REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC APPLICATION NO. 81 OF 2002

IN THE MATTER OF AN APPLICATION FOR THE ORDER OF MANDAMUS

AND

IN THE MATTER OF SECTION 42 SUBSECTIONS 3 AND 5 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 79 AND 80 OF THE COSNTITUTION OF KENYA

AND

IN THE MATTER OF LUGARI/MALAVA CONSTITUENCEIS ELECTORAL BOUNDARIES

BETWEEN

JOTHAM MULATI WELAMONDI …….....…….... APPLICANT

AND

THE CHAIRMAN ELECTORAL COMMISSION OF KENYA……RESPONDENT

RULING

I have before me an application for Judicial Review whereby one Jotham Mulati Welamondi seeks an order of Mandamus to compel the Electoral Commission of Kenya to transfer Matete Division back to Lugari Constituency (its original constituency) from Malava constituency immediately after the current parliament is dissolved and to transfer all Matete registered voters from electors Register No. 155 to Register No. 156. The application is intituled as above.

The motion purports to be brought under the provisions of section 3 A of the Civil Procedure Act, Order 1 rule 8 and Order L III rule 3 of the Civil Procedure Rules and all other enabling provisions of the Law). It is brought in pursuance of leave granted to the applicant on 12th April 2002 vide miscellaneous Civil application No. 54 of 2002. That application for leave was intituled as follows:-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISCELLANEOUS APPLICATION NO. 54 OF 2002.

IN THE MATTER OF THE CONTITUTION OF KENYA SECTIONS

42 (3) AND (5)

AND

IN THE MATTER OF LUGARI/MALAVA CONSTITUENCIES ELECTORAL REGISTER NUMBERS 156 AND 155

BETWEEN

JOTHAM MULATI WELAMONDI.....APPLICANT

VERSUS

CHAIRMAN ELECTORAL COMMISSION OF KENYA.....RESPONDENT

NOTICE OF MOTION EX PARTE

The application was heard and allowed by Osiemo, J. on 12th April 2002. The foundation of the application is that Matete Division is administratively in Lugari District and yet in terms of representation in Parliament it falls under Malava Constituency in Kakamega District, a fact which, it is alleged, disadvantages the residents and voters in the Division in many respects in Lugari District as their member of parliament who should speak for them has no forum to speak in Lugari District as he is from Kakamega District. It is said that the present arrangement is in expedient, unsatisfactory and inconvenient in many other respects which are recited on the face of the motion and in the affidavit of the applicant in support of the motion.

When the motion was called for hearing on 20.6.2002, Mr. Otieno, advocate acting on behalf of the electoral commission took several objections thereto which he claimed were of a preliminary nature and called for its dismissal with costs. His first objection was that the respondent had been served with notice of motion without the statement accompanying the application for leave in contravention of order 53 rule

,4 (1) which provides:-

> "Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereinafter provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

He submitted that since they had not been served with the said statement and the same was not in the court file housing the motion on notice, the motion was incompetent. The second objection was that the application purported to invoke the provisions of under 1 rule 8 of the Civil Procedure rules which relate to representative suits. He submitted that those provisions could not be mixed with the procedure under Order 53 and, even if they could, there was no authority filed by the constituents in Matete Division giving the applicant their consent to file the application on their behalf. The case of *KEDUIWO A & OTHERS VS SAMUEL KIPSIGE ARAP SOl* (C.A. NO. 140 OF 1996)(unreported) was cited in that regard. The third objection was that the application invoked provisions of the constitution of Kenya and it could not therefore have been brought by way of motion on notice. It was submitted that applications under the constitution should be brought by way of originating motion or summons. The fourth objection was that the application had not been brought in the name of the Republic. It was submitted that all applications for prerogative orders ought to be brought in the name of the Republic and that as the present one was not so brought it was fatally defective. The case of FARMERS BUS SERVICE AND OTHERS V THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) B.A. 779 was relied on for the proposition. The fifth objection was that the provisions of section 42 and 43 of the constitution which were invoked conferred on the Electoral Commission discretion with regard to alteration of constituency

boundaries and accordingly the court could not by an order of Mandamus Compel the Commission to exercise its discretion in a particular way. The sixth objection was that since the application sought an order of Mandamus to compel the respondent transfer Matete Division back to Lugari Constituency, it implied that a decision was inforce to the effect that the Division had been removed from Lugari constituency and, accordingly, until that decision had been quashed by an order of certiorari, the order of Mandamus sought could not properly issue. It was submitted that an order of Mandamus cannot quash what has already been done. For the last two objections heavy reliance was placed on the case of KENYA NATIONAL EXAMINATION COUNCIL. V THE REPUBLIC (EX PARTE GEOFFREY GATHENll NJOROGE & OTHERS (CIVIL APPEAL NO. 266 OF 1996)(Unreported). The seventh objection was that there was no evidence that the electoral commission had failed to perform its duty the eight and last objection was that the order sought would involve the supervision of the court which would be impossible and accordingly it ought not to be granted. The case of JOHN MICHUKI & ANOTHER V ATTORNEY GENERAL & OTHERS (HC. MISC. APPL. NO. 975 OF 2001) was cited in that regard.

Mr. H.P. Wamalwa, the advocate for the applicant replied to the above objections as follows. On alleged non service of the statutory statement, he stated that on 29.4.2002 long before the firm of Onyinkwa & Co. Advocates, who had instructed Mr. Otieno, came on record, he had served the Electoral Commission in Nairobi with the motion on notice, the affidavits and the statutory statement. He also submitted, in the alternative, that even if he had not served the statement with the motion, the irregularity would not be fatal as the statement could be served at any time. As regards the point that the applicant had no locus standi to represent the Matete voters as he had not obtained their consent or authority to lodge the motion, he submitted that the rules on locus standi were not rigid and all the applicant needed to show was that there was a public interest involved and he himself would be personally affected by the decision. He contended that the applicant could satisfy both conditions if he was heard on the merits. He further submitted that order 1 rule 8 was not mandatory. He then went on the distinguish the case of KEDUWO & OTHERS V SAMUEL KIPSIGE SOl on the grounds that the suit in that action was clearly a representative suit and it was so stated unlike the present application. He further submitted that by dint of rule 6 of Order 53 which empowers the court to hear any interested party in judicial review proceedings, the applicant herein had locus standi and he could be heard.

On whether the application was incompetent for seeking an order of mandamus without seeking an order of certiorari in the first instance, counsel for the applicant's response was that the applicant's case was not that there was a decision which required to be quashed but that there was a hazy situation which required to be corrected and the order of mandamus could effect the necessary correction. In the alternative, it was submitted that where a situation calling for an order of certiorari to remedy the same exists and mandamus is also available as a remedy, the court can issue an order of mandamus directly to remedy the situation. He submitted that the case of THE REPUBLIC V DIRECTOR GENERAL OF EAST AFRICAN RAILWAYS CORPORATION EX PARTE KAGWA (1977) K.L.R. 194 supported the latter proposition. He further submitted that the Electoral Commission could be compelled by an order of mandamus to perform its constitutional duty. In that regard he cited the case of EDGAL OGECHI & OTHERS V UNIVERSITY OF EASTERN AFRICA. BARATON (C.A. NO. 130 OF 1997) (unreported) for the proposition that mandamus is an appropriate remedy for the enforcement of not only a public duty imposed on a person or body of persons by statute but also a duty imposed by the common law. Also cited was the case of COMMISSIONER OF LANDS & ANOTHER V COASTAL ACQUACULTURE LTD (C.A. NO. 252 OF 1996) (unreported) for the proposition that a public body could be compelled by an order of mandamus to act in accordance with the law in the process of compulsory acquisition of a citizen's property. Counsel for the applicant also submitted that Judicial Review is a special procedure and accordingly order 1 rule 8 of the Civil Procedure Rules did not apply thereto. Accordingly it was not necessary for the applicant to show that he had obtained the consent of the registered voters of Matete Division for whom he purported to have brought the present proceedings. He relied on the case of COMMISSIONER OF LANDS V KUNSTE HOTEL LTD (C.A. NO. 234 OF 1995) (unreported) Last, but no least, counsel submitted that section 84 of the constitution of Kenya grants the court a wide and unfettered discretion in terms of the orders it can grant. Those powers, he submitted, should not be fettered by mere technicalities. Further more, he added, the proper stage to raise objections to Judicial Review proceedings is only during the hearing of the substantive motion and not by way of preliminary objections. He relied on the case of IN THE MATTER OF AN APPLICATION BY

THE OWRNERS OF MOTOR VESSEL "GLOBE TOUR" (HC. MISC. APPL. NO 39 OF (1998) for that proposition.

In reply, Counsel for the respondent submitted that none of the cases relied upon by the counsel for the applicant assisted the applicant's case. He submitted that "THE GLOBAL TOUR CASE" was infact an authority for the proposition that where the prescribed form of procedure is not followed, the offending application is incompetent. THE KUNSTE HOTEL CASE was said to contain dicta that an applicant could not sue in defence or in protection of public rights without the written consen.t of the Attorney - General and accordingly even if the present proceedings were an ordinary action (and it was emphasized that they were not) the applicant could not bring it on behalf of Lugari constituents without the consent of the Attorney-General. It was also contended that the EXPARTE KAGGWA case did not support the applicants contention that where both certiorari and Mandamus might be appropriate relief, an order of Mandamus alone would correct the defects which an order of certiorari could have corrected. It was further submitted that the COASTAL ACQUACULTURE CASE was not an authority for the proposition that a public body could be compelled to perform a duty including a constitutional duty by an order of Mandamus. It was emphasized that where discretion is given to a public body by statute or the constitution, the court's could not interfere with the exercise of such a discretion as to do so would be judicial interference with executive action. Lastly, it was reiterated that the enforcement of constitutional rights should be initiated by way of originating summons and not order 53 of the Civil Procedure rules. The provisions of Legal Notice Number 133 of 2001 were invoked in support of that proposition.

I have considered the above submissions by the Advocates for the parties. I take the following view of the matter. First, there is no warrant for the proposition that objections to judicial review proceedings cannot be taken in advance of the hearing of the substantive motion. Am of the opinion that objections in limine may be taken to Judicial Review Proceedings at the commencement of the hearing thereof as happened in this case. I am also of the opinion that the only objections which could not be so taken are those predicated on disputed facts or which called upon the court to exercise its discretion. In the latter regard I would invoke the authority of MUKISA BISCUITS LTD V WEST END DISTRIBUTORS LTD (1969). E.A on the scope and meaning of preliminary objections. At P 700 Law J.A laid down the law as follows:

> "So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

And Sir Charles Newbold in his characteristic forceful and forthright rendition of the law had this to say at P. 701

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop."

Bearing those strictures in mind, I don't think I could pronounce on the competence or otherwise of the application before court on the basis of the alleged non-service of the statement of facts accompanying the application for leave contrary to the provisions of order 53 rule 4 (1) for the reason that the alleged non service is disputed by the applicant. There is no reason to assume that the word of one counsel is any less credible that the word of his opponent.

As regards the invocation of section 3 A of the Civil Procedure Act; order 1 rule 8 of the Civil Procedure rules; and Section 42 (3) and (5), 79 and 80 of the constitution of Kenya by the applicant in the motion for Judicial Review by way of Mandamus, the court of Appeal decision in COMMISSIONER OF

LANDS V KUNSTE HOTEL LTD (Supra) is the clearest authority that Judicial Review Procedure is a special Procedure. Indeed both counsel here appear to accept that proposition but interpret it quite differently. Counsel for the applicant appears to think that because Judicial Review Procedure is a special Procedure, the applicant can in effect institute a representative action on behalf of the registered voters of Matete Division without the written authority of the said voters. He is of the view that the High Court can grant relief by way of Mandamus to enforce the constitutional rights of those voters. Counsel for the respondent's view on the other hand is that none of the provisions of the Civil Procedure Act and the rules (apart from order 53 and the rules there under) and or of the constitution of Kenya can be invoked in the Judicial Review Proceedings before the court. For my self, I accept the submissions of counsel for the respondent in that regard. I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis.
It follows therefore that it is incompetent to invoke the provisions of sections 3 A and order 1 rule 8 of the civil procedure rules. It is equally incompetent to invoke sections 42, 79 and 80 of the constitution of Kenya. To the extent that the motion before the court invokes those provisions of the law to introduce the procedure of enforcement of the perceived fundamental rights of the applicant and other Matete Division voters in an application for Judicial Review under order 53, the motion is wholly incompetent and fatally defective. A representative suit can only be brought in an ordinary action under the Civil Procedure Act and rules. And an action to enforce the fundamental rights guaranteed under sections 70 to 83 inclusive of the Constitution of Kenya can only be brought as a separate proceedings by way of originating summons (see L.N. No. 133 of2001: The constitution of Kenya (protection of Fundamental Rights and Freedoms of the individual) practice and Procedure Rules; Rule 11 (a) as read together with Rule 9). Before those rules were made, the Procedural form for initiating proceedings to enforce fundamental rights was usually an originating motion on notice.

On whether or not an order for Mandamus could issue to Compel the Electoral Commission to perform a duty imposed upon it by the constitution, I am in agreement with the submission of counsel for the applicant that it would in appropriate circumstances. The authorities cited show that mandamus is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant. A fortiori it is should be an appropriate remedy to compel the performance of a constitutional duty. In similar vein I reject the submission of counsel for the respondent that the court cannot by way of Judicial Review intervene where the public body is exercising a discretionary power. In my judgment, the court would be perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. But such intervention would only be by way of prohibition (if the act is incomplete) or certiorari (if the act is complete) and not by way of mandamus. As the application before court is for an order of Mandamus, the proper question here is this: Has the Electoral Commission refused to perform a duty imposed on it by the constitution to the detriment of the applicant? Section 43 (5) of the Constitution which has been invoked here provides:-

> "Whenever a census of the population has been held in pursuance of any law, or whenever a variation has been made in the boundary of an existing administrative area, the Commission may carry out a review and make an alteration to the extent which it considers desirable in consequence of that census or variation."

To my mind, the above provision does not impose any duty on the Electoral Commission to carry out a review and make an alteration to constituency boundaries whenever there has been either a census or a variation in the administrative boundaries. It confers a discretionary power to be exercised in a manner considered desirable by the commission. In those premises I am of the persuasion that there being no peremptory duty imposed on the Commission by that provision of the constitution, the submission by counsel for the respondent that Mandamus as a remedy is misconceived is irresistible. Mandamus cannot issue to compel the exercise of a discretionary power let alone its exercise with a view to arriving at a particular result as prayed by the applicant here. And while I am on the inappropriateness of the remedy

sought, let me add that I am also in agreement with the submission by counsel for the respondent that if it was the applicant's case that the electoral commission had in the past made a decision to transfer Matete Division voters from their original Lugari Constituency to Malava Constituency and that what was sought was a reversal of that decision, Certiorari would have been the appropriate remedy. That is because certiorari looks at the past and quashes a decision already made whereas Mandamus looks to the present situation and aims at enforcing a duty which has not been performed. Unlike certiorari, Mandamus does not quash that which has been done. There is nothing in the EXPARTE KAGGWA to support the applicant's submission that Mandamus could be invoked in place of certiorari to quash a decision already taken.

The objection that the order sought would involve the supervision of the court and accordingly it ought to be refused in the exercise of the court's discretion was not strictly a preliminary objection. It is the sort of objection which could only have been raised in opposition to the substantive motion on the merits. I accordingly decline to consider the same.

Last, but not least, the objection that the application is made in the name of the wrong person is well merited. In FARMERS BUS SERVICE AND OTHERS V THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779, the East African Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled. On Kenya's assumption of Republican status on 12th December 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of Certiorari, Mandamus or Prohibition now issue in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue. In the premises, the proper format of the substantive motion for Mandamus would have been

"REPUBLIC ..... APPLICANT

v

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT

EX PARTE

JOTHAM MULATI WELAMONDI"

And although the application for leave is not an issue in this preliminary objection and I should not be understood to be questioning the grant of leave, the said application ought to have been intituled as follows-

"IN THE MATTER OF AN APPLICATION

BY JOTHAM MULATI WELAMONDI

FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF ALTERATION OF THE LUGARI/MALAVA CONSTITUENCIES ELECTORAL BOUNDARIES BY THE ELECTORAL COMMISSION OF KENYA"

The upshot of my consideration of the grounds of objection taken is that I find the motion to be completely muddled in form and thus incompetent and also misconceived in substance. Accordingly, the preliminary objection thereto is sustained and it is consequently, ordered that the motion be struck out will costs to the respondent.

DATED at Bungoma this 30th day of July 2002.

A.G RINGERA

JUDGE

JUDICIAL REVIEW

- A special jurisdiction
- Whether provisions of rules and provisions of Law outside Order 53 can be invoked in Judicial Review proceedings.
- Mandamus- nature of remedy and when it can be sought.
- Correct format of applications for Judicial Review.
- Whether Electoral Commission can be compelled by Mandamus to revise and alter Constituency boundaries.