



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 20 OF 2004

IN THE MATTER OF: AN APPLICATION BY THE MANAGEMENT

COMMITTEE THE MOMBASA BRANCH OF KENYA NATIONAL CHAMBER OF COMMERCE
AND INDUSTRY FOR ORDERS OF CERTIORARI MANDAMUS & PROHIBITION

A N D

IN THE MATTER OF: THE MEMORANDUM AND ARTICLES OF ASSOCIATION OF THE
KENYA NATIONAL CHAMBER AND INDUSTRY

A N D

IN THE MATTER OF: PURPORTED DISSOLUTION OF THE MANAGEMENT COMMITTEE OF
THE MOMBASA BRANCH OF THE KENYA NATIONAL CHAMBER OF COMMERCE AND
INDUSTRY

IN ACCORDANCE WITH ORDER LIII RULES 1, 2, 3, AND 4 OF THE CIVIL PROCEDURE RULES

REPUBLIC APPLICANT

Versus

1. DAVID M. GITHERE
2. LABAN ONDITI RAO
3. ANDREW MATAZA
4. TITUS G. RUHIU
5. THE KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY (KNCCI)
6. ABDALLA MIRAJ
7. ABDALLA MIRAJ
8. EUNICE NJERU
9. HERBERT MWACHALA

10. MEHURU SHAH

EXPARTE

1. NAJIB BALALA

2. SAM OKELLO

3. SAID ATHMAN

4. ALEXANDER MWANGEKA

5. KULDIP SODHI

6. AWADH SWALEH

7. DOMINIC LIVU

8. BEN SWAI

9. SAMMY GITAU

10. MARY STEVENS

11. SHAMSA MIRAN

12. ABDALLA SALIM

13. ROGER BAINTY

14. SAID NADHIR - Who are all Officials and members of the committee Committee of the Mombasa Branch of Kenya National Chamber of Commerce & Industry

RULING

By a letter dated he 6th January 2004 the National Chairman of the Kenya National Chamber of Commerce and Industry (the KNCCI) dissolved the Mombasa Branch of KNCCI (the Branch) on the ground that there were wrangles within the Branch that had paralysed its operations. Being aggrieved by that decision the Branch officials came to court seeking leave to apply for judicial review orders of certiorari to quash that decision and prohibition to prohibit the Management Committee that had been appointed to run the affairs of the Branch. Leave was duly granted by this court and it was further ordered that that leave should operate as a stay. The KNCCI has by an application dated the 19th January 2004 brought under the inherent jurisdiction of this court and under order 50 of the Civil Procedure Rules, challenged the leave and applied to have it set aside. It has listed in the application 9 grounds which can be summarized to three main ones, namely:-

1. That the KNCCI not being a public body but a limited liability company incorporated under the Companies Act is not amenable to judicial review process.
2. That the judicial review order of prohibition cannot issue where a decision has already been made.
3. That the Chamber Summons for leave is incurably defective and leave ought not to have been granted.

Basing his argument on the grounds set out in the application and the replying of Laban Onditi Rao,

Mr. Mutiso for the KNCCI argued that the application is properly brought under the inherent jurisdiction of the court. He also cited the Court of Appeal decision in ***Republic -Vs Communications Commission of Kenya [2001] 1 EA 199*** in support of his argument. He submitted that the KNCCI is a limited liability company incorporated under the Companies Act Cap 486 of the Laws of Kenya. It has a Memorandum and Articles of Association which provide a mechanism for resolution of internal disputes. The dispute leading to the dissolution of the Branch is not in the arena of public law. It falls under private law. He cited the case of ***Kadamas -Vs- Municipality of Kisumu [1985] KLR 954*** for that proposition.

Relying on the Court of Appeal decision in ***Kenya National Examinations Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge and others Civil Appeal No. 266 of 1996 (unreported)*** Mr. Mutiso argued that the decision to dissolve the Branch having been made the grant of leave to apply for the order of prohibition was erroneous. He urged me to allow the application by setting aside the order granting leave.

Mr. Gikandi for the Branch strongly opposed the application. He first submitted that the application is fatally defective for failure to cite the correct provisions of law under which it is brought. He said the application should have been brought under Order 53 Rule 1(4) of the Civil Procedure Rules. When there is a specific provision like this section 3A of the Civil Procedure Act should not be invoked.

Conceding that the KNCCI is a limited liability company Mr. Gikandi however further submitted that its activities thrust it into the public law arena. He also relied on the case of ***Kadamas Vs Municipality of Kisumu (supra)***. It has authority to affect the rights not only of its over 6000 members but also those of the public at large as it issues certificates of origin to members of the public. In doing this, he said, it acts as an agent of the Ministry of Commerce and Industry. He said there is no law or authority that only public bodies established under Acts of Parliament are amenable to judicial review. He urged me to strike out or dismiss the KNCCI's application.

I have considered the able rival submissions made by counsel for the parties. I have also considered the affidavits in support of and in opposition to the application. The main issue raised is whether or not a limited liability company incorporated under the Companies Act and not controlled by the Government is amenable to judicial review. Before I deal with this issue however, I wish to dispose of the one raised Mr. Gikandi that the application is fatally defective.

As I have already stated this application is brought under the inherent jurisdiction of this court. Order 50 which is cited is to show the procedural mode adopted which is by notice of motion. The Court of Appeal in ***Njuguna -Vs- Minister fo r Agriculture [2000] 1 EA 184*** stated that an application to challenge leave should be brought under the inherent jurisdiction of the court. It stated :-

“It cannot be denied that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave. See Halsbury’s Laws of England (4 th Ed. Volume 1(1) paragraph 167 at 276”.

I agree with these views of the Court of Appeal. An application seeking to set aside leave cannot be brought under Order 53 Rule 1(4) as Mr. Gikandi argued. That provision in my view can only be used to set aside the Order of stay given along with leave. I therefore hold that this application is properly before the court and Mr. Gikandi's contention that it is fatally defective fails.

The judicial review jurisdiction is vested in the High Court by Section 8(2) of the Law Reform Act which provides:-

“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 alike order”.

Thus the law applicable to our judicial review proceedings is the English Law. In the English system the origin of judicial review appears to have arisen from the immunity given to the judicial officers in the discharge of their judicial duties. Public policy demanded that no judge should be harassed by the thought that: “if I do this or that, I may be sued by this or that prisoner or this or that litigant”. Rather than subject a judge or any magistrate to influences of that kind the law provided that no litigant could bring an action against a judicial officer for anything done by him in his judicial capacity. But that did not mean that nothing could be done by anyone. An unjust judge of an inferior tribunal was not to be free from control. Although he did not owe any duty to the prisoner or to the litigant he did owe a duty to the state and the state could call upon him to account. In the old times in England the King was regarded as the State, and the state as the King. It was for the King to call upon any judge of an inferior court and ask him to account for his actions whenever a complaint was raised. The King did this by the prerogative writ of certiorari. The very words “prerogative writ” show that it was issued by the royal authority of the King. No subject could issue it on his own. He had no right to issue it as that could amount to an action by an individual against a judge or judicial officer. All that the subject could do was to inform Kings judges, the Kings Bench, of his complaint. He could tell them about the unjust judge of the inferior court and the King’s judges would then authorize the issue of a writ in the King’s name. The very titles show that. They were intituled. *Reg -Vs- ABC -Ex-parte XYZ . Regina* means the Queen. The Queen brought the proceedings. The title shows that XYZ had made an ex-parte application to the court and the court had given leave for proceedings to be brought in the Queen’s name against the inferior court or tribunal.

Thus the King’s Bench Division exercised supervisory powers over inferior courts and statutory tribunals to give relief to parties affected by their decisions who would not themselves sue those tribunals or inferior courts. That jurisdiction was never exercised over private tribunals. *In the case of Rex Vs Northumberland Compesation Appeal Tribunal Ex -parte Sahw [1952] 1 K.B. 338 Denning L.J. stated at page 351 that:-* **“The court of Kings Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal ... not subject to the prerogative writs”.**

The jurisdiction was therefore originally meant to be exercised over and control the acts, and I suppose omissions, of the inferior courts. It was later over the years extended to cover statutory tribunals, statutory commissions and other statutory bodies. Lord Atkin’s famous statement

“Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King’s Bench Division ...”

was given in a case - *Rex -Vs- Electricity Commissioners Ex -parte London Electricity Joint Committee Co. [1923] ALL ER 150* - involving a statutory commission set up under the English Electricity (Supply) Act, 1919. In *Rex -Vs- Criminal Injuri es Compensation Board, Ex -parte Lain (1967) 2 QB 864* , Lord Parker C.J. said at page 882:-

“The only constant limits throughout were that it was performing a public duty ... we have it seems to me reached the position when the ambit of (judicial review) can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially”.

The jurisdiction was further extended, in the words of Lord Denning M.R. in *O’Reilly Vs Mackman [1982] 3 WLR 604 at page 620*, to “... all public authorities and public officers and indeed anyone acting in exercise of a public duty including a university; see *Republic Vs Aston University Senate, Ex -parte Roffey [1969] 2 Q.B. 538*”.

As I have endeavoured to show the judicial review jurisdiction was originally mean to be exercised and control the acts and omission of inferior courts and tribunals acting judicially but has now been extended to cover literally all acts, including administrative acts, of public bodies and officers performing

public functions or duties. One may then ask which are these public bodies. Can the Kenya National Chamber of Commerce and Industry be described as a public body? Mr. Gikandi submitted that it should because its activities thrust it into the arena of public land and also relied on the case of **Kadamas Vs Municipality of Kisumu** (supra). With due respect I do not agree with that submission. In that case the Court of Appeal held that although the relationship of master and servant was a matter for private law that was not the only criterion to be considered. The Respondent was a local authority established under an Act of Parliament. It therefore proceeded to grant the judicial review orders.

Section 2 of the Interpretation and General Provisions Act to mean:-

“(a) the Government or any department, institution or undertaking thereof; or

(b)

(c) a local authority; or

(d) any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature”.

In my view the KNCCI does not fall within the category of the bodies covered by this definition. It is a company incorporated under the Companies Act. The Branch has not given any evidence to show that it has any legal authority to perform public duties. Its services are to its members who join it voluntarily. True it has a large membership some, if not most, of which are multimillion industrialists. That however does not change its character. Its functions are of a private nature talking of nationalized undertakings and large companies as well as voluntary associations like Trade Unions, Employers’ Associations professional bodies and others, Lord Denning M.R. in his book *The Discipline of Law* had this to say at page 147 – 8:-

“They wield tremendous power over every man and woman in the land. They can give or take away his or her right to work. They can put him or her on the dole. They can call strikes or order lockouts. By so doing they can inflict wide spread damage - and pain and suffering beyond measure - on thousands and thousands of innocent victims. All in pursuit of their own sectional interests - the interests of their particular group of their own voluntary association.

“The question at once arises. If these groups of people abuse or misuse their powers, can the courts of law do anything to restrain them? It is the most important question affecting society today. None of the old machinery of certiorari, mandamus or prohibition is available against these groups because they are not public authorities. If there is to be machinery, it has to be newly designed and newly made”. (emphasis supplied).

I am satisfied that the KNCCI falls within the category of the groups mentioned by Lord Denning in the above quotation. It is equally not amenable to judicial review. In the circumstances the order of this court of 16th January 2004 granting the Branch leave to apply for the judicial review orders of certiorari and prohibition was erroneously granted and is hereby accordingly set aside with costs to the KNCCI.

Dated this 27th day of February 2004.

D.K. Maraga

Ag. JUDGE

