REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 751 OF 2001

GEORGE GIKUBU MBUTHIA .... PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD .... DEFENDANT

RULING

The plaintiff's Notice of Motion dated 10th June, 2004 and filed on 11th June, 2004 was brought under orders L rule 1, XLIV rule 1(1) of the Civil Procedure Rules, and s 3A of the Civil Procedure Act (cap 21). The application carries one substantive prayer,

"That, this Honourable Court do review and set aside its orders made on 19th December, 2001".

What are the grounds in support of the application? That there is error apparent on the face of the record in that the defendant's preliminary objection was not supported by prior "notice"; that lack of prior "notice" rendered the orders given by the honourable Mr Justice Ombija on 19th December, 2001 irregular because the judge did not have jurisdiction to give the said orders; that the preliminary objection by the defendant to strike out paragraphs 7,8,10 and 12 of the plaintiff's affidavit sworn on 9th May, 2001 introduced a completely different motion; that the plaintiff was not served with a "notice" for the said preliminary objection as required by order L, rule 2 of the Civil Procedure Rules; that non service of prior "notice" should have been served upon the plaintiff and it should have contained sufficient detail to enable the plaintiff to know the substance of the allegations against him.

In further support is the affidavit of George Gikubu Mbuthia sworn on 10th June, 2004. This affidavit, I believe, is presented as a bare formality, as it merely restates the grounds already set out above. This, of course, makes the affidavit largely inappropriate, as rather than provide an evidentiary foundation for the application, it essentially comprises arguments such as are better presented by counsel during submissions.

The defendant did file, on 23rd June, 2004 grounds of opposition to the plaintiff's application. Among the objectons are the following : a preliminary objection on a point of law may be raised any time in the course of hearing; the Court's ruling on the preliminary objection is sound in law and can only be questioned on appeal; there is no mistake or error apparent on the face of the Court record; objections to the content of an affidavit can be raised orally in court, pursuant to order XVIII, rule 8 of the Civil Procedure Rules; the affidavit sworn by the applicant on 10th June, 2004 in support of the application is in contravention of order XVIII, rule 3(2) of the Civil Procedure Rules, on account of the argumentative matter which it contains, and it should be struck out.

Hearing took place on 23rd September, 2004 when Mr Mbuthia represented himself as plaintiff/applicant while Ms Mugaa appeared for the defendant/ respondent.

Mr Mbuthia submitted that the preliminary objection which the learned judge had upheld, on 19th December, 2001 amounted to an ambush and should have been preceded by a notice. The applicant contended that such notice should always be given, and that without it, there is a breach of natural justice. He cited in support the case of *David Onyango Oloo v Attorney-General*, Civil Appeal No 152 of 1986. In this judgment, which was concerned especially with the administration of prison rules, the Honourable Mr Justice Nyarangi had made the following remarks:

"There is no provision in the Prisons Act which excludes the jurisdiction of courts to concern themselves with the rights of inmates however circumscribed by a penal sentence. In order to consider fairly, the Commissioner has to observe the basic principles of fundamental justice. That would require that the inmate affected be fully informed of the disciplinary offence which he is alleged to have committed, that he be given sufficient time to prepare his case, that in his consideration the Commissioner takes into account the material presented by the inmate and the Commissioner indicates that he has weighed all evidence before him before reaching the conclusion to deprive [the applicant] of remission."

Whereas the defendant had taken the position that an objection of the type here in question is not an application, the applicant submitted that under order L rule 2, no motion could be brought without notice, and so the defendant ought to have complied with this requirement. The applicant argued that the moment the notice was not given, the Court lacked jurisdiction to hear and determine the matter, as the rules of natural justice would not have been observed.

The applicant proceeded to build his case on the foundation that the Court had lacked jurisdiction. He ought in my view, to have discussed in more detail how an objection on a point of law is such a solemn matter that, throughout the course of a trial, it could not be attempted unless "notice" has previously been given. He went on to cite a passage taken from *The Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd*, Civil Appeal No 50 of 1989 (Nyarangi, JA) which occurs in the judgment of Gicheru, JA (as he then was) in *Roy Shipping S A and All Other Persons Interested in the Ship "Mama Otan" v Dodoma Fishing Company Ltd,* Civil Appeal No 238 of 1997:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

From the general principle stated above, the applicant proceeded to argue that the Court had lacked jurisdiction to hear the defendant's preliminary objection and to determine the question against his client on 19th December, 2001.

Mr Mbuthia anchored his submissions on the supposition that insofar as notice had not been filed and served before the preliminary objection was raised by the defendant, there was a failure of natural justice – and so there was no jurisdiction for the honourable Mr Justice Ombija to proceed to give a ruling; and in his contention, this was a case for review, for error on the face of the record. He sought to rely on the Court of Appeal decision in *National Bank of Kenya Ltd v Ndungu Njau*, Civil Appeal No 211 of 1996, where the Court thus remarked:

"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground of review."

The applicant was of the view that the foregoing exposition of the law on review for error on the face of

the record, favoured him; and the nub of his case was that natural justice was omitted in the Court's path to the making of the orders of 19th December, 2001. So he prayed for the setting aside of those orders made some three years ago, "so that the main application [of 18th May, 2001] can proceed".

Ms Mugaa for the respondent submitted that the applicant had not satisfied the grounds for review, in accordance with order XLIV, for errors on the face of the Court record. She submitted that any alleged error on the face of the record that can only be established by a long-drawn process of reasoning, would not be an error apparent on the face of the record. This, with respect, is a valid argument, well supported by the authority of a Court of Appeal decision – *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173.

The Court there held (pp 174 – 175):

"We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which as to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

Counsel submitted that the ruling made by the honourable Mr Justice Ombija on 19th December, 2001 could be questioned on appeal, but not challenged under the concept of review. The applicant had been accorded a hearing, but had not raised the question of a possible lack of jurisdiction. The learned judge did give consideration to all his representations, before taking a decision. It cannot in these circumstances be claimed, counsel submitted, that the rules of natural justice had not been complied with. On this account, counsel submitted that the case, *David Onyango Oloo v Attorney-General*, Civil Appeal No 152 of 1986 which was sought to be relied on by the applicant, was just not relevant.

Ms Mugaa contended that preliminary objections were not at all contemplated under order L rule1, and that it was wrong for the applicant to proceed under that rule. She submitted that preliminary points are really in the nature of points of law, and thus they can be raised any time during the hearing of an application. She further submitted that the applicant had not given sufficient reasons for seeking a review of court orders, in the present matter; he had unearthed no new evidence, and so this was a case to be appealed exclusively, if there was the intent to challenge the decision of the learned judge.

I have not believed that the applicant, who was fully heard before the impugned court orders were made, was subjected to a denial of the play of the rules of natural justice. Whether or not natural justice has played its role in judicial decision-making is, in my view, a controversial and a litigious point which, when in issue, must be regarded as a fit subject for appeal to a higher court. For one thing, natural justice itself is an abstract principle in its full sense, and the presence or absence of it in its totality is not, in most cases, a visible phenomenon on the records; this, at least, is true for the manner in which the honourable Mr Justice Ombija conducted the hearing leading to the orders of 19th December, 2001. Therefore, I would hold that the said orders cannot be questioned following the method of review for errors on the face of the record. It should be made quite clear that errors on the face of the record, which on that account lend themselves to review, generally show an obvious and crystal-clear starkness such as make them readily perceptible. Such was not the case with the orders now being challenged.

Partly for that reason, the foundation relied on by the applicant in disputing the Court's jurisdiction when it made those orders, is, I think, a faulty one. Besides, the fact that a court has not had a strict adherence to all the rules of natural justice would not, I think, deprive it of the jurisdiction to hear and determine a case; it could only entail the kind of misdirection, in the light of the special circumstances of the case,

which could justify the intervention of an appellate court.

Since I have already taken the position that the plaintiff's application cannot succeed, it is unnecessary for me to ascribe this finding to the form of the applicant's supporting affidavit which, as I have already noted, is substantially defective, just as counsel for the respondent also noted.

I therefore dismiss the plaintiff's application with costs to the respondent. Orders accordingly.

Dated and Delivered at Nairobi this 26th day of November 2004.

J.B.OJWANG

Ag. JUDGE