REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 473 of 2006

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

R LII CIVIL PROCEDURE RULES, NAIROBI CHIEF MAGISTRATE COURT MISC. CRIM. APPL NO. 167 OF 2006 CRIMINAL INVESTIGATION DEPARTMENT VERSUS HINESH CHUDASAMA

NAIROBI CHIEF MAGISTRATES COURT MISC CRIM. APPL NO. 168 OF 2006

CRIMINAL INVESTIGATION DEPARTMENT VS HINESH CHUDASAMA

NAIROBI CHIEF MAGISTRATE COURT

MISC CRIM. APPL NO. 174 OF 2006

CRIMINAL INVESTIGATIONS DEPARTMENT VS. HINESH CHUDASAMA

REPUBLIC…………………………………………….............……APPLICANT

EX PARTE HINESH K. CHUDASAMA on his own behalf and on behalf of the estate of Pooja Hinesh Kantilal Chudasama

-Versus-

1. **THE CHIEF MAGISTRATES COURT, NAIROBI**
2. **DIRECTOR, CRIMINAL INVESTIGATIONS**

DEPARTMENT…...RESPONDENTS

- AND -

MISC. APPLICATION NO. 478 OF 2006

IN THE MATTER OF THE SOCIETIES ACT, CAP 108 OF THE LAWS OF KENYA

-AND-

IN THE MATTER OF THE HEROES OF FAITH

CHRISTIAN FELLOWSHIP

-BETWEEN-

BISHOP PAUL KAMAU NJOROGE……………..........………1ST APPLICANT

BISHOP THOMAS KAMUYU MUGO………………..........…..2ND APPLICANT

SNR. PASTOR SIMON NJOROGE MIRUNGU……..........…...3RD APPLICANT

PASTOR PAUL MBURU KANGARA………..........….……….4TH APPLICANT

PASTOR PAUL KAMAU MBUGUA…………..........…………5TH APPLICANT

PASTOR HEZEKIAH KANYUGI MUCHIRI……...............………6TH APPLICANT

-VERSUS-

THE ATTORNEY-GENERAL ……………………......….…….1ST RESPONDENT

THE REGISTRAR OF SOCIETIES………………......….…….2ND RESPONDENT

JEREMIAH WA NDUNG'U THUKU,

CHIEF, KINALE LOCATION…..........……………......…...………..3RD RESPONDENT

-AND-

PAUL MUTHEE KAMAU ……………….……….……...…...1ST INTERESTED PARTY

BERNARD CHEGE GACHERU…………..…....…..….2ND INTERESTED PARTY

PETER WARUINGE KENJA……………..…......….……..3RD INTERESTED PARTY

SIMON NDUNG'U KIBARU……………….…………......……4TH INTERESTED PARTY

NG'ANG'A KARANJA…………………………......….…5TH INTERESTED PARTY

MARGARET MBURA NYAGA…………...…….........…..6TH INTERESTED PARTY

RULING

Both these applications dated 30th August, 2006 and 1st September, 2006, came before me seeking grant of leave for orders of Judicial Review specified in the respective applications made under Order LIII of Civil Procedure Rules.

In both the applications I granted leave to both the *ex parte* applicants as envisaged in Rule (1)(2) of Order LIII. However, I also made further orders that I shall hear *inter partes* the issue as to whether the leave so granted should operate as stay or not. The said orders were made by me under rule 1(4) of the said order which stipulates:

"1(4) The grant of leave under this rule to apply for an order of prohibition as an order of certiorari shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application, ***or until the Judge orders otherwise***. (emphasis mine)

Was I wrong to make the aforesaid orders? The counsel for the Respondents and interested parties in both cases reacted by saying I was wrong. They both did so by filing their objections by way of filing notices of Preliminary Objection.

I shall for the record quote the grounds raised in both the notices herein.

"***NOTICE OF PRELIMINARY OBJECTION - Misc. C.A. No. 473/06***

The Respondents shall at the hearing of the chamber summons application dated 30th August 2006 raise a preliminary objection to the hearing of the same on the following grounds.

1. That the leave can not be ordered to act as stay after the same was not granted at the time when the leave was granted *ex parte*. To order the application for leave to act as stay be argued *inter partes* will be contrary to law and the court's judgement in the following cases:

· Republic versus Commissioner of Co-operatives *ex parte* Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd. E.A.L.R. [1999] 1 E.A. 245 at 246

· Shah *versus* Resident Magistrate, Nairobi E.A.L.R. [2000] 208 at 209.

Dated at Nairobi this 22nd day of November, 2006

"***NOTICE OF PRELIMINARY OBJECTION - Misc. C.A. 478/06***

TAKE NOTICE that the interested parties shall prior to the hearing of the applicant's chamber summons dated 1st September 2006 raise a preliminary objection to the same *in limine* on the following grounds;-

(a) THAT the application as listed for hearing is fatally defective in view of the clear provisions of Rule 1(4) Order LIII of the Civil Procedure Rules.

(b) THAT with the Court having declined to issue the stay orders sought under prayer 4 of the application at the *ex parte* stage; the same cannot be addressed at an *inter partes* stage.

(c) THAT granting of the prayer sought would clearly contravene the clear provisions of the law.

(d) And on other or further grounds as will be adduced at the hearing hereof.

The Interested Parties shall seek to have the preliminary objection heard and determined *in limi*ne and prior to the hearing of the application.

DATED at NAIROBI this 11th day of September, 2006."

In short they submitted that leave cannot operate as stay once I failed and/or refused to grant the same at an *ex parte* stage of hearing of the application.

Both counsel simply relied on two Court of Appeal cases, namely: (1) ***Republic –vs- Commissioner of Co-operative*** *ex parte* ***Kirinyaga Tea Growers Co-operative Savings & Credit Society Ltd.*** (1999) 1 E.A. CA/C 245, and (2) ***Shah v. Resident Magistrate, Nairobi*** (2000) 1 E.A. CA/C 208.

The Court of Appeal in second case cited hereinbefore mainly relied on the observations made by the Court in the first one.

Both these cases are from Court of Appeal and if the Court in fact decided these issues, as observed, I have to put my tools down as I am simply bound by the decision of the Court of Appeal as per rules of precedent.

After recounting provisions of Order LIII, Rule (I) (1), (2) & (4) the Court of Appeal observed in the case of ***Republic v. Commissioner*** (supra) that there are three mandatory requirements for filing the application for Judicial Review, namely:

(a) That the application must be made *ex parte* to a Judge in chambers;

(b) That the application shall be accompanied by statements of facts; and

(c) That the application is also to be accompanied by affidavits verifying the facts relied on.

I do note here that these are the mandatory requirements observed by the Court and immediately thereafter the Court has thus to observe namely;

"if the application must be made *ex parte*, then it follows that it must be heard and granted or refused *ex part*e. If the application is granted, then rule 4 of Order LIII must also be dealt with because it is at the granting stage that the Judge is required to deal with the issue of whether the leave granted shall act as a stay. From the provisions we have set out it is clear to us that a judge has no power to separate the granting of leave *ex parte* from the issue of whether or not such leave shall act as a stay. The Judge must decide at the stage of granting leave whether or not such a grant shall act as a stay. There is no power to make one portion of the chamber summons *ex parte* and the other portion of it to be heard *inter partes*. *There was, however, no appeal from the order of Aluoch J made on the 11th June 1996 and though the Appellant's* first, ground of appeal is that:

"the Learned Judge erred in law and in fact by ordering that the prayer that leave to operate as a stay to be heard *inter pa*rtes, the only notice of appeal filed by the Appellant complains only against…the decision of the Honourable Justice Ole Keiwua given at Nairobi on the 16th July 1996".

There could, accordingly, be no proper appeal against the decision of Aluoch J made on the 11th June 1996 and ground one of the grounds of appeal is incompetent and must be rejected." (emphasis mine)

It is clear from the above that the decision of Aluoch, J was not directly in question and the same was not an issue of determination in appeal before the Court of Appeal. The Court of Appeal in the said judgement did not put forth the submissions made, if any, by the parties before it and thereafter made the above observations.

Thus although the portion of the holding part of the reported judgement in the said case pictured the aforesaid observations as the decision of the Court, in reality that is not the direct picture in my humblest view. The portion of what was held after some introductory note is made and published by the editor of the Report is not a part and parcel of the Judgement. What was for determination before the Court was the decision of Ole Keiwua J (as he then was) who heard the application *inter parte*s and dismissed the said for Judicial Review after leave was granted by Aluoch, J. who in turn ordered that the application for leave to operate as stay be heard *inter partes*. The order of Aluoch, J. so made was not directly in issue.

Similarly in the case of ***Shah v. Resident Magistrate*** (supra) Aluoch J. first granted leave *ex parte* to the application for Judicial Review and ordered that the application for leave to operate as stay be heard *inter partes*. She then, after an issue of propriety of bifurcation of granting of leave and adjournment of prayer of leave to operate as stay for *inter partes* hearing was raised, ***suo moto*** set aside all the initial orders and made an order that entire application be heard *de novo* before another Judge. Githinji J. (as he then was) heard the application and declined to grant leave. An appeal was filed against that order made by Githinji, J. (as he then was). Ole Keiwua JA who was one of the three Judges who heard the appeal expressed his view, viz:

"***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 stay of proceedings, for hearing inter *partes*, but ***I do not think*** (emphasis mine) that the discretion extends to enable such a Judge to hear that application both *ex parte* and *inter partes* as was about to happen in this case before Aluoch, J." (emphasis mine)

He then further observed and I quote –

"The Learned Judge of the superior court in my view, had no basis on which to undo the grant of leave, which prayer she had granted to the Applicants. There was no application made to that effect and upon which she could review or vary her order granting leave to apply for the order of prohibition. Her decision thereafter to send the file and the very same application for leave, for hearing by another judge of co-ordinate jurisdiction (Githinji J) was without foundation inasmuch as the order granting leave to the Applicants could not be set aside by the Learned Judge without an application for that purpose. It further appears doubtful, whether Githinji J. could properly have embarked on the hearing of the application and thereby decline leave and stay which former prayer, had already been granted and improperly taken away by Aluoch J. That muddled situation goes to show that the Applicants' intended appeal has chances of succeeding, quite apart from the proposed grounds upon which it is intended to be made."

It is also pertinent to note that in the said case, the Court of Appeal was considering the application for stay under Rule 5(2)(b) of Court of Appeal Rules and the case arose from Criminal proceedings before the subordinate Court. It is also relevant to note the different interpretations of the stages of *ex parte* application made by the Court of Appeal in both cases. The first followed mandatory language and second one gave the discretion to convert *ex parte* applications into *inter partes* one. Awour JA in her Ruling in the said case relied entirely on ***Republic v. Commissioner*** (supra) which I have already quoted hereinbefore.

The first issue to determine by me is:

Whether the above observations made by the Court of Appeal in these two cases were *ratio decidendi* or *obiter dictum*.

If it is the decision made by the Court on an issue before the Court then the matter stops here. If not, and if the same were *obiter dictum,* in both the matters, they become persuasive authorities not the binding ones.

The definitions of *obiter dictum* and *Ratio decidendi* on pages 1100 & 1269 of Black's Law Dictionary (7th Edition), read as under:

Obiter dictum (ob-I-tar dik-tam). [Latin "something said in passing"] A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive). – Often shortened to dictum or, less commonly, obiter.

"Strictly speaking an '*obiter dictum'* is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' – that is, incidentally or collaterally and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion…In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as '*dicata,'* or '*obiter dicta,*' these two terms being used interchangeably." William M. Lile et al, Brief Making and the Use of Law Books 304 (3d ed. 1914).

Ratio decidendi (ray-shee-oh des-a-den-di), n. [Latin "the reason for deciding"] 1. the principle or rule of law on which a court's decision is founded . 2. The rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise . – Often shortened to ratio.

"The phrase 'the ratio decidendi of a case' is slightly ambiguous. It may mean either (1) the rule that the

judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later court concedes him to have had the power to law down." Glanville Williams, Learning the Law 75 (11th ed. 1982).

"There are..two steps involved in the ascertainment of the ratio decidendi..First, it is necessary to determine all the facts of the case as seen by the judge; secondly, it is necessary to discover which of those facts were treated as material by the judge."

The essence and spirit of doctrine of precedents was succinctly stated by Sir John Salomod: viz

"A Judicial precedent speaks in England with authority; it is not merely evidence of the law but a source of it and the courts are bound to follow the law that is so established.

Absolute authority exists in the following cases:

(i) Every court is absolutely bound by the decisions of all courts superior to itself. Goodhart, case law in England and America (15) Carnel Law Quantely 173 at 175."

In ***Kiriri Cotton Co. –vs- Ranchoddas K. Dewani*** (1958) EA 239, the Court of Appeal made it apparent that what is binding is ratio decidendi and it shall be a pedantry to state that the decisions of Court of Appeal is absolutely binding on the High Court, but not their opinions stated by the way which are officially termed as *obiter dictum.*

With utmost humility I am of an opinion, from the facts of the two cases, relied on and observed by me hereinbefore, that the observations made by Court of Appeal in the aforesaid two cases were not made on the issues which were directly before the Court for determination. At the risk of being repetitive or immodest the orders made by Aluoch J. were not under attack before or for direct determination by the Court of Appeal. Thus, in my understanding there is no decision of the Court of Appeal on this issue. I must hasten to state that the observations made by the Court do deserve and exert highest respect and I have to consider them as highly persuasive authorities.

Having observed thus I can now deal with the preliminary objections.

Dr. Kuria the learned counsel for *ex parte* applicant in Misc. C.A. No. 478/06 in advancing his contention that this Court has discretion and jurisdiction to bifurcate the two stages provided in Rule 1 of Order LIII Civil Procedure Rules, submitted that the issue of discretion of the Court cannot be determined as a preliminary point. He relied on the case of ***Mukisa Biscuit –vs- Westend Distributors Ltd.*** [1969] EACA 696.

Dr. Kuria could be right in contending so, but in my view, due to the serious nature of the point raised, I shall consider the objections raised.

In Kenya, the functions and remedies of orders of certiorari, mandamus and prohibition by way of judicial review found roots in 1956 by the enactment of Law Reform Act (Cap.26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, i.e. to supervise the acts of government powers and authorities which affect right or duties or liberty of any person.

I shall like to borrow wise words from Prof. H.W.R. Wade and C.F. Foipsyth (Chapter 17 Administrative Law, 8th edition) – namely

"The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act which he can safely disregard."

Again in the famous case of ***Marbury v. Madison*** the Chief Justice Mashall came out very strongly on the protection of civil rights when he stated, viz

"The government of the United States has been emphatically renamed as a government of laws and not of mess. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

I am aware that the emphasis on the principle of rule of law is not directly in issue before me, yet I shall have to express the seriousness and might of the powers vested in the High Court by way of these remedies under judicial review. The Court, generally, while hearing applications under the process of judicial review, may it be under the Constitution or under Order LIII of Civil Procedure Rules, are faced with serious issues involving Civil & Constitutional rights and liberties of a person. That is why it is elevated as a special jurisdiction even under the Civil Procedure Rules.

With this brief base of the judicial review process, I shall now come to laws relating to these remedies.

Obviously, I am expected to start from the Constitution.

Section 60(1) of the Constitution gives unlimited and inherent powers stipulates:

"60. (1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

Going further we have Section 65(2) of the Constitution which stipulates:

"65(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts."

The Constitution goes further while giving powers to the High Court for protection of fundamental rights vide Section 84(2), which reads -

"84(2) The High Court shall have original jurisdiction –

(a) to hear and determine an application made by a person in pursuance of subsection (1):

(b) to determine any question arising in the case of a person which is referred to it in pursuance of sub-section (3).

And ***may make such orders***, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)." (emphasis mine)

There is no dearth of decisions in all commonwealth judicial systems that while protecting fundamental rights, the Court has power to fashion new remedies. (See ***Gaily v. A.G***. (2001) 2 RC 671, ***Ramanoop v. A.G.*** (2004) *Law Reports of Commonwealth* (from High Court of Trividad and Tobago). Our Court in ***Wanjuguna v. Republic*** (2004) KLR 520, has also expanded the same doctrine under Section 82 of the Constitution.

I shall like to emphasis a passage from ***Ramanoop's case*** (supra)

"The breadth of the language of subsection(2) is clear……….. There is no limitation on what the Court can do. Any limitation of its powers can only derive from the constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal."

A person in Kenya is granted options to come before the Court to vindicate his claims, and get these remedies, which is either under the Constitution or under Law Reform Act (Sections 8(2) and 9 thereof). I may add that sub-section (2) referred in the said authority is worded similarly as words of Section 84(2) of our Constitution.

In my view, the options are only as regards the process but not as regards the rights of the individual or the power of the Court.

If the individual intends to combine the remedies then he can come under the Constitution. If he asks only for orders of certiorari, mandamus, or prohibition then he must make an application under Order LIII of Civil Procedure Rules. (See ***Republic. v. The Commissioner of Police & Another*** Misc. C.A. No. 534 of 2003). The present *ex parte* applicants have come before the Court under the latter option before the Court, i.e. by way of Judicial Review under Order LIII.

At the time of enactment of Law Reform Act, the legislature thought it fit to adopt the judicial powers of English Court as per Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. That was in 1956 and the relevant Act in United Kingdom was the said Act.

Kenyan legislature has, however, failed to make any significant development in the said law or failed to keep abreast with the development made in the field of administrative law in the United Kingdom. However, Kenyan Judiciary has continued, like the Courts in the United Kingdom, to consider the three remedies of Judicial Review a very important means to uphold and defend the rule of law.

Far reaching and practical amendments in the judicial review process were made in United Kingdom namely allowing the Court to grant other remedies such as damages, interlocutory orders etc, (corresponding to our Section 84(2) of the Constitution). I shall like specifically to note that the word '*shall'* appearing in Order LIII Rule 2 (similar to our rules) was substituted with the word '*must'* which was reverted again to the word '*shall'* when other remedies were combined with orders of certiorari, mandamus and prohibition.

I can easily and unhesitantly observe that there cannot be a more emphatic expression of a mandatory term than the word '*must'*.

The procedural law in England provided that the application for orders of certiorari, mandamus or prohibition 'must be made *ex parte*.' Yet the English Courts declined to be overpowered by the said mandatory provision and held that the application which is meant to be heard *ex parte* may be, in appropriate cases, adjourned for persons or bodies against whom relief is sought to be represented and heard. Lord Diplock observed so in the cases of ***Inland Revenue Commissioners v. National Federation of Self-Employed*** (1982) AC 617 at 642 and ***O'Reilly v. Macknan*** (1982) 3 All E.R. 1124 at 1130.

Lord Halisham in ***London and Clydeside Estates Ltd. v. Aberdeen D.C.*** [1979] All E.R. 876 at 883 has stated *inter alia,* viz.

"when Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the …….. detail. But what the Courts have to decide in a particular case is the legal consequence of non-compliance of the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the Courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another."

I shall like to take strong support from the above words to state that the Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, specially in the field of very important sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court.

I may also borrow the following passage on page 361 of the Judicial Review Handbook (3rd edition) by

Michael Fardham.

(E) POWER TO BE USED SPARINGLY:

R V SECRETARY OF STATE FOR THE HOME DEPARTMENT, ex p. BEGUM (1989). I admin LR 110, 112F (McGowan J): "this is a jurisdiction that should be very sparingly exercised"; R V Crown Prosecution Service exp. Hogg (1994) 6 Admin LR 778, T81E – 782; R V Secretary of State for the Home Department ex p. Chinnoy (1992) 4 Admin LR 457, 462 D-F; R V Customs & Excise Commissioners, ex p. Eurotunnel Plc [1957] CLC 392, 399 F. (it is obvious that the whole purpose of the [permission] stage would be vitiated if the grant of [permission] were to be regularly followed by an application to set it aside"); R V Environment Agency, ex p. Learn [1988] Env LR DI, transcript (Law J,: "It may very well be that [the claimants] will face great, perhaps insuperable, difficulties when the case is finally heard, but in my judgement this was never a case for an application to set aside [permission]." "It cannot be emphasised too strongly that such an application is not to be brought merely on the footing that a [defendant] has a very powerful, even overwhelming case")…"

Finally I get great support from very incisive passage from the case of ***R V Kensington and Chelsea Royal LBC*** (1989) All E.R. 1202 at 1215 where Lord Parker LJ observed.

"There remains a matter of procedure which can be canvassed by counsel for the council, namely the question whether, assuming an application, as I hold it can, can be made for interim relief of this sort, it can be made *ex parte* or must be made on notice to the other side. The position under Ord 53 is that every application for leave to move must be made *ex parte* in the first instance (r3(2)) and it is on the grant of leave, which may be made on such *ex parte* application, that the alternative powers under Ord 53, r 3(10) arise. ***The judge, when considering whether or not to grant an application for interim relief, having decided that he would grant leave and therefore given himself jurisdiction to grant relief of either of the types mentioned in the paragraph, will no doubt consider whether the case is sufficiently urgent to warrant his dealing with it at that time, or whether he should put it over to be heard inter partes.*** In so doing he would be reflecting the procedure under Ord 29 that would apply in the case of an action, for there it is provided that except in urgent cases the application for interim relief must be made by motion or on summons (see Ord 29, r1(2)). It is therefore impossible to rule that all such applications must be on notice. I would, however, for my part observe that where an application for interim relief is intended to be made, the applicant would be well advised to give notice to the other party that such an application is being made ***in order that the other party may, if he so wishes, attend and assist the court by filling in any gaps in the information which may be available and thereby enable the matter to be dealt with properly at a first hearing and dispense with the necessity of having a second hearing. I can therefore say no more than that notice that an ex parte application for interim relief is going to be made would be an advisable step in all cases.***

For the reasons which, I fear at great length, have endeavoured to give, I would allow this appeal. I would conclude only by thanking counsel for their assistance, which I have found to be invaluable." [emphasis mine]

I am, in present matter, expected to interpret the provisions which are procedural in nature. It is well settled that "Rule of procedure cannot be allowed to become mistress of justice, it is the hand maid of justice."

Supreme Court of India in the case of ***CIT –vs- Venkatacharan*** (1993) supp. (3) S.C.C., 413 observed that:

"Rules of procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to ***achieve justice and are not hurdles to obstruct the pathway of justice."*** (emphasis mine).

Am I supposed to get support from the above English and Indian authorities? I do think that in absence of any decision from the Kenyan Courts, these authorities can be relevant source for my decision even so

can the past 1938 procedures, developments in written laws and case laws. They are, in any event, always persuasive authorities.

Role of a Judge is defined in a very elaborate fashion by J Cardozo and I quote -

"A judge must think of himself as an artist who, although he must know the handbooks, should never trust them for his guidelines, in the end he must rely upon his almost instinctive senses of where the line lay between the word & purpose which lay behind it" (See 52 Harvard LR 361 at 363).

Unparallel Lord Denning observed as follows in ***Seaford Court Estates Ltd v. Asher*** (1994) 2 ALL E.R 155 at 164.

"***A Judge must not alter the material of which the Act is known but he can and should iron out the creases"***

Simply put I may observe that the initial stage of obtaining leave is similar to getting an entry into Judicial arena so that the applicant can vindicate his rights or claims. In my earnestly humble view, till that stage no serious inroads can be expected to be made in the rights of the opposite side. Even if it is so, the Courts in Kenya and of course in the U.K. have come out strongly in favour of the discretion of the Court to allow the other party to enter in the arena at the appropriate stage to avoid multiplicity of process of setting aside the initial order of leave. It was to make the procedure more effective, just and fair specifically to suit an advertical system of justice.

The Court as stated in case of ***Kingston*** (supra) gets jurisdiction after the grant of the leave and there is no legal basis to stop or obstruct the Court to get representation from the other side before it can grant a more substantial and drastic, if I may state so, remedy of stay. In my view, what the Court decides after representation from other side shall be more judicially viable than what the Court would do before such representation. It can be a safer and fairer manner to avoid great inroads and hindrance to the rights and obligations of the opposite party.

I have carefully tried to read and re-read the provisions of sub-rule 1(4) of the Order LIII Civil Procedure Rules and I do not read any prohibition for the Court not to bifurcate two stages of the application.

Section 9 of the Law Reform Act also supports my opinion. Its provisions grant power to make rules as to proceedings. Section 9 (1) (b) stipulates -

"9(1) Any power to make rules of court to provide for any matters relative to the Procedure of Civil Courts shall include powers to make rules of Court:

(a) ……………………….

(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"

This sub-section does not make any provisions or does not make any mention as regards the procedures which includes the procedure concerning the said leave to be operative as a stay. Thus sub rule (1) (4) of Order LIII can be said to have been made without any support from an Act of Parliament. However, in my view, this issue may not be relevant at this case, but I can safely state that even in absence of the said sub-rule, there cannot be any impediments on the part of the Court to grant the remedy of stay.

Be that as it may, what I intend to observe is that any restrictions on the inherent power of the Court to grant appropriate orders deemed fit has to be sourced from the Constitution and an Act of Parliament cannot stifle that power. However, I have observed that the language of the said rule 1(4) does not in any event hinder the Court's jurisdiction to make an order that it shall adjourn the hearing of application of stay to the *inter partes* hearing. What the Court can do at an *ex parte* hearing, it can do at *inter partes*

hearing.

I shall also take support from the observations made in the case of ***Rosafric Ltd. & 3 Others –vs- The Minister of Finance*** Misc. CA No. 1392 of 2001 (unreported); that there is nothing in Order LIII of Civil Procedure Rules which stultifies this Court's unlimited, original and inherent jurisdiction. The decision emphasised that the Court should welcome the opportunity to be assisted by the opposite party at an early stage.

It is also my humble view that it shall be a travesy of law and an affront to the inherent and unlimited power of the Court, if the Court is not allowed to grant orders *inter partes* which it can give *ex parte.*

This interpretation of the law as hereby put forth by me makes it amenable to the spirit of Order LIII Civil Procedure Rules, rule of law and independence of judiciary as a protector and defender of Constitution and the rights of the subjects of Kenya.

I thus dismiss the preliminary objections raised in both these applications and direct that both applications be heard as ordered.

The costs of these proceedings be in the cause.

I shall be failing in my duty if I do not express my gratitude for the assistance from all the counsel and would like to stress that I have considered the submissions and authorities very carefully and failure to mention some of them is not accidental.

DATED and **DELIVERED** at Nairobi this 2nd day of February, 2007

K.H. RAWAL

JUDGE