

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

Misc Appli 891 of 2006

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE KENYA PORTS AUTHORITY CAP 391

AND KENYA PORTS AUTHORITY REVISED

STAFF REGULATIONS 2002

BETWEEN

ABDI MOHAMED DAIB.....APPLICANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

R U L I N G

The Respondent herein, Kenya Ports Authority, took out a motion pursuant to the provisions of Sections 3A and 80 of the Civil Procedure Act and under Order L rule 1 of the Civil Procedure Rules in which it prayed to this court to review its order it issued on 31st August 2006 staying the dismissal of Abdi Mohamed Daib, the applicant herein and the requirement for him to vacate house no. K.Z.G.BLK 28/1-D2 pending the hearing of the substantive

Application for judicial review. The motion is supported by the affidavit of Irene Mbogho sworn on 5th October 2006.

When the motion was served upon the exparte applicant, he raised a preliminary objection against the motion. The preliminary objection dated 13th February 2007 is the subject matter of this decision. The Respondent has urged this court to strike out the entire motion on the ground that the same is incompetent and fatally defective. It is the submission of Mr. Mabeya learned advocate for the Respondent that the provisions of Sections 3A, 80 of the Civil Procedure Act and order L rule 1 of the Civil Procedure Rules do not apply to judicial review proceedings. Mr. Kinyua, learned advocate for the Applicant conceded to the submission that Section 80 of the Civil Procedure Act order L rule 1 do not apply to judicial review proceedings. He is however of the view that the provisions of Section 3A of the Civil Procedure Act applies because it is a saving provision that enables this court to exercise its inherent jurisdiction in such proceedings. On the other hand Mr. Mabeya was of the view that the Kenya Ports Authority should have come under Order LIII rule 4 of the Civil Procedure Rules to enable this court to review the exparte orders. I have considered the fact that it is conceded that section 80 and order L rule 1 do not apply to judicial review proceedings. I agree that the concession was properly made. What is now in contention is whether or not such an application can be premised under Section 3A of the Civil Procedure Act. There is no unanimous decision on this provision by the High Court. It would also appear that such an issue has not been raised and put to the attention of the Court of Appeal on this issue. For example a motion nearly

similar to the one now before this court was made in High Court at Nairobi vide Nairobi H.C.C.C. No. 110 of 1998 between **Aga Khan Education Service Kenya and Benson Wairagu & 3 others.** The motion in that case was premised on the provisions of Section 3A and Order L rule 17 of the Civil Procedure Rules. No objection was raised on the competency of the motion. The Judge who heard the motion refused to grant the order and opted instead to dismiss the motion. The applicant preferred an appeal against the decision. The court of appeal approved the statement of law in the English case of **R =VS= Secretary of State EXPARTE arbage [1978] 1 ALL E.R. 324** where it was stated as follows:

“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court to the judge who granted leave to set aside such leave.”

From the above statement of law it is clear that the court of Appeal set out clearly that such an application can only be made under the inherent powers of the court. I agree with the submissions that Section 3A is a saving provision of the inherent powers of the court while exercising its Civil jurisdiction. By citing the provisions of Section 3A, what prejudice did the applicant/Respondent suffer? In my view no harm will be visited upon him. In any case Section 3A does not confer any powers but only restates that there is a power to make such orders as may be necessary for the ends of justice and to prevent an abuse of the court process. In my appreciation of the law I am certain that the objection has merit but it does not render the entire motion fatally defective. Inherent jurisdiction of the court must be exercised subject to the rule that if there is no specific provisions which would meet the necessities of the issues in question. In the end and for the above reasons I dismiss the preliminary objection with no order as to costs.

Dated and delivered at Mombasa this 6th day of March 2007.

J.K. SERGON

J U D G E