REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 417 OF 2002

1. MARTIN O OLUOCH

2. RICHARD W MURIITHI

3. DANIEL I METHU

4. HENRY N GICHURU …….... APPLICANTS

VERSUS

1. THE MINISTER FOR HEALTH

2. THE KENYATTA NATIONAL HOSPITAL BOARD …… RESPONDENTS

FIRST RULING

On this small application for leave to apply for orders of certiorari, and the advocates for the intended respondents and interested parties showing up for its hearing with a view to oppose it, an unexpected storm in a teacup has sprung up, possible only in an acrimony – prone society in which unsatisfied social aspirations are bad and ugly business, so that everyone insists to have his own way with a bewildered frivolous obstinacy, pathetic as that of a child.

On seeing the lawyers for the intended respondents and interested parties, the lawyers for the intended applicants asked the court to ignore their counterparts and deny them a hearing on the present application for leave. Reason? It is because sub-rule(2) of rule 1 of October 53 of the Civil Procedure Rules, says that an application for leave to apply for an order under Order 53, such as an order of *certiorari* "shall be made *ex parte* to a judge in chambers"; and that because that provision employs the word "shall", the application for leave must be made in the absence of the intended opposite parties. This, it is said, is mandatory, even if the application for leave is served on the intended respondents and interested parties The other side says that that is not a correct perception of the rule. They say that the court may allow them to be heard if they attend and wish to oppose the granting of leave.

I say that this question is frivolous. In the first place, this is a quarrel about a subordinate rule of procedure, which shall not limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court (section 3A, Civil Procedure Act). Section 81 of the Civil Procedure Act says that no rule is to be inconsistent with the provisions of the Act, such as the provisions of section 3A. Together, sections 3A and 81 clearly show that no rule in the Civil Procedure Rules should be construed so as to be inconsistent with the Act.

If the court is satisfied that the effect of the rule concerned, construed in a particular way would result

in injustice, then sections 3A and 81 say that it should not be construed in such a manner. Any rule which purports to take away the inherent jurisdiction of the courts to do justice or to prevent abuse of the process of the court will normally not be upheld, and it must be looked at very carefully before it is construed in such a manner: Sir Charles Newbold, P, *in Rawal v. Mombasa Hardware,* Ltd [1968] EA 392, at 394.

This is because Rules do not purport to be exhaustive: In re *Keshavlal Punja Parbat Shah* (1955), 22 EACA 381; *Abdalla Mohamed v Ahmed bin Salam Makharran,* (1956), 23 EACA 260. As it has been repeatedly said, the Rules of procedure are intended to serve as the handmaidens of justice, not to defeat it: *Iron & Steelwares, Ltd v C W Martyr & Co* (1956), 23 EACA 175; and a pathological attachment to technicality without enquiring into the essence and purpose of a rule can only work injustice. Procedural rules are not for fetishism; they are for justice. A complaint about ordinary procedure makes sense only where a transgression would be productive of injustice and undeserved hardship or prejudice.

Here, it is complained that there is an intended violation of what is being touted as a 'mandatory" rule of procedure. But what prejudice to any party is likely to occur if the intended respondents and interested parties are heard on this "*ex parte"* application? No one is attempting to point a finger at any prejudice, hardship, inconvenience or injustice. What injustice, actual, anticipated or conceivable, do the applicants apprehend? None is named. Then, why is there this waste of public time, trembling about attendance of counsel for the parties intended to be moved against? This is incomprehensible.

Incomprehensible, because there is nothing inherently wrong in what may (at the risk of a contradiction in terms) be referred to as an "opposed ex parte application", which, carefully employed, has got overwhelming advantages, both to the court and to the parties on both sides. It may be an uncommon happening, but the mere rarity of such a procedure and the apparent terminological contradiction, should not obscure the utility of the process.

Counsel for the intending applicants (applicants for leave to apply for an order of judicial review) says that the party moved against should be silently present and take no part in the proceedings. This view overlooks one important factor. If an *ex parte* order is made (e.g. granting leave), the party against whom the applicant moves or is allowed to move, may thereupon move to vary or discharge that order. So, if the view of the advocate for the applicants in these proceedings is to prevail, it would mean that the opposite party would be present in court and remain silent, taking no part at all in the hearing – to be seen and not to be heard - and if the orders are granted then that is when they would move to vary or discharge them. Of course, if they were not present they could similarly move to vary or discharge the orders when they learn of them afterwards.]

But then what is the sense and justice of such a proceeding? Such a procedure where a respondent or his advocate would sit back quietly to see if the ex parte order is made and if it is, then to launch forth to seek to vary or discharge it, is wasteful and inconvenient, and it falsely gives the wrong impression that getting leave or any *ex parte* order is an automatic matter of course in which a court does not apply its judicial mind to relevant material factors required to be placed before it.

On the other hand, in most cases if the opposite party or his advocate is present at the *"ex parte "* stage and is allowed to oppose the application, the court will obviously be assisted in deciding whether or not to grant the *ex parte* order by knowing what contentions may be advanced against the grant, and what is the general line of the evidence in opposition that is likely to be filed when the applicant later moves on notice. An advantage to the applicant is that the court, having heard what there is to be said in opposition to the application or intended application, may sometimes be encouraged to grant the order which otherwise would be refused.

One does not have to think hard to see the practical difference between the procedure of present–but–silent, and of present-and-heard. There is a considerable practical difference between the ebb and flow of argument, and the still life of hearing all that one side has to say, reaching a decision, and then hearing separately all that the other side has to say later. Hearing both sides usually makes it possible for the real points to emerge more quickly, and thus save time, and costs.

So, there are those advantages to the court, as well as to the applicant (or intending applicant). There is also a practical advantage to the respondent (or intended respondent) if the court allows an "opposed *ex parte* " proceeding. For instance, sometimes if the intended respondent has to wait until the i*nter partes* hearing of the application or subsequent proceedings so that all the evidence on both sides can be gone through, it may turn out that by the time of the *inter partes* hearing his affiants, witnesses or documents, may no longer be available. He may lack someone to swear as to vital matters. So if he is allowed to speak straightaway, the respondent may be able to stop the applicant to advance beyond this stage, and he may do so now when he is still able to access to relevant matter which may not be procurable after waiting for *inter partes* hearing.

I am, of course, alive to some disadvantages of hearing both sides at what should be an *ex parte* stage. There may be a disadvantage to the party resisting the application because he may go to the trouble of preparing and advancing contentions at short notice in a case in which a truly *ex parte* application would have failed in any event, when if, on the other hand, he had not attended or spoken, he could still have remained away or gone silently away with no order in existence which he need move to vary, discharge or otherwise battle with. For the applicant, the "opposed *ex parte* " procedure carries the risk that if his application fails he may be ordered to pay be ordered the costs of the party who has successfully opposed the application: the court has jurisdiction to make an order for costs against the applicant in such cases, whether in the cause or in any event; and, in particular, if there has been an invitation to the other side (as was the case herein) it cannot be right that the applicant should issue an express or tacit invitation to be present to the party against whom the order is sought, and then deny him any claim to the costs of what has proved to be a successful opposition.

It seems clear that the two procedures, one of remaining away or being present but silent, and the other of attending and opposing, co-exist, and if a choice were to be made between the two of them, I venture to laud the latter – of being heard on an "*ex parte*" application if no injustice is thereby occasioned – and one which has much to commend it, and it is a practice which the court should encourage but without making it obligatory. In addition to the other advantages already mentioned, the procedure of "opposed *ex parte* " applications is a saving on having to hold a second hearing on an application for discharge, to which the respondent is always entitled to make, with its own attendant expenses and time wastage.

But those broad considerations of principle aside, this much may be said in direct answer to, and disposal of, the argument that because the relevant rule has in it the word "shall", an application for leave to apply for an order of *certiorari, prohibit ion or mandamus,* must be made in the absence or silence of a respondent or intended respondent. It was said that when the word "shall" is used in a statutory provision it gives a mandatory requirement.

That thinking is not in line with the correct interpretation of words in general, and the word "shall" in particular, when employed in a statute. It is true indeed, that the word "shall" is used in Order 53, rule 1(2) which provides that an application for leave to apply for any of the orders of judicial review "shall be made *ex parte* to a judge in chambers"; but that, by itself, does not make it mandatory. The use of the word "shall" does not always mean that an act is obligatory or mandatory: it depends upon the context in which the word occurs and any other circumstances. The word does not always necessarily connote a mandatory intent on the part of the lawmaker.

A search for the meaning of the word "shall" is done with the same aids in statutory interpretation as those which guide a court in the construction of any expression in any enactment. The court must always have regard for the main object of the legislation in question, pay attention to the punctuation of the enactment or particular provision, allow the interpretation to be qualified by the different circumstances prevailing both as at the time of passing the statute and also as at the time of the case in question. No word or other statutory provision is to be interpreted out of its proper context and divorced from its general environment. It has been said over and over again, that it is the duty of the court, in construing statutes, to find out the mischief which the lawmaker intended to remedy and then to construe the legislation in such a way as to achieve that purpose. Remember this: a statute is not passed in a vacuum, but in a framework of circumstances so as to give a remedy for a known state of affairs. To arrive at its

true meaning, you should know the circumstances with reference to which the words were used: and what was the object, appearing from those circumstances, which the legislative authority had in view.As it is well known, in the interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common law or equity or customary law, parent statutes or subsidiary legislation), at least four things are to be discerned and considered:

1. What was the state of the law before the making of the Act or the Rules under it?

2. What was the mischief and defect for which the legal regime did not provide when the legislation was enacted?

3. What remedy did the lawmaker resolve and appoint to cure the disease in the society?

4. What is the true reason of the remedy which the legislature intended to apply?

Bearing these matters in view, it is then the duty of the court always to construe the enactment in such a way as to suppress the mischief and all the manoeuvres which tend to frustrate the spirit and policy of the statute, and, instead, advance the remedy, and suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commado* , and to add force and life to the cure and remedy, according to the true intent of the makers of the legislation, *pro bono publico* . See the general principles and the actual approach adopted by the Court of Appeal for East Africa, on appeal from the High Court of Kenya in The New *Great Insurance Company of India Ltd v Lilian Evelyn Cross and another* , [1966] EA 90.

And, as it is well known, it is permissible for a judge to read in words which he considers to be necessarily implied by words which are already in the statute, and in a proper case he may add to, alter or ignore, statutory words, to prevent a provision from being unintelligible or absurd or unreasonable, unworkable or irreconcilable with the rest of the statute. If a judge considers that the application of given words in their ordinary sense would produce an absurd result which cannot reasonably be supposed to have been the intention of the legislature, he may apply them in any secondary meaning which they are capable of bearing.Although not binding on this court, I find the statements of the law by Lord Reid in *Federal Steam Navigation Co Ltd v Department of Trade and Industry*, [1974] 2 All ER 97, at p100, persuasive and with respect, approve of them.

I know that in statutes dealing with ordinary people in their everyday lives the language employed is presumed to be used in its primary ordinary sense unless this understanding stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred so as to obviate the injustice, absurdity, anomaly or contradiction or fulfil the purpose of the statute: while, in statutes dealing with technical areas, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified) some secondary meaning as terms of art. In this connection I also, with respect, approve of the statement of the law, as rendered in another case of persuasive value, by Lord Simon of Glaisdale, in Maunsell v Olins , [1975] AC 373, at p 391.

These are some of the principles to be applied in the interpretation of words, and helpful in the instant arguments..

In looking for the meaning of the word “shall” and give it its proper construction, a judicial mind must take into account the purpose for which the relevant provision is made and its nature,considered in its setting, the connected provisions and other similar matters, the serious general inconvenience or injustice to person resulting from reading the provisions as directory or mandatory, where the cause of justice is promoted or retarded as a consequence of construing the provision one way or the other.

No general rule running in fixed grooves is either possible or desirable to be prescribed, and indeed each case depends on the object sought to be achieved by the lawmaker. Not being rigid and fixed, the construction of the word “shall” in a given statute must be adapted to the fitness of the matter the subject

of the statutory provision being considered: *Yamin v Mohammad* , AIR 1968 Delhi 149. The use of the word “shall” in a statutory rule is not finally determinative of a particular direction in a law being mandatory, and there have been occasions when it has been held that, though the word “shall” has been used in a legislative enactment, the direction given by the law-making authority is only meant to be directory; and, also, that it may be qualified by different circumstances, such as by a reference to the object of the legislation, or regard being had to the punctuation of the provision, or the other significant words around it.

*Opoya v Uganda [*1967] EA 752 is an illustrative case. It dealt with a provision in a Penal Code, which provided that where at the time of the commission of robbery the offender is armed with any dangerous or effensive weapon or instrument, or is in company with one or more persons, or wounds, beats, strikes any person, “he shall be liable on conviction to suffer death”. On whether or not the penalty of death prescribed was mandatory, the Court of Appeal for East Africa held that although the word “shall” appeared in the penalty section, the words stipulating the punishment for robbery of that type, and the language of the legislature must be given its plain and rational meaning according to the express or manifest intention of the legislature; and that so construed, the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it. In short, the sentence of death prescribed was discretionary and not mandatory.

That is only one example to show that the use of the word “shall” does not always mean that the enactment is obligatory or mandatory, and that it depends upon the context in which the word “shall” occurs and the other circumstances, like the object and purpose of the enactment and the mischief aimed at. That word is not finally determinative of a particular direction in a law being mandatory, and there may be occasions when although it is used in an Act, the direction given by the legislative body is only meant to be directory. In other words, under certain circumstances, the expression ‘shall” is construed as “may”, and to give it a mandatory signification may lead to some absurd or inconvenient consequences or be at variance with the intent of the law-maker.

As already noted, the construction of the expression “shall” depends on the provisions of a particular statute, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations, such as the presence or absence of a provision to the effect that in case of non-compliance with the requirement in question the relative act itself would be vitiated or certain consequences of a penal nature would follow, or an injustice suffered. The question whether a particular provision of a statute which on the face of it appears mandatory because it uses the word “shall” is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case, and for that purpose the object of the statute in making the provision is the determining factor.The purpose for which the provision has been made and its nature, the intention of the legislative authority in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the subject in issue and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory or even as merely implying futurity. For, as it is well known, the various meanings of the word “shall” may range under two general classes according as it is used:

1) as implying futurity; or

2) as implying a mandate, or giving permission or direction.

It is not a word which, as soon as it is seen in a statute, it is necessarily construed to enjoin a peremptory mandate. For example, in *Restick v Crickmore* , The Times, December 3, 1993, it was held that the words “The High Court shall order that they be struck out”, in section 40(1) of the County Courts Act, 1984 (c 28), do not impose a mandatory requirement on the High Court to strike out proceedings which were wrongly started in the High Court: there remains the option to transfer the proceedings to a County Court.

In R v Craske, *ex parte Metropolitan Police Commissio ne*r [1957] 2 QB 591, it was held that the word "shall" in section 19(5) of the Magistrates' Courts Act 1952 (c 55) which provided that the magistrate "shall proceed to the summary trial of the information", was not mandatory to the extent of depriving the magistrate of the right to permit the accused to change his mind and opt for trial by jury after all. And, in *Manton v Brighton Corporation* , [1951] 2 KB 393 it was held that "shall be appointed for the ensuing year" means for that year only, but not that an appointee should continue, in all circumstances, throughout the year. In section 16(1) of the Companies Directors Disqualification Act, 1986 (c 46), it was provided that one "shall give not less than 10 days' notice". It was held that "shall" in that enactment was permissive i.e directory, and not mandatory, and that failure to give the 10 days' notice did not render an application for a disqualification order either void or voidable: *Secretary of State for Trade and Industry v Langridge* [1991] 2 WLR 1343.Examples can be multiplied many times, but these illustrative cases suffice for the moment.

Never lose sight of the intended consequence of the failure to comply with the provision being interpreted. Where a requirement is held to be mandatory, a failure to comply with it will invalidate what is done in contravention of the provision; but if the requirement is held to be merely permissive (directory), failure to comply with it does not invalidate what is done, and the law will be applied as nearly as may be as if the requirement had been complied with. Bear in mind all the time, that it would be draconian if every failure to comply automatically invalidated things done. It is the broad policy of the piece of legislation, and the principle of fairness to parties, which must be uppermost in an adjudicator's mind. The policy is not to be frustrated by a mere procedural irregularity or technicality; and a party is not to be prejudiced by a procedural rule which does not go to the fundamentals of justice. People shall not be allowed to take undue advantage of strict and rigid adherence to formalities. Formalities are not to be used to defeat the public good and justice. Courts must reject technicalities and apply the simple test, whether the interests of justice are served and abuse of the process of the court prevented. So, even where the duty is mandatory, the court will not nowadays hold it to be contravened because of a purely formal or technical defect, i.e a defect which does not materially impair the remedy intended to be provided by the enactment for the mischief to which it is directed: see Munnich v Godstone RDC [1966] 1 WLR 427.

What I have gleaned from the illustrative East African and English cases and set out above, is sufficient to give us guidance on how this point should be decided.

Looking at the scheme of Order 53, you see that the procedure for judicial review falls into two stages. First, an application must be made for leave to apply for the remedy desired. The application must be supported by a full statement which identifies and describes the applicant, and which sets out the relief sought, the grounds on which it is sought; and affidavits verifying the facts relied upon. At this stage, *uberrima fides* is required, and if there is deliberate misrepresentation or suppression of material facts in the affidavits or statement, leave may be refused. Such leave is granted only if the court is satisfied that the applicant has a sufficient interest in the subject-matter of the application. Secondly, leave to apply having been granted, an application for the order is then made. In these proceedings we are still at the first stage, and so I say nothing of this second phase.

Leave to apply for an application for judicial review may be refused for undue delay when the court is satisfied that to grant it would cause substantial hardship to others or prejudice their rights, or would be detrimental to good administration: i.e for more or less similar reasons for withholding the relief sought after leave granted and the application filed.

On the other hand, the approach of the court to ex parte applications for leave to move for judicial review is:

a) to grant leave if it is clear that there is a point fit for further inestigation at a full *inter partes* hearing of a full substantive application for judicial review with all such evidence as is necessary on the facts and all such argument as is necessary on law;

b) if there is no arguable case the judge should dismiss the application for leave to move for judicial review;

c) if, on considering the papers, a judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for him to invite the putative respondent to attend and make representations as to whether or not leave should be granted, provided that the *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing : ie, the test to be applied at the *inter partes* leave hearing is this, that if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave;

d) if, on the other hand, a putative respondent or other proper person somehow gets wind of the *ex parte* application for leave to apply for judicial review, and attends court and desires to be heard in opposition at that stage, the court, having regard for the particular facts and circumstances prevailing, may direct as to whether such person should be heard at that stage or excluded: the matter is in the judicial discretion of the court – a discretion which must always be exercised to uphold and advance the judicial fundamentals of ensuring (i) acess to courts and justice, (ii) individual liberties, (iii) natural justice, and (iv) avoidance of perversity of justice.

Even where leave is granted, it is open to a respondent or other proper person to apply for the grant of leave made ex parte to be set aside, although such applications are discourage and should only be made where the respondent shows that the substantive application will fail.

The purpose of Order 53 rule 1(2) with regard to leave is to place the control of the progress of a review application in the hands of the courts. The rule seeks to ensure that the process of judicial review which provides the exclusive means by which public matter can be challenged in the courts, is in the control of the courts, to prevent the wastage of public time by the merely meddlesome and curious, out to pry in what does not concern them. The control is exercised by carefully selecting which applications are fit for judicial determinations, and which ones should not be subject of judicial determination. In the exercise of its discretion the court may refuse to grant leave to file a judicial review application, on account of many reasons. For instance:

a. As the law acknowledges the need for speedy certainty as to the legitimacy of target activities, it requires applicants for judicial review to act promptly. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. Schemes and decisions cannot be held up indefinitely. Another speed reason is for public bodies to be able to set their spending patterns according to their decision making activities. One of the purposes of leave is to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action. Further deals might be done in reliance upon the validity of the decision now impugned. And the framework might have been in place for a long time. For these reasons, if applications for judicial review are not made promptly, leave may be refused unless the court considers that there is good reason and granting leave would not be likely to cause hardship or prejudice or would not be detrimental to good administration.

b. It is a condition precedent to his obtaining the relief which he seeks, that a review applicant is required to demonstrate a sufficient interest in the target activity which he seeks to challenge. Not every applicant is entitled to judicial review. One must have an interest or a reasonable concern with the matter to which the application relates. There must be a genuine grievance reasonably asserted. At leave stage the court must consider whether the applicant has a sufficient interest in the matter, and, on this aspect court holds only a *prima facie* view, which may be altered on further consideration in the light of further evidence that may be before the court at the second stage (the hearing of the application for judicial review itself). So, if, without going into the matter in depth, and on a quick look at the material then available, the court thinks that nothing of what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed is disclosed, it may refuse to grant leave.

c. In the administration of justice, full and frank disclosure of all relevant material facts known to

the applicant or would have been known to him on proper and reasonable inquiry, is a fundamental requirement. The requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity. If, therefore, the applicant fails to discharge his duty of full and frank disclosure, the court may refuse to grant leave to apply for judicial review.

d. Furthermore, depending on the nature of the point at issue and circumstances, a person who does not first resort to an alternative remedy which is efficacious and less demanding or drastic, may (but not must) be refused leave to apply for judicial review, on the ground that he has not exhausted his other available (e.g. statutory) remedies which may be efficient, quicker, cheaper and more convenient and hardship free, than judicial review. The court has a discretionary power to refuse leave for failure to use an alternative remedy.

e. On an application for leave, the court, although it `should not go into the matter in any depth at that stage, must, on a quick perusal or presentation, find disclosed what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed. That is when it may give him leave to apply for judicial review. Accordingly, there is a power to refuse leave for lack of a *prima facie* case.

f. Also relevant to the discretionary leave is the anxious desire to avoid a flood of review applications. There is a distinct judicial reluctance to reach conclusions which would add to the burdens shouldered by courts which are already, and invariably, saturated with applications for judicial review, among others, and the general stance of the courts is they are primarily to act with restraint and deference towards public authorities. Courts are troubled at the prolific use of judicial review for the purpose of challenging the performance by public authorities of their functions. Although an action or inaction of a public body or official is clearly susceptible to judicial review, as where they have abused their powers or otherwise acted perversely, great restraint should be exercised in giving leave to proceed by judicial review. Nothing should be done to signal a flood of applications for judicial review, and persons should not deceive themselves into believing that they can obtain leave to move for judicial review simply by pointing to a difference between the opinion of judges and that of public authorities. Stability and relative certainty would be jeopardized if judicial review were rampant, because there is nearly always something to be said against any administrative decision and parties who felt aggrieved would be even more likely than at present to try their luck with a judicial review application. The increase in applications for judicial review of administrative action (inevitable if the threshold of unreasonableness is lowered) will lead to the expenditure of time and money by litigants, a prolongation of uncertainty for all concerned with the decisions in question, the taking up of court and public time which could otherwise be devoted to other matters, and opening a wide door which would seriously undermine the principle of finality in decision making. Floodgates of judicial review of applications must be tamed, and this is quite opportune at the leave stage.

Why do I say all this at this stage when I could as well say it at the hearing for leave or even later still on application for judicial review? I say it now, because that way it can be seen that these considerations can easily be lost sight of if the applicant alone appears before the court, while they can be raised by the other party if he is present and allowed to speak at the leave stage. I also say this at this stage to show that at the leave stage the concern of the court is for those matters and not as to whether the application is truly *ex parte* or whether it is an "opposed *ex parte*" application. By saying all these things at this stage I show that the use of the word "shall" in the rule under consideration is intended to make it a mandatory requirement to seek leave to apply for judicial review, and does not relate to the ex parte nature of the application for leave: it does not make it mandatory for proceedings to be *ex parte* .

By saying all these things at this stage I seek to demonstrate that if the prospective respondent somehow gets to know of the application for leave and attends, or if the court desires his presence to assist it and calls him to attend for that purpose and he attends and he is heard, a number of advantages may flow from his contribution. In most cases the court will obviously be assisted in deciding whether or

not grant the *ex parte* application by knowing what contentions may be advanced against the grant, and what is the general line of the evidence in opposition that is likely to be filed when the applicant later moves on notice. An advantage to the applicant is that the court, having heard what there is to be said in opposition to the grant of relief, may sometimes be encouraged to grant the relief that otherwise would be refused. The court may at once, and very early see and be fortified, that the putative respondent has little or no basis on which to resist the application. Furthermore, the applicant may escape an avoidable liability on his undertaking in damages (where this may be required). As I have already pointed out, there is a considerable practical difference between the ebb and flow of argument in *inter partes* proceedings proper, and the still life of hearing all that one side has to say, reaching a decision, and then hearing separately all that the other side has to say.There can be no doubt, too, that proceedings inter partes even on an initial ex parte application, usually make it possible for the real points to emerge more quickly, and thus save time.

I am not saying that the "opposed *ex parte* " procedure is all lined with heavenly advantages. It has its own disadvantages, for each side. For example, as I have already noted above, the party resisting the *ex parte* application may go to the trouble of preparing and advancing contentions at short notice in a case in which a truly *ex parte* application would have failed in any event, when if he had not been heard he would still have gone silently away, with no ex parte order in existence which he need move to vary or discharge. For the applicant, the procedure of "opposed *ex parte*" proceeding carries the risk that if his application fails he may be ordered to pay the costs of the party who successfully opposed the application. On what I have said so far, it is clear that the two procedures, *ex parte* and "opposed *ex parte* " , thus co-exist, and the "opposed *ex parte* " procedure has much to commend it. Indeed, in most cases it seems to be the practice which the court will encourage as a very sensible practice which advances the object of the Rules in general, and Order 53 1 (2) in particular. Any practice or procedure which can achieve or advance those objectives without doing violence to justice is welcome.

In the instant case, it is not shown that in the interest of justice, convenience and conscience access to justice by the intended respondents at this ex parte stage must be denied until later on. On the contrary, if opposition to the granting of leave is upheld, the applicant might even be saved from incurring further or unnecessary expenses on a litigation which need not otherwise come up at all, or be pursued further. The intended respondents might have something useful to say which may help the court to reach its decision, which the applicant, either by design or oversight, might have suppressed or otherwise not brought to the notice of the court. There is no showing that the applicant is likely to suffer any prejudice if granting leave is opposed right away.

It is in the light of these considerations, and acting on the foregoing principles, that I do not find this objection meritorious. I dismiss it. Both sides may be heard at this stage on the application for leave.

I so order.

Signed and dated by me at Nairobi and delivered *ex tempore* this 26th day of April, 2002.

R. KULOBA

JUDGE

26.4.2002