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

Misc Civ Appli 1769 of 2004

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 75 OF THE CONSTITUTION OF THE

REPUBLIC OF KENYA AND SECTIOS 26,27 AND 28 OF THE STATE

CORPORATIONS ACT CAP 446 OF LAWS OF KENYA

BETWEEN

REPUBLIC .... APPLICANT

AND

THE PERMANENT SECRETARY

MINISTRY OF PLANNING AND NATIONAL DEVELOPMENT .... RESPONDENT

Ex parte: Professor Mwangi S. Kimenyi

RULING

The application before me is dated 9th December, 2005 and is brought by way of a chamber summons. It seeks to enjoin (KIPPRA) Kenya Institute for Public Policy and Research as the second respondent and also for leave to amend the Statement and the Notice of Motion. It is supported by an affidavit of Charles Njinu Kihara the applicant's counsel herein, sworn on 9th December, 2005. It is expressed to be brought under S 3A of the Civil Procedure Act and O 53 rule 4(2) of the Civil Procedure rules. The Skeleton arguments were filed by the applicant on 20th February 2005.

In opposition, Grounds of opposition were filed on 16th December, 2005 on behalf of the proposed second defendant (KIPPRA). Six grounds have been raised but in the view of the court, only grounds 5 and 6 are relevant at this stage of the proceeding. Grounds 1 to 4 address the substantive motion and not the application to amend.

Ground 5 states:

"No leave has been obtained in respect to the new complaint made against KIPPRA."

Ground 6 states:

"There has in all circumstances been in ordinate delay prior to the proposed amendments."

KIPPRA on 22nd February 2006 filed skeleton arguments of the same date and again the court is of the view that although the intended party has set out grounds (a) to (e) those which are relevant to the application to amend are (a) (c) ad (e).

In (a) the proposed party contends that promptness is a vital component in evaluating the competing claims. Total inertia for a period of 1 year 9 days is not only inordinate but inexcusable.

In (c) the proposed party contends that No leave has been sought in terms of Order LIII rule 1(1) to institute proceedings against KIPPRA and that no orders of mandamus prohibition or certiorari can issue unless leave has been obtained in accordance with the rule.

In (e) the proposed party, claims that the proposed Amended statement contains facts instead of grounds. The facts are matters of evidence. Inclusion of such matters of evidence renders the statement totally defective.

The principal objection is that the applicant is adding a new party and such a party cannot be enjoined at the hearing and a new cause of action allowed as well.

The applicant's principal argument for allowing the amendment is that it is properly taken care of by Order 53 rule 4 (2) upon which the application is grounded.

The learned counsel for the proposed party Mr Ngatia has relied on several authorities, all of which I have taken into account. Of special interest is the Court of Appeal decision in the case of ***ALFRED ROMANO & 3 OTHERS v amE.C.A. CA NO. NAI 375 OF 2002*** for the principle at page 6 that even where the court has unfettered discretion material must be placed before it to enable it to exercise the discretion.

SCOPE OF JUDICIAL REVIEW CONSIDERED

Judicial review proceedings are intended to avoid technicalities of procedure in order to achieve flexibility, promptness, speed and finality hence the avoidance of the application of the Civil procedure rules, hook, line and sinker.

This flexibility is reflected in O 53 rule 2 which requires that the Notice of Motion be served on all persons directly affected. Except where a court is involved in which case the presiding officer of the court must be specifically served the operative words as regards all other parties is that, they must be served and where it is not possible to serve reasons must be given in the terms prescribed in O 53 rule 3. Judicial review proceedings have the potential of affecting parties who have not been served. In the case before me it has not been disputed that KIPPRA, is an affected party because it is contended that it was the employer of the applicant. It is also not contested that KIPPRA through its directors was served on 15th February 2005 with the Notice pursuant to O 53 rule 3(3).

Although the applicant has invoked S 3A which is not applicable in judicial review proceedings, he has also invoked O 53 rule 4(2). Combining them is not fatal because the two are severable. The requirements of this rule as regards amendments are:

1) The giving of notice of intention to amend

2) The proposed amendment to be availed to the parties affected.

The notice is not in any prescribed form provided it sufficiently conveys the intention and the proposed amendment to the statement is served as well. I therefore find and hold that although it is good practice to file an application to amend under the inherent powers of the court a formal application was not contemplated by the rule at all – and a formal application is a hangover from the civil procedure process and is superfluous. All the same I hold that the application as filed does constitute the notice envisaged under the rule and that the rule has been fully complied with since the proposed amended statement has been served.

It is also significant to note that the scope or ambit of the amendment have not been defined nor is there a specific ban to the introduction of a new cause of action, even at the hearing stage.

It is also significant to note that the wording of O 53 rule 4 (2) clearly stipulates that an amendment to the statement may be sought on the hearing of the motion. The above takes care of the principal objection as raised above. As regards the amendment of the Notice of Motion I hold that the court has inherent powers to allow it so that the purpose of the proposed amendment in the statement is not defeated. In my view the ROMANO decision is distinguishable firstly because the applicant has explained the delay of 1 year 9 days in that the parties had informed the court that they needed time to settle the matter of court and the applicant appears to have been taken by surprise when the respondent filed objection on 8th November, 2005 which objection gave rise to the application to join. In the case of ***R v REGISTRAR OF SOCIETIES exp NYANGAYA (SDP HC Misc 1133 of 2000 (unreported))*** I set out in extenso what inherent power involves. It is not a question of unfettered discretion. It is a question of the court's ability to do justice in every situation. The court does recall many recorded appearances before it by the parties during the period cited and the parties did not conceal to the court that they were trying to negotiate a settlement. I do accept this as constituting satisfactory explanation for the delay. Moreover the fact that the proposed party had been served does, in my view make it an affected party pursuant to rule 3(1). I am aware that I have in several decisions held that promptness is the hallmark of judicial review proceedings, but as stated above he applicant's position or reasons for the apparent delay are clearly borne out by the court record. However whether or not the delay between the filing of the application for leave and the hearing and determination of the application might affect the good administration of the respondent including the proposed party, is in my view a matter for argument on merit when the Notice of Motion comes up for hearing.

I also find that the proposed party will not suffer prejudice, in that it has already been served and will have an opportunity to reply and thereafter heard on merit.

Concerning the argument that there is no "new leave" obtained as regards the cause of action and the joining of the proposed party the answer to this is in my view lies in answering the question, why prior leave is sought in the first place.

The first purpose of leave is to avoid harassment of public authorities on whom Parliament has imposed a duty to make public law decisions as per Lord Bridge in ***COCKS v THAMES DISTRICT COUNCIL [1983] 2 A.C. 286***. This is obviously to guard against unmeritious, frivolous and vexatious claims against public authorities and other targets of judicial review. I have also set out reasons for leave in my recent ruling in ***R v NZOKA HC Misc 1217 of 2003*** (unreported) and I wish to reiterate them here**.**

Lord Diplock explained the purpose in even clearer terms in the case of ***O'RIELLY v MACKMAN [1983] 2 AC 237*** at page 281 A-C:

"**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 a nullity ... Further ... 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".**

The second reason for leave was to prevent the opening of floodgate of cases in the early years of the judicial review jurisdiction. The floodgate reason has however not stood the test of time and it is a very small fraction of the cases which fail to satisfy the prima facie test of the 1st stage of an ex-parte-hearing for leave.

I therefore find that the objection that leave has not been obtained to amend the statement and any other consequential amendments such as that of the Notice of Motion is not sustainable at all and has no good basis in law. Indeed as regards the amendment to the Notice of Motion this is just a reflection of the amendments in the statement. The statement includes the description of the applicant, the relief sought and the grounds. An amendment may touch on any of the matters normally contained in a statement. The Notice of Motion to me is a mirror of the statement.

It is clear to me that prior leave is intended to protect respondents against unmetorious claims. It is usually the plainest of cases which fail the 1st stage of leave. In the matter before me nearly all the points raised by the proposed party against being joined are arguable and I have fully addressed this. Taking the first principal point of objection, namely the point of promptness except as regards certiorari and it is not clear yet whether the applicant will be pursuing or relying on this (when the limitation is six months from the date of the impugned decision) as regards other decisions and matters not stipulated in rule the test is whether the delay is reasonable and whether there is a good explanation for it or likely prejudice or hardship to third parties. Mandamus addresses mainly breach of statutory duty or non performance of statutory duty and this has no limitation because it regulates the present and the future. Similarly there is no limitation on prohibition because the order addresses the future except where it is twinned to certiorari. An applicant applies for relief when the breach or non-performance occurs. The issue whether or not the delay is inordinate can safely be determined on merit on hearing the application.

The second principal objection is that the subject matter is a contract of service which is not the province of judicial review. The courts reaction to this is that it would be improper for the court to adjudicate on the merits of such an objection at this stage because whether or not a contract has statutory under pinnings entitling a judicial review court to have jurisdiction is not usually a straight forward affair and it is often a serious matter for argument not suitable for a summary disposal at leave stage. For illustrations see the arguments presented for and against in the case of ***ERIC MAKOKHA v UNIVERSITY OF NAIROBI.*** The court has to consider for example whether the source of power is statute in order to assume jurisdiction and sometimes whether the power giving rise to the decision is a contract or statute. The issue becomes even more complicated and unsuitable for advance hearing when the issue is whether there are two or more decision makers. The simplest situation of plain contracts such as that of ***R v BBC exp LAVELLE*** ... are very rare, yet even here the conclusion was reached after lengthy arguments. Sometimes even the source of power is not the test for jurisdiction, but whether the target body carries a public function – in which case the test is not the source of power but the nature of power – see the case of ***R v PANEL ON TAKE OVERS AND MERGERS, exp DATAFIN PLC*** [1987] Q B 815 where at page 827A-B DONALDSON MR, characterized the principal issue as whether "this remarkable body is above the law." Thus, in the recent case of eviction of licensed hawkers from the Nairobi (CBD) I gave stay until the hawkers were relocated elsewhere. I did give an order of leave and stay because in the circumstances and on a prima facie basis I considered that defacto power could be the subject matter of judicial review and legitimate expectation is about fairness which is at the core of this jurisdiction. In other words justiability or non-justiability are not plain matters for advance hearing and are in my view, better handled at the final stage after full arguments of facts and law. It is when one confronts a matter such as this one when one realizes the great wisdom and visionof Lord Diplock, in the seminal case of ***CCSU v MINISTER FOR CIVIL SERVICE*** ... where he predicted that judicial review was likely to develop on a case to case basis. It would be extremely prejudicial to a hearing on merit, if I were for example to disallow this matter now on my view on whether, the alleged contract is the source of power or the State Corporations Act or whatever, without a hearing on merit and the above cases only go to illustrate the complexity of the issues in administrative law and that very few matters are so plain as to deny prior leave at the threshold stage.

It is for the above reasons that I find that since the Judicial review rules allow amendments the proposed party has in this case nothing to suffer by way of prejudice because it will be heard concerning

its objections on merit, on the hearing of the judicial review application itself. As long as the court is satisfied that the amendments raise arguable points and they are not frivolous, vexatious or for that matter unmetorious, amendments should be allowed for hearing on merit in the main application and fresh leave is unnecessary. The other consideration is whether the proposed amendments are aimed at helping the court to determine the real questions between parties.

Finally it is important to observe that it will be a sad day for administrative law if a target body were to be allowed to unilaterally choose whether to be a respondent and therefore not subject to law. The courts have to remain the guardian of the law and be in the forefront, in for example determining when there is abuse of power and to prevent it. It is for the court and not for any other person to determine the existence or non existence of such matters because all are equal under the banner of the rule of law, which entails that all be equal before the law in their rights and in their duties. For this purpose courts have to maintain perpetual vigilance because this is what it takes to vindicate the rule of law.

When confronted with new situations, as I have been so confronted in this matter, I have as a court, been compelled to reflect on the reasons for leave and the scope of amendments and to ask the critical questions, – such as where did it all start and why and for what purpose was leave intended to serve and the objectives of judicial review. In blazing the trail, mistakes will be made but as a court, I take consolation in the thought that making mistakes in the course of attempting to serve the overall objectives of any particular jurisdiction would be a worthwhile venture!

For the above reasons I grant orders in terms of prayer 1 of the application dated 9th December, 2005 and also orders in terms of prayer 2 of the application pursuant to O 53 rule 4 (2) as regards the statement, and orders in terms of prayer 2 as regards the Notice of Motion pursuant to the inherent powers of this court and further grant orders in terms of prayer 3 pursuant to O 53 3 (3) and the inherent powers of this court. Costs shall abide the outcome of the Notice of Motion.

I further direct that parties file and serve written submission as regards the main application (if they have not already done so) within 10 days and that this matter be mentioned on 20th June 2005 for allocation of a convenient early hearing date.

It is so ordered.

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

J.G. NYAMU

JUDGE