



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC. NO. 1110 OF 2002

MR. JUSTICE M. M. OLE KEIWUA1ST APPLICANT

MR. JUSTICE J. V. ODERA JUMA2ND APPLICANT

V E R S U S

**IN THE MATTER OF PROFESSOR YASH PAL GHAI CHAIRMAN THE CONSTITUTION OF
KENYA REVIEW COMMISSION AND TWO OTHERS**

R U L I N G

At the commencement of the hearing of the applicants` Amended Notice of Motion dated October 31, 2002, Mr. Nzamba Kitonga, counsel, acting on behalf of an intended interested party, applied that his clients, namely Mr. Charles Muindi together with 517 other persons be enjoined in this suit. The oral application was based on the strength of an affidavit sworn and filed on December 13, 2002 by one Franics Kinyatta Rwano.

Similarly, Mr. Ndubi, counsel acting on instructions of another intended interested party, a Mr. Oduor Ong`wen informed the court that his client had also sworn and filed an affidavit dated December 13, 2002 with a view to having his client enjoined in the suit.

Mr. Sheth, counsel representing the applicants, admitted that both depositions filed in support of the intended interested parties joined to the suit were incompetently before the court for two reasons:- first that they had not sought leave of this court to file those depositions, and secondly that there is no formal application before this court to enjoin the intended interested parties. Mr. Sheth argued that Order 50 Rule 1 of the Civil Procedure Rules provided that all applications to the court shall be by motion, and that section 89 of the Civil Procedure Act required that the procedure provided in the Act in regard to suits shall be followed in all Civil Proceedings. I “omit” is defined in section 2 of the Civil Procedure Act to mean “all civil proceedings commenced in any manner.

Both Mr. Kitonga and Mrs. Ndubi relied on Order 53 Rule 6 of the Civil Procedure Rules which states as follows:- Order 53 Rule 6

“On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice of summons, and shall be liable to costs in the discretion of the court if the order should be made.”

Both counsel argued, without providing or citing any authorities, that proceedings under Order 53

were special, and that the rules of Civil Procedure did not apply to applications under the said order.

The issue before this court is whether a formal application under Order 50 of the Civil Procedure Rules is necessary to enjoin an interested party in this Judicial Review application. If the answer is in the positive, then Mr. Sheth's submission that both the depositions having been filed without leave, and without a formal application, one incompetently before the court, must be upheld, and these depositions must be struck out.

So, then, are the rules of procedure made pursuant to the Civil Procedure Acts applicable to applications for Judicial Review under Order 53?

The genesis of the High Court's supervisory jurisdiction under Order 53 of the Civil Procedure Rules in the Law Reform Act, Caps 26, Laws of Kenya. Section 8(2) of that Act provides as follows:-

“ In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.”

Originally in England, mandamus prohibition and certiorari were called “Prerogative Writs”, issued in the name of the King to control inferior tribunals from exceeding their jurisdiction.

In Kenya, section 8(2) of the Law Reform Act enabled the High Court to issue orders of mandamus, prohibition and certiorari in situations where the High Court of Justice in England would have a similar power. In 1992, by legal notice number 164 of 1992 the heading “orders for mandamus, prohibition and certiorari” was changed to “applications for Judicial Review”.

The reason why we have provided a brief outline of the historical background, is to emphasize that proceedings under order 53 are special proceedings for special purposes having special and specific rules of its own. These special rules have been enacted pursuant to powers donated to the Rules Committee under Section 9 of the Law Reform Act. Accordingly, it assumes the force of law from an Act of Parliament from the Law Reform Act, and not from the Rules Committee established under Section 81 of the Civil Procedure Act. That makes proceedings under Order 53 special proceedings, as the Court of Appeal so stated in R. v. Communications Commission of Kenya, Civil Appeal No.175/2002. These proceedings are neither Civil nor Criminal as the Court of Appeal stated in The Commissioner of Lands v. Kunste Hotel, CA 234/95. They are neither “an action” as defined in the Interpretation and General Provisions Act, Or a “suit” as defined in the Civil Procedure Act. See also Walter Odhiambo v. Registrar of Trade Unions (HC Misc. 210/89)

It is, therefore, clear to this court that proceedings under Order 53 are special in nature, that Order 53 stands on its own with its own rules and that the Civil Procedure Rules relied on by the Applicants' Counsel are not available to the applicants. In fact, there is a clear acknowledgement of this fact in Section 3 of the Civil Procedure Act which states that:-

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force”.

We are of the opinion, and we so hold that Order 53 creates that special jurisdiction envisaged in the aforesaid Section 3 of the Civil Procedure Act, having its own rules and procedures. Accordingly, Order 50 of the Civil Procedure Rules is not applicable to proceedings under Order 53, and it is not obligatory upon intended interested parties to make formal applications to be enjoined in the proceedings. Any interested party has a right to be heard, as provided for in Order 53 Rule 6, provided that interested party is able to persuade the court that he or she is a proper person to be heard”.

Based on this ruling this court will now be prepared to invite submissions from counsel to show how

the proposed or intended interested parties are proper persons to be heard in these proceedings. These shall be the orders of this court.

Dated at Nairobi, this 17th day of December, 2002.

A. I. HAYANGA

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J U D G E

17/12/2002

A. VISRAM

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J U D G E

17/12/2002