



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION NO 447 OF 2005

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE
CHAPTER 75 LAWS OF KENYA
AND
IN THE MATTER OF THE TRAFFIC ACT
AND
IN THE MATTER OF SALE OF GOODS ACT
AND
IN THE MATTER OF THE POLICE ACT
BETWEEN

REPUBLIC APPLICANT

VERSUS

THE COMMISSIONER OF POLICE 1ST RESPONDENT

THE OFFICER IN CHARGE OF PANGANI

FLYING SQUAD POLICE 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT
EX PARTE JACOB JUMA

HASSAN ZUBEIDI INTERESTED PARTY

RULING

By an application by way of a Notice of Motion dated 8th April 2005 the 4th respondent seeks the following substantive orders.

1. That the Orders of stay made by this honourable court on 7th April 2005 be set aside
2. That the motor vehicle Registration Number KAR 222 S be consequently released by Jacob Juma to the 4th respondent.

The application is expressed to be brought under O 39 rule 1 Order 50 Rule 2 of the Civil Procedure Rules section 3A of the Civil Procedure Act and all other enabling provisions of the law.

By a Notice of Preliminary objection dated 11th April 2005 the applicant has raised the following objections:-

1. The application does not lie as Order 39 and Order 50 of the Civil Procedure Rules do not

apply in Judicial review proceedings. O L11 is not affected by any other statute or rules except section 8 and 9 of the Law Reform Act Chapter 26 of the Laws of Kenya

2. The court had no jurisdiction to issue the orders it issued on 8th April 2005 as there was no prayer in the application for interim stay of the orders of 7th April 2005 neither did the law allow the court to issue them. 3. The court has no jurisdiction to hear and determine the application 4. Jurisdiction of the court to set aside the stay order issued on 7th April 2005 has not been invoked at all and therefore the court lacks jurisdiction to set aside the said order or any other order issued on 7th April 2005

5. Prayer 3 can only be sought through a independent suit and not through an interlocutory application and more so not through judicial review proceedings thereby making the entire application incompetent and fatally defective

6. The application as filed is fatally defective and incompetent as applications under O 39 must be commenced by a chamber summons and not a notice of motion

7. The formal order as extracted is fatally defective as it does not comply with the mandatory provisions of Order XX rules 6 and 7 of the Civil Procedure Rules 8. Only the 1st, 2nd or 3rd respondents were competent to apply to stay the stay order granted on 7th April 2005 and not the 4th defendant as the search, seizure and detention of the suit motor vehicle did not involve or was not carried out by the 4th respondent.

The applicant prays that the application dated 8th April be struck out and/or dismissed with costs the orders of 8th April 2005 be set aside and/or the formal order issued on 8th April be nullified.

The objector, and the 1st, 2nd and 3rd respondent filed written skeleton submissions with lists of authorities on 21st April 2005 and 25th April 2005 respectively. The 4th respondent did not file any but raised the following points.

1. The application cannot be dismissed. It can only be struck out 2. Under s 100 of Civil Procedure Act the court has general power to amend on its own motion or upon application and I hereby orally apply for leave to amend to delete Order 39 and to substitute O 53 rule 1(4)

3. The court has jurisdiction to entertain the application under its inherent powers. This jurisdiction is wider than in s 3A of the Civil Procedure Act. The court can amend on its own in the interest of justice. Cited this court's authority in HC Misc 1183/2004 R v LAND REGISTRAR KAJIADO & ANOTHER Exparte KIRSEK INVESTMENT where this court invoked its inherent jurisdiction and set aside an exparte order for leave and stay for inter alia non disclosure of material facts.

Mr Meche relied on the written submissions and contended as follows:-

1. Only points 1,3 and it can be taken as objections the other can only be taken on appeal since the objector has not applied to set out the order given by Justice Ransley on 8th April 2005

2. The court has the power to order otherwise under O 53 rule 1(4) and the 4th respondent has applied to amend

3. No prejudice will be suffered by allowing he amendment

4. In the case of J B Maina & Co Ltd v Grain Bulk Handlers and Two others, the Court of Appeal doubted if judicial review jurisdiction was unique. It held that the right of appeal was available under O 42 of the Civil Procedure Rules

5. O 53 rule 1(4) applies and the court has power to set aside an ex parte order. In reply Mr Owuor the learned counsel for the objector said that all the authorities relied on by the applicant relate to Civil Procedure Rules and the application to amend under s 100 is in the Civil Procedure Act and that the application to amend in order to cite the inherent powers of court is both oral and belated. He added that the case of J B MAINA did not add anything new in the law because with or without Order 42 of the Civil Procedure Rules there was a statutory power of appeal under the Law Reform Act and that I should dismiss in limine or strike out the application.

I have considered the points raised, submissions of counsel including the written skeleton arguments and the authorities cited to the court.

The law reports are now replete with various authorities concerning the consequences of lapses in procedure including the citing of wrong provisions. In the instant case no less than 10 authorities have been cited. After considering all of them I have come to the firm conclusion that when the court is moved by way of an application the applicant wants justice done in accordance with the law. It follows that the overriding duty for the court is to do justice and not to be detracted from this path by technicalities of procedure.

Of course we must not disregard the importance of procedural law and practice. They contribute greatly to the orderly administration of justice, certainty, predicability, scholarship and accuracy. But while all these objectives are worthwhile, they are lesser ideals. Our core business is to do justice. In the past we have all fallen short of this ideal and have occasionally chosen to worship at the altars of the lesser ideals. Perhaps we should always remind ourselves that ours is the higher call of always trying to attain justice. I would suggest we borrow occasionally from the captains of industry and the corporate world who often remind themselves of what their core business is. Using the core business as the guide they very often sell the extras or outsource from elsewhere in order to firmly cling to the core business. Our core business is justice. There is need to offload the technicalities in order to embrace justice.

With the overriding duty to do justice in view the first test the court should consider is to ascertain whether the court has jurisdiction. This is because as Nyarangi JA said in (Lilian S" v CALTEX OIL KENYA LTD (1989) 1653 CAF" said "jurisdiction is everything". Perhaps it is also safe to say that one way of ascertaining whether the court has jurisdiction is not just to look at the citations or the provisions in the headings to the application but to look at the substance and the content of the application. In the case of GATHUNA v AFRICAN ORTHODOX CHURCH OF KENYA [1982] KLR 356, it was held that whenever a question of jurisdiction is raised the court must take into account the issue and make a finding on it. If according to the substance and the content of the application the court has jurisdiction I think the court should entertain the application and/or allow necessary amendments in order to do justice and ignore any citations which do not go to jurisdiction and go to the form of the application. The second test is if there is no express jurisdiction does the court have inherent jurisdiction to entertain the matter.

The third test is to ascertain if the disregard of procedural impropriety is likely to cause prejudice which could not be reasonably compensated by an award of costs and the fourth test is to ascertain if the impropriety does in any way violate the Constitution.

It is perhaps old fashioned for this court to consider what jurisdiction means.

However in view of the frequency of objections the Constitutional and Judicial Review Court has had to contend with since its establishment in July 2004, I would ask to be excused for attempting to switch the clock back. HALSBURYS 3rd Edition Vol 9 pp 350-57 has defined jurisdiction as:-

“the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The Limits of this authority are imposed by statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means.”

Applying the first test above to the facts of the instant case the question I pose to myself is does this court have jurisdiction to set aside its own ex parte order for leave given by Mr Justice Ransley (who has given his consent in writing for any other Judge in the Constitutional and Judicial Review Division to hear the application) on the allegation that the applicant failed to disclose material facts to the court when the court granted the ex parte order or such like ground. The answer to this question is an emphatic “yes” because this court has in the recent past set aside its own ex parte order for failure to disclose material facts to the court. This, is the case cited above HC Misc 1183/2004 (unreported) R v LAND REGISTRAR KAJIADO & ANOR Ex parte KIRSEK INVESTMENTS where the court held that such an order can be set aside for material nondisclosure and to prevent its process from being abused and that where a statute does not provide the procedure the court in order to prevent the intention of the legislature from being defeated can invent the procedure.

On this point see the cases of R v GENERAL COMMISSIONERS FOR THE PURPOSES OF THE INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON ex parte PRINCES EDMOND OF POLIGNAC (1917) 1 KB WHERE THE COURT STATED: 487

“It is of fundamental importance that applications for judicial review should be made will full disclosure of all material available to the claimant perhaps this is a case which I can properly use in order to send out a message to those who are making applications to this court reminding them of their duty to make full disclosures failure to do so will result in appropriate cases in the discretion of the court being exercised against (a claimant) in relation to the grant of a (remedy).....” The special facts before me also easily pass the other three tests and therefore this court feels free to administer justice without the shackles of technicalities

It follows therefore that although I am in full agreement with the objector’s Counsel that both the Civil Procedure Rules and the Act do not apply to Judicial review because it is a special jurisdiction with its own unique rules set out in Order 53 and made under S 9 of the Law Reform Act where those rules are silent, the court is entitled to invoke its inherent jurisdiction to deal with the situations before it especially in the situations where it is clear that it has jurisdiction to deal with the matter. In such instances it would be a tragedy for justice were the court to fold its hands and say look this court’s hands are tied! Although s 60 of the Constitution is expressed to confer the High Court with unlimited Original Jurisdiction in civil and criminal matters the courts have over the years interpreted the provision in a liberal manner to also cover all situations which have not been expressly provided for by any written law. Even on this ground the court would have no excuse to fold its hands as well and in the Trinidad case of PETERS & ANOTHER v ATTORNEY GENERAL TRINIDAD & TOBAGO the court held that in the face of silence the court could invent an appropriate procedure in order not to defeat the intention of the legislature. For the above reasons I decline to uphold the objection but instead allow the applicant to amend the application as appropriate and to invoke or cite this court’s inherent powers or jurisdiction. Thereafter the application to be deemed properly before the court and for the application to be set down for hearing on merit. I believe what this court has just done is just taking one small step for justice and the real great leap forward for justice was made by the late Justice Madan in the celebrated case of GITHUNGURI II where he converted a Judicial review application into a Constitutional application and proceeded to grant relief. This was before the s 84(6) Rules were made and where a generation of Chief Justices had failed to make the rules under the section. I order that any costs occasioned by the amendment be paid by the applicant to the respondent, in this application. I further order that the necessary amendment be effected within 3 days and the application set down for hearing immediately thereafter.

DATED AND DELIVERED AT Nairobi this 13th day of May 2005.

J G Nyamu

JUDGE