REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 728 OF 2003
IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW
FOR LEAVE

SIMON WAWERU …….. APPLICANT

Versus

DIRECTOR G.T.I. MOMBASA

THE ATTORNEY GENERAL …… RESPONDENTS

R U L I N G

By a tenancy agreement dated the 1st day of January 2001 the Government Training Institute Mombasa (the GTI) leased to Simon Waweru (the Tenant) the Government Training Institute Students Canteen (the Premises) for a period of three years with an option to renew at a monthly rent of Sh. 10,000/=. The agreement provided that any additions or alterations could be carried with the written approval of the GTI. It would appear that the Tenant carried out extensions and or alterations to the premises although the GTI denies having approved them. On the 26th September 2003 the GTI wrote to the Tenant reminding him that the tenancy was to expire on the 31st December 2003 and that he should arrange to vacate and hand over the Premises on 1st January 2004. Some correspondence was exchanged but the parties did not agree. On the 17th December 2003 the Tenant applied under Order 53 Rules 1 and 2 for leave to apply for the judicial review order of certiorari to remove into this court and quash the notice of termination of tenancy. Leave was granted on the same day and the court directed that the leave shall operate as a stay. The GTI was not amused, particularly, with the order of stay. On the 6th February 2003 it applied under Order 53 Rule 1(4), Order 50 Rules 17 and the proviso to Rule 2 as well as under the inherent jurisdiction of this court to have the order of stay set aside. The application listed several grounds upon which the same is based. Some of those are grounds that should have been raised or relied on in the hearing of the Notice of Motion filed pursuant to the leave granted. The relevant grounds can be summarized as follows:-

1. That this court has no jurisdiction to grant a stay order as it did.

2. That the Tenant had failed to disclose to court that he was in breach of the tenancy agreement by keeping and slaughtering animals in the premises and by using the premises as a workshop.

3. That the Tenant had not made out a prima facie case for grant of leave which leave the court directed should operate as a stay.

Before I deal with the main issues raised in this application I would like to give my reasons for overruling Mr. Okello's objection on the further affidavit filed by the Tenant out of time and also dispose of the issue of the competence of this application raised by Mr. Mburu.

On the 27th January 2004 Justice Mwera granted the Tenant leave to file a further affidavit within four days. He did not. On 2nd February 2004 Justice Mwera extended that leave to the 5th February 2004 but the Tenant did not file it until the 10th February 2004. When this application came before me for hearing on the 11th February 2004 Mr. Okello applied that the Tenant's further affidavit having been filed out of time without leave should be expunged from the court file. Mr. Mburu applied that I should extend time and order that it be deemed as having been filed with leave of the court. He said he failed to file it in time because he was sick. In overruling Mr. Okello on the point I considered that and the fact that on 6th February 2004 I had adjourned the hearing of this application on account of Mr. Mburu's sickness. I also perused the further affidavit and I was satisfied that the matters therein raised could not cause any prejudice to the GTI. I therefore extended the leave and ordered that the affidavit be deemed to have been duly filed with leave and that it can be used.

In his reply to the submissions made by Mr. Okello in this application Mr. Mburu submitted that this application is fatally defective. He submitted that section 8(5) of the Law Reform Act provides for a right of appeal against any order made in exercise of the civil jurisdiction on the court. The only recourse an aggrieved party has, according to Mr. Mburu, Order 50 Rule 17 notwithstanding, is to appeal. Mr. Mburu further submitted that the English authorities cited by Mr. Okello including the Kenyan Court of Appeal decision in **Njuguna -Vs- Ministry of Agriculture [2000] 1 EA 184** are all wrong.

He further argued that once leave with stay have been granted they cannot be separated. They can only be set aside in a ruling on the Notice of Motion filed pursuant to the leave or by the Court of Appeal. With due respect to Mr. Mburu I do not subscribe to that view. I have no powers to overrule the Court of Appeal.

This application seeks to set aside the order of say granted with leave. Order 53 Rule 1(4) under which this application has been brought clearly provides for that. It 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 a stay of the proceedings in question until the determination of the application or until the judge orders otherwise".**

To me the words "until the judge orders otherwise" mean that the judge can set aside the order of stay.

In the circumstances I overrule Mr. Mburu's preliminary point and hold that this application is properly before the court.

Mr. Okello's main argument in this application is that this court has no jurisdiction to grant stay of the proceedings along with leave. According to him Order 53 Rule 1(4) which gives the court power to grant stay is *ultra vires* the provisions of section 9 of the Law Reform Act. He argued that section 30 of the Constitution vests legislative powers in Parliament. Parliament has enacted section 9 of the Law Reform Act. That section read together with section 81 of the Civil Procedure Act gives the Rules Committee power to make rules of procedure.

Grant of orders of stay is not one of the matters provided for in section 9 of the Law Reform Act. Mr. Okello made a long submission on the point and quoted many authorities including extracts from text books on interpretation of statutes and urged me to hold that Order 53 Rule 1(4) is ultra vires Section 9 of the Law Reform Act.

I have already set out the provisions of Order 53 Rule 1(4). For ease of reference I think it is appropriate to also set out the provisions of section 9 of the Law Reform Act. It reads:-

> **"9(1) Any power to make rules of court to provide for any matters relating to the**

procedure of civil courts shall include power to make rules of court -

(a)Prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition, or certiorari is sought;

(b) Requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for such order;

(c) Requiring that, where leave is obtained, no relief shall be granted and no grounds relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made;

(2) Subject to the provisions of Subsection (3), rules made under Subsection may prescribe that application for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the Act or omission to which the application for leave relates; (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired".

Counsel also submitted and urged me to hold that the effect of the order of stay in judicial review proceedings is a grant of an injunctive order against the Government which is prohibited by Section 16 of the Government Proceedings Act. He also urged me not to follow the Court of Appeal decision in the case of **The Commissioner of Lands -Vs- Kunste Hotel Limited Civil Appeal No. 234 of 1995** in which it was held that judicial review is a special jurisdiction which is neither civil nor criminal. In an application like this the court is exercising its civil jurisdiction and cannot therefore grant injunctive orders against the Government. He said the Court of Appeal was not referred to sections 8 and 9 of the Law Reform Act and its decision in that case therefore is per incuriam. Mr. Okello also argued that the decision to terminate the tenancy having been made there was nothing to stay. The GTI had held no proceedings and that it was not acting pursuant to any legal authority given to it by an act of Parliament and was therefore not amenable to judicial review. He concluded that the decision was based on contract and matters of contract do not fall with the purview of judicial review.

With due respect I find no merit in all these submissions. I agree with Mr. Mburu that Section 9 of the Law Reform Act is clearly not exhaustive on the matters the rules were to cover. It would be ridiculous to give the High Court powers to issue orders of certiorari if, while the application for those orders is pending before it the High Court would have no powers to stay proceedings or the implementation of the order sought to be quashed.

I find no conflict between the provisions of Section 9 of the Law Reform Act and those of Order 53 Rule 1(4) of the Civil Procedure Rules. Even without the latter provisions it is my view that the High Court would still have powers under its inherent jurisdiction to stay proceedings or the implementation of the order sought to be quashed.

The judicial review jurisdiction was initially meant to control acts of the subordinate courts and statutory tribunals but has over the years been extended to cover even administrative acts of public officers. (**See Ridge Vs Baldwin [1964] 1 ALL ER 66).** The acts or decisions now do not have to be made on judicial or quasi-judicial capacities only in order to be amenable to judicial review. If they are not fair the court can intervene by way of judicial review. (**See Re H.K. (an infant) [1967] 2 QB 617**. Mr. Okello's argument therefore that the GTI decision not to renew the tenancy was not a proceeding or that GTI does not have legal authority does not in the circumstances hold any water. It is common knowledge and Mr.

Okello conceded that GTI falls under the Directorate of Personnel Management which is a department in the Office of the President. The duties of the GTI Principal are public duties and his acts and decisions are amenable to judicial review.

The other point Mr. Okello raised was that judicial review does not apply in matters of contract. He quoted no authority for that proposition. That argument is also misconceived. The cases of **Northumberland Compensation Appeals Tribunal, Ex-parte Shaw [1953] 1 KB 338, Kadamas -Vs- Municipality of Kisumu [1985] KLR 954 and Director of Pensions -Vs- Cockar [2000] 1 EA 38** to mention just a few all related to claims based on contracts of employment.

Lastly Mr. Okello argued that the stay order granted in this case was in effect an injunction against the Government which is in contravention of Section 16 of the Government Proceedings Act. I believe that is why he was urging me not to follow the Court of Appeal decision in the Commissioner of Lands -Vs- Kunste Hotel Limited (supra). In that case the Court of Appeal held that:-

> **"… Section 8(1) of the Law Reform Act denies the High Court powers to issue orders of mandamus, prohibition and certiorari while exercising civil or criminal jurisdiction. What that then means is that notwithstanding the wording of Section 13A above [of the Government Proceeding Act] which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari the court is neither exercising civil nor criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of Section 136 of the Government Lands Act, and also Section 13A of the Government Proceedings Act which had the matter under consideration been an action, would properly have been invoked to defeat the present matter".**

A completely different bench of the Court of Appeal in Republic Vs Communications Commission of Kenya [2001] 1 EA 199 also held that on their own terms the provisions of sections 8 and 9 of the Law Reform Act which vest in the High Court of Kenya the power to issue orders of certiorari, prohibition and mandamus are not subject to any other Act of Parliament. In that case the court was considering the provisions of Section 109 of the Kenya Posts and Telecommunication Corporation Act which required at least one month's written notice to be given to the corporation before any action was commenced against it. The court held that the section could not be invoked to defeat the judicial review application in that matter.

It therefore follows that section 16 of the Government Proceedings Act or any other section of that Act or of any other Act cannot therefore be invoked to defeat the judicial review jurisdiction. Mr. Okello's argument in that respect also fails. I was also not impressed by Mr. Okello's argument that the Tenant had not made out a prima facie case for issue of leave and stay. The GTI's decision not to renew the tenancy without providing for payment to the Tenant of the cost of renovations, which were confirmed by the Ministry of Roads Public Works & Housing, and without giving him an opportunity to be heard appeared to me clearly against the rules of natural justice and unfair.

The other point that Mr. Okello raised relates to statement in support of the application. He submitted that contrary to the provisions of Order 53 Rule 1(2) all the facts relied on by the Applicant in this case are contained in the accompanying statement instead of being deponed to in the verifying affidavit. He cited for this proposition the Court of Appeal decision in the case **Commissioner General, Kenya Revenue Authority Vs Silvano Onema Owaki Kisumu Civil Appeal No. 45 of 2000** in which it was held that a statement containing the facts relied on is worthless. On page 7 of the judgment the Court of Appeal stated:-

> **"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. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7: The application for leave "By a Statement" the facts relied on should be stated in the affidavit *(see Republ ic Vs Wandsworth JJ., ex P. Read [1942] 1 KB 281*) . "The statement" should contain**

nothing more than the name and the description of the Applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit".

In this case all the facts are contained in the accompanying statement. The copies of the documents are also annexed to that statement. As held by the Court of Appeal in the said case such statement is worthless. The Tenant's application does not therefore have any legs to stand on. Consequently I allow this application on this ground and set aside the order of stay granted along with leave. It is regretted that the Tenant who in my view had a very strong case has lost on a technicality and for that reason I order that each party bears its own costs for this application.

DATED this 9th day of March 2004.

D.K. Maraga

Ag. JUDGE