JUDICIAL REVIEW

- **CONSENT ORDERS in Judicial review and their scope**
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- **INHERENT JURISDICTION defined and applied.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Misc Civil Case 1133 of 2002

IN THE MATTER OF: AN APPLICATION BY JUSTUS NYANGAYA,

DR BORO GATHUO, DAVE MUUMBI AND

THE SOCIAL DEMOCATIC PARTY SDP FOR

LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: THE SOCIETIES ACT, CAP 108 AND THE

REGISTRAR OF SOCIETIES

RULING

By an application by way of a Notice of Motion dated 2nd December, 2003 the applicants seek to set aside a consent order entered by the Deputy Registrar of the High Court on 29th October, 2003 or 3rd November, 2003.

The original applicants applied for leave to apply for orders of judicial review on 27th September, 2002 and succeeded in obtaining leave as well as stay. The original applicants were Justus Ngangaya, Dr Boro Gathua, Dave Muumbi and the SDP.

Subsequent to the obtaining of leave and stay the interested parties Dr Apollo Njonjo who is the Secretary General of the Social Democratic Party (SDP) and Mr Pheroze Nowrojee the National Treasurer of the same political party were enjoined as Interested parties. The two are the new applicants in this application and they will hereinafter be referred as "IPS".

On 4th October, 2002 the IPS filed an application to set aside the stay and Justice Hayanga now retired vacated the stay and the order vacating the stay was served on the Original applicants as well as the respondent who is the Registrar of societies.

On 2nd December, 2003 this court gave the following orders:

1. That the order given by the Honourable court on 29th October, 2003 be and is hereby stayed and any execution thereof be stayed for 14 days

2. That the Registrar of Societies be and is hereby stayed from registering any changes arising out of any National Leaders Conference held pursuant to the said order given on 29th October, 2003 for 14 days

3. That the application be served within three days for hearing inter parties on 16th December, 2003.

The main application according to the statement and what is contained in its body sought the following orders: "An order of mandamus to compel the Registrar of Societies to accept and file the Notification of change of officers as presented to him on 11th September, 2002."

The Notification itself gave the changes as under:

Title	Full Name
1. Chairman	P Anyang Nyong'o
National Political Bureau	
2. National Chairman	Justis Nyangaya
3. Secretary General	Boro Gathuu
4. Treasurer	Dave Muumbi

The position taken by the applicants, in their application of 4th October 2002 and the subsequent order by Hayanga J vacating the stay is easily understood in that at leave stage it cannot be ordered that leave granted to apply for a mandamus order do operate at stay because logically there can be nothing to stay in respect of the leave for mandamus unlike orders of certiorari and prohibition where such leave can if ordered by a Judge operate as stay. Thus, Order 53 rule 1(4) reads:

> **"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Judge so directs operate as stay of proceedings in question until the determination of the application or until the Judge orders otherwise."**

The applicants claim that the original applicants are aware of the fact that the applicants had become parties firstly because they were served with the orders enjoining them and secondly through Boro Gathuo they had filed a replying affidavit on 5th November, 2002. In para 3 and the whole of the affidavit

there is a clear acknowledgement that the IPs were interested parties and were part of the proceedings. Similarly the Registrar General by an affidavit sworn by Ms Catherine Nyiha, a Senior Assistant Registrar of Societies on 17th December, 2003 did respond to the IPs application and she too had knowledge of the IPs and the fact that they were part of the proceedings. Both affidavits it is contended show that at all times the original applicants and the respondent were aware that the IPs were contesting the proceedings.

On 29th October 2003 a consent letter was filed in court. The consent letter was dated 25th October, 2003. Although the consent letter was signed by the original applicants and the respondent it was not signed by the IPs. It was also not shown to the IPs.

On 3rd November, 2003 (ie 5 days later) the Deputy Registrar of the High Court entered the said consent as an order. When the applicants came to know of the order they filed this application to set aside the order entered.

The brief arguments in support of the applicants case are:

1) Before the writing of the consent letter on 25th September, 2003 and 29th October, 2003 is a period of approximately one month and the Original applicants had ample time to consult, or inform the IPs concerning the negotiations leading to the consent letter since the IPs were already on record

2) The two applicants were fairly active officials throughout this period and were available

3) The consent touched on confirmation of other officials

4) The consent order was relied on to confirm the officials named at page (3) above at the National Leaders Conference of the SDP

5) No signature was done or prepared for the Interested parties

6) The notification upon which the relief of mandamus was being sought dated 15th September, 2002 differs significantly with the consent letter marked “ANI” in that none of the three paragraphs in the consent letter identified as a,b and c relate to the notification of change of 11th September, 2002.

Thus the consent letter provides:-

> **a) “That the registration by the Registrar of Societies on 23rd September, 2002 of Apollo Njonjo as the Secretary General, Pheroze Nowrojee as the National Treasurer, Moses Mwihia as the Chairman National Political Bureau, Olang Sana as the Chairman Young Social Democrats, Abubakar Awadh as the Deputy Organising Secretary of the Social Democratic Party of Kenya be and is hereby revoked.**
>
> **b) That the officials of the Social Democratic Party of Kenya elected in 1999 and registered on 2nd November, 2001 namely:**
>
> **National Chairman - Justis Nyangaya**
>
> **Secretary General - Apollo Njonjo**
>
> **Assistant Secretary General - Patrick Muchama**
>
> **Treasurer - Dave Muumbi**
>
> **Be and are hereby confirmed as the current officials.**
>
> **c) That the Chairman of the Social Democratic Party of Kenya shall within thirty days (30)**

from the date of this order convene a National Leaders Conference of the social Democratic Party of Kenya in accordance with S 29 of the Societies Act and file the names of the officials elected thereat with the Registrar of Societies within 14 days from the date of the National Leaders Conference."

7) All the parties did not sign the consent

8) What was put in the consent as shown above was different from the relief sought in the statement, application for leave and the Notice of Motion

9) Leave of court at the leave stage ex-parte did not cover the reliefs set out in a,b and c above

10) No leave was sought and granted to cover the reliefs sought in a,b and c

11) The reliefs sought as a,b and c comprised private party matters to which the Judicial order of mandamus does not apply and to which Judicial review does not apply

12) The reason for giving the two dates of 31st October 2003 and 3rd November, 2003 as alternatives was the fact that the consent letter bears both dates one with the endorsement of a High Court Registry stamp of 31st October, 2003 and the other being a Registrar General stamp dated 3rd November, 2003. The Registrar General endorsed his approval yet it was not sent to the IPs to approve even if one were to assume that O 20 of the Civil Procedure Rules apply. This order requires approval by all parties.

13) On 29th September, 2003 Mr Wangongu for the Original applicants is recorded to have appeared before Mr Justice Hayanga when the Judge ordered the matter be mentioned on 26th November, 2003. Also present was Mr Nowrojee one of the applicants herein. It is clear from this appearance Mr Wagongu was aware of the consent letter dated 25th September, 2003 and its contents yet he neither revealed this to the court nor to his learned Senior and applicant Mr Nowrojee. The letter was court stamped by the Deputy Registrar on 29th October, 2003 and the formal order "AN2" or consent stamped 31st October, 2003 and the Order given on 29th October 2003 and issued on 3rd November, 2003. Mr Nowrojee submits that Mr Wangongu who is an officer of court and advocate for the Original applicants deliberately withheld the information from the court and the IPs yet he was aware that they were parties to the proceedings

14) By a memorandum by way of minutes AN5 the Deputy Registrar of the High Court even in the face of the order by Hayanga J AN4 – and he the Deputy Registrar was aware of it or should be deemed to have been aware of it because it formed part of the court record and from AN4 the existence of IPs was clearly apparent, nevertheless entered the memorandum and proceeded to sign it notwithstanding that the IPs were not parties to the consent letter and had not signed it.

Mr Nowrojee submitted that a Deputy Registrar cannot validly enter a consent unless all the parties have agreed and have done so in writing. He further submits that the Deputy Registrar has no power in Judicial review proceedings to enter any order whether by consent or otherwise because Judicial review is a power vested within the court itself because it is in the nature of the Republic supervising its own officials. Its origin is a prerogative because it emanated from the Crown (now read Republic) and therefore that power cannot be delegated to an executive officer and this is why Judicial review is a jurisdiction sui generis.

He further argued that if any party was desirous of entering a consent in Judicial review they have to appear before a Judge who is the only person who can check if the consent order falls within Judicial review and whether leave has been obtained for the agreed orders or whether the process of the court is not being abused. He added that this case is a good illustration of for example of a possible collusion say between a party, an applicant and a Land Registrar where an order is obtained transferring a property under the guise of a settlement. The same collusion can be extended to criminal rulings and civil rulings and judgments without any references to the initial relief sought in the application for leave and in the statement.

15)No explanation has been given why all the parties were not invited.

16) The consent was to the detriment of the applicants who were removed from office without the benefit of the matter going to hearing on merit and that the consent order is to the benefit of the original applicants without any Judicial determination.

17) The registrar entered judgment without all the parties having consented contrary to O 48 on the ministerial role of the Deputy Registrar.

18) If the Civil Procedure Rules do not apply at all then O 48 does not apply and therefore the Registrar had no powers to enter the consent and there was no provision for making any such application to enter the consent The powers to enter judgment are vested in the court (Judges) and cannot be delegated to the Deputy Registrar HALL v MAIYA (1983) I KAR 206.

19) If no Civil Procedure Rules apply then no judgment was entered, and the consent judgment must still be set aside as being entered by an unauthorized court official instead of a Judge of High Court.

20) In a Judicial review the parties include the original applicant, the respondent and the Interested Party – see WHITE BOOK 2003 and since all the parties did not sign the judgment entered was a nullity.

21) There was a material non disclosure of a material fact that the IPs had a pending cross application and by a deliberate omission a judgment was entered as a result of the non disclosure. The respondent was also aware of the IPs contest and the cross application which was on record and both original applicants and the respondent know that the IPs would be adversely affected by the consent judgment but kept the Interested parties in the dark.

22) That all the above facts show that the High Court has jurisdiction to set aside an order obtained by a party without any basis in law, without the consent of all the parties and where the High Court has been misled or kept in the dark.

Mr Mwaura the learned counsel for the Original applicants in his brief submissions relied on the affidavit of Mr Justus Nyangaya sworn on 11th December, 2002 and further clarified that in the chamber summons seeking leave dated 27th September 2002 and the subsequent application for Judicial review dated 20th September, 2002 there was no prayer for stay. When leave was granted on 27th September, 2002 the applicant was allowed to apply for an order of mandamus directing the Registrar of Societies to file notification of change of offices dated 11th September 2002. There was also an order that the present office holders do continue to act until the final determination of the application and that the then office holders were the original applicants and this cannot be interpreted to be an order for stay – as an order for stay prohibits the doing of an act and in the circumstances there was no prohibition and what was being maintained was the status quo. That after the IPs were enjoined following the application dated 4th October, 2002 they did not file any papers in opposition to the substantive application for Judicial orders which application was to compel the Registrar of Societies to register the original applicant as officials of SDP pursuant to a National Leaders Conference held on 9th September 2002. After the conference a notification of change dated 11th September, 2002 was lodged with the Registrar of Societies and the Registrar resisted the registration on the basis of the annual returns for the year 2001 – returns were filed one year after the meeting to which they related. Such returns are required by rule 13 of the Societies Rules to be filed on or before 31st March of each year.

Those returns are the ones the IPs relied on to claim that they are officers of SDP and since they were filed out of time and contrary to the law they could not be said to be valid. The Registrar of Societies was convinced that there was an error and he came to the conclusion that the only valid office bearers of the party were the ones contained in the notification of change of offices filed with the Registrar on 11th September, 2002 pursuant to the meeting held on 9th September, 2002. The original applicants and the respondent having reached that position the negotiations were conducted on or about 29th October, 2003.

The Attorney General requested to meet the parties on 26th November, 2003 which day was gazetted as a public holiday. There was no intention to commit fraud on IPs or the court. The IPs could not have been able to grant the orders which original applicants wanted. On the other hand the respondent was willing to rely on the notification. That one of the applicants Apollo Njonjo is still Secretary General and has nothing to loose. On the law, Mr Mwaura submitted that S 8(5) of the Law Reform Act only allows an appeal and there is no mention of setting aside final orders in Judicial review. He also relied on the written skeleton arguments and his list of authorities. He asked for the dismissal of the application.

Mr Adera In a very brief submission he relied on s 8 (5)of the Law Reform Act for the position that a final order cannot be set aside and also relied on Order 48 of the Civil Procedure Rules and in particular rules 2(a) and (b) and submitted that the Deputy Registrar has authority to enter judgment and that under O 53 rule 6 the IPs have no standing to contest the consent because they can only oppose the Notice of Motion.

I have considered the positions taken by all the parties as outlined above including the submissions of counsel together with the written skeleton arguments. The court after a careful scrutiny of the reasons given by the applicants counsel in his lengthy arguments number 1 to 22 as outlined above has been sufficiently persuaded that the reasons given in support of the arguments are convincing. On the other hand the brief arguments advanced by the counsel for the original applicants and the respondent in support of the consent order are off the mark in terms of the applicable law and are also factually incorrect. Firstly the changes effected pursuant to the consent order were the ones the applicants were opposed to and were entitled to a hearing and determination. Secondly once proceedings in the nature of Judicial review are filed it is not the parties who give relief but the court.

(A) PARTIES

It is significant to consider who are the parties to a Judicial review application. One of the situations is where there is an applicant or applicants and a respondent or respondents. The second situation is where there is an applicant or applicants, a respondent or respondents and an interested party or parties. The facts of this particular case fit the second category. It is common ground that there were interested parties in this case. It was therefore necessary for both the court and all the other parties at all times to recognize their presence until the determination of the matter in question. The position as outlined has the authoritative support of *THE WHITE BOOK VOL 2002 at page 152* as cited by the learned counsel for the applicants Mr Pherozee Nowrojee. The relevant portion 54.1.13 reads:

> **“The parties to a Judicial review claim will be the claimant, the defendant and interested parties. The defendant will usually be the public body whose decision, action or failure to act is under challenge. An ‘interested party’ is defined in rule 54 1(1) f as any person ‘who is directly affected by the claim.’ Under the former RSC Order 53 r 5(3) application for Judicial review had to be served on persons “directly affected.”**

In the Kenyan context it is Order 53 rules 3 and 4 which requires service on persons directly affected. I therefore find that the Kenyan situation on parties to be similar to the current situation in the United Kingdom notwithstanding the repeal of their O 53 by the new O 54.

Since it is common ground that the IPs were not parties to the consent letter and order and yet they were affected parties how does this affect the consent letter and order.

In the case of *FLORA N WASIKE v DESTIMO WAMBOKO* cited by Mr Mwaura learned counsel for original applicant the Court of Appeal in holding I stated the law as under:

> **“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside a contract for example on grounds of fraud, mistake or misrepresentation.”**

On this I find that in the circumstances of the case before me since the IPs were parties to the proceedings

in law and they were deliberately excluded from the consent letter/order or judgment the very act of excluding them is a fraudulent act taking into account that the exclusion was clearly aimed at conferring benefits to the excluding parties and denying the IPs of the same benefits. Similarly the exclusion of the IPs if not done fraudulently does in the circumstances constitute negligent misrepresentation to say the least and an unforgivable mistake as well.

I therefore find that the applicants are perfectly entitled as they did to apply to set aside the challenged order/judgment even on the basis of the three limbs of the laws (or grounds) as expounded in the FLORA case above.

It is also clear to the court that when the Deputy Registrar of the High Court entered the minute representing the consent order/judgment on 3rd November, 2003 and which bears the date of 29th October 2003, there was a court order by Hayanga J on 29th September, 2003 ordering a mention of the matter by consent for 26th November, 2003. Both Mr Wangogu and Mr Nowrojee for the IPs were present. It should have been apparent to him that the IPs were parties and their approval and signature was absolutely necessary if a consent order or judgment was to be valid and beyond challenge. The oversight on the part of the Deputy Registrar was either deliberate, negligent or by mistake and all these lapses entitle the aggrieved party to avoid the consent order. Lord Herschell in the celebrated case on misrepresentation *DERRY v PEEK 1889 14 AC 389 said "if a representor deliberately shuts his eyes to the facts or purposely abstains from their investigation, his belief is not honest and he is just as liable as if he had knowingly stated a falsehood"*

Neither the Registrar of societies nor the Deputy Registrar can oust the Court's jurisdiction to determine matters referred to it. He had no right to rely or not to rely on any returns at all. In any case the returns relied on were not part of the proceedings.

(B) <u>DEPUTY REGISTRAR OF THE HIGH COURT – JURISDICTION</u>

When the application for leave was filed on 27th September, 2002 and leave granted it was granted on the strength of the statement filed on the same day and the relief sought was in these terms:

> **"An order of mandamus to compel the Registrar of Societies to compel and file the Notification of change of officers as prescribed to him on the 11th September, 2002."**

However the consent recorded and in particular orders (a) (b) and (c) are completely outside the ambit of the relief sought.

i. Thus the orders are not in the nature of mandamus directed at the registrar of Societies

ii. The orders are not in the nature of mandamus at all and are therefore outside the scope of Judicial review remedies at all or as claimed in the proceedings the consent order was purporting to settle

iii. The orders disregarded the IPs who were part of the proceedings and literally took away offices from them without any determination by a Judicial review court

iv. It is not possible in law for a consent order or letter to confer Jurisdiction on the Deputy Registrar where it is not specifically conferred on him. In other words jurisdiction cannot be conferred by consent. It is trite law that jurisdiction to grant Judicial review remedies is vested in the court (Judges), and they cannot delegate the power to grant those remedies to a Deputy Registrar or any other person this being a supervisory jurisdiction specifically conferred on them by statute – *see HALSBURY'S LAWS OF ENGLAND 3rd Edition vol II page 119 and para 222:*

> **"Parties cannot by agreement or otherwise confer jurisdiction upon or oust the jurisdiction of a court"**

Surely the effect of the consent judgment or order was to oust the jurisdiction of the court by virtue of an agreement by some of the parties to make the matter worse. Even if all the parties had agreed to oust the courts jurisdiction I find and www.kenyalaw.org Republic v Registrar of Societies ex-Parte Justus Nyangaya & 3 others [2005] eKLR 16 hold that they could not do so. The said consent judgment/order is null and void for this reason as well.

(C) RELIEF SOUGHT IN THE STATEMENT IS AT VARIANCE WITH THE FINAL ORDER

As analysed above the Deputy Registrar acted in excess of his jurisdiction and, this court has a supervisory jurisdiction to set it aside or quash it on this ground as well.

In addition a party or parties cannot seek relief that is outside the statement unless leave to amend the statement is sought and granted pursuant to O 53 rule 4(2) and no such amendment or leave was sought in this case.

It follows that the consent judgment or order flies in the face of O 53 rule 4(1) of the Civil Procedure Rules which is worded in mandatory terms. The consent is not valid for this reason as well.

(D) EFFECT OF FRAUD, MISTAKE OR MISREPRESENTATION

It is clear from the facts outlined above that the original applicants counsel kept away from the court material facts concerning the settlement which had been worked on behind the IPs back on 29th September, 2003. It is also quite apparent that the Deputy registrar ignored the state of the court record when entering the consent judgment as indicated above. What then is the effect of the above in law to the consent judgment or order. Since the IPs were parties to the proceedings and were deliberately kept out of the consent judgment or order by the other parties, the effect of this must be the same as that of a party to a contract which he is entitled to rescind and once he challenges such a consent judgment/order in court for keeping him away the effect must be to restore the parties position to that prevailing before the consent was entered into – parties in status quo ante. Lord Atkinson in the case of *ABRAM STEAMSHIP COMPANY v WESTVILLE SHIPPING COMPALY LTD [1923] AC 773 at 781* described the effect in the following terms:

> **"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it the expression of his election, if justified by the facts, terminates the contract, puts the parties in statusquo ante and restores things as between them, to the position in which they stood before the contract was entered into."**

I therefore hold that this court views the position of IPs in electing to apply to set aside the consent judgment in the same light. They have elected not to be bound by it although the consent judgment purports to bind them and consequently this court is obligated to set the consent judgment/order aside in order to restore all the parties to the position they stood before the consent judgment/order was entered into. It does not matter to the court whether the acts leading to the entering of the consent constitute mistake, fraud or misrepresentation, justice demands that the previous position be restored.

(E) COURTS JURISDICTION AND THE REASONS FOR INTERFERING

Counsel for the applicant has cited a stream of authorities mainly in exercise of this courts civil procedure jurisdiction. It has been contended that because the consent www.kenyalaw.org Republic v Registrar of Societies ex-Parte Justus Nyangaya & 3 others [2005] eKLR 18 judgment/order is final this court has no jurisdiction to set it aside in all situations because the only remedy provided under s 8 (3) and (5) of the Law Reform Actfor an aggrieved party is to appeal against the order.

I reject this argument and hold firstly that the consent order entered was not in the nature of the order

envisaged under s 8(3) and (5) because it was wrongly entered without the participation of essential and affected parties and secondly the order was neither a final order of mandamus, certiorari or prohibition and this is very clear even from its wording. Thirdly the Deputy Registrar had no jurisdiction to enter it. Civil Procedure Rules including O 48 on the ministerial powers of the Registrar do not apply to Judicial Review it being a jurisdiction sui generis. I am of course aware that due to the practical necessity of signing orders issued by the High Court generally the Deputy Registrar has by force of practice over the years signed orders relating to judicial review but this he does pursuant to specific court orders and this has to my knowledge been orders such as mandamus, certiorari or prohibition after the granting by the court (Judge) or in uncontested orders signed by all the parties and which are not substantive judicial review orders. The need for this is pegged on practical necessity and for good administration of justice in the courts. Although O 53 and the Law Reform Act Cap 26 do not provide for ministerial powers to the Registrar, the intention of legislature would be defeated if Judges were to be required to perform ministerial acts instead of the Deputy Registrar.

However as held above the entering of the consent judgment/order in this case was not in the view of this court ministerial at all – it was substantive and outside the jurisdiction of the Deputy Registrar.

I therefore find such an order can be set aside under the court's inherent jurisdiction which has not been taken away by s 8 of the Law Reform Act because the nature of the order is outside the definition of the orders contemplated under s 8. By analogy I hold that even a court exercising Judicial review jurisdiction has inherent powers to set aside a judgment/order wrongly entered in line with *MAGON v OTTOMAN BANK 1967 EA 609, MULIRA v DASS (1971) EA 227, ALI BIN KHAMIS v SALIM KIROBE (1956) EACA 195, CRAIG v KANSEEN (1943)* I AII ER 209.

I further find and hold that the consent judgment/order was a nullity since the Deputy Registrar did not have powers to enter it – it being not a ministerial act. Again by way of analogy the cited case of ORARO & RACHIER v CO-OPERATIVE BANK CACA No 1549 2000 is illustrative. In addition the acts complained of by the applicants above do in the view of the court constitute an abuse of its process and the court has inherent jurisdiction and powers to prevent an abuse of its process see R v KENSINGTON IRCexp de POLIGNAC (1917) KB 486. I am also of the view that the court would have similar powers under s 60 of the Constitution.

I also accept as good law that where some of the parties such as in this case fail to make a full disclosure to the court and obtain what for all practical purposes is an exparte order behind the back of bona fide parties to the proceedings such as the IPs the court has jurisdiction to refuse such an application if asked for ex-parte or obtained exparte, in violation of the duty uberrimae fidei to make full disclosure to court.

The cases of *R v KENSINGTON IRex.p. de POLIGNAC (ibid)* cited by applicants Counsel and the cases THE MOTOR VESSEL "*LILIANS" CACA 50 of 1989, DEVANI v BHADRESA (1972)EAa 22, DONNEB AUM v MIKOLASCHE (1966) EA 25 THE HAGEN* (1908) p 189 are all on the point. In any event it is trite law that the court has jurisdiction to set aside any ex-parte order and the order obtained herein is ex-parte – since it left out some of the parties.

Again, this court has jurisdiction to set aside a judgment that does not amount to a judgment when moved by an aggrieved party. Since neither the Law Reform Act nor the Civil Procedure Rules nor Order 53 on Judicial review, nor any other statutory provision make any express provision for setting aside of any consent order or any order wrongfully entered in a Judicial Review, I hold that the inherent jurisdiction can be properly invoked and the applicants have quite rightly invoked it. In the course of the last 20 months or so this court has invoked its inherent jurisdiction where the court has been deceived or where full disclosure has not been made or when an ex-parte final order has been made in the following cases: *R v LAND REGISTRAR KAJIADO & 2 OTHERS ex-parte JOHN KIGUNDA HC Misc 1183 of 2004 unreported., KENYA BUS SERVICE LTD & 2 OTHERS v ATTORNEY GENERAL AND THE MINISTER FOR TRANSPORT AND 220 OTHERS* IPs HC Misc 413 of 2005 unreported.

In the KENYA BUS SERVICE case (ibid) this court had occasion to compare ordinary jurisdiction of

the court and the inherent jurisdiction and at pages 20 and 21 and a quote of what the court stated would not be out of place:

> **"Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Acts of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.**

Sir Isaac J H JACOB writing in his work entitled *THE REEFORM OF CIVIL PROCEDURE LAW AND OTHER ESSAYS IN CIVIL PROCEDURE (1982) VERSION HAS DESCRIBED THE INHERENT POWERS IN CLEAR TERMS AT PAGE 224:*

> **"The answer is that the jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". This description has been criticised as being "metaphysical" but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court, it is its very lifeblood its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The Judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner."**

In conclusion and for the reasons set out in A – to E the Order given by the Deputy Registrar on the 29th October, 2003 or 3rd November, 2003 is forthwith set aside with costs to the applicant.

DATED and delivered at Nairobi this 21st day of July 2005.

J G NYAMU

JUDGE

Counsel:

Mr Pherioze Nowroee

For the applicant

Mr Mwaura for Original

Applicant and respondent

Mr Njoroge court clerk