



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

Misc Civ Appli 1217 of 2003

REPUBLIC APPLICANT

VERSUS

LAND DISPUTES TRIBUNAL COURT CENTAL 1ST RESPONDENT

MWINGI SENIOR RESIDENT MAGISTRATE'S COURT 2ND RESPONDENT

Exparte: Kaka Nzoka

RULING

By an application dated 31st October 2003 the ex-parte applicant Kaka Nzoka seeks two judicial orders of certiorari the first one against the Land Disputes Tribunal's Central Division Mwingi in Land Case No 14/2001 in respect of an award made on an undisclosed date awarding the land to one Kathale Mukumbi the Interested party. The second order of certiorari is sought against the Mwingi Senior Resident Magistrate Court in Land Case No 57 of 2001 made on the 14th April 2003 making the decision of the Land Disputes Tribunal Court Central Division a court order. The third order sought is that of declaration that the Lands Disputes Tribunal Court Central Division is and was an illegal body.

Counsel have agreed to combine the Notice of Preliminary objection dated 8th June 2004 filed on 23rd June 2004 on behalf of the Attorney General, the advocate for the respondents and a Notice of preliminary objection dated 6th August 2004 filed on 10th June, 2005 on behalf of the Interested Party. Basically, the Preliminary objections are aimed at stopping the hearing on merit of the Notice of Motion dated 31st October, 2003.

The grounds raised in the Preliminary objections are:-

1. That the award issued by the Land Disputes Tribunal no longer exists and the tribunal is functus officio
2. That the application is statute barred by limitation since six months have elapsed since the court adopted the Lands Tribunal's decision
3. That the applicant cannot seek an order for declaration vide Judicial Review application
4. That the application is misconceived and a misuse of the court process
5. That the court lacks jurisdiction to entertain this application

6. The Judicial Review proceedings are fatally defective and incompetent in view of the leave having been obtained irregularly

7. That the applicant herein has appealed to the Provincial Land Disputes Tribunal hence subjecting himself and/or acknowledging the jurisdiction of the said Appeal Tribunal under the Land Disputes Tribunal Act 1990.

As is now the practice in Judicial Review and Constitutional matters, all the three parties have filed written skeleton arguments with lists of authorities. The applicant filed his on 27th April 2006. The respondent filed theirs on 28th April 2006. The Interested Party (I.P.) filed on 30th March 2006.

I have considered the skeleton arguments and the cases cited and I prefer to deal with the subject matter under the following headings:

LEAVE

In this matter leave was granted on 13th October, 2003 by the court upon applying the test set out in *NJUGUNA v MINISTRY OF AGRICULTURE [2000] 1 ea 184* which was stated at page 186 as follows:

“It cannot be denied that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the Judge who granted leave to set aside such leave – see HALSBURYS LAWS OF ENGLAND (4th Ed) vol 1(1) para 167 at page 276.”

Although leave is provisional until set aside for good reasons upon an application it cannot in my view be relitigated when the application for judicial review comes up for hearing or after the filing of the application. It cannot in my view be attacked by way of a preliminary point instead of arguing the judicial review application itself on merit because after its grant and the filing of the application it is spent and the parties have to contest the subsequent application for judicial review on the basis of the grounds and reliefs set out in the statement filed with the application for leave. However where leave is granted with an order that such leave does operate as stay a party can apply as set out in the *NJUGUNA* case above in cases of material nondisclosure or misrepresentation and I have myself set aside such an order in the *R v LAND REGISTRAR KAJIADO Misc Civil Application No. 689 of 2001*.

However it is clear to me that the court at that stage is able to set it aside because its order is still provisional but once the application is filed and set down for hearing the order cannot be said to be provisional any more. The other reason why in my view a court cannot reopen it is because the purposes of leave are firstly to protect the targeted officials and public bodies against frivolous and vexatious challenges which might hamper public administration of those bodies and secondly, at the advent of judicial review it was feared that it would open floodgates of endless applications. By hindsight this has not happened in many jurisdictions. In Kenya since the establishment of a Constitutional and Judicial Review Division in the High Court, it is true that over 2000 applications have been filed within a period of two years only! However the reasons for this phenomenon are believed to be many, including the creation of greater democratic space in the country, greater awareness of the need for constitutionalism and limits of power, greater awareness that judicial review is a major pillar in the enforcement of the rule of law, greater understanding of the scope and efficacy of public law, and renewed confidence in the courts. Indeed there is nothing to indicate that the majority of the cases so far heard and determined were other than well grounded.

LEAVE IS A FILTER

In other words leave stage is a filter stage. Stated differently the purpose is to weed out hopeless cases at the earliest possible time, thus saving pressure on the courts and needless expense for the applicant e.g. it

allows malicious and futile claims to be weeded out or eliminated and this in turn prevents public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. The way I see it is that the court's responsibility is that of handling the matters before it with speed, efficiency and economy so as to achieve the overall objectives of judicial review.

As regards the first purpose of leave as set out above it was well captured by Lord Diplock in the case of *O'REILLEY v MACKMAN AND OTHERS [1982] 3 AIL ER 1124* in these words:

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense, as to the legal validity of a decision the authority has reached in purporting exercise of decision making powers for any longer period that is absolutely necessary in fairness to the person affected by the decision.”

Overall, I am in agreement with Ole Keiwua J as he then was where in the unreported case of *DIPAK PINACHAND SHAH & ANOTHER v THE RESIDENT MAGISTRATE NAIROBI AND THE ATTORNEY GENERAL CIVIL APPLICATION 81 OF 2000* he observed at page 4:

“that the learned Judge of the Superior court, in my view had no basis on which to undo the grant of leave, which prayer, she had granted to the applicants. There was no application made to that effect and upon which she could review or vary her order granting leave to apply for the order of prohibition.”

For the same reasons stated herein this is why it is odd for an appeal to lie in respect of an order granting leave firstly because the Judge never gives any reasoned ruling or fixed opinion concerning the merits of the matters raised and secondly because the Court of Appeal is likely to pronounce firstly on merit before the matter is actually heard by the High Court on merit secondly because such an order is provisional. Indeed the word “order” in S 8(5) of the Law Reform Act as regards appeal is in my humble view, the actual judicial orders and not on any interim orders. While bowing to the decisions made concerning appeals, it is important to observe that the word “order” has no prefix in S 9 of the Law Reform Act since there is nothing like “prerogative orders.” They ceased to exist on 18th December, 1956 when the Law Reform Act came into force.

The final reason for not allowing a challenge on leave in the manner contemplated is that such a challenge has the unfortunate effect of the court sitting on appeal of its own order.

I have persistently maintained that it is wrong to challenge an order for leave. It is a filter premised on the exercise of a judicial discretion and based on the evidence available at the filter stage. It is not a hearing as such and very often the Judges do not give reasons.

For the above reasons (save the obiter concerning the right of appeal) I disallow all the preliminary grounds based on the challenge to the order for leave.

OBJECTIONS BASED ON THE ORDER OF FILING DOCUMENTS

According to the rules I am in agreement with the submission of the learned counsel for the applicant that there is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion. Indeed, there is no requirement that the Motion be filed simultaneously with any other documents. Order LIII rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the Motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However, under Order 53 rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can only do so after sending out a notice to the parties and the procedure for this is clearly

outlined in the rules. Where the other parties have not filed any affidavits the applicant would under O LIII have no legal basis for filing another or further affidavits. To this extent the applicants case is complete as at leave stage and practicing advocates are hereby cautioned that the Civil Procedure practice of filing many affidavits to counter the opponents case is a hangover which is not acceptable under the Judicial review jurisdiction.

It is however clear to me that the application for leave, statement and verifying affidavit or affidavits must be filed together in terms of O 53 rule 1(2) and the only document which should be filed at least one day prior the filing is the notice under Order 53 rule 1(3). Although in this matter it is not disputed that the application for leave was filed on 13th October, 2003 and the statement and the verifying affidavit were filed on 9th October 2003, leave having been granted cannot in my view be revisited except as per the application to set aside as outlined above. This is no doubt an irregularity which should have been contested before the filing of the judicial review application. It is quite apparent that this irregularity did escape the courts attention at leave stage perhaps due to the urgency, and haste which accompany the applications for leave. In my view leave having been granted it cannot be relitigated for the reasons outlined above. After all there is no application to set aside leave as such.

LIMITATION

As regards, time for applying for certiorari in the cases set out in Order 53 rule 2 it is limited to 6 months and in those cases the court is prohibited from granting leave after the period of 6 months and the application for leave must be made not later than six months after the date of the proceedings i.e. the judgment, order, decree, conviction or other proceedings. In the case of ***R v JUDICIAL COMMISSION INTO THE GOLDBERG AFFAIR ex parte HON MWALULU*** the court held that the rule applies only to the formal orders set out therein and does not apply generally and in addition, the exclusion does not apply where there is lack of jurisdiction and that the court should be able to reach out and attack nullities arising out of lack of jurisdiction of the targeted decision making bodies. In the reformed English jurisprudence a party can apply for a declaration in respect of nullities whenever they are detected. In our situation the application must be made within reasonable time and the delay explained in the cases outside the rule. Hardship and prejudice to other parties are major factors in these cases and in the exercise of any judicial discretion. Having said so, according to my calculation the application for leave was on the dot as regards the order or judgment of the magistrate – ie within 6 months. My finding on this is that since the date of the award is unknown (but exhibited) and the issue relates to the jurisdiction of the Tribunal as outlined in S 3 of the Land Disputes Tribunal Act 1999 rule 2 cannot exclude the courts jurisdiction to adjudicate on the issue of jurisdiction because once a nullity always a nullity and for the reason that the ousting of courts jurisdiction under rule 2 cannot apply where the issue is possible lack of jurisdiction by the targeted body. My attention has been drawn to the case of ***J.K. MUNGA v THE LAND REGISTRAR KIAMBU & TWO OTHERS HC Misc 195 of 2000*** – The ruling of my learned brother Mr Justice Khamoni . I can only comment on it during the hearing. I would disallow the objection on this ground as well. In any event the court granting leave should have addressed this in terms of rule 2.

EVIDENCE AND LAW ISSUES

It has been rightly argued that the affidavit verifying the statement does not contain all facts as required see ***COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY v SILYANO ONEMA OWAKI (UNREPORTED A.C 45/2000)***. While in nearly all my past decisions I have bowed to this authority I find a distinguishing aspect in this case in that the applicant herein in his statement which is the pleading in judicial review terms relies on law and not necessarily on facts. Thus in Ground 11 (a) he pleads lack of jurisdiction by the Tribunal and for that matter by the Subordinate Court under S 3,4,7 and 13 of the Land Disputes Tribunal Act. He has amplified on this in Ground 12 of the statement. I am therefore uncomfortable to hold that a pure issue of law which is contained in a statute which is an Act of parliament needs verification. Only factual matters in the statement could reasonably need verification. In my view it would be unjust to shut out the application from being heard on merit on a pure point of law touching on the jurisdiction of the targeted bodies on the basis that there is no verification. I find this somewhat absurd and certainly to my mind this novelty has not yet been tested, for this reason I lean in

favour of hearing the matter on merit so that every possible objections can be raised.

PRAYER FOR DECLARATION IN THE STATEMENT

The objection here is that the applicant included in the statement a prayer of an order for declaration which is at the moment beyond the jurisdiction of this court. I uphold this objection. However since this prayer is clearly severable from the other judicial review orders sought, I hold that the slip up is not fatal.

The declaration sought is incompetent and is hereby disallowed.

I had occasion to hold in the case of *PENGRUNE v MINISTER FOR FINANCE* (unreported) that this court's jurisdiction is only limited to granting the judicial orders of certiorari prohibition and mandamus and that order of injunction, declaration and damages are at the moment beyond the courts mandate. It is recommended that the law be amended to give the court the mandate to grant these other orders.

CONCLUSION

1) In my view where an applicant wants his day in court to be heard on merit in an application where leave has been granted his right should not be lightly deprived and there must be compelling reasons to warrant the taking away of that right e.g. on a point of law which is not contentious or where the subject matter is not amenable to judicial review and therefore plainly non-justiable. The court should always lean towards sustaining a hearing on merit instead of taking it away on at a preliminary hearing. It must not be forgotten that some of the matters raised as preliminary objections e.g. loci standi or standing, and jutiability in Judicial Review can be highly contentious and should not necessarily be taken to be suitable topics for determination as preliminary points. They should ideally be determined at the second stage on merit.

2) A careful look at the analysis of the points raised and covered in this ruling including its length, is the plainest or clearest demonstration that the points raised are not suitable for determination as preliminary points and that full arguments on merit should be entertained in the interest of justice. Issues such as standing, whether or not there is a public law element, availability of alternative remedy, the scope of grounds for intervention are not always straight forward and plain matters for determination at the threshold stage. To illustrate this point until only recently judicial review jurisdiction was directed at statutory power and any power outside the statute or subsidiary legislation was beyond reach until the case of *R v PANEL ON TAKE OVER MERGER'S DATAFIN ex-parte [1987] Q.B 815* where Judicial review was sought to challenge the decision of an unincorporated association which exercised no statutory or prerogative powers. The court held it had powers to intervene because the association dealt with a public law matter ie. regulating the London stock exchange. At the other end of the pendulum in the case of *R v BRITISH BROADCASTING CORPORATION ex-parte LAVELLE CCA 1983* the court declined to intervene in a contract of service between Miss Lavelle and British Broadcasting Corporation because the power to terminate stemmed from a contract.

3) In the case of *CZARMIKOV v ROTT SCHIDT & COMPANY [1922] 2 K.B. 478 at 488 L.J. Scrutton*, proclaimed of the Trade Union's power – "There is no Alsatia in England where the Kings Writ does not run." His concern was that powerful trade associations would otherwise impose their own "law" on traders and citizens less powerful than they and for this reason, some control and even supervision of arbitral process by the local courts was considered desirable. However in the past two decades or so following considerable worldwide inspiration of the Model law on national arbitration laws, the good judges quotable quotes above no longer applies to arbitration but in many ways his quote could be fitting in describing the judicial review jurisdiction in terms of growth even in this country. As I said in the obiter *R v COMMISSIONER OF LANDS exp LAKE FLOWERS LTD HC Misc12335 of 1998* case, this jurisdiction should reach out to the protection of slum dwellers and hawkers and in promoting constitutionalism and the rule of law, in checking on arbitraness and finally in preventing abuse of power. Incidentally "Alsatia" in Lord Scrutton's quote above referred to Whitefriars area of London, near Fleet Street which is now occupied by lawyers and accountants but which was once a well known sanctuary for criminals – and Alsatia was therefore at one time unreachable!

In the Kenyan situation very often great power has in the past been exercised by officials outside the statutes – they invoke “de facto power” to kick out licensed hawkers without notice or slum dwellers contrary to the International Covenant on Economic, Social and Cultural Rights 1966. It is in this untrodden area of law where this court last year stopped the relocation of Nairobi licensed hawkers until they were relocated elsewhere by the city fathers. I can therefore clearly see why the courts may have in future reach out and check the abuse of the “de facto power”. A simple illustration of de facto power is a chief who confiscates a cow, a goat or chicken of a citizen without invoking any written law. Indeed judicial review is about fair treatment and for it to remain relevant now and in the future it must reach out to enhance fairness, governance, democracy and public morality – it has a glorious role and future. In this role it has a partner in the Constitution and as partners the two must keep almost the same pace. The steps must be made in the actual hearings on merit and the threshold is certainly unsuitable as clearly illustrated in this case. We must throw away the procedural chains of the past. On reflection, it is clear to the court why the Civil Procedure Act and Rules should not apply to judicial review and that at some point in future, Judicial Review should be regulated by a self contained Act of Parliament with its special rules or form part of the Constitution. Civil Procedure Rules are unsuitable.

These matters are not as straight forward, simple or as plain as we sometimes intend them to be and a summary approach should only be in the plainest of cases only, to save valuable judicial time, and to avoid hampering public administration with unmeritorious claim and also to prevent public bodies from being harassed by irresponsible applications, to prevent the courts time being taken up by busybodies and finally to remove the uncertainty in which public bodies and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. At leave stage the court is being asked to exercise a judicial discretion on material available. It is largely a filter stage. The discretion at the second stage is different. I therefore disallow the preliminary objection and direct that the application for judicial review be heard on merit at a date to be appointed as per the practice these days. In the circumstances I make no order as to costs.

It is so ordered.

DATED and delivered at Nairobi this 2nd day of June, 2006.

J.G. NYAMU

JUDGE