



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 472 of 2004

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULE

AND

IN THE MATTER OF MINISTER'S APPEAL CASE NO. 256 OF 2007

BETWEEN

NJUE KIRIRU.....APPLICANT

VERSUS

PETERSON NJERURESPONDENT

AND

IN THE MATTER OF THE REPUBLICAPPLICANT

VERSUS

THE MINISTER FOR LANDS

LANDS & SETTLEMENT.....2ND RESPONDENT

RULING

On 17th April 2008 this court dismissed the ex parte Applicant's Notice of Motion dated 28th July 2004 for failure by the Applicant and his Counsel to attend court for the hearing.

The ex parte applicant has now moved this court under Order IXB Rule 8 of the Civil Procedure Rules and S.3A Civil procedure Act seeking that the court do set aside its orders made on 17th April 2008 and the Notice of Motion dated 28th July 2004 be reinstated for hearing. The Notice of Motion is dated 22nd April 2008. The Applicants Counsel Mr. Sane, filed an affidavit in support of the Application in which he depones that he had been ill since 15th April 2008 and was not able to go to work. He attended hospital on 16th April 2008 and called a Counsel by name Lilian Nchogu to hold his brief on 17th April 2008 and she agreed to do so but informs Mr. Sane that she arrived in court at 9.15 a.m. after the case had been dismissed for non attendance.

The application was opposed and the 1st Respondent Peterson Njeru filed a replying affidavit in which he depones that the Applicants have not disclosed all material facts to the court that the matter had been adjourned twice at the instance of the Applicant. He also depones that the land in dispute is registered in his name yet the Applicant/Respondent has been in occupation of the suit land to his detriment. He opposes the grant of the orders as they will allow the Applicant to remain in possession to his detriment.

The substantive application herein was a Judicial Review application brought pursuant to order 53 Civil Procedure Rules. It is trite and the courts have repeatedly said that Judicial Review is a special jurisdiction to which the Civil Procedure Act and the Rules made thereunder do not apply. It is only Order 53 that governs the procedure in Judicial Review Applications as donated by S.8 and 9 of the Law Reform Act. The Applicant has invoked Order IXB Rule 8 of the Civil Procedure Rules and S.3 A Civil Procedure Act. The same do not apply. S.8(1) of the Law Reform Act provides that when the High Court is exercising Judicial Review jurisdiction, it is neither exercising civil or criminal jurisdiction. The Court of Appeal confirmed this position in **KUNSTE HOTEL LTD. V THE COMMISSIONER OF LANDS CA 234/95** and **REP V COMMUNICATION COMMISSION OF KENYA CA 175/00** where the court said Judicial Review jurisdiction is a special jurisdiction and the Civil Procedure Act and its Rules and even the Government Proceedings Act did not apply. The result is that Order IXB Civil Procedure Rules does not apply in these proceedings and this court's jurisdiction is not properly invoked and orders sought cannot issue. Since order 53 Civil Procedure Rules does not provide for setting aside orders courts have set aside interim orders of stay under the court's inherent powers under Order 53 Civil Procedure Rules.

But can this order of dismissal be set aside? S. 8 (3) of the Law Reform Act gives the answer. It reads:

“8(3) No return shall be made to any such order and no proceedings in prohibition shall be allowed but the order shall be final, subject to the right of appeal therefrom conferred by Section (5) of that Section.

(4)

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

The courts have interpreted this section to mean that even an order of dismissal from a Judicial Review application cannot be set aside by the High Court but should be subject of appeal to the Court of Appeal.

In **R V COMMISSIONER OF LANDS ex parte JEMIMAH MBUGUA H. M ISC. APP. 1238/98**, the applicant sought to set aside or vary an order dismissing Judicial Review Application which had not been heard on merit but dismissed after being called out and the Applicants were absent as was the case in the instant case. Justice Makhandia held that the dismissal order was an order of the court under Order 53 Civil procedure Rules and there was right of appeal provided under statute, that is S.8(3) and (5) of the Law Reform Act and declined to grant the order.

Similarly in **KENYA FARMERS ASSOCIATION LTD. V THE MINISTER FOR CO-OPERATIVE DEVELOPMENT HMISC 284/03** Kimaru J. held that the court lacked jurisdiction to rehear the Judicial Review application but they could appeal under S 8. (3) and (5) of the Law Reform Act. In another case of **KURIA MBAE V THE LAND ADJUDICATION OFFICER –CHUKA HMISC APPLICATION 257/1987**, Mbito and Mango JJ held as follows:

“.....there is no doubt or dispute that a party aggrieved by the decision of this court granting or refusing an order of certiorari is entitled to appeal to the Court of Appeal. However according to Section 8 (3) of the Act, the court's order on such application is final and cannot be subject of pleadings or prohibition. There is also no provision in the said Act or any other law making such prerogative order of this court subject to the usual pleadings available in proceedings under the Civil Procedure Rules. In our view therefore, it would appear that this court has no jurisdiction to stay, recall, review, set aside or quash an order of certiorari once it has made it.

We wish to observe that it is now firmly established by the Court of Appeal that where the proceedings are governed by a special Act of Parliament, the provisions of such Act must be strictly construed and applied and that the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such Act. As such, the provisions of the Civil Procedure Rule and Act cannot be implied merely because the Special Act does not exclude them.....”

In J.B. MAINA & CO. LTD V GRAIN BULK CA 246/03 the Court of Appeal adopted its decision in the case of JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBURG AFFAIR V JOB KILACH (2003) KLR 249. The court said “we think this is sufficient authority for an appeal from “an order” made by the High Court under orders 53 of the Civil Procedure Rules. It is to be noted this section simply says “an order” and not “prerogative order” or any such qualification. So the appeal is statutorily available in Kenya as it is available in England.”

The above passages concludes the path that the courts have taken as regards orders of the High Court in Judicial Review proceedings. Whether or not the order of the court is made on merit, it is appealable to the Court of Appeal. This court having dismissed the Judicial Review application for reasons that the Applicant had not attended court, the same can only be subject of an appeal to the Court of Appeal and so that even if the court had been properly moved, the orders would not have been granted.

For the above reasons, this application stands dismissed with costs to the 2nd Respondent, Peter Nyeru.

Dated and delivered this 30th day of September 2008.

R.P.V. WENDOH

JUDGE

Present

Mr. Muriuki – Respondent

Mr. Njogu – Applicant

Holding brief for Sane

Daniel – court clerk