



Editorial Note

JUDICIAL REVIEW GOLDENBERG COMMISSION

· *Alleged impropriety of procedure. Commission rule (i) challenged as being ultra vires provisions of S 33(a) iii, s 7 and s 10 of the Commission of Inquiry Act Cap 2001*

· *Impartiality of the procedure adopted challenged*

· *Fear that the adopted procedure if flawed could result in the final outcome of the inquiry being challenged in the courts and substantial public funds expended lost including serious compromise of Criminal justice*

· *STANDING OR LOCUS STANDI of the Applicants considered on a prima facie basis*

x alleged violation of law on grounds of the doctrine of ultra vires is substantial and the subject matter is of great national and public interest and the apparent inaction by the Attorney General does on a prima facie basis confer sufficient interest on the applicants. Personal interest or personal legal inquiry by an applicant although invariably the basis for standing is not the only test of standing

x Principle of legitimate expectation considered. It can confer standing to pressure groups and other parties.

· *CONDITIONAL STAY – limited as to time granted with review conditions*

· *R v ATTORNEY GENERAL ex parte BIWOT [2002] 1 KLR 68 considered*

· *This is an instant ruling .*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO 1279 OF 2004

JOHN JACKSON MWALULU

& 8 OTHERS APPLICANTS

versus

THE JUDICIAL COMMISSION

OF INQUIRY INTO THE

GOLDENBERG AFFAIRS & 3 OTHERS RESPONDENTS

RULING

In this application the applicants who have on a prima facie basis satisfied me on the basis of the statement and the Verifying affidavit that they have a Standing as public spirited individuals, the subject matter being the proceedings of the ongoing commission of inquiry popularly known "Goldenberg Inquiry" being a matter of great national and public interest, have contended that they have detected a procedural impropriety in the conduct of the Goldenberg Commission of Inquiry – Rules and Procedures of the Commission appear to give the Commissioners a discretion to summon witnesses whereas s 3(a)(iii) of the Commissioner of Inquiry Act makes it mandatory for the commissioner to summon the witnesses.

Also the applicants standing could on a prima facie basis be based on the principle of legitimate expectation especially in the face of the Attorney General's inaction and the serious consequences should their legal challenge succeed.

It has been argued that the Commissioner's rules (i) is ultra vires s 10 and 7 of the Act and also is ultra vires s 3(a) (iii) of the Act which is worded in mandatory terms. The impartiality of the commission has also been challenged.

It is contended that as a result the witnesses named in the application have not been summoned.

The applicants fear that if the commission winds up its proceedings without summoning the named persons the ultimate result of the inquiry namely the Report to be presented to the President could be the subject matter of legal challenge in the courts thereby rendering the result nugatory at great expense to the public and to the State in view of the moneys so far expended on the inquiry.

The applicants argue that all is not lost because the commission has still not wound up its affairs and it still could perform its statutory duty. The applicants have cited to this court the case of R v Attorney General ex -parte BW 1 [2002] 1 KLR 668 where the majority judgment of a bench of 3 judges held that it was fatal to omit to summon witnesses who have been adversely affected. They held that it was not enough to send out warnings under S 12 of the Act – those adversely affected must be summoned to testify on the facts pointing at them.

Under S 10 the commission has the power of the High Court to summon those witnesses and those powers ought to be invoked, the applicants contend.

In the case cited the matter related to the Commission of Inquiry entitled the Akiwumi Inquiry been which had been set up pursuant to the provisions of the same Act as in this case.

I have carefully considered the law and in particular this court's jurisdiction and I have come to the prima facie and tentative conclusion that the matter is amenable to judicial review and the applicants have an arguable case on possible violation of the above provisions of the law.

I am of course aware that at this stage I cannot say anything further because this could prejudice the hearing of the application when and if filed. The duty of this court at this stage is to establish whether or not an arguable case has been established or whether a serious case has been established. This is the principle established in the case of AGA KHAN EDUCATION SERVICE KENYA ex-parte ALI SEIF & THREE OTHERS C A 257/2003 and WA NJUGUNA V MINISTRY OF AGRICULTURE. Both are Court of Appeal decisions.

For this reason I find and hold that a case for granting leave has been established and I accordingly grant leave in terms of prayers 3 (a),(b),(c) and (d) and also grant orders in terms of prayer 1 and 2.

As regards prayer 4 of the application concerning the stay I hereby grant a conditional stay to prevent the proceedings at the inquiry being completed before the expiry of the next three

weeks ie 21 days.

The stay is also subject to the following conditions:

(a) That the respondents have the liberty to contest the grant of this stay anytime from now and for that reason they must be served by the close of the day a Monday 27th September, 2004 with the application.

(b) The applicants will if they deemed necessary be at liberty to apply for the extension of this order any time before its expiry upon service or the respondents

(c) The main application for judicial review must be filed as stipulated in the Rules within 21 days and served within 8 days (d) That all interested or affected parties are at liberty to apply if necessary

(e) The court retains the power to vary this order of stay upon application of any other interested parties including the Attorney General.

I reserve the order on costs and direct that the court hearing the main application addresses this.

It is so ordered.

Dated and delivered this 24th day of September, 2004.

J G Nyamu

JUDGE