 2008

CANOBBIO PIETRO APPLICANT

V E R S U S

THE PRINCIPAL IMMIGRATION OFFICER.....1ST RESPONDENT

THE MINISTER FOR IMMIGRATION.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

R U L I N G

A Chamber Summons dated 8th May, 2008 was filed by M/S Kiplagat & Company advocates for the ex-parte applicant named as CANOBBIO PIETRO. It is primarily an application for leave to file Judicial Review proceedings for certiorari and prohibition.

The Chamber Summons was filed on the 8th May, 2008. On the 9th May, 2008, I ordered that the application be served. It was served and the Attorney-General appeared on behalf of the three respondents named as THE PRINCIPAL IMMIGRATION OFFICER, THE MINISTER FOR IMMIGRATION, and THE COMMISSIONER OF POLICE.

On 26th June, 2008, before the application was heard inter-parties, Mr. Saende informed me that he was holding brief for Mr. Majanja for interested parties named as COSIMO ROSAFIO and SMOKY HILLS LIMITED. He informed me that the said interested parties were adversely affected because they were adversely mentioned in paragraph 9 (d) and (e) and paragraph 37 of the affidavit in support of the Chamber Summons application sworn by the ex-parte applicant on 23rd May, 2008. Counsel contended that his clients, the interested parties, should be joined, so that they apply for the offending paragraphs in the affidavit to be expunged.

Dr. Khaminwa for the ex-parte applicant opposed the joining of the interested parties at this stage. Counsel submitted that Order 53 of the Civil Procedure Rules provided for joining of parties in the main motion, not in the ex-parte application stage. Counsel emphasized that Order 53 of the Civil Procedure Rules was a complete code and did not provide for joining of parties at the ex-parte application stage. In any event, Dr. Khaminwa argued, the orders sought by the ex-parte applicant were against the Minister and not the interested parties.

Ms Munyi, who appeared for the respondents submitted that it was contrary to the principles of natural justice to shut out a party who has been mentioned in the proceedings. Counsel submitted that it was true that the interested parties were mentioned in the subject affidavit. Counsel emphasized that the interested parties should be given an opportunity to file an appropriate application, if need be.

I have considered the arguments of Counsel who appeared before me. I will not grant the request by the interested parties (*who are in fact intended interested parties, as they are not yet parties in these proceedings*).

Indeed, as a court of justice, this court has discretion to allow affected parties, even at ex-parte application stage to be served so that they may appear in court to clarify certain issues to assist the court to come to a just decision. In this particular case the decision of the court required in the Chamber Summons will be whether or not to grant leave to file Judicial Review proceedings and whether, if the leave is granted, it operates as a stay of an intended action by the Government.

As far as I can see, the intended interested parties are not parties to the proceedings nor are any orders sought against them. If any orders were requested against them, I would not have required any formal application to be filed, but would order that they be served and participate in the ex-parte application for leave. That would be a justified exercise of the discretion of court, as I have already decided that the ex-parte application be served, and heard inter-partes.

In the present case, however, the intended interested parties appear to want to be heard, to expunge paragraphs of an affidavit, which affidavit I have not seen myself. Even if that affidavit is there, the decision anticipated by them to be made by this court at this ex-parte application stage, will go to the merits of the main motion, rather than the issue of leave sought. In addition, the leave is sought to file Judicial Review proceedings not against the interested parties, but against actions by the intended interested parties, but against Government officials of whom the intended interested parties are not.

My decision therefore is that, if the intended interested parties wish to participate in the proceedings, they should come after the main motion is filed, that is, if leave is granted. I will not hear them at this ex-parte application stage, as hearing them will have no bearing on the issue of granting or not granting the leave sought by the applicant to file Judicial Review proceedings against Government officials. If leave is granted, they should be served with the main motion when it is filed. Their request to be heard at this preliminary stage is declined.

I will proceed to give a hearing date for the Chamber Summons application.

Dated and delivered at Nairobi this 22nd day of July, 2008.

GEORGE DULU

JUDGE.

Court:

1. Hearing on 24/9/2008.
2. Interim orders extended till then.