



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (Milimani Law Courts)

MISC CIV APPLI 1071 & 1056 OF 2004

IN THE MATTER OF AN APPLICATION BY TIMOTHY THAGANA FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI CRIMINAL CASE NO. 1361 OF 2004 REPUBLIC Vs RJKIMAN GROENIK AND 15 OTHERS

BETWEEN

REPUBLIC APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT AT NAIROBI RESPONDENT

RULING

In HC Misc Cases 1056/2004, 1071/2004, applications to set aside orders of leave and stay entitling the respective applicants to institute judicial review applications have been filed. In respect of all the applications a preliminary objection has been raised that the applications are fatally invalid and incurably incompetent because they were filed by an advocate without authority to do so. The preliminary objections further add that the applications are supported by an affidavit of an advocate without authority to act in the matter.

It is common ground that Mr Kibe, the learned counsel has been appointed by the Honourable the Attorney General pursuant to section 85(2) of the Criminal Procedure Act to be prosecutor in Nairobi Chief Magistrate Court Criminal Case No 1361 of 2004, and all related proceedings in the High Court and Court of Appeal. In HC Misc 760 the accused/suspect in that case seeks orders whose effect is to prohibit Criminal Case No 1361 of 2004. The letter of appointment as a public prosecutor is exhibited as "KMI" and the relevant part reads.

"I, S. AMOS WAKO, ATTORNEY GENERAL, in exercise of the powers conferred on me by Section 85(2) of the Criminal Procedure Code Cap 75 Laws of Kenya, do hereby appoint KIBE MUNGAI, Advocate of the High Court of Kenya, to be prosecutor for the purpose of the case

mentioned below, and all related Proceedings in the High Court and Court of Appeal whenever they arise. NAIROBI, CHIEF MAGISTRATE COURT CRIMINAL CASE NO. 1361 of 2004
REPUBLIC v RJKMAN GRONIK

The principal objection is that Mr Kibe Mungai's appointment as a public prosecutor does not entitle him to appear before me in the High Court in a Judicial Review matter which is neither criminal nor civil - it is sui generis – see *COMMISSIONER FOR LANDS v KUNSTE HOTEL* where, the Court of Appeal held that judicial review proceedings are sui generis.

To counter the arguments Mr Kibe has contended that he is an agent of the Attorney General in respect of all the matters relating to the criminal case in which he was appointed and the words used in the letter of appointment support his position. He cited S 26(5) of the Constitution in support of this contention.

S26(5) of the Constitution reads:

“The powers of the Attorney General under subsections 3 and 4 may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.”

Mr Kibe has also argued that since what is being challenged are the powers of the Attorney General it is not a suitable matter for a preliminary objection and that the objection ought to have been brought by way of a formal application because the authority given cannot be severed with one part being valid and the other invalid. The application to quash authority would be necessary. Thus, if the Attorney General acted in excess of the authority conferred on him by S 85(2) the challenge lies under judicial review jurisdiction and in case he acted outside S 26 of the Constitution a Constitutional challenge could be mounted and the challenge should not be by way of a preliminary objection:

S 85(2) states:

“The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.”

S 85(3) reads:

“Every public prosecutor shall be subject to the express directions of the Attorney-General”

I have considered the arguments presented to the court by counsel.

My understanding of the position is that whereas S 85 of the Criminal Procedure Act (Code) relates to criminal prosecutions and cases, the Attorney General may give express directions under S 85(3) to a public prosecutor. Thus although the letter of appointment does not cite S 85(3) reference to the High Court and the Court of Appeal in the letter must be construed to be special directions under the section, because the criminal case in which the prosecutor was appointed is in the Chief Magistrate's court who has the jurisdiction and the competence to handle the case. In referring to the High Court and the Court of Appeal the Attorney General envisaged for example a reference to the High Court under S 67 of the Constitution or a Constitutional challenge under S 84 of the Constitution and appeals from the Chief Magistrate to the High Court. In all these situations or illustrations, the High Court does have jurisdiction to handle aspects of the criminal case. In the courts construction or interpretation of the letter no other appointment would be necessary in the High Court or the Court of Appeal. Similarly the High Court and the Court of Appeal would have jurisdiction in respect of a criminal case where a challenge is instituted under its supervisory jurisdiction over subordinate courts by way of judicial review as has happened. By analogy no appointment of another prosecutor/advocate would be necessary to defend any such judicial review proceedings just because they are sui generis.

The provisions of S 85 are based on the Attorney General constitutional powers concerning the

institution and the conduct of criminal prosecutions as set out in S 26, of the Constitution.

In my interpretation of S 26 it does cover related proceedings which touch on or impact on the criminal proceedings such as judicial review proceedings. This is the interpretation, I give to S 26 (7) of the Constitution which provides:

“For the purposes of this section, an appeal from a judgment in criminal proceedings before any court or a question of law reserved for the purpose of those proceedings to any other court, shall be deemed to be part of those proceedings.”

The reference to the question of law reserved for the purpose of those proceedings to any other court, contemplated a judicial review court, otherwise the reference to any other court would have no meaning – it is a court outside the court handling the criminal prosecution itself hence, its combination with an appeal as part of the proceedings.

I therefore find that the Attorney General has not acted in excess of his power under S 85(2) since the powers he has stem from S 26 which give him wider powers to appoint even in respect of related proceedings which touch on, or impact on the criminal proceedings. For the above reasons I hold that the appointment is valid and the applications are properly before this court.

I further uphold Mr Kibe’s argument that the point challenging the validity of his appointment is not a matter that should have been raised by way of a preliminary objection because the contention was that the Attorney General had acted outside the statutory powers conferred on him under S 85(2) – He acted ultra vires the section. The origin of Judicial review was the doctrine of ultra vires and a substantive application ought to have been instituted.

Similarly if the appointment was outside S 26, of the Constitution a constitutional application ought to have been filed seeking constitutional relief. Thus in both cases the Attorney General would have been given the opportunity to defend his appointment and it could not have been the intention of the framers of the Constitution to cause the beneficiary of a constitutional power to defend himself instead of the person who in exercise of the power I made the appointment. Even on this second ground I would have disallowed the preliminary objection as well.

The up-short is that the preliminary objections are dismissed. Costs shall be in the cause.

DATED and delivered at Nairobi this 9th day of June, 2006.

J.G. NYAMU

JUDGE