REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAKURU

CIVIL DIVISION

MISC CIV APPLI 1 OF 2001

IN THE MATTER OF: AN APPLICATION BY CHARLES WANJOHI MWANGI

FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & MANDAMUS

AND

IN THE MATTER OF: THE PENSIONS ACT CAP 189 OF THE LAWS OF KENYA & OF A DECISION DATED 13TH JULY 2000

BETWEEN

REPUBLIC.....APPLICANTS

AND

DIRECTOR OF PENSIONS.....RESPONDENTS

EXPARTE.....CHARLES WANJOHI MWANGI

RULING

On 31st May, 2004 this court dismissed with costs an application by the applicant for leave to amend a notice of motion dated 27th July, 2001 and for leave to file the amended notice of motion out of time. The court observed that the leave granted was for purpose of applying for orders of certiorari and mandamus and the same having been granted over 3 years ago, no such application had been filed.

The applicant was not satisfied with the aforesaid ruling and on 5th August, 2004 he filed another application seeking a review of the orders made on 31st May, 2004. The application was brought under Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. I think it is important to state some background information that is relevant to the present application. The applicant had commenced judicial review proceedings on 10th January, 2001 when he sought leave to apply for an order of certiorari to remove to the High Court and quash a decision of the Director of Pensions dated

13th July 2000. The leave as sought was granted on 10th July 2001 and the court ordered that the application for judicial review be filed within 21 days thereafter.

On 27th July 2001 the applicant, instead of filing the substantive application, made another application for leave as in the first one and when the application came up for hearing on 16th October, 2001 counsel for the applicant sought an adjournment to amend the application and the matter was stood over generally.

On 18th July 2002 the applicant made another application under Order VIA Rule 3(2) and 8, Order XLIX Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He sought leave to amend his notice of motion dated 10th July 2001 although in reality there was no such a notice of motion dated 10th July, 2001. He also sought leave to file the amended notice of motion out of time. The application was heard by Lesiit J and on 25th June, 2003 she delivered a ruling striking out the same on the grounds that the notice of motion intended to be amended had not been annexed to the application and that there was no such application dated 10th July 2001 in the court record.

On 17th February, 2004 the applicant filed an application by way of chamber summons praying for leave to amend the notice of motion dated 27th July, 2001 and for leave to file the amended notice of motion out of time. This court dismissed with costs the said application after considering some preliminary arguments that were raised by the respondent on the propriety of the application.

The applicant now wants this court to review its own decision aforesaid on the grounds that there were same errors apparent on the face of the record. The respondent's counsel objected to the said application on the ground that Section 3A of the Civil Procedure Act was not applicable in an application for judicial review and submitted that the only recourse that the applicant had was to appeal against this court's decision if he was dissatisfied with the same and cited Section 8 of the Law Reform Act. On the other hand, Mr. Kisila for the applicant submitted that there was nothing in the Law Reform Act that prohibited this court from reviewing its rulings in a judicial review matter.

Both counsel did not cite any authorities on 12th May, 2005 when they appeared before me but with leave of the court they filed some authorities thereafter and I will refer to some of them in the course of this ruling. Recently, I had occasion to consider whether this court has jurisdiction to review or set aside its own orders made in judicial review proceedings – that was in ***COMMISSIONER OF CO-OPERATIVES VS FRANCIS NJUGUNA KUBAI & OTHERS*** Misc. Civil Application No. 374 of 2003. Section 8(2) (3) and (5) of the Law Reform Act Cap 26 Laws of Kenya provide a good starting point in considering the above issue and it is important that I restate them.

"***8(2) In any case in which the High court in England is, by virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.***

(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 therefrom conferred by sub-section (5) of this Section.

(4) ……..

(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 provisions of Section 8(3) is that once the High Court has issued the orders of Mandamus, Prohibition or Certiorari, one cannot ask that court to review or set aside such an order but can appeal against the grant of such an order to the Court of Appeal. The use of the words "***any such order"*** in sub-section (3) of the above quoted section clearly refers to "***an order of Mandamus,***

Prohibition or Certiorari" as in sub-section (2). That, in my view, excludes any other interlocutory order for example an order granting leave to apply for an order of certiorari or an order directing that grant of such leave shall operate as stay of some proceedings.

I would add that in sub-section (3) the words "***the order shall be final, subject to the right of appeal"*** imply that there is no room for exercising any discretion whatsoever by the High Court as to whether to entertain an application for review or setting aside after the final orders aforesaid have been made.

The position is different in sub-rule 5 which allows "***Any person"*** who is aggrieved by an order made in the exercise of the **Civil Jurisdiction** of the High Court under Section 8 to appeal therefrom to the Court of Appeal. It is to be noted that this sub-section does not, in my view, make specific reference to the orders of Mandamus, Prohibition or certiorari but refers to **an order** made in the exercise of the civil jurisdiction of the High Court under Section 8. This may include any other order for example, grant of leave to apply for an order of mandamus. Under sub-section (5) any person aggrieved by such an order may elect either to appeal to the Court of Appeal or make an appropriate application to the same court which made the order that aggrieved him, as long as it is not an order of mandamus, prohibition or certiorari which orders are only subject to an appeal to the Court of Appeal as per the provisions of sub-section (3) of the section.

In ***JUDICIAL COMMISSION INTO THE GOLDENBERG AFFAIRS & 3 OTHERS VS KILACH*** [2003] K.L.R. 249 the Court of Appeal considered a similar issue as in this matter and it was not convinced that because the trial judge made exparte orders then the only route open to the applicants was to go before that judge and ask him to set aside the orders. They said that that was one way open to the applicants, the other was by way of an appeal to the Court of Appeal.

Their Lordships stated as follows:-

"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…… We think that in Kenya, at any rate, the law gives these applicants the right to appeal and we are not convinced 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."

In view of the aforesaid Court of Appeal decision, I must, with great respect, disagree with the decision of Nyamu J in *PAUL KIPKEMOI MELLY VS THE CAPITAL MARKETS AUTHORITY* Misc. Civil Application No. 1523 of 2003 at Nairobi (unreported) where he held that the High Court had no power to review, vary or set aside its own ex-parte orders granting leave to apply for judicial review, even if its inherent jurisdiction was invoked and that the only remedy was by way of an appeal.

In *DICKSON NGIGI NGUGI VS THE COMMISSIONER OF LANDS* Civil Appeal No. 297 of 1997 (unreported) the Court of Appeal allowed an application to set aside a dismissal order of a mandamus application made under order IXB Rules 4 and 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act which had been rejected by the High Court.

The applicant in the present application before this court has applied under the provisions of Section 3A of the Civil Procedure Act for review of this court's order dated 31st May, 2004. As per my earlier observations regarding Section 8(5) of the Law Reform Act (supra) the applicant can rightly invoke the inherent powers of the court and urge it to review the aforesaid order.

But having said that, does the application itself merit any review? I do not think so. The applicant has been guilty of laches and has not offered any reasonable explanation for that. On 10th July, 2001 this court granted leave to apply for judicial review orders within 21 days from the date thereof but no proper

application was filed for years, perhaps due to procedural lapses on the part of counsel for the applicant as earlier shown. It was not until 17th February, 2004 that an application for extension of time to file the notice of motion out of the 21 days period earlier granted was made. While I agree that the said time could have been extended by a reasonable period as was held in *WILSON OSOLO VS JOHN OJIAMBO & ANOTHER* Civil Appeal No. 6 of 1995 (unreported) an applicant in judicial review proceedings should exhibit diligence in pursuing the orders sought.

Secondly and more important, even if I was to review my earlier orders, the application for the order of certiorari is itself fatally defective in that the facts in support of the application are contained in the statement accompanying the application and not in the verifying affidavit.

In *COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY VS SILVANO OWEMA OWAKI T/A MARENGA FILLING STATION* Civil Appeal No. 45 of 2000 at Kisumu (unreported) the Court of Appeal stated as follows:-

"The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by Rule 1(2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case……We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review."

The court found the application to be fatally defective for that reason and struck it out. I am equally of the same view as far as the present matter is concerned. For these reasons, I dismiss with costs the applicant's application dated 4th August, 2004.

DATED, SIGNED & DELIVERED at Nakuru this 7th day of July, 2005.

D. MUSINGA

JUDGE

7/7/2005