



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civ Appli 1335 of 2005

REPUBLIC
APPELLANT

VERSUS

KENYA BUREAU OF STANDARDS
RESPONDENT

AND

INTERTEK TESTING SERVICES INTERNATIONAL LIMITED 1ST INTERESTED PARTY

SOCIETE GENERALE DE SURVEILLANCE 2ND INTERESTED PARTY

RULING

The application dated 31st October, 2005 and expressed to be grounded on XVIII Rules 3,5,6 and 8 of the Civil Procedure Rules and under the inherent jurisdiction of the court, S 3A of Civil Procedure Act and all, other enabling Provisions of law brought by the 1st Interested Party (INTERTEK TESTING SERVICES INTERNATIONAL LTD), seeks to strike out and expunge from the record paragraphs 16, 17, 19, 22 and 24 of the Replying Affidavit of Jean Spinosi sworn and filed on 13th October, 2005 and secondly that all the documents contained in the exhibits annexed to the affidavit of Jean Spinosi marked JS 5 and JS 6 be struck out and the applicant for judicial review, Bivac International SA (Bivac) be prohibited from referring to them. The grounds in support of the application are set out in the body of the application. At the outset exhibits “JS5” and “JS 6” are alleged copies of the minutes of the Tender Evaluation Committee and Tender committee respectively. The overall subject matter is Procurement.

The applicant filed written submissions with a list of authorities duly paginated and highlighted on 20th January 2006.

The 2nd Interested Party, Societe Generale De Surveillance SA (SGS) through its Counsel Mr Nyandieka supports the position taken by the 1st Interested Party.

On the other hand the Bivac International (Bureau Veritas) did on 7th March 2006 in response file

written skeleton arguments with a list authorities duly paginated and highlighted. Submissions were made by the parties before me on 8th May 2006.

I have considered the written submissions with authorities as described above and I have also taken into account the submissions of counsel.

The starting point in my view is whether the application which is expressed to be grounded on the Civil Procedure Act and Rules is procedurally competent, and secondly whether the application was contemplated under Judicial Review jurisdiction. On this and for the sake of consistency (having given many other rulings on the point myself) I would like to reproduce Justice Ringera's findings in the case of **WELAMONDI v THE CHAIRMAN ELECTORAL COMMISSION OF KENYA KLR Vol (2002) 485**. I would associate myself fully with holdings 2 and 3 which he set out as follows:

- 1. "Judicial review proceedings under O 53 of Civil Procedure Rules are a special procedure which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings."**
- 2. In exercising powers under O 53, the court is exercising neither civil nor a criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction sui generis. It is therefore incompetent to invoke the provisions of section 3A and Order 1 rule 8 of the Civil Procedure Act and the Rules and sections 42, 79 and 80 of the Constitution of Kenya."**

It follows that to the extent the application has invoked the Civil Procedure jurisdiction the application is incompetent and ought to be thrown out on this ground alone. However the applicant has also invoked the inherent power of this court. Obviously it is perfectly in order to invoke the jurisdiction especially in situations where no specific procedure has been provided by the parent Act ie the Law Reform Act Cap 26 of the Laws of Kenya or Order 53 on Judicial review. But is it right, logical or proper for this court's inherent power to be invoked so as to apply the provisions of the Civil Procedure and Rules on contents of affidavits where Parliament has provided for what in many ways is an exclusive means to access the remedies of Judicial orders? The answer to this is a clear "NO" because Judicial Review jurisdiction is a special jurisdiction and was from its introduction intended to remain special and set apart from the other jurisdiction including the civil procedure jurisdiction. Even in other comparable jurisdictions, it is invoked under special rules eg Judicial Review Acts and Rules. In my view it was intended to encourage the development of public law. In order to do this it was absolutely necessary to eliminate the technicalities inherent in the civil procedure which had contributed substantially in slowing down the civil procedure matters. For example the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is for example a nullity. Also the requirement that leave to apply for certiorari to quash a decision must be made within a limited period after the impugned decision was made (in our situation O 53 rule 2 of the period is 6 months) – see *OL REILY v MACKMAN [1983] 2 AC 237 per Lord Diplock at 281* is clearly another inbuilt safeguard. The current English position is that an applicant can only impugn a decision within three months of its making. Obviously the reasons for the short limitations are based on the need to instill promptness and speedy finality so as not to interfere with the needs of good public administration in the target bodies or decision makers. The purpose of Order 53 was in my view to provide a clear and flexible procedure which is conducive to the attainment of administrative justice with the special attributes of speed, effectiveness and finality. Where there is a convergence of possible breach of private and public rights an applicant has to choose how to approach the court depending on which is the dominant relief sought.

To add on to sui generis principle touched on by Justice Ringera in WELAMONDI case (supra), I wish to observe that to a very large extent judicial review jurisdiction is exclusive as discussed in the case of *O'RIELLY v MACKMAN* (supra) and it would be useful for this court to restate the principle so that procedural minefields are not imported from elsewhere (civil procedure process) into judicial review. To illustrate why the principle of exclusivity is important, under the Civil Procedure, the issue of the disputed documents could be resolved for example by a Notice to admit or a Notice to produce, discovery or interrogatories etc – but it is evident that the applicant did not resort to any of the methods because in

public law the objectives go beyond mere proof of particular facts or documents and very often it is a challenge of the decision making process itself or the lack of jurisdiction in making the decision. Sometimes the challenge is, how the decision was arrived at and the ultimate decision of a judicial review court could turn on the presence or absence of a particular document or documents or on their meaning or validity. In such situations it is only proper that that ultimate decisions be made at the final stage of the proceedings. Any challenge to a particular document or documents in advance would literally mean putting the cart before the horse. The objectives of judicial review would in my view be defeated by technical objections on form, content, annexures, or blind applications of rules on striking out or expunging of contents of affidavits or paragraphs thereof. In my view the overall objectives of judicial review are much wider and go beyond those intended to serve the Civil Procedure jurisdiction in many ways.

It is for this reason that I would like to set out the exclusivity principle. Stated simply the principle means that judicial review provides exclusive means by which, public matters can be challenged in the courts. While the principle does permit very rare exceptions the facts of this case take it out of the exceptions.

Thus the applicant desires a technical knock out of some challenged or impugned documents using the civil procedure rules which were largely designed for the Civil Procedure process. An early determination of the validity or otherwise of the documents would most likely finally end the matter without any contest on merit. I wish to reproduce the formulation of the principle by Lord Diplock in the *O'REILLY v MACKMAN* case at pg 285 E:

“It would in my view as a general rule, be contrary to public policy, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means evade the provisions of Order 53 for the protection of such authorities.”

This is why the Order 18 challenge on affidavits must be rejected. Thus, a respondent cannot and should not be allowed to use means that are strange to or outside the judicial review to impair the courts ability to review the decision making process without any fetters or hindrance. If the Civil Procedure Act and the rules do not apply to judicial review see Court of Appeal decision of *AKO v SPECIAL DISTRICT COMMISSIONER FOR KISUMU* ... Order 18 on affidavits would not also apply and it cannot be singled out for application. In this, I wish to observe that for the sake of the principle of certainty of law – there is merit in the courts being either consistently wrong or consistently right! The Civil Procedure Act and Rules cannot be applied selectively when it is convenient. In my view, Order 42 on appeals does not apply because it refers to “prerogative orders” which were abolished on 18th December, 1956 by the Law Reform act Cap 26 S 8(1).

I would therefore, disallow the challenge on this principle as well.

Even in England, before the 1977 legislative changes which removed the perceived disadvantages and procedural bottlenecks in judicial review it was not possible for an administrative court to order discovery for example. An Administrative court for example is hardly required, on the issue of the jurisdiction of the lower court to rely on facts for the purpose of determining where there is excess of jurisdiction or lack of it. In my view if such an important built in procedural and evidential safeguard as discovery was not possible and is still not possible under our current law an application to strike out an affidavit or paragraphs thereof, ought not to be allowed. In the matter before me and strictly on a prima facie basis and guarding myself from in any way finally adjudicating on any issue finally, the paragraphs intended to be struck out, appear to constitute the heart of the challenge to the decision making process as set out in the main application so that if the court were to intervene at this stage, after having granted leave for the entire application to be heard on merit the court shall literally have sat on appeal as regards the matters raised in the paragraphs and shall be compelled to sever the application and to go into the merits and adjudicate on parts of it before the actual application for judicial review is heard. The inherent jurisdiction of the court should not be used to frustrate hearings on merit or to create technical hurdle sin

judicial review or to open the floodgates of technicalities or unnecessarily create procedural minefields in this special jurisdiction. Granted that it might not be desirable to have two standards of affidavits in the entire court system the overriding concern of the court should in my view be to endeavour to attain the overall objectives of the judicial review jurisdiction which in most cases is the court's ability to identify the challenged decision or to trace it without any hindrance in order to determine any alleged illegality, irrationality or impropriety. For example it is not clear what prejudice the applicant would suffer in articulating its entire case in the main application and for this reason also, I find no good reason for bogging down judicial review with applications based on technicalities of procedure before the actual hearing. I see no good reason why the court should not deal with the affidavits as they are in the main application and any challenges on the validity of the affidavits and documents at that stage. To demonstrate the importance of what I have stated above I would like to cite the case of *R v SECRETARY OF STATE FOR HOME DEPARTMENT exp KHAWAJA [1984] AC 74* where a immigration decision was challenged under judicial review jurisdiction:

“The immigration officer, whether at the stage of entry or at that of removal, has to consider a complex of statutory rules and non-statutory guidelines. He has to act upon documentary evidence and such other evidence as inquiries may provide. Often there will be documents whose genuineness is doubtful, statements which cannot be verified, misunderstandings as to what was said practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even discretion. The Divisional Court, on the other had, on judicial review of a decision to remove and detain, is very differently situated. It considers the case on affidavit evidence, as to which cross-examination, though available does not take place in practice. It is as this case well exemplifies, not in a position to find out the truth between conflicting statements – did the applicant receive notes, did he read them, was he capable of understanding them, what exactly took place at the point of entry? Nor is it in a position to weigh the materiality of personal or other factors present, or not present, or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect, a court of appeal as to the facts on which the immigration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably could decide as he did” This is a quotation of Lord Wilberforce.

In the same way this court declines to adjudicate on admissibility, relevance or the genuineness of the evidence offered by both parties at this stage by slavishly following the technicalities or the hangover of the civil procedure process and prefers to leave this aspect to the court, dealing with the judicial review application on merit. The court should not be denied the opportunity of dealing with the disputed documents in whatever state they are in, and deciding at that stage how they impact or affect the impugned decision or on the entire case. Exercising that judgment at this stage would in my view result in a serious miscarriage of justice. Excluding the annexures as suggested would result in prejudging the entire matter in advance.

The main grounds for intervention which I have often called the three “Is” are illegality, irrationality and impropriety of procedure. Thus, if the intervention is based on alleged impropriety of procedure, by striking out or expunging documents on whatever procedural reason might deny the court of a proper grasp or appreciation of the alleged impropriety.

While it is tempting to worship at the altar of technicalities, the court must resist the temptation and focus on the objectives of judicial review, because at the end of the day at the second stage of the hearing on merit the court holds all the cards and for example if a party deliberately refuses to make a full disclosure he shall have done so at his risk because the court expects full cooperation from the targeted bodies, applicants, as well as from interested or affected parties. In *FOTHERGILL v MONARCH AIRLINES LTD (1981) AC 251* Lord Diplock had this to say concerning the cooperation and the common partnership between the court and the parties including the challenged bodies:

“The court ... when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizens for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive

power of the state.”

In *R v LANCASHIRE COUNTY COUCIL exp HUDDLES ON* [1986] 2 All ER 941 Donaldson M.R., referred to the modern judicial review as:

“a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.”

It is therefore clear that in the exercise of this jurisdiction the court expects and demands much more than affidavits and the duty of cooperation ensures that the overall objectives of judicial review, so well stated by Donaldson are met. To add my own thoughts concerning the future and which have nothing to do with the facts of this case at all because I have already stated them in my recent ruling in the case *R v KAKA NZOKA Misc Civil Application No. 1217 of 20003*. On the horizon I can clearly visualize a Freedom of Information Act that shall usher in a more open government public authorities and institutions. When that time arrives judicial review jurisdiction shall have a leading role in ensuring that openness is achieved and maintained. It has a continuing role of enhancing democracy, public morality and public interest.

Finally permit me to state that there is need for a judicial review court to be broadminded in order to fully allow the fullest vindication of the rule of law. Even in the context of this application which is pegged on documents, their source, veracity, validity admissibility or relevance, I predict a much wider scope or role of the judicial review jurisdiction which transcends these concepts. Pending any future legislation touching on freedom of information I see Government and other public authorities being increasingly challenged to maintain good governance, accountability and transparency even in the information field because as servants of the people they hold that information in order to advance the public interest. It is a moot point whether any such challenge can succeed in the face of our current law and the courts have to scratch their hands! I see a great role for judicial review in this area so as to achieve the great public interest of an open government and public authorities. Our thoughts, our law and our jurisprudence must gravitate towards these goals sooner rather than later. In this role the consolation is that we only have the procedural chains to loose!

For the above reasons the application is dismissed with costs in the cause.

It is so ordered.

DATED and delivered at Nairobi this 16th day of June 2006.

J.G. NYAMU

JUDGE