REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Civ Appli 720 of 2003

IN THE MATTER OF: THE SENIOR PRINCIPAL MAGISTRATE'S COURT MOMBASA

IN THE MATTER OF: [MOMBASA] CRIMINAL CASE NO. 3393/2003

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE (CAP 75, LAWS OF KENYA)

A N D

IN THE MATTEROF: ORDER LIII OF THE CIVIL PROCEDURE RULES

A N D

IN THE MATTER OF: AN APPLICATION BY

(1) DOUGLAS CHIGUBA

(2) TSUMA CHIGUBA AND

(3) MWAMWERO CHIGUBA

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

B E T W E E N

REPUBLIC

-VERSUS -

SENIOR PRINCIPAL MAGISTRATE COURT MOMBASA ….RESPONDENT

EX-PARTE:

DOUGLAS CHIGUBA

TSUMA CHIGUBA

MWAMWERO CHIGUBA ..... APPLICANTS

Coram: Before Hon. Justice Mwera

Court clerk – Kazungu

R U L I N G

This notice of mention dated 24/3/2004 was filed under Order 49 rule 5 Civil Procedure Rules and Section 3A Civil Procedure Act for orders that the time for filing the application for orders of certiorari and prohibition be enlarged and thus allowing the notice of motion for those orders filed pursuant to leave granted on 10/12/2003 to be deemed duly filed and within time. Besides the five grounds set out in the body of the application, Mr. Okongo also relied on his supporting affidavit.

The court was told that the leave to apply for judicial review orders of certiorari and prohibition was given on 10/12/2003. That the applicants failed to file the substantive notice of motion (seeking the reliefs) within 21 days as mandated under Order 53 Civil Procedure. And that because this court has power under Order 49 rule 5 Civil Procedure Rules and Section 3A Civil Procedure Act to enlarge time where the stipulated limit has expired, that discretion should be exercised in favour of the applicants now so that they have an opportunity to procure the sought orders, or otherwise, they will be prejudiced.

Mr. Oko'ngo submitted that a lawyer with their firm, one David Waweru, obtained the said leave. But before he filed the necessary notice of motion he resigned from the firm and because he did not formally and properly hand over the files he had been working on, all came to light on 27/2/2004 when the applicants came to inquire about the fate of their application. That by 27/2/2004, 21 days had long gone hence this application seeking to enlarge the time as said above. That the application had been made as promptly as it was possible and the applicants need not be prejudiced due to the inadvertence on the part of their lawyers.

Mr. Mutungi for the Hon. the Attorney General opposed this motion on five grounds but mainly that this court had no power under Order 49 rule 5 Civil Procedure Rules to enlarge time as prayed. That the process of judicial review was rooted in Section 8 of the Judicature Act and under it the court exercised a special power which was neither civil nor criminal, and which therefore did not fall to be governed by the Civil Procedure Act and Rules. And that the applicants' claim for certiorari and prohibition was not valid at all. Both sides presented and referred to the following cases: The Commissioner of Lands Vs Kunste Hotel Ltd. CIVIL APPEAL NO. 234/1995 (C.A.) BUNG HC MISC. APPLICATION NO. 81/2002 JOTHAM WELAMONDI VS ELECTORAL COMMISSION OF KENYA and Wilson Osolo Vs John Ochola & Anor CIVIL APPEAL NO. 6/1995.

The court then rose to consider its decision. In doing so Order 53 SCPR (1997) of UK which is in many respects like our Order 53 Civil Procedure Rules was perused.

Judicial review proceedings contained in Order 53 Civil Procedure Rules arise from Section 8 of the Law Reform Act (Cap 26) and the relevant part thereof reads:

> "8 (1) .....
>
> (2) In any case in which the High Court of 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."

Then Order 53 was inserted in our Civil Procedure Rules. It is for this feature that it is generally assumed that accordingly all the relevant provisions of our Civil Procedure Rules do apply to that Order. This court does not think so because the Civil Procedure Act and Civil Procedure Rules only apply when this court is exercising its civil jurisdiction. While entertaining its judicial review jurisdiction the court is neither exercising its civil nor criminal jurisdiction and the Kunste case said just that. In that case the Court of Appeal was considering Section 13A of the Government/Proceedings Act vis as vis the minister's

exercise of powers under section 136 of the Government Lands Act. The provisions of those Acts are not relevant here nor are the facts in that case. But that court said:

> "By virtue of Section 7 of the Administration of Justice (Miscellaneous Provisions)
>
> Act 1938 of the United Kingdom, which is applicable on this country by reason of Section 8(2)
>
> of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for
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> the writ of habeas corpus. So Section 8 (1) above denies the High Court the power to issue
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> orders of mandamus, prohibition and certiorari while exercising civil or criminal jurisdiction.
>
> What that means is that notwithstanding the wording of Section 13A, above, which talks
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> of proceedings, in exercising the power to issue or not to issue an order of certiorari, the
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> court is neither exercising civil or criminal jurisdiction. It would be exercising special jurisdiction
>
> which is outside the ambit of Section 136 ..... and also Section 13A ....."

By the above, this court holds the view that it exercises a special jurisdiction while dealing with claims under Order 53. Because that Order derives its power from the Law Reform Act and not the Civil Procedure Act, it is complete in itself as to procedure and substance unless the Law Reform Act says more or otherwise. The substance of what Order 53 covers is about the nature of reliefs to be sought under it, the procedure to go about, the parties to the proceedings thereunder and what material is required in such proceedings. It is a complete regime, no matter that it is contained in the Civil Procedure Rules booklet. It has seven rules (and subrules).

It emphasizes that no application for judicial review orders shall be made unless leave has first been granted. It sets out the material to accompany the application for leave and that before that is entertained ex parte by a judge in chambers the applicant shall give notice of the application to the registrar not later than the day of the hearing of that application. This is the only part of Order 53 that allows the court to extend the period of giving such notice to the registrar or failure to do so but on good cause. The judge may direct that the leave granted operate as stay, but this leave is limited to being given when it is sought not later than 6 months after the date of the proceeding complained of. Then what concerns us here follows.

"3(1). When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court ...".

Order 53, its mother Act (Cap 26) or treatises written about the prerogative remedies of mandamus, certiorari and prohibition do not speak of enlargement of time as regards filing this notice of motion. That means it is not contemplated and cannot be implied either. It is just not there. Quite likely this is due to the history and the intended operation of prerogative orders in the realm of public affairs as administered by public bodies pursuant to statute or prerogative. And the bodies include inferior courts and tribunals. Here the complainant by the applicants is about an inferior court hearing some criminal case(s) against them. The judicial review process should therefore be direct, quick and certain. So because one is approaching the court in urgency claiming that the inferior court is about to do him injustice by the way it is going about the matter before it, the urgency must be reflected in the filing of the substantive motion in a given time and not later. With the forefoing, this court is unable to accede to the applicants' plea in this application – not on the substance of their complaint but because they did not proceed in the required manner set out in the special regime of judicial review proceedings. This application must therefore be refused with costs.

This however is a court of justice and in that regard it is observed that CMCR.C No. 1173/2003 (MBA) and 3392/2003 appear to be identical in all respects and this court was told without denial that both prosecutions are simultaneously proceeding against the applicants. They contain a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code The particulars are identical:

> "(1) DOUGLAS CHIGUBA (2) TSUMA CHIGUBA (3) MWAMWERO CHIGUBA:
>
> On the 2nd day of March 2003 at Vikwatani in Kisauni within Mombasa District of the Coast Province jointly with others not before court assaulted WILLIAM DENA DADILO thereby occasioning him actual bodily harm."

It is common principle in criminal justice that an accused person should not suffer twice over one offence. It is called double jeopardy. We need not go into the rationale of this now. Now if it be true that the two criminal cases are going on at the same time, it is advised that the Hon. The Attorney General looks into the matter before the next lower court sessions and sorts out the apparent double jeopardy facing the applicants. In fact it is an administrative matter which ought not to have gone beyond the first intimation that two similar cases were going on against the applicants at the same time. Or that the State ought to satisfactorily explain the circumstances by having the court give a ruling why the 2 cases should both go on and thereby afford the applicants an opportunity to challenge the whole thing on appeal.

Well that is only an observation. This application is dismissed with costs.

Delivered on 19th October 2005.

J.W. MWERA

JUDGE