REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 1047 OF 2004

IN THE MATTER OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)
THE COMMON LAW OF ENGLAND AND ALL OTHER ENABLING PROVISIONS OF THE LAW
AND
IN THE MATTER OF TAXATION OF ADVOCATES/CLIENTS BILL OF COSTS

BETWEEN
KASAMANI & COMPANY ADVOCATES

VERSUS
UNITED INSURANCE COMPANY LIMITED IN KISUMU HCCC MISC. NO. 130 OF 2004

BETWEEN
REPUBLIC ……..…… APPLICANT
EX-PARTE
UNITED INSURANCE COMPANY LIMITED
AND
C. LUTTA KASAMANI t/a KASAMANI & COMPANY ADCOVATES …….. INTERESTED PARTY
RULING

The substantive Notice of Motion dated 7th September, 2004 was scheduled for hearing *inter partes* before me on 26th January, 2005. On that occasion when the matter was called out at about 9.10 a.m., both Counsels for the Applicant and the Respondents were absent. However Counsel for the interested party was present. He applied that in the absence of Counsel for the Applicant to prosecute the Application, the same ought to be dismissed. The Court acceded to the request and duly dismissed the Application with costs to the interested party.

On 28th January, 2005 the Respondent filed the instant Application under Certificate of urgency in which it sought:-

1. **THAT** the Application be certified as urgent and be heard ex-parte at the first instance.

2. **THAT** pending the determination of the Application and prayers number 3 and 4 an Order for stay do issue against the Deputy Registrar, High Court of Kenya – Kisumu as Taxing Master in Kisumu or any other Court of Similar jurisdiction in Kenya Prohibiting the said Deputy Registrar as Taxing Master from proceedings in Taxation of Bills of Costs filed in Kisumu HCCC Misc. Cause No. 130 of 2004 or registering Bills of costs or taxing similar Bills in contempt against the Applicant.

3. **THAT** the orders of 26th January, 2005 dismissing the Applicant's Notice of Motion be set aside and the said Notice of Motion dated 7th September, 2004 be reinstated for hearing.

4. **THAT** stay orders granted on 19th August, 2004 be reinstated.

5. **THAT** costs be provided.

The Chamber Summons Application came before me for hearing ex-parte on 31st January, 2005 when I granted prayers 1 and 2 aforesaid. I further directed that the Application be served on the Respondent and interested Party and the same be set down for hearing interpartes. The Application was duly served and fixed for hearing before me on the 22nd April, 2005. Upon service, the interested Party duly filed a Replying Affidavit to the Affidavit in support of the Application. On its part the Respondent was contend with filing Notice of Preliminary Objection.

When the matter came up for hearing before me as aforesaid it was agreed that the preliminary Objection be argued first. In the Notice of Preliminary Objection dated 20th and filed ***in Court on 21st April, 2005 by the Respondent, the Preliminary Objection was coined in the following terms "TAKE NOTICE that the Respondent shall raise a Preliminary Objection that this Court has no jurisdiction to entertain this Application hence the same ought to be struck out."***

In his submissions in support of the Preliminary Objection Mr. Ombwayo Learned Senior Litigation Counsel submitted that pursuant to the provisions of Section 8 (3) of the Law Reform Act, which provide that:-

> ***"No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the Order shall be final, subject to the right of Appeal therefore conferred by subsection (5) of this Section."***

This Court was barred from entertaining the Application.

It was his submission that an Order dismissing an Application for Judicial Review was final order. That in the instant case when the Court called out the Application for hearing, the Applicant and his Advocate were absent which act forced the Court to dismiss the Application with costs. Accordingly the dismissal order amounted to a final order of the Court. Therefore the only remedy available to the Applicant was to appeal against the Order of dismissal and not to apply to set aside the same. Mr. Ombwayo further submitted that the Law Reform Act and Order 53 of the Civil Procedure Rules gives this Court special jurisdiction and where an act of Parliament confers special jurisdiction Civil Procedure Act and the rules made thereunder do not apply. It is the Act and special rules made under the said special Act that apply. Order 53 is made pursuant to the provisions of the Law Reform Act and consequently the other rules in the Civil Procedure Rules do not apply. Counsel referred the Court to the following authority ***KUNA MBAE VS THE LAND ADJUDICATION OFFICER CHUKA & ANOR, MISC. APPL. NO. 257 OF 1983 (unreported)*** in support of the submission. Here the Court held that a party aggrieved by the granting or refusal of an Order of Certiorari is entitled to Appeal. The Order once made is a fortiori final and is not subject to consequent pleadings pursuant to the Civil Procedure Rules. In the instant case, the Order of dismissal amounted to a refusal to grant the prayers in the Judicial Review Application.

Mr. Ombwayo further submitted that the Civil Procedure Act and the Rules made thereunder do not apply to Order 53. He relied on the case of ***HCCCC MISC. APPL. NO. 832 OF 2003 REPUBLIC VS COMMISSIONER OF CUSTOMS & EXCISE EXPARTE SWAN CARRIERS LTD*** for this submission. In this case it was held that the inherent powers of the Court is inapplicable where there is a specific provision of the Law. In the instant case the only part of the Civil Procedure Rules applicable is Order 53 which has no provision for the setting aside of an Order of dismissal. The enabling provisions of the Application before Court being Civil Procedure Rules cannot grant this Court jurisdiction to entertain the Application. To buttress the argument further Counsel referred the Court to the Court of Appeal decision in ***CIVIL APPEAL NO. 175 of 2000 REPUBLIC VS COMMUNICATION COMMISISON***

OF KENYA & ANOR (unreported) where the Court of Appeal held that they were doubtful as to whether Order 6 of the Civil Procedure Rules was applicable to proceedings instituted under Order 53. For the foregoing reasons, Counsel for the Respondent urged this Court to find that the Court has no Jurisdiction to entertain the instant Application.

On the part of Mr. Kasamani, Learned Counsel for the interested party, he concurred and associated himself with the submissions by Counsel for the Respondent. He added however that the Application before Court is brought under Order IXB Rule 4 and 8 of the Civil Procedure Rules. He submitted that this Court had no jurisdiction under Order 53 to entertain the Application. He therefore prayed for the Application to be struck out.

In response, Mr. Ngunjiri, Counsel for the Applicant submitted that the arguments by Counsel for the Respondent cut both ways. He submitted that there is no provision under Order 53 for dismissal of an Application for non-attendance. Order 53 only provide for the hearing of the Application. So that if there is no provision for the dismissal of a Motion for non-appearance, what the Court ought to have done in the instant case was to stand over the Application generally.

Mr. Ngunjiri further submitted that Order 53 is contained in the Civil Procedure Act. It is inclusion in the Act was not by chance or mistake. It was deliberate. In the premises the other provisions of the Civil Procedure Act and the rules made thereunder must of necessity apply to the Judicial Review Proceedings under Order 53 of the Civil Procedure Rules.

As regards Section 8 (3) the Law Reform Act where it is provided that ***"No return shall be made on such Order ……..."*** and Mbae's decision aforesaid Counsel submitted that Mbae's case was wrongly decided as in that case the Court was dealing with wording***"……. No return shall be made on any such orders……"*** It was the submission of Counsel that with the change of the word "to" to "on" the meaning of the requirement aforesaid completely changed. Mr. Ngunjiri further submitted that in any event Mbae's decision was not binding on this Court. He concluded his submissions on this aspect by staying that Section 8 (3) aforesaid had not been complied with as no return had been made on the Order of dismissal.

As regards ***REPUBLIC VS COMMUNICATION COMMISISON OF KENYA (SUPRA)*** Mr. Ngunjiri agreed with the reasoning of the Court of Appeal to the extend that the Law Reform Act was not subject to any other Act. However he was in no doubt at all that the Civil Procedure Act and the rules made thereunder applied to Applications under Order 53.

As regards ***REPUBLIC VS COMMISISONER OF CUSTOMS AND EXCISE (supra)*** he submitted that similarly the decision was not binding on this Court. He further submitted that although Judicial Review jurisdiction is neither Civil or Criminal, however the procedure is Civil, hence the Civil Procedure Act applies. \

Finally, Mr. Ngunjiri submitted that the Application having not been heard on merit does not come or fall within the last part of Section 8(3) of the Law Reform Act. This Court therefore had jurisdiction to entertain the Application.

In brief reply, Mr. Ombwayo submitted that Section 9 of the Law Reform Act does not provide that the whole of the Civil Procedure Act and rules thereunder are applicable to Judicial Review. On the issue of the Court not having jurisdiction to dismiss the Application, Mr. Ombwayo submitted that the Court had such jurisdiction. However the jurisdiction that the Court did not have was powers to vary and or set aside an Order of dismissal. On the use of the words ***"to"*** and ***"on"*** in the Act and Mbae's case, it was Ombwayo's submission that there was no difference. The two words in the context in which they were used meant one and the same thing. On the issue of no return being made, Mr. Ombwayo was of the view that we no longer deal with writs. Writs in Judicial Review were done away with and replaced by Orders. Once an Order is made, it is dated, signed and remains on record. The fact that nobody has not followed it up and obtained a certificate does not mean that the order does not exist.

I have carefully considered the submission as outlined above and the authorities cited in support thereof. First I have no doubt at all that Judicial Review is a special jurisdiction that is neither Civil nor Criminal. This is the same position taken by the ***COURT OF APPEAL IN COMMISSIONER OF LANDS –VS KUNSTE HOTELS LTD (1995 – 1998) I.E.A. 1***. However Section 8 (5) of the Law Reform Act says:

> ***"Any person aggrieved by an Order made in the exercise of the Civil jurisdiction of the High Court under this Section may appeal therefrom to the Court of Appeal."***

The Orders that the High Court can make under this Section are those set out in Section 8 (2) of the Act. From the wording of Section 8 (5) it appears to me that in exercising its powers under Section 8 (2) the High Court is exercising its Civil jurisdiction though the jurisdiction is undoubtedly special in the sense that it is created pursuant to Section 8 of the Act. In ***REPUBLIC VS COMMUNICATION COMMISSION OF KENYA (2001) I.E.A. 199*** the Court of Appeal held that:-

> ***"……On their own terms the provisions of Section 8 and 9 of the Law Reform Act which vests in the High Court of Kenya the power to issue orders of Mandamus, Prohibition and Certiorari are not subject to any other Act of Parliament…."***

To my mind therefore although the Court in Judicial Review Proceedings would be exercising Civil jurisdiction, it is a special jurisdiction which in itself does not mean that the Civil Procedure Act and the Rules made thereunder are applicable. To this extend I would agree with Mr. Ombwayo's submission that the Law reform Act and Order 53 gives this Court special jurisdiction and where an Act of Parliament confers special jurisdiction, Civil Procedure Act and the rules made thereunder do not apply. Order 53 was made pursuant to powers donated by Section 9 (1) of the Law Reform act.

And although Order 53 is contained in the Civil Procedure Act this in itself does not mean that the entire Civil Procedure Act and Rules are applicable to the Judicial Review Proceedings as submitted by the Learned Counsel for the Applicant. As stated by Justice Nyamu in ***REPUBLIC VS COMMISSIONER OF CUSTOMS AND EXCISE, (supra)*** whose reasoning and conclusions I wholly associate myself with ***"…….. the only part of the Civil Procedure Rules which is applicable to Judicial Review is Order 53 whose rules, were in turn made under Section 9 of the Law Reform Act Cap 26. Section 3 and 3A have no Application to Judicial Review……"***

The Court of Appeal again in ***REPUBLIC VS COMMUNICATIONS COMMISISON OF KENYA*** also weighed in with this comments ***"……. What we are saying is that we very much doubt whether any of the provisions of order 6 Rule 13 (1) of the Civil Procedure Rules is applicable to proceedings instituted under Order 53 of the Rules ……"*** By same reasoning I am convinced that apart from Order 53, no other Section of the Civil Procedure Act and the Rules are applicable to proceedings commenced under Order 53.

In the instant case, the Applicant has filed the Application pursuant to the provisions of Order IXB Rules 4 and 8 and Section 3A of the Civil Procedure Rules. Going by what is stated in the aforesaid authorities, it is obvious that those provisions are inapplicable. Consequently this Court has no jurisdiction to entertain the instant Application. A strict construction of the provisions of Section 8 (3) and 8(5) of the Law Reform Act show that they do not confer jurisdiction on this Court to stay, review or, set aside any order it has granted or made. Once an order of whatever kind has been made in the Judicial Review Proceedings, the only remedy open to an aggrieved party is to Appeal to the Court of Appeal. In the instant case the Applicant ought to have preferred an Appeal from the order dismissing the Application rather than making the instant Application.

Counsel for the Applicant however submitted that since there is no provision under Order 53 for the dismissal of an Application for want of appearance, the Order dismissing was made without jurisdiction. That order 53 only provides for the hearing of the Motion. Obviously this argument cannot be sustained. Taken to its logical conclusion it would mean that since there is no provision for the dismissal of Judicial Review Application upon interpartes hearing under Order 53, all Judicial Application with or without

merit ought automatically to be allowed. That could not have been the intention of the legislature. In any event such scenario would be totally unreasonable and unacceptable. A Court of Law always retains inherent powers to make such orders as will meet the ends of justice. An order dismissing an Application for want of attendance or prosecution would be such an order.

Counsel for the Respondent further advanced the argument pursuant to the provisions of Section 8 of the Law Reform Act which provide as follows:

> ***"8 (3) No return shall be made to any such Order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of Appeal therefore conferred by subsection (5) of this Section."***
>
> ***"8 (5) Any person aggrieved by an Order made in the exercise of the Civil Jurisdiction of the High Court under this Section may Appeal therefore to the Court of Appeal."***

It was Mr. Ombwayo's submission that the Order of dismissal made by this Court on 26th January, 2005 amounted to a final order of this Court and consequently the only remedy available to the Applicant is to appeal against the order of dismissal. To fortify his argument, Counsel referred the Court to ***KURIA MBAE –VS- THE LAND ADJUDICATION OFFICER – CHUKA & ANOTHER (SUPRA)*** where a two judge bench held interalia:-

> ***"……..There is no doubt or dispute that a party aggrieved by the decision of this Court in granting or refusing an Order of Certiorari is entitled to Appeal to the Court of Appeal. However according to Section 8 (3) of the Act, this Court's order on such Application is final and cannot be the subject of pleadings or prohibition. There is also no provision in the said Act or any other Law making such prerogative Order of this Court subject to the usual pleadings available in proceedings under the Civil Procedure Rules. In Our view therefore, it would appear that this Court has no jurisdiction to stay, arrest, recall, review set aside or quash an order of Certiorari once it has made it.***
>
> ***We wish to observe that it is now firmly established by the Court of Appeal that where the proceedings are governed by a special Act of parliament, the provisions of such Act must be strictly construed and applied and that the provisions of the Civil Procedure Act and Rules do not apply unless expressly provided by such an Act. As such, the provisions of the Civil Procedure Rules and Act cannot be implied merely because the special Act does not exclude them……."***

On his part, Counsel for the Applicant countered the Respondents aforesaid submission by saying that Mbae's case was wrongly decided. That instead of the Court properly construing the wording of the Section to wit: ***"……no return shall be made to any such Order ….."*** it is instead construed it. ***"…….No return shall be made on such Order…." I***t was Mr. Ngunjiri's submission that with the change of the word form ***"to"*** to ***"on"*** the meaning of the Section completely changed.

I do not agree with Counsel for the Applicant that Mbae's case was wrongly decided. Indeed I totally agree with the reasoning of the Judges in the said case. I am aware that the said decision is not binding on me being a decision of the Court with coordinate Jurisdiction. It is however of persuasive authority. Is an order dismissing a substantive Judicial Review Application a final Order as contemplated by Section 8 (3) of the Law Reform Act. The answer must be obvious. To my mind, an order dismissing such an Application would amount to a refusal by the Court to grant an Order in the nature of Judicial Review. Such an Order in my view can only be subjected to an Appeal but not to subsequent pleadings pursuant to the provisions of the Civil Procedure Rules.

I do not think that the change of the word from "to" to "on" completely ultered the meaning of the Section as submitted by Counsel for the Applicant. I do not even think that anything turns on this submission. It is really a question of semantics and makes no difference. In my opinion it means one and the same thing – No Review proceedings can be entertained once a final Order in Judicial Review

Proceedings has been made. I also tend to think that the change of the word was not deliberate but inadvertent. After all the Judges subsequently reproduced verbatim the provisions of Section 8 (3) and (5) of the Law Reform Act where the word used is ***"to"*** and not ***"on".***

Mr. Ngunjiri's final argument was that no return had been made pursuant to the order of dismissal. According to Stroud's Judicial dictionary, 2nd Edition, a return to a writ is a certificate from a person of what has been done under it. It is my understanding that in Judicial Review Proceedings we no loner issue writs. Rather we issue orders of Mandamus, Prohibition and Certiorari. Strictly speaking therefore the definition given by Stroud's Dictionary aforesaid would be inapplicable in our circumstances. It is also my understanding that once an order is issued by the Court, all that a party interested in the order needs to do is to formally extract it. Once it is extracted, that in my view would in itself amount to certificate. In the instant case Counsel for the interested party formally applied and was duly issued with a copy of the certified Order of this Court dated 15th February, 2005.

In the result I uphold the preliminary Objection by Counsel for the Respondents with the consequence that the Application dated 28th January, 2005 is dismissed with costs to the Respondents and Interested Party.

Dated at Nairobi this 13th Day of May 2005

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M. S. A. MAKHANDIA

JUDGE