



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

Misc Civ Appli 70 of 2006

REPUBLIC APPLICANT

AND

THE MUNICIPAL COUNCIL OF ELDORET 1ST RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT 2ND RESPONDENT

EX-PARTE DR. ZEPH GAYA and 4 OTHERS

RULING

Dr. ZEPH GAYA and his four colleagues who are the ex parte applicants herein, appeared before me in an ex parte application on 30/3/2006 against THE MUNICIPAL COUNCIL OF ELDORET (hereinafter referred to as ‘the 1st respondent’) and THE MINISTER FOR LOCAL GOVERNMENT (hereinafter referred to as ‘the 2nd respondent’), when they sought leave to apply for orders of judicial review.

Their prayer (e) in the notice to the Registrar which was for all purposes and intent, and as is a mandatory requirement, similar to prayer (e) in the Chamber Summons read as follows:

“That leave be granted to the applicants to apply for orders of judicial review for:”

a).....

b).....

c).....

d).....

e) *“An order of prohibition to prohibit the 1st respondent from arbitrarily increasing and collecting rates from the ex-parte applicants and the other rate payers within the 1st respondents jurisdiction until the pending objections to the proposed rates review are placed before a properly constituted rating Court and determined and further until such time as the annual estimates expected of the 1st Respondent under section 212 of the Local Governments Act and the Annual Audits and Abstracts accounts have been produced and supplied to the ex-parte applicants for the exparte applicants to have a say in the increase of the proposed and collection of the rates in accordance with the recognized principles that govern the rule of natural justice.”*

Having taken the submission of their learned counsel, Mr. Manani, I found that his clients deserved the orders which they sought against the respondents and I granted them the order for leave to institute an application for the specified prerogative orders, as well as an order for stay in specific terms.

Being aggrieved by the said order, the 1st respondent has now moved this court in an application, in which it seeks the following orders:

- > *That the orders of stay granted to the ex-parte applicants pursuant to prayer 2 of their Chamber Summons application dated 30th March 2006 be discharged and set aside, and in the alternative;*
- > *That this Court be pleased to discharge and set aside that part of its order staying the collection of old/existing rates by the 1st respondent from the applicants and other rate payers within the Eldoret Municipality.*
- > *That the order extracted and presented to the Deputy Registrar for endorsement and which is dated 30th March 2006 be set aside.*

It was The submission of MR. Gicheru, learned counsel for the 1st respondent that at the exparte stage, the court could only grant an order for leave but not an order of prohibition, yet the order, which was issued by this court had been abused, as not only does it include several aspects which the applicants had not sought for, in that it bars the collection of all rates within the 1st respondents jurisdiction in general and also includes other rate payers who are not parties to the suit but that the order as extracted did not conform with order of the Court. He therefore urged the court to find that the order as extracted is an abuse of the due process, and to revisit the order which it issued and to set it aside.

The exparte applicants oppose the application. They maintain that the extracted order complies with the order of this court.

Mr. Manani the exparte applicants' learned counsel who stated that the proceedings were instituted by the five named persons on their own behalf and on behalf of other rate payers of Eldoret Municipality, was of the view that Order LIII of the CPR does not require the granting of leave to institute proceedings of a representative nature, and it was his submission that the procedure which the 1st respondent has adopted in bringing this application is wrong for it should have applied for review.

I shall not deal extensively with the issue of whether or not this is a representative suit at this stage for to do so would jeopardize the hearing of the substantive application where the issue of whether or not one can commence a representative suit under Order LIII will be best addressed, which in essence means that at the exparte stage it was only the five named persons, whose identity was disclosed and who appeared as the exparte applicants, who until the issue is determined, would be the only persons to enjoy the benefit of the orders which were issued by this court.

Be that as it may, Mr. Manani, also took the view that the application is incompetent as it's supporting affidavit was commissioned by one Mr. Momanyi who appears as an interested party as he is one of the rate payers. As I have stated hereinabove, the issue of whether all rate payers who fall within the 1st respondent's jurisdiction are parties to these proceedings will be one of the issues for determination at the substantive stage. It therefore means that until the issue is determined, the one who commissioned the supporting affidavit can not be said to be an interested party and on that ground I find that he can not be faulted for having commissioned the said affidavit, in any event, and even if he is an interested party, the affidavit would still be acceptable as the Oaths and Statutory Declarations Act does not prohibit such persons from acting as commissioners in matters where they have an interest.

It is now well established that that the grant of leave does not guarantee that the court will also grant an order of stay. Indeed this is the gist of Order LIII rule 1 (4), of the Civil Procedure Rules (CPR), which stipulates that:

“The grant of leave under this rule to apply for an order of prohibition of an order of certiorari shall, if the judge so directs, operate as a stay of proceedings in question until the determination of the application, or until the Judge orders otherwise.”

It is clear therefore that each application is to be based on its particular circumstances.

But what recourse does a party who feels aggrieved by the ex parte orders have?

Mr. Gicheru relied on the decisions in **Njuguna v. Minister for Agriculture [2000] 1 EA 185**, where the position was well laid down by the court as that *“the appropriate procedure for challenging of leave which has already been granted is to apply under the inherent jurisdiction of the Court, to the Judge who granted leave, to set it aside”*, which position was reiterated and expounded in **The Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v. Kilach C.A. No. (Nai.) 77 of 2003 (UR 40/03)**, where the court held that *“the appropriate procedure for challenging leave granted ex parte is either by an application under the inherent jurisdiction of the Court to the Judge who granted the leave or by way of an appeal”*.

Based on the above decisions which are binding on me, I find that such a party can challenge not only the order for leave, but where the situation arises, also an order for stay. He can do so by urging the court to exercise its inherent jurisdiction, one must remember that applications under Order LIII are of a special nature for they are neither civil nor are they criminal.

Admittedly the legal principle on the application of Order LIII aforementioned is now well settled and as laid down by the Court of Appeal, in **Commissioner of Lands vs. Kunste CA 234 of 1995**, as follows:

“in exercising the power to issue or not to an order of certiorari, the court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction”.

It is thus clear that the said proceedings are governed by Order LIII and the other provisions of the CPR are therefore not applicable to these special proceedings, and the 1st respondent could not thus move the court for review of its orders of 30/3/2006 under Order LXIV of the CPR, as MR. Manani urges this court to find. The application which is made under the court’s inherent jurisdiction is in the circumstances proper.

I have looked at the order as extracted.

It reads that *“Leave is hereby granted to the ex-parte applicants to apply for orders of judicial review in line with prayer 1 (a) – (e) of the application that is to say, that leave is granted to file a motion for the following orders:*

(a)

(b)

(c)

(d)

(e) *“An order of prohibition to prohibit the 1st respondent from arbitrarily increasing and collecting rates from the ex-parte applicants and the other rate payers within the 1st respondents jurisdiction until the pending objections to the proposed rates review are placed before a properly constituted rating Court and determined and further until such time as the annual estimates expected of the 1st Respondent under section 212 of the Local Governments Act and the Annual Audits and Abstracts accounts have been produced and supplied to the ex-parte applicants for the ex parte applicants to have a say in the increase of the proposed and collection of the rates in accordance with the recognized principles that*

govern the rule of natural justice.”

I also ordered that order for leave in line with prayer (e) above shall operate as a stay in line with prayer 2 of the application which they sought an order to the effect that *“the leave so granted to operate as a stay of the enforcement of the new proposed and collection by the 1st respondent of the existing rates until the motion for judicial Review is finalized”*.

The extracted order reads as follows:

“That the said leave operate as a say of enforcement by the 1st respondent of arbitrary increase and collection of rates from the ex-parte applicants and other rate payers within the 1st respondents jurisdiction until the pending objections to the proposed rates review are placed before a properly constituted rating Court and determined and further until such time as the annual estimates expected of the 1st Respondent under section 212 of the Local Governments Act and the Annual Audits and Abstracts accounts referred to in prayer (a) above have been produced and supplied to the ex-parte applicants for the exparte applicants to have a say in the increase of the proposed and collection of the rates in accordance with the recognized principles that govern the rule of natural justice.”

It is clear that the extracted order was at variance with the order which I granted on 30/3/2006, for not only does the section of that order which deal with the order for stay include extraneous matters which were not covered in my order, but the exparte applicants have gone even further to include rate payers who are not yet parties to the proceedings, but it erroneously states that the order of stay would remain in force pending the hearing and determination of objections to the proposed rates review and until the annual estimates and the Annual Audits and Abstracts accounts of the 1st Respondent are produced and supplied to the ex-parte applicants to their satisfaction. That was not the order of this court.

When I granted the orders of 30/3/2006, I did so on the premise that the said order for leave was purely provisional. I based my decision on the fact that the exparte applicants had a prima facie case against the respondents. It was however incumbent upon the exparte applicants to make a substantive application thereafter. The exparte applicants cannot turn that provisional order around and seek to enforce it as a final order. That in my view is an abuse of the process which cannot be allowed by the Court.

I am alive to the decision in the case of Commissioner General, Kenya Revenue Authority through Republic and Silvano Onema Owaki t/a Marenga Filing Station C.A. (Ksm) No. 45 of 2000 where though not granted an order for stay of proceedings, the exparte applicant nevertheless eventually extracted an order which contained an order for stay of proceedings and which extracted order was at *“great variance”* with that made by the Court. When faced with the issue the Court of Appeal held that *“The order as extracted is a nullity and did not operate as a stay*”

In view of the above finding I do hereby allow this application. I find that there has been abuse of the process by the exparte applicants, for which reason I do hereby set aside the order for stay.

The 1st respondent shall have the costs of this application.

Dated and delivered at Eldoret this 18th day of May 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Manani for the ex-parte applicant, Mr. Gicheru for the 1st respondent