



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 191 of 2006**

**AQUARIUS LIMITED ..... 1<sup>ST</sup> APPLICANT**  
**ELITE STUDIOS LIMITED ..... 2<sup>ND</sup> APPLICANT**  
**M.T. PAREKH LIMITED ..... 3<sup>RD</sup> APPLICANT**  
**SAFARI CRAFTS LIMITED ..... 4<sup>TH</sup> APPLICANT**  
**GARDENT CENTRE LIMITED ..... 5<sup>TH</sup> APPLICANT**  
**LALY FURNISHING HOUSE LIMITED ..... 6<sup>TH</sup> APPLICANT**  
**BACHELORS BAKERY LTD ..... 7<sup>TH</sup> APPLICANT**  
**DINNESH PATTNI T/A B. J. PATTIN & SONS ..... 8<sup>TH</sup> APPLICANT**  
**OLTETIA OLE SAPAI T/A AMERICAN SNACK BAR ..... 9<sup>TH</sup> APPLICANT**  
**MR. KURBANALI SHAMSUDIN**  
**T/A MARKET FISH & CHIPS ..... 10<sup>TH</sup> APPLICANT**

**AND**

**THE CHIEF MAGISTRATE'S COURT –NAIROBI.....1<sup>ST</sup> RESPONDENT**  
**METRO PLAZA LIMITED ..... 2<sup>ND</sup> RESPONDENT**  
**CITY COUNCIL OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

On 11<sup>th</sup> April, 2006 the ex-parte applicants Aquarius Ltd and 9 Others moved this court for leave to bring an application for Judicial Review Orders against the Chief Magistrate's Court Nairobi and Two

Others. The orders sought were, certiorari to quash the decision of the magistrate to reopen the case Chief Magistrate's Case Misc. Criminal 12A/05; certiorari to quash the Magistrate's decision ordering the inspection of the suit premises by the City Engineer and an order of prohibition to issue against the magistrate to stop him from summoning the City Engineer to carry out the inspection. The application also sought an order that leave if granted, do operate as stay. The application was brought under order 53 R.1 (1), (3) Civil Procedure Rules, section 8(2) Law Reform Act and section 60 of the constitution. Mr. Orengo & Ms Aulo counsel for the applicant appeared before Hon. Dulu Ag. Judge on 13<sup>th</sup> April, 2006 and the court granted the prayers for leave. However, the Judge declined to grant an order of stay.

The substantive Notice of Motion was filed in court on 20<sup>th</sup> April, 2006 and after directions were given as to the hearing, the matter was fixed for hearing on 17<sup>th</sup> May, 2006 but when the matter came up for hearing, an application for adjournment was sought by the Respondent who had been served with the applicants' list of authorities and submissions the previous evening.

All the counsels had not complied with the courts order of 27<sup>th</sup> April, 2006, that the submission and authorities be put in within 5 days of 27<sup>th</sup>. Consequently the court granted an adjournment for the matter to be heard on 8<sup>th</sup> June, 2006.

On the same afternoon of 17<sup>th</sup> May, 2006 the applicant filed an application under certificate of urgency seeking the following orders, that;

- (1) the application be certified urgent
- (2) that the application be heard ex-parte in the 1<sup>st</sup> instance.
- (3) that the orders of the 1<sup>st</sup> Respondent given herein on 16<sup>th</sup> May,

2006 in Nairobi Chief Magistrate's Court Misc. Criminal Case

No.12 (A) of 2005 including orders that

- A boarding fence be provided around the premises.
- The masonry debris be removed from the premises and
- The existing masonry steel and timber structures be demolished and removed from the site;

Be stayed until the 8.6.2006.

#### 4. Costs in the cause.

The application was 1<sup>st</sup> heard ex-parte and the court granted an order stopping the execution of the Chief Magistrate's Court order pending the hearing of this application inter-parties the next day. Mr. Orengo argued the application on behalf of the applicant, 1<sup>st</sup> Respondent was represented by Mrs. Oduor, Mr. Langi represented the 2<sup>nd</sup> Respondent whereas Mr. Osundwa appeared for the 3<sup>rd</sup> Respondent.

The application was expressed to be brought under S.3A Civil Procedure Act and is supported by an affidavit sworn by Diamond Jaffer Ali Mapara.

Mrs. Oduor did not file any papers in response but addressed the court on points of law.

Mr. Daniel Rono, Manager of the 2<sup>nd</sup> Respondent swore a replying affidavit whereas the 3<sup>rd</sup> Respondent filed grounds of opposition dated 18<sup>th</sup> May, 2006.

Briefly the facts to this case as stated by the applicants are that the applicants are tenants of the 2<sup>nd</sup> Respondent. It is the applicant's contention that there was a conspiracy between the 2<sup>nd</sup> Respondent and City Others to have 2<sup>nd</sup> Respondent charged, plead guilty so that the court would issue and order of demolition of the premises which the applicants occupy. This matter had come up before J. Ringera in a case between the parties HCC No.203 of 2002 in which the court gave an injunction restraining the Respondent from demolishing the premises. The matter was sent for review and Hon.J. Kimaru ordered a retrial in his ruling in Criminal Revision 7/2003. It is then this matter was heard afresh and the matter was reserved for ruling. But the Magistrate later ordered the calling of more evidence under section 150 Criminal Procedure Code. The City Engineer was supposed to be called as a witness and required to visit the scene to ascertain the status of the site as of that date. This is what the applicants are challenging because according to them that amounted to the court taking part in investigations and was therefore acting in excess of its jurisdiction and that prompted the filing of this application for orders of certiorari & prohibition. When the applicants came to court, the orders of demolition of the premises had not been made by the lower court and so could not have been sought at the time of filing of the Chamber Summons for leave. It is the applicant's contention that if the order is not granted, the substratum of the application will have been removed as the 2<sup>nd</sup> Respondent had already commenced demolition of the premises.

Mr. Orengo argued that though, it is trite law that an application for leave and stay be heard ex-parte or argued at same time, under the circumstances this situation had not arisen as the Chief Magistrate's Court had not made the orders sought to be stayed in this application and the court cannot be rendered toothless in the face of an injustice and that is why the court has inherent power to act in such situations. He said that order 53 Civil Procedure Rules has no provision to cover that situation and that the court can grant the prayer under Section 3A Civil Procedure Act and that order 53 Civil Procedure Rules which is a subsidiary legislation cannot take away the inherent power of the court which derives its power from section 60 of the constitution. Counsel also argued that order 53 is a product of section 81 which establishes the Rules Committee that made rules under Order 53 Civil Procedure Rules and the court would invoke section 3 A Civil Procedure Act if necessary. Counsel relied on the following authorities;

- (1) **WANJAU v. MURAYA** (1983) KLR 276 where the court held that S. 3A Civil Procedure Act cannot be invoked anyhow but will be invoked where there is no specific provision of law or procedure.
- (2) **SAMMY MUHIA & 2 OTHERS v. KENYA POWER & LIGHTING CO, LTD CA** 620/04 where the case started by way of plaint, was converted to a constitutional reference and the court granted an order of injunction though it was not sought.
- (3) **ALICEN CHELAITE v. DAVID MAINA CA** of 150/98 – an election petition where the court overlooked the fact that procedure on service was not followed and invoked the inherent power of the court so that the petition could not be struck out.

In reply, Mrs. Oduor argued that this court has no jurisdiction to grant the order of stay as it was considered by J. Dulu ex-parte and not granted. She relied on the case of **SHAH v. R.M. NAIROBI (2000) I E.A. 208** in which the Court of Appeal held that the issue of leave and stay were to be heard together ex-parte or both be considered at an inter partes hearing but could not be split to hear one ex parte & another inter partes.

Secondly counsel argued that the magistrate had jurisdiction to hear the case and that in essence what the applicant is trying to do is to substitute an appeal with Judicial Review.

Thirdly counsel argued that the prayer now sought is not contained in the Notice of Motion and statutory statement. The final decision of the Chief Magistrate is therefore not subject to Judicial Review.

Mr. Langi on the other hand submitted that the application has been overtaken by events since the demolition is already complete. He relied on Daniel Rono's replying affidavit. He also associated himself with submissions by 1<sup>st</sup> Respondent.

Mr. Osundwa associated himself with arguments of Mrs. Oduor and relied on his grounds of opposition.

I have considered the rival arguments by all counsel. The applicants do not deny that in Judicial Review, the issue of stay is considered ex parte along with issue of leave or both leave and stay be considered at an inter partes hearing. The 2 cannot be heard separately (**SHAH v. RM'S COURT NAIROBI**) (2000) I.E.A. 208. In this case J. Dulu did deal with both issues of leave and stay ex parte and declined to grant an order of stay.

Section 8 of the Law Reform Act is what donates power to order 53 Civil Procedures Rules to grant Judicial Review Orders. That section provides that when the court exercises its jurisdiction under that order, it is neither exercising civil nor Criminal jurisdiction.

It provides:

**“Section 8(1) the High Court shall not whether in the exercise of Civil or Criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari.**

**(2) In any case in which the High Court in England is, by virtue of the provision of section 7 of the Administration of Justice (Misc. Provisions) Act 1938 of the United Kingdom empowered to make an order of Mandamus prohibition or certiorari, The High Court shall have power to make a like order.”**

The Court of Appeal has held over and over again that Civil Procedure Rules do not apply to Judicial Review proceedings.

See **COMMISSIONER OF LANDS v. KUNSTE HOTELS LTD CA 234/1995**

And **REPUBLIC v. COMMUNICATION COMMISSION OF KENYA CA 175/2000**

The two decisions clearly state the Court of Appeal's position, that the Civil Procedure Act & Rules do not apply to Judicial Review proceedings and this is a restatement of Section 8 Law Reform Act. I have no doubt that the court's jurisdiction under order 53 Civil Procedure Rules is of a civil nature but the substantive law is derived from the Law Reform Act. Counsel for the applicant cannot therefore argue that Order 53 Civil Procedure Rules being a subsidiary legislation is subject to section 3A of the Civil Procedure Act. Even though Rules made under Order 53 are made by the Rules Committee under section 81 of the Civil Procedure Act, yet they are so made with due regard to section 8 and 9 of the Law Reform Act. Order 53 Civil Procedure Rules does not stand alone as a subsidiary legislation. It is based on section 8 and 9 Law Reform Act which is a substantive statute or legislation and order 53 has to be read together with section 8 and 9 of the Law Reform Act. Section 8 Law Reform Act specifically ousts the jurisdiction of Civil Procedure Act and Rules. I do agree with the applicant's arguments that section 3A will only be invoked where there are no specific provisions, orders or rules to cover the relief sought as was held in the case of **WANJAU v. MURAYA**. In the present case, there are specific provisions for Judicial Review under sections 8 and 9 Law Reform Act and order 53 Civil Procedure Rules and that is the law that is applicable.

The order sought to be stayed was made on 16<sup>th</sup> May, 2006 when this matter was already before the court. The prayer is not sought in the statutory statement and the Notice of Motion. Order 53 Rule 4(1) Civil Procedure Rules specifically provides that it is only the relief specified in the statutory statement and notice of motion that can be granted See J. Nyamu's decision in the **CHAIRPERSON OF NATIONAL GOVERNING COUNCIL OF THE AFRICAN PEER REVIEW MECHANISM & ANOTHER v. THE HON. PROF. PETER ANYANG NYONGO & OTHERS MISC. APPLICATION NO.1124 OF 2005**. The relief described in the statement relates to orders to quash the decision of the Magistrate to call evidence of The City Engineer; and an order to visit the site and prohibiting the Magistrate from re-opening the case. The order of 16<sup>th</sup> May, 2006 was given during the pendency of these Judicial Review Proceedings. Order 53 4(2) provides for amendment of the statement but even if it were amended to include the prayers, the Notice of Motion, in of view cannot be amended

and so that prayer would generally be shut out. Mr. Orenge urged the court to exercise its power under section 3A to grant the orders to avert an injustice being perpetrated. I have considered the decisions that were relied upon. I do note firstly, that none of the cases deals with Judicial Review. In the **SAMMY MUHIA CASE** the suit was brought under section 84 of the constitution and under section 84(2), the court can grant or give any direction, or orders for purposes of enforcing provisions of section 70 - 83 of the constitution. The discretion given to the court under that section is very wide and unlimited unlike the provisions relating the Judicial Review, which are special and restricted to order 53 Civil Procedure rules.

In the **ALICEN CHELAITE CASE**, which was an election, petition in which service was an issue, the court invoked its inherent power. In that case it is not said that the provisions relating to election petitions specifically ousted the application of the Civil Procedure Act & Rules, as did Order 53 Civil Procedure Rules as read with section 8 and 9 of Law Reform Act.

In the case heard by J. Ringera in relation to these same parties, HCC No.203/02, where the Judge declined to grant prayers sought but granted an order of injunction, to avoid on injustice being done, that suit had been brought under Order 39 Civil Procedure rules, section 3 Civil Procedure Act and all the inherent powers of the court. A door has been opened for the Judge to grant the orders. The above decisions are distinguishable from this case. Under Order 53, even if the court were to exercise its inherent power it should be within the purview of that order. Order 53 Civil Procedure Rules specifically prohibits the grant of orders outside the statutory statement and the applicant's prayer cannot be granted. I would agree with Mrs. Oduor that order 53 does not contemplate a situation where an application seeking other orders other than those in the statement and notice of motion will arise. In Judicial Review, the decisions that are being challenged will have been in existence as of the time of filing the application. Even as counsel filed this application, he knew the limitations of the courts jurisdiction under Judicial Review and should have considered what remedy was more efficacious in the circumstances because if stay was not granted, the lower court had the right and power to continue with the hearing of the case before her and make her decision accordingly.

The 2<sup>nd</sup> Respondent's manager Daniel Rono swore an affidavit to the effect that the demolition ordered by the court has already been completed and that if the court granted any orders, it would be doing so in vain. This is an application in Judicial Review. The court does not take oral evidence and it is not possible to ascertain otherwise than believe that, that is the position and the court will therefore not grant a stay order in vain.

For the reasons given above, I find no merit in the application and it is hereby dismissed. Costs to be in the cause.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2006**

**R. P. V WENDOH**

**JUDGE**

In presence of

Ms Aulo – Applicant

Mr. Wohuro – 1<sup>st</sup> Respondent

Mr. Langi – 2<sup>nd</sup> Respondent

Mr. Makori – 3<sup>rd</sup> Respondent