



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli 1570 of 2005**

**JAMES KEGA KANGAU & OTHERS.....**  
**.....PLAINTIFF**

**versus**

**THE ELECTORAL COMMISSIONER OF KENYA & ANOTHER.....**  
**RESPONDENT**

**RULING**

On 2<sup>nd</sup> November 2005, my brother Hon. Justice Ibrahim granted to the applicants leave to file an application in the nature of Judicial Review for orders of certiorari and prohibition against the decision of the Electoral Commission of Kenya and the Honourable Minister for Local Government. The substantive Notice of Motion dated 18<sup>th</sup> November 2005 was filed in court on 23<sup>rd</sup> November 2005.

On 22<sup>nd</sup> December 2005 the 1<sup>st</sup> respondent filed a replying affidavit and a Preliminary Objection dated 19<sup>th</sup> and 14<sup>th</sup> respectively. The Preliminary Objection raised 4 grounds of objection. The objection was argued before me on 2<sup>nd</sup> March 2006.

Ms Keli counsel for the 1<sup>st</sup> respondent abandoned the 1<sup>st</sup> three grounds of objection which had been overtaken by events and argued the 4<sup>th</sup> ground which is to the effect that the application is defective in form. She urged that the orders sought being prerogative ones, the application should have been brought in the name of the Republic. She urged that the Notice of Motion dated 18<sup>th</sup> November 2005 has no applicant. It is between the respondents ex parte and some 4 people and none is named as an applicant. She relied on the case of FARMERS BUS SERVICE & OTHERS V TRANSPORT LICENSING APPEAL TRIBUNAL 1959 E.A 719 in which the Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted.

The above authority was then quoted in the case of WELAMODI V THE ELECORAL COMMISSION OF KENYA MISC APPLICATION 81/02 where the court went ahead to repeat the format of the application for Judicial Review as drawn in the FARMERS BUS CASE and how it should be intituled. The Notice of Motion was struck out for being incompetent. In the WELAMODI CASE, case several objections were raised including the one that the application was not brought in the name of the Republic. Justice Nyamu considered the above cases in THE CHAIRPERSON OF THE NATIONAL GOVERNING COUNCIL OF THE AFRICAN PEER REVIEW MECHANISM V HON. MINISTER PROF ANYANG NYONG & OTHERS MISC APPLICATION 1124/05 where he held that

failure to bring a Judicial Review application in the name of the Republic was fatal to the application.

Mr. Mutinda appeared on behalf of the 2<sup>nd</sup> respondent and wholly adopted the submissions by Ms Keli and urged the court to dismiss the application

Mr. Njongoro, appearing for the interested parties submitted that Section 3 A Civil Procedure Rules made pursuant to Section 81 Civil Procedure Act does not apply to Judicial Review because Judicial Review proceedings are special, brought under Order 53 Civil Procedure Rules promulgated pursuant to Section 9 of the Law Reform Act. He urged that reliance on Section 3 A Civil Procedure Act renders the application fatally defective. He relied on the case of NDETE V CHAIRMAN LANDS DISPUTES TRIBUNAL (2002) 1 KLR PAGE 392 in which J. Ringera held that an application for Judicial Review must be made in the name of the Republic. Counsel agreed with Ms Keli that the application before court has no applicants and should be struck off.

Mr. Kihara counsel for the applicants opposed the Preliminary Objection and made lengthy submissions in reply. His first contention - that when the Chamber Summons seeking leave to bring Judicial Review proceedings was filed, the parties were easily identifiable and the question of there being no applicant does not arise. Mr. Kihara's 2<sup>nd</sup> contention is that there is no statutory format for bringing Judicial Review proceedings but that the Preliminary Objection is premised on practice. He further argued that Order 53 Civil Procedure Rules cannot regulate proceedings of Judicial Review alone as Order 53 was formulated by the Rules Committee under Section 81 Civil Procedure Act which has to be read in conjunction with Section 8 and 9 of the Law Reform Act: It is his view that Section 3A Civil Procedure Act is the only one which gives inherent power to regulate procedure in court and Section 60 of the constitution.

Counsel's other argument is that Order 53 Civil Procedure Rules came into being by legal notice 5/96 which invoked Section 81 Civil Procedure Act and that order 53 Civil Procedure Rules is not all inclusive as it provides for other provisions of law. Lastly, that the respondents have not filed any documents to the effect that they have been prejudiced because the applicants are unknown.

Counsel's submission is that the defect in the Notice of Motion is a minor misdescription. Counsel drew an application dated 2<sup>nd</sup> March 2006 and filed in court on 3<sup>rd</sup> March 2006 seeking to amend the Notice of Motion dated 18<sup>th</sup> November 2005 which is now under attack. Counsel relied on several authorities. He distinguished the FARMERS CASE with the present one because in that case the applicants were allowed to amend and further that in that case what was sought was writs but not prerogative orders. He also wants the court to consider the 3 orders sought and the fact that the Notice of Motion was at variance with the extracted order in the FARMERS BUS case.

As regards WELAMODI CASE, Mr. Kihara's submission is that it is not binding on this court being a High Court decision and it was struck out because the court found the application to be muddled up. He added that the danger of emphasizing form is that it is likely to lead to injustice to the subjects who come to seek Judicial Review orders.

Counsel cited the case of KENYA BANKERS ASSOCIATION V MINISTER OF FINANCE MISC APPLICATION 908/01. (2002 1 KUR 61) in which it was held that in cases of public interest, the issue of locus standi be considered liberally. AHMED V COMMISSIONER OF CUSTOMS & EXCISE 2000 EA 203. The Court of Appeal held that where the plaint was wrongly headed, the irregularity was not fatal.

Counsel further relied on Supreme Court Practice Rules 1997 para (1) 14-40 which considers Order 53 R 14 of English Law on Judicial Review where the word 'otherwise' is used and he submits the use of that word means one can amend even the heading and the court should therefore allow amendment of the Notice of Motion.

Lastly, Mr. Kihara contends that the orders were initially given in the name of the crown because the crown complained on behalf of the Public against the executive which had acted in excess of power or

breached rules of natural justice but now the state is enjoined as a respondent and left as a nominal applicant and by the Republic being an applicant and a respondent at the same time, it offends principles of separation of powers and the Preliminary Objection should be dismissed.

I have now considered the submissions of all counsel on the Preliminary Objection raised and I find one of the key questions raised is where the place of Judicial Precedent is in Judicial Review. Mr. Kihara contends that there is no laid down procedure on the bringing of applications for Judicial Review but the cases decided are based on practice. Since the FARMERS CASE OF 1959, the court's have adopted the format set out by the Court of Appeal of Eastern Africa on how the applications for Judicial Review should be intitled and brought in the name of the crown.

As of 1959 when the FARMERS CASE was decided, the orders were granted at the prerogative of the crown. On 12<sup>th</sup> December 1964, upon Kenyas assumption of Republican status, the place of the crown was taken over by the Republic and orders of certiorari, prohibition and mandamus are made in the name of the Republic. It is not disputed that the orders are issued in the name of the crown (Republic) to ensure that public authorities and tribunals treat the individuals fairly and stick to the law and powers conferred upon them. Mr. Kihara purported to argue that since the applications are brought in the name of the Republic and the Government is also included as a respondent, it amounts to violation of the principle of separation of powers but I do not agree. This has been the practice. The crown or Republic put in place a system/mechanism of checking itself and its officers excesses and that argument cannot be sustained. There is a wealth of authorities showing that the courts have adopted the procedure (format) set out in the FARMERS BUS CASE by Court of Appeal of East Africa – the highest court – whose decisions are binding on this court. The courts interpret, and declare what the law is and it cannot be denied that there is now in force a procedure for bringing Judicial Review proceedings in the name of the Republic.

The respondent and interested parties do not question the Chamber Summons dated 1<sup>st</sup> November 2005. What is under attack is the Notice of Motion dated 18<sup>th</sup> November 2005. Mr. Kihara for the applicant was of the view that since the Chamber Summons was properly before the court and there is no query as to who the applicants were, that defect is minor. The Chamber Summons served its purpose, as it was seeking leave to bring Judicial Review proceedings which leave was granted. It is the Notice of Motion which will be seeking prerogative orders and the court will only be looking at the verifying affidavit/Annexures and statement filed with the Chamber Summons.

I have seen the Notice of Motion filed. It does not include the Republic as an applicant nor does it show who the applicants are. As it is filed, there are no applicants before this court. The question this court is to consider is whether the omission is fatal or is the Notice of Motion curable by amendment.

It is Section 8 of the Law Reform Act that donates power to the High Court to issue prerogative orders. Section 8 (1) provides as follows.

“The High Court shall not, whether in the exercise of its civil or criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari”

The above provision therefore means that when exercising jurisdiction under Order 53 Civil Procedure Rules, the court is neither exercising civil nor criminal jurisdiction. In the case of COMMISSIONER OF LANDS VS KUNSTE HOTEL LTD CA 234/95, the Court of Appeal held that the jurisdiction under Order 53 Civil Procedure Rules is a special jurisdiction which is neither civil nor criminal. There is no doubt that the jurisdiction is of a civil nature but the substantive law, is Sections 8 and 9 of the Law Reform Act. Even if the Rules made under Order 53 are made pursuant to Section 81 Civil Procedure Act, by the Rules Committee, the Rules Committees will make such rules with due regard to Section 8 and 9 of the Law Reform Act. The fact that the Rules Committee makes the rules under Order 53 Civil Procedure Rules does not confer Civil jurisdiction on Order 53. The Court of Appeal's decision in KUNSTE CASE; R V COMMUNICATIONS COMMISSION FOR KENYA AND OTHERS CA 175/00; and other cases have held that the jurisdiction exercised by the High Court under Order 53 is special one and Civil Procedure Rules or other provisions of Law do not apply. That is in conformity with Section 8(1) of the Law Reform Act. Accordingly Section 3A Civil Procedure Act which the

applicant cites in the Notice of Motion cannot apply. Section 3 A applies to Civil Jurisdiction which Judicial Review is not.

After Ms Keli, Mr. Mutinda and Mr. Njongoro had argued the Preliminary Objection, Mr. Kihara asked for an adjournment to reply. On 3<sup>rd</sup> March 2006 when the matter came up for Mr. Kihara's reply, he had filed a Chamber Summons seeking to amend the Notice of Motion, which the respondent seeks to have struck out because of its incompetency. Though the court was invited to look at the amended Chamber Summons by Mr. Kihara it was improper to file it then and hear it then since the court was already hearing the Preliminary Objection and the Preliminary Objection having been filed first, had to proceed to its conclusion anyway. Can the Notice of Motion dated 18<sup>th</sup> November 2005 be amended? As considered above, the Civil Procedure Act and its rules will not apply to Judicial Review proceedings. The court can only fall back to the provisions of Order 53 Civil Procedure Rules.

In the COMMUNICATIONS COMMISSION CASE the Court of Appeal held that Order VI Civil Procedure Rules did not apply to Judicial Review proceedings and the applicant should have moved the court under the inherent powers granted to the court under order 53 Civil Procedure Rules. Under Order 53 Civil Procedure Rules apart from Rule 4(2) there is no provision for amendment. Rule 4 (2) provides as follows:

“The High Court may on the hearing of the Motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matters arising out of the affidavits of any other party to the application and where the applicant intends to ask to be allowed to amend the statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of the statement, and shall supply on demand copies of any such further affidavits.”

That is the only provision relating to amendments in Order 53 Civil Procedure Rules. There is no provision in the said rules for amendment of the Notice of Motion.

In the FARMERS BUS CASE, the court, apart from setting out the format of the application for Judicial Review, it ordered that the Notice of Appeal should be amended (see page 781 para G). This matter was in the Court of Appeal not in High Court. The order of amendment did not refer to the amendment of application before the High Court. The amendment referred in my view, to the application before the Court of Appeal. There was no order that the High Court application in that case be amended. I find that the decision in the WELAMODI CASE, NEPAD CASE AND NDETE CASES to have been correctly arrived at by the different judges. The courts found the failure to bring the application for Judicial Review in the name of the Republic to be fatal to the application. The question of who is a party to a proceeding is an issue of Law and the Law has to be complied with. There are no short cuts.

Mr. Kihara attempted to go into the facts of the individual cases to distinguish with this case and with each other but the court was dealing with a Preliminary Objection and the question before court was whether the Notice of Motion dated 18<sup>th</sup> November 2005 could stand without the Republic as an applicant. We were not dealing with the facts.

Mr. Kihara cited the case of DONDE which the court finds to be irrelevant as the above case touched on the exercise of the courts discretion in matters of ‘locus standi’ where there is a public interest so that the court is more generous and lenient when the public interest is substantial. The courts discretion can only be exercised within the precincts of Order 53 Civil Procedure Rules and the Preliminary Objection does not touch on whether the Republic has a standing in the matter or not. Similarly the AHMED CASE is irrelevant as it relates to misjoinder of parties in a plaint – which is not the case in this matter.

The practice which has acquired the force of law through judicial precedent is that prerogative orders are issued in the name of the Republic. The application for Judicial Review has to be intitled like the format in the FARMERS BUS CASE and WELAMODI CASE. In the Notice of Motion dated 18<sup>th</sup> November 2005 there is no applicant. That application is fatally defective and the court has no option but strike it out with costs to the respondent and interested parties.

Dated and delivered this 17<sup>th</sup> day of May, 2006.

**R.P.V. WENDO**

**JUDGE**