



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Application 1623 of 2004

PRIME OUTDOOR NETWORK LTD & ANOTHER.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

By an Application by way of a Chamber Summons dated and filed on 25 – 11 – 2004, the ex-parte Applicants sought and were on the same day (25-11-2004) granted orders for leave to apply for Judicial Review for orders of Certiorari and Prohibition, and that leave so granted was to operate as a stay of the Enforcement Notice of the Respondent (City Council of Nairobi) served on the Applicants on 24-11-2004 pending the hearing and final determination of the application for Judicial Review.

Following the said order for leave as aforesaid, the Applicants filed through the firm of Akolo and Co. Advocates a Notice of Motion dated 10-12-2004. I will call this the first Notice of Motion pending the said orders of Certiorari and Prohibition against the Respondent. However, perhaps unknown to the firm of Akolo & Co., Advocates another Notice of Motion dated 15-12-2004 was filed by the firm of Singh Gitau Advocates on 16.12.2004 seeking five (5) orders.

It is unclear from the record which Notice of Motion was served upon the respondent. I can only infer from the Chamber Summons of 15.06.2005, and filed on 17.06.2005, that the Notice of Motion served upon the Respondent was that of 15.12.2004 drawn and filed by the firm of Gitau Singh Advocates. There is actually no Notice of Change of Advocates from Akoko & Co, Advocates to Gitau Singh Advocates although there is a Notice of Change of Advocates from Singh Gitau Advocates to Akoko & Co. Advocates. Yet the Replying Affidavit of Sophie Kinyua, the 2nd Ex parte Applicant's General Manager is drawn and filed by the firm of Singh Gitau Advocates. Counsel for the Applicants must I think clear the issue of representation of their client(s).

Be it as it may, it appears that upon service of the second Notice of Motion (of 15.12.2005) the Applicants' representatives, namely Sophie Kinyua, met the Respondents Director of City Planning with a view to working out amicably the matters complained of, and raised in the Notice of Motion for judicial review. There were apparently changes personnel of the Respondent's Department of City Planning, and the Applicants failed to follow up their discussions with the then Director of City Planning. Following this lapse in communication, between the Applicants and the Respondent's Department of City Planning the Respondent's found opportunity to attack the Applicants' Notice of Motion dated 15.12.2004 and filed 16.12.2004, I am doubtful whether it would have been different if the Notice of Motion attacked was that of 10.12.2004, I think the issues raised by the applicant's would have been the same.

So in the Chamber Summons dated 15.06.2005 and filed on 17.06.2005, the Respondent prays that the Notice of Motion dated 15.12.2005, be struck out with costs to the Respondent of the Chamber

Summons and the substantive judicial review proceedings. The grounds for this Chamber Summons are that_-

(a) the Notice of Motion is frivolous and unsustainable because it relies on facts contained in Affidavits that are fatally defective for non-compliance with the mandatory provisions of the Oaths and Statutory Declarations Rules.

(b) The Notice of Motion is also frivolous as it relies on a statutory Statement that is fatally defective for noncompliance with the Mandatory Provisions of Order LIII Rule 1(2) of the Civil Procedure Rules.

(c) The application is otherwise an abuse of the court process and is merely intended to enable the Applicants to enjoy the ex-parte orders of stay granted on 25.11.2004 indefinitely to the prejudice to the Respondent.

The Respondent relied upon the supporting Affidavit of Geoffrey G.K. Katsoleh sworn and filed 17.06.2004. The salient parts of the said Affidavit may be summarized as follows:

(a) the statutory statement dated 25.11.2004 confirms statements of fact contrary to the mandatory provisions of the law.

(b) The Applicants Affidavits sworn by Francis Raudo and Sophie Kinyua do not comply with the provisions of the Oaths and Statutory Declarations Act.

(c) Six months had expired since the application was filed and served and the Applicants had failed to set it down for hearing.

(d) The failure to set down the application for hearing was intentional and is an abuse of the court process as it is intended to grant the Applicants maximum benefits of the exparte order granted on 25.11.2004, again to the prejudice of the Respondent.

The Replying Affidavit of Sophie Kinyua sworn on 20.07.2005, and filed on the same day, contends of the advice of Mr. Singh that, the application is incompetent, misconceived, and without any merit whatsoever, that the Notice of Motion dated 15.12.2004 and filed on 16.12.2004 is competent and properly on record. Sophie Kinyua also depones that whilst the court orders were subsisting, the Respondent's agents had destroyed the Applicant's media by defacing them with oil sprays occasioning the applicant loss of order Kshs.700,000/=. This deponent also reiterates discussion held with the Respondent's Director of City Planning and that they were awaiting the Respondent's response to the proposals made by the ex parte applicants, before taking further action in the matter, and therefore denies abusing the courts process.

This deponent further avers that judicial review time would have been saved if the Respondent had responded to the Applicant's proposals, and the issues giving rise to the Notice of Motion could have been resolved.

Mr. Kariuki learned Counsel for the Respondents and Mr. Njoroge, learned Counsel for the two Applicants (Alliance Media (K Ltd) and Mr. Oriero, learned Counsel for the first ex-parte Applicant (... Out Door Network Ltd) reiterated these arguments on both sides of the divide.

In addition to matters deponed to by Ms. Sophie Kinyua, on behalf of the 2nd Exparte Applicant, Mr. Oriero on behalf of the 1st Ex-parte Applicant submitted that the application (the Chamber Summons of 15.06.2005) was incompetent because it purports to invoke the provisions of Section 3A of the Civil Procedure Act (Cap 21, Laws of Kenya) and Order VI rules 13(a) (c) and (d) whereas the jurisdiction for judicial review is donated by Sections 8 and 9 of the Law Reform Act (Cap. 26, Laws of Kenya) and the Rules made there under being Order LIII, of the Civil Procedure Rules.

This Counsel relied upon the decision of Ringera J (as he then was) in the case of **ANNA WANGUI Paul VS VICTORIA COMMERCIAL BANK LTD** (Milimani Commercial Courts HCCC NO. 1395 of 2000) that failure to exhibit documents deponed to, as required by the Oaths and Statutory Declaration Act (Cap 15, Laws of Kenya) and the Oaths and Statutory Declaration Rules is not fatal to the application, and failure to annex the exhibits is merely an irregularity.

Having set out the respective Counsels arguments, I shall turn to the issues raised by the Respondent's Chamber Summons of 15.06.2005. These issued may be restated as follows-

- (a) Whether the Respondents Chamber Summons having been brought under the provisions of Section 3A of the Civil Procedure Act, Order VI rule 13(1)(b) and (d) Order LIII rule 1(2) of the Civil Procedure Rules is incompetent
- (b) Whether the verifying affidavits of Francis Raudo for the 1st Applicant and Sophia Kinyua for the 2nd Applicant all filed on 25.11.2004 are defective, and fatal in terms of the provisions of the Oaths and Statutory Declarations Act (Cap 15, Laws of Kenya) and the Oaths and statutory Declaration Rules.
- (c) Whether the statement of facts is not in accord with the provisions of Order LIII rule 1(2) of the civil Procedure Rules.

On the first issue, the Respondent's Chamber Summons dated 15.06.2005 is misconceived and is incompetent by virtue of being premised upon the provisions of Order VI Rules 13(1)(b) and (d) of the Civil Proceeding Rules and indeed Section 3A of the Civil Procedure Act.

Section 3A of the Civil Procedure Act is a further codification of the Courts inherent powers to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.

Order VI Rule 3(1) (b) and (d) empowers the Court at any stage of the proceedings to order to be struck out or amended any pleading on the grounds either that it is scandalous, frivolous, or vexatious, or that it is otherwise an abuse of the process of the court.

It was the contention of both Mr. Njoroge and Mr. Oriaro learned Counsel for the 1st and 2nd ex-parte Applicants, that the Court in exercise of its judicial review jurisdiction exercises a special jurisdiction which is neither civil or criminal, that the ordinary rules of civil procedure applicable to actions, instituted by a plaint or originating summons do not apply. The reason is to be found in Section 8 of the Law Reform Act (Cap 26 Laws of Kenya). The said section says-

“8(1) The High Court shall not whether in the exercise of its civil or criminal jurisdiction issue any of the prerogative writs of mandamus prohibition or certiorari.

(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.”

In the case of the COMMISSIONER OF LANDS VS KUNSTE HOTEL LTD (Civil Appeal No. 234 of 1995), the Court of Appeal (Akiwumi Pall JJA and Bosire Ag. JA said:-

“By virtue of the provisions of Section 7 of the Administration of Justice (Miscellaneous Provision) Act 1938 of the United Kingdom which is applicable to this country by reason of section 8(2) cited above) of the Law Reform Act, prerogative writs were to be known as “orders” except for the writ of habeas corpus, Section 8(1) above denies the High court the power to issue orders of Mandamus prohibition and certiorari while exercising civil or criminal jurisdiction.”

Further, in the case of **PAUL KIPKEMOI MELLY VS CAPITAL MARKETS AUTHORITY (H.C. MISC APPLICATION NO. 1523 of 2003)**, Nyamu J following the above case also found that ordinary rules of civil procedure have no application to matters of judicial review.

In the case at hand, what those authorities mean is that notwithstanding the provisions of Section 3A which reiterates the courts inherent and unlimited jurisdiction (as conferred to it by section 60(1) of the Constitution) to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court, this court can only issue such orders necessary to meet the ends of justice or prevent the abuse of the process of the court in terms of the said Section 9 of the Law Reform Act, or in other words it cannot and has not jurisdiction to-do so. It did not and does not aid the Respondent's application to base its application on either the provisions of the Civil Procedure Act, or the particular rules (Order VI rule 13(1)(b) and (d) of the Civil Procedure Rules.

To that extent therefore, the Respondents Chamber Summons of 6.05.2005 is misconceived and incompetent; and having come to this conclusion on the first issue on the matter, I do not propose to examine and discuss other issues raised in the Chamber Summons. The said Chamber Summons is therefore struck out and dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 22nd day of September 2005

ANYARA EMUKULE

JUDGE