REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CIV. APPLI. 374 OF 2003

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF FRANCIS NJUGUNA KUBAI

AND

IN THE MATTER OF CO-OPERATIVE ACT

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF CO-OPERATIVES……...……...RESPONDENT

EXPARTE

FRANCIS NJUGUNA KUBAI…….…….SUBJECT

AND

ESTATE OF PETER NDUNGU KUBAI THAARA.....1ST INTERESTED PARTY

JUMATATU FARMERS CO-OP. SOCIETY.....2ND INTERESTED PARTY

RULING

On 21st October, 2003 the subject herein filed an application for judicial review seeking an order of certiorari to bring into this court and quash the decision of the Commissioner of Co-operatives dated 25/2/02 in appeal case No. 5 of 1995. When the application came up for hearing on 20/7/04, counsel for the respondent raised some preliminary objections. One of them was to the effect that leave to apply for the order of certiorari was obtained outside the statutory six months period. That argument had been fortified by an affidavit sworn by the subject on 21st October, 2003 wherein he deposed in paragraph 2 thereof that:-

"That I filed an application for leave to file a substantive application for judicial review vide NAKURU

HIGH COURT MISC. APPLICATION NO. 263 OF 2003."

The court held that if the application for leave was filed any time in 2003, then the same was out of the six months limitation period as required under Order LIII Rule 2 and therefore upheld the preliminary objection and struck out with cost the said notice of motion.

On 23rd March, 2005 the applicant filed an application by way of a notice of motion under Order XLIV Rule 1 of the Civil Procedure Rules and Sections 3A, 63(e) and 80 of the Civil Procedure Act and prayed for stay of execution of the orders made on 28th September 2004 when the aforesaid ruling was delivered. He also urged the court to review and set aside its orders of 28th September 2004 and reinstate the earlier application to hearing

The main ground on which the application for stay of execution and review was based was that the applicant's earlier deposition that the application for leave was made in Nakuru High Court Misc. Application **No. 263 of 2003** was erroneous and/or a typographical error as leave had actually been granted on 13th May, 2003 in Nakuru High Court Misc. Application **No. 265 of 2002,** the application for leave having been filed on 16th August, 2002. This averment was contained in an affidavit sworn by the applicant's advocate, Mr. Lawrence Karanja.

Counsel for the first affected party Mr. Karanja-Mbugua filed a Notice of Preliminary objection to the aforesaid application and stated as follows:-

"***1. THAT under the provisions of Section 8(3) of the Law Reform Act, this court has no jurisdiction to vary, review or set aside its own orders dated 28th September, 2004.***

2. that the provisions of Order XLIV Rule 1 of the Civil Procedure Rules and Section 3A, 63(e) and 80 of the Civil Procedure Act are not applicable in Judicial Review applications in that, matters under Order LIII of Civil Procedure Rules are creatures of Section 9 of the Law Reform Act and not a creature of Section 81 of the Civil Procedure Act, hence Judicial Review mattes are governed by Order LIII of the Civil Procedure Rules (a self contained regime).

3. THAT the only avenue for an aggrieved party on any decision arising out of a Judicial Review application is for an appeal."

Counsel therefore urged the court to strike out the applicant's application.

Mr. Karanja-Mbugua cited several authorities in support of the aforestated preliminary grounds of objection. I will refer to them briefly before I revert to the counter arguments that were raised by the applicant's counsel together with the authorities that he relied upon then I will, upon consideration of all the submissions and the authorities cited state this court's views and thereby determine the preliminary objection.

Mr. Karanja-Mbugua for the first interested party first cited ***NDETE VS CHAIRMAN LAND DISPUTES TRIBUNAL & ANOTHER***, [2002] 1 K.L.R. 392. In that matter Ringera J (as he then was) held that the Civil Procedure Rules Order 53 is a special jurisdiction as the rules therein are not made under the Civil Procedure Act but under the provisions of Section 9 of the Law Reform Act and in that regard Order 6 Rule 12 of the Civil Procedure Rules that had been cited in the course of arguing the application was not applicable to proceedings brought under Order 53 which is promulgated in pursuance of the provisions of Section 9 of the Law Reform Act.

Counsel also cited ***WELAMONDI VS THE CHAIRMAN, ELECTORAL COMMISSION OF KENYA*** [2002] 1 KLR 486 where again Ringera J held that in exercising powers under Order 53, the court was exercising neither civil nor criminal jurisdiction in the strict sense of the word but was exercising jurisdiction ***sui generis***. It was further held that it was incompetent to invoke the provisions of Section 3A and Order 1 Rule 8 of the civil Procedure Act and Rules and Sections 42, 79 and 80 of the

Constitution of Kenya.

Mr. Kahiga for the applicant opposed the preliminary objection and stated that Section 8(2) of the Law Reform Act empowers the High court to issue judicial review orders in the same way as the High Court in England.

He cited the Court of Appeal decision in ***DICKSON NGIGI NGUGI VS THE COMMISSIONER OF LANDS*** Civil Appeal No. 297 of 1997 (unreported) where Bosire J (as he then was) dismissed with costs the appellant's motion for mandamus and prohibition. Thereafter, the appellant applied to the same court by way of a Chamber Summons taken out under Order IX B Rules 4 and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and asked the court to set aside its earlier orders dismissing the application for judicial review. The judge rejected the application and the appellant moved to the Court of Appeal which allowed the appeal and set aside the orders of the High Court Judge and in effect allowed the Chamber Summons by the appellant.

Mr. Kahiga cited that decision to demonstrate that the Court of Appeal agreed that a party could rightly apply under the Rules of the Civil Procedure Act to a judge to set aside his own orders made in a judicial review application.

He also referred to the Court of Appeal decision in ***JUDICIAL COMMISSION INTO THE GOLDENBERG AFFAIRS & 3 OTHERS VS KILACH*** [2003] KLR 249 where their lordships stated as hereunder:-

"***Nor are we convinced that because the orders of Mbito J were made ex parte the only route open to the applicants was to go before that judge and ask him, under his inherent powers, to set aside the grant of leave. That was one way open to the applicants."***

M. Kahiga further submitted that when parties come to court under Order 53 they subject themselves to the provisions of the Civil Procedure Rules. He added that judicial review proceedings for purposes of the Civil Procedure Act amount to civil proceedings in so far as they are commenced in the manner prescribed under Order 53. He referred to the Court of Appeal decision in ***WILSON OSOLO VS JOHN OJIAMBO & ANOTHER,*** Civil Appeal No. 6 of 1995 (unreported) where the court, in considering an appeal wherein the High Court had wrongly allowed an application for extension of time to apply for an order of certiorari beyond the statutory period of six months stated as follows:-

"***It was a mandatory requirement of Order 53 Rule 3(1) of the Civil Procedure Rules then (and it is again so) that the notice of motion must be filed within 21 days of grant of such leave. No such notice of motion having been apparently filed within 21 days of 15th February, 1982 there was no proper application before the superior court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules."***

The court held that the six months statutory period for an order of certiorari could not be extended by the court as it was a creature of the Law Reform Act but the 21 days period as provided by Order 53 Rule 3(1) could be extended if an application was made.

Having summarised the rival arguments that were advanced before this court, I must now determine:-

(a) Whether this court has jurisdiction to vary, review or set aside its own orders in a judicial review application,

(b) Whether Civil Procedure Rules outside Order 53 of the Civil Procedure Rules are applicable in judicial review applications.

(c) Whether the only avenue for an aggrieved party on any decision arising out of a judicial review application in the High Court is by way of an appeal to the Court of Appeal.

To determine the above issues, it is imperative that I restate the historical background of our Order 53 as I understand it. Order 53 and the Rules thereunder were enacted pursuant to the provisions of Section 9 of the Law Reform Act Cap 26 Laws of Kenya and the rules were first gazetted in Legal Notice No. 299 of 1957 and in other subsequent legal notices as are shown in the marginal columns under the marginal notes of the various rules in Order 53 of the Civil Procedure Rules. Section 9(1) of the Law Reform Act states:-

"***9(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court-***

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made."

In its wisdom, the legislature in formulating Section 9 of the Act, left the task of making rules of court to deal with matters of judicial review to another body but the Act specified some mandatory inclusions thereto. It is important to note that Section 9 talks of power to make rules of "***Procedure of Civil Courts"*** and there can be no doubt that that power, for purposes of the Law Reform Acts, is exercised by the Rules Committee which is prescribed by Section 81 of the Civil Procedure Act Cap 21 Laws of Kenya whose preamble states:-

'An Act of Parliament to make provision for procedure in civil courts."

The mandate of the Rules Committee is:-

"Power to make rules not inconsistent with this Act and, subject thereto, to provide for any matters relating to the procedure of civil courts."

The commencement date of the Law Reform Act Cap 26 was 18th December, 1956 whereas the commencement date of the Civil Procedure Act Cap 21 was 31st January, **1924** and in wording Section 9 of the Law Reform Act as it is, the legislature must have been aware of the provisions of Section 81 of the earlier Act, the Civil Procedure Act, which had created the Rules Committee.

The preamble to the Law Reform Act reads as follows:-

"An Act of Parliament to effect reforms in the law relating to civil actions and prerogative writs."

It therefore appears to me that the High Court, in dealing with matters of mandamus, prohibition and certiorari in the civil jurisdiction acts as a civil court and may, where appropriate, follow rules of procedure as made by the Rules Committee under Section 81 of the Civil Procedure Act otherwise there would have been no other reason as to why that committee formulated the Rules under Order 53 together with all the other Civil Procedure Rules.

The Law Reform Act Section 8(2) states that the powers which the High Court has are as those which the High Court in England had under Section 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938 of the United Kingdom.

The section replaced the ***writs*** of mandamus, prohibition and ***certiorari*** with **orders** of mandamus, prohibition and certiorari. It is therefore important to note that these reliefs which the High Court grants under Order 53 are no longer writs of mandamus prohibition and certiorari but they are orders of

mandamus, prohibition and ***certiorari***.

Section 8(5) of the Act states as follows:-

"***(5) 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."***

My understanding of the above quoted Section 8(5) is that where a person is not satisfied with an order **other than a final order of mandamus, prohibition or certiorari** which has been made by the court in exercise of its civil jurisdiction may choose either to appeal to the Court of Appeal or make such other application as may be appropriate to the same court which made the order and such an application may include setting aside or reviewing the order.

Section 8(3) of the Act makes it clear that the orders of mandamus, prohibition and certiorari, once issued by the High Court are final as far as proceedings in that court are concerned but an appeal against such orders can be made to the Court of Appeal. In other words, the High Court cannot vary or set aside an order of mandamus, prohibition and certiorari but it can do so in respect of any other interlocutory order which it has made in the course of dealing with a judicial review application. In my view, if, for example, the court grants an applicant leave to commence judicial review proceedings for an order of certiorari and pursuant to the grant of such leave also makes an order that the leave so granted shall operate as a stay in some related proceedings, if a respondent or any other person is aggrieved by such order, he may either file an application before the court that issued the orders and pray that they be set aside or he may file an appeal to the Court of Appeal.

I think the above position can be supported by the recent Court of Appeal decision in ***JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS VS KILACH*** (supra) where at page 262 their Lordships stated:-

"***We think that in Kenya, at any rate, the law gives these applicants the right to appeal and we are not convinced that that right can be taken away from them by simply telling them.***

'***This is merely an exparte order. Go back to the High Court and have the matter sorted out there"***

The law gives the applicants option to come to this court by way of an appeal. They cannot be punished for exercising that option. In the particular circumstances of this case, we think the exercise of their option to appeal was the more appropriate one because as we have said the subject matter of the dispute has dragged on since the early 1990s. If the applicants had opted for asking Mbito J to set aside his order granting leave and if he had refused, the applicants might still have been obliged to come to this court."

I believe there is little room for dispute (if any) that under Section 8(5) of the Law Reform Act, there are other options available to a person aggrieved by an order of the High Court other than appealing to the Court of Appeal if that order is not a final one of mandamus, prohibitions or certiorari. If he chooses to employ those other options, how does he approach the court to seek the desired remedy since the rules made by the Rules Committee pursuant to the powers donated by Section 9(1) of the Act are silent or non existent for that matter? I believe in appropriate circumstances an application can be made under Sections 3 and 3Aor any other appropriate section of the Civil Procedure Act or any other relevant law.

Let me refer to Order 53 Rule 4(2) to illustrate how the inherent jurisdiction of the court as granted by Section 3A of the Civil Procedure Act has been applied. Order 53 Rule 4(2) says that the High Court may on the hearing of the notice of motion allow the statement to be amended and may allow further affidavits to be used. It does not talk about the notice of motion itself neither does it expressly state that the notice of motion cannot be amended but I am aware of several instances when applications to amend the notice of motion were made under Section 3A of the Civil Procedure Act and such applications were granted. In ***COASTAL AQUACULTURE LIMITED VS THE COMMISSIONER OF LANDS & ANOTHER***, Mombasa H.C. Misc. Civil Application No. 55 of 1994 (unreported) Mbogholi Msagha J. allowed

amendment of a notice of motion and when the matter went to the Court of Appeal in ***COMMISSIONER OF LANDS VS COASTAL AQUACULTURE LIMITED*** Civil Appeal No. 252 of 1996, their Lordships found no fault with that procedure and relied entirely on the amended proceedings to uphold the orders made by Ringera J. (as he then was).

in my view therefore, this court has jurisdiction to vary or set aside its own interlocutory orders in judicial review applications in appropriate circumstances but not the final orders of a mandamus, prohibition and certiorari. To hold that it does not have such jurisdiction or that it cannot operate outside the strict confines of Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules would be to whittle down its powers unnecessarily contrary to the provisions of Section 60(1) of the Constitution of Kenya and such a holding would mean that the court cannot deal with any relevant issue that may arise in judicial review proceedings that is not expressly provided for under Sections 8 and 9 of the Act and Order 53. For example, if an applicant in judicial review proceedings wanted to effect service of court process upon a respondent who is outside the jurisdiction of the court, or where the persons to be served are so many that personal services is not possible, will he not have to make an appropriate application to effect service outside the court's jurisdiction or do so by way of an advertisement in a newspaper? What about in instances where it would be appropriate to consolidate two judicial review applications? Can that be done by applying Order 53 only? I do not think so.

It is obvious that the Rules Committees needs to formulate more comprehensive rules to deal with this important area of legal practice, because the 2 rules that exist under the Law Reform Act and the 7 rules that are spelt out by Order 53 relating to judicial review are insufficient to govern this wide and expansive territory of our jurisprudence.

I believe what I have stated is sufficient for purposes of rejecting the preliminary grounds of objection that were raised by counsel for the first affected party. I dismiss the preliminary objections and award costs thereof to the applicant. I direct that a hearing date for the pending application be fixed expeditiously.

DATED, SIGNED & DELIVERED at Nakuru this 29th day of June, 2005.

D. MUSINGA

JUDGE

29/6/2005