REPULIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC CIVIL APPLICATION NO. 1115 OF 2002

KIHIUMWIRI FARMERS CO LTD …… APPLICANT

VERSUS

THE REGISTRAR GENERAL …… RESPONDENT

R U L I N G

The Chamber summons application dated 2811-02 is made by the interested party in a Judicial Review application under Section 3A and Order 53 of the Civil Procedure Rules is asking this court to set aside Leave granted to the applicants to institute Judicial Review proceedings on grounds that the application for Judicial Review was brought by a firm of advocates which was not authorized by the Board of Directors of the applicant farmers company or by a resolution of its shareholders in a General Meeting.

That the verifying affidavit dated 24-9-2002 by one Paul Njiru Gitau was done without authority of the company given thatthe same had ceased to be a Director of the company.

At the hearing of this application Mr. Mwaura advocate for the applicant attempted to raise a Preliminary objection but this was abandoned and parties instead argued the substantive application with Mr. Ogana arguing the grounds set out above and adding that the application for leave was done out of time and that leave cannot be granted to a none existent applicant. He also said that the court erred in failing to note that the person applying had no authority.

But Mr. Mwaura for the Respondent said that both section 9 of Cap 26 gives right to apply for Judicial Review to any person who is aggrieved saying that what the court looks at is whether the application is made in time and whether it is made in time no other consideration is possible and court's discretion is tied to the presence of time.

The questions I would like to answer here are first, whether this court can after giving Leave to institute Judicial Review to an applicant can revise such grant of leave and set it aside.

Secondly who has locus to be an applicant and thirdly at what stage of Judicial Review proceedings do all these arise.

Order 53 rule 1 says:-

> "No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore he, been granted in amendment with this rule".

The rule states how application should be made ex-parte and in case of certiorari it is to be made within six months. Normally leave is made in writing under Chamber summons and this procedure is

better than an Oral Application as it saves time and costs besides the advantage with written application is that the court would give written reasons for refusal. It is after leave that application for Review is filed by way of Notice of Motion which is then served on the Respondents and the persons interested.

At Leave stage the court looks at the application to see on the face of it if the applicant has included material considerations in the application whic indicate prima facie that the offending authority committed a failure of duty, or abused its discretion, or misused its authority which in public law calls for the remedies asked for in the Judicial Review.

Secondly that the applicant is a person aggrieved or that he has standing in accordance with section 9 of the Law Reform (Misc. …) Act Cap 26 of the Kenya Laws. Thirdly that the application is made promptly and in any event in case of application for an order of certiorari it is made not later than six months after the date of proceeding or any shorter period as prescribed by any Act.

The court also needs to be satisfied that all the prescribed documents under the rule accompany the application being:-

(i) Statement setting out time name and description of the applicant.

(ii) Relief sought

(iii) Grounds upon which relief is sought.

(iv) Verification affidavit verifying the facts relied on.

Then last but not least application must be made promptly as usually inordinate delay distorts the facts in contention and may supersede them with new situations making discretion to grant the order un-exercisable.

> ***"It is neither necessary nor desirable for the statement to set out a lengthy enumeration of all the facts and evidence relied upon. What is required is a concise and coherent statement of the essential points of facts and law so as to show the basis of the argument …"***

[Ref. Judicial Review Superstone Goudie pp. 446]

On this argument I do not agree with Mr. Shairi that mere delay is what the court considers nor does it make sense when there is no limit on the other two branches of Prerogative orders.

The next question is whether the court can reverse its decision having given an Order for leave. The Law is clear on this point. The court has jurisdiction to set aside its order granting leave exparte but such application to set aside the order must be made timeously. (See Ex.P. HERBAGE (NO.2) [1987] QB 1077), again such applications should be made sparingly and ought not to be used by applicants to jump the queue in hearing list and should be made on very clear cases like where there is material non-disclosure of important and material facts or the application is completely un arguable one or the court was not in a position to appreciate true nature of the case. See R v. SECRETRY OF STATE FOR … HOME DEPT. EXP Khalid Al-Nafeesi (1990) COD 106.

Mr. Ogana has called on me to set aside the Leave Order because the advocate was not authorized by the Board and that the applying company is a stranger to the proceedings. But the fact whether the directors of 1996 are the real directors or some others is yet to be established. Since Form CR 12 for 3/70 marked as WMG 1 and WMG 3 attached to affidavit of Wilfred Mwangi Gichane sworn on 28/11/02 do not dispel a situation where investigations is needed. Mr. Ogana has stated that there is no standing shown by the applicant.

As I have said above the applicant must show that he has locus standi i.e. that he is a person

aggrieved. Normally the courts are nowadays not obstructive but encourage the filing of Judicial Review so that as a matter of policy people should have unrestricted approach to courts to question and challenge ….. decisions being by public bodies and not used as avenue for intermeddling busy bodies without stake against the consequences of actions they except to impugn. Applicant need not show financial loss to prove locus. The question of locus is therefore determinable both at the Leave stage and at the stage of full hearing. At the leave stage Lord Diplock said in R v. IRC Exp. NAITIONAL FED OF SELF EMPLOYED AND SMALL BUSINESSES LTD (1982) AC 617 thus:-

> ***".. This is a threshold question in the sense that the Court must direct its mind to it and form a prima facie view about it on the material that is available at the first stage. The Prima facie view so formed if favourable to the applicant may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the Judicial Review application itself:- .. The discretion the court is using at this stage is not the same as that which it is called upon to exercise when all the evidence is in, are "has been fully argues at the hearing of the application".***

These considerations deter me from acceding to Mr. Ogana's argument for setting aside the Order granting Leave at this stage. I think there may be more evidence required because I do not think that locus is purely a question of discretion but a question of fact and law and that the question of locus is not an abstract matter which can be severed from the merits of the case so that a person aggrieved must be determined in the of the matter to which application relate so the court ought to evaluate the matter of the complaint.

In the IRC case where the House of Lords considered this in relation to sufficient interest Lord Wilberforce said that it would be appropriate to consider

> ***".. the powers or the duties in law of those against whom the relief is asked the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed*** ..".

so as to say in our case that to determine who is aggrieved must be considered in relation to the whole cases' factual context. This is attainable only at the substantive hearing. So issues of Locus standi should be left to be dealt with at the full hearing and in practice only in the clearest of cases will leave be refused on that ground alone. (see De Smith Woolf & Jowell Judicial Review of Administrative Action Pp 662 3rd Edition)

Furthermore, the right to set aside Leave Order must be done circumspectly. The court must only do so where it is clear on the pleading that the court while granting leave failed to appreciate the true nature of the case or that the applicant did not disclose some material fact and the court was misdirected thereby where UBERRIME FIEDS is lacking where affidavits conceal material facts. See R v. KENSINGTON I.T.C [1917] IKB 486.

In this case M. Ogana says the applicant was not existing and there Mr. Ogana would be right because in addition to Locus Standi, applicant must have legal personality and Leave ought not be given where applicant does not exist. But however from what I have said here existence ad authority are different concepts and are not alternatives.

All in all I would go with the view expressed in Ex.P. KHALID AL NAFEES [1990] COD 106.

That although court can set aside grant of leave where there is no arguable case or for non disclosure nevertheless, "However, except in very special and clear cases such applications are not looked on by court with favour".

This fortifies my above conclusion.

The application is dismissed with costs but the applicant will be at liberty to review the same argument at the substantive hearing.

Delivered this 24th day of March 2003.

A.I. HAYANGA

JUDGE

Read to Mr. Ogana

Read to Mr. Shairi

A.I. HAYANYA

JUDGE