REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 47 OF 2000

IN THE MATTER OF: SALIM TUNJE GAMBO ……APPLICANT

VERSUS

COMMISSIONER OF LANDS ……..RESPONDENT

AND

IN THE MATTER OF: COUNCILLOR ALI DIDI

AND 8 OTHERS ..……...…….INTERESTED PARTIES

R U L I N G:

The issue raised in the Preliminary objection taken up in this matter is of singular importance to litigants. Can an order of temporary injunction be issued under Order 39 r 1 of the Civil Procedure Rules in a Judicial Review matter? The issue assumes some complexity because of the uncertainty which has prevailed for a long time on the definition of "suit", and one's perception of the latest in put in that conundrum from the Court of Appeal in CA 234/95 The Commissioner of Lands vs. Kunste Hotel Ltd. (UR).

Some background to the issue is necessary.

The Applicant came before this Court on 22.2.00 pleading that some two beach plots in Jimba, Kilifi measuring about 10 Acres which he had occupied since 1975 and which he had Title Deeds to, were unlawfully taken back by the Commissioner of Lands in 1998 and the plots were instead dished out to some 9 Politicians contrary to all known procedures and propriety. He has permanent and extensive developments on the plots. The allottees were intending to sell the plots to other persons at a huge profit.

Leave was granted to the Applicant to apply for orders of Certiorari to quash the allotments and for prohibiting the allocation of the said plots to any person other than the Applicant. The leave granted was to operate as a Stay of any further proceedings relating to the two parcels of land. That was on 23.2.00. He then filed the Notice of Motion seeking those prerogative orders on 24.2.00 with minor amendments on 14.3.00.

Upon service of the Application on the Commissioner of Lands and on the interested or affected parties, hopes were expressed that the matter would be settled, but the Applicant returned to court on 28.7.00 under Certificate of Urgency pleading that the interested parties had during the currency of the order staying further proceedings, obtained Title deeds to the Plots. That was in March and May 2000. He had filed an Application on 27.7.00 under Order 39 and Order 1 r 10 Civil Procedure Rules seeking three substantive Orders:

1."THAT The Commissioner of Lands and the Kilifi Land Registrar be restrained from registering and effecting any registrations upon Title Numbers: Kilifi/Jimba/419 & 432 until the hearing and disposal of this Judicial Review application or until further orders of this Court.

2. THAT AHMED ABUBAKAR ALWI and KALUMAS TOURS & SAFARIS LIMITED the respondents herein be hereby restrained from entering, trespassing, interfering, selling, disposing or alienating Title Numbers: Kilifi/Jimba/419 & 432 until the hearing and disposal of this Judicial Review application or until further orders of this Court.

3.THAT the Applicant be granted leave to add AHMED ABUBAKAR ALWI as an interested party in this case."

The Third Order sought would appear to be superfluous since there is already an order recorded on 13.3.00 joining one Ahmed Abubakar (presumably one and the same person) as the 10th Interested Party and he was served with the Notice of Motion and Stay order. There is also a Notice withdrawing the action against one Massimo Spinelli.

Before the Application came up for hearing however a Notice of Preliminary objection was filed by one of the interested parties who had been given Title to one of the plots. His contention was this:

"1. THAT an application under Order XXXIX relating to temporary injunction and interlocutory orders does not lie in an application under Judicial Review order LIII.

2. THAT the said application which is brought under the umbrella of a Judicial Review application is fatally incompetent and an abuse of the process of the court.

3. THAT the application by way of Chamber Summons under Order XXXIX where there is no suit pending between th e parties is bad in law, an abuse of the process of the court and ought to be struck out with costs".

It is an objection that says the same thing in three different ways. In essence it questions the applicability of Order 39 Civil Procedure Rules to Applications for Judicial Review. It received support from Counsel for the Interested parties Ms Kibaara and Kiamba but there was no representative of the Attorney General who has never bothered to enter Appearance or Respond to the matter on behalf of Commissioner of Lands, the Respondent, who is presumed to have acted in the cause of his duties as a Government functionary.

The argument by the interested parties is this:

Order 39 applies to Civil Suits as defined under the Civil Procedure Act and Rules thereunder - see S.2 and O 4 r 1. There is no suit, so defined, filed here. What is filed are proceedings for Judicial Review which are a creation of another Statute, the Law Reform Act. The rules promulgated to govern their procedure are not under the Civil Procedure Act but have their source in the Law Reform Act. The Rules were imported into the Civil Procedure Act from the Law Reform Act and are therefore not part of the Civil Procedure Rules. Moreover authoritative pronouncement has now descended from the Court of Appeal that Judicial Review proceedings are neither Criminal nor Civil. They are special proceedings.

That was in the Kunste Hotel case (supra). This court has also held that an injunction does not lie in a matter that does not fit the definition of "suit". That was in CA 13/97 JOHNSON MWANGI MAINA vs. EVANSON KAMENDE.

Perhaps I should set out the material portions in the two decisions relied on before referring to the response made to those submissions.

On the definition of "Suit" in CA 13/97, I stated in holding that an Appeal is not a Suit:

"It has to be admitted that there has been for some considerable time confusing interpretations, of what amounts to a "s uit". For the definition in the Act appears to be so wide that any civil action commenced in any manner the Rules committee has prescribed in the Rules amounts to a suit. I am aware that such difficulties of construction were raging over 40 years ago – see for e.g. Manson House Ltd. –vs- Williamson [1954] 21 EACA 98, Bhagat Singh –vs- Chauhan [1956] 23 EACA 178 and M ityana Ginn ers Ltd. –vs- Public Health Officer, Kampala [1958] EA 339. They had not been resolved by 1968 for example in Mandavia –vs- Rattan Singh [1968] EA 146, where Duffus J.A . found that execution proceedings were a "suit" as defined under Section 2 while Spry J.A. dissented and said,

"I appreciate, that the definition of 'suit' in Section 2 of the Civil Procedure Act is expressed in very wide terms (quote) but when the Act is read as a whole, I think it becomes clear that there are civil proceedings which are not to be regarded as suits even though initiated under the rules. I think that such proceedings would include proceedings which arise out of a su it which has been determined, that is to say execution proceedings".

Newbold P. the Third Judge in that case, chose to make no comments on that controversy.

One would also have thought that the Rule s prescribe the manner in which Judicial Review matters are to be instituted in courts and that therefore they are suits. But in CA 234/95 decided on 14.3.97, THE COMMISSIONER OF LANDS –vs- KUNSTE HOTEL LTD. (UR) the court said such proceedings are not a"suit" as defined under Section 2 of the Civil Procedure Act. There may be other categories of cases excluded in that definition".

In the "Kunste Hotel Case the Court was grappling with the meaning of "Action" under the Government Proceedings Act and found that it meant, as defined in the Interpretation and General Provisions Act:

"any Civil proceedings in a Court and includes any suit as defined in Section 2 of the Civil Procedure Act".

They continued:

"That definition without more does not tell us much. However, when looked at toget her with the provisions of S.8 of the Law Reform Act, Cap 26 Laws of Kenya, we are able to discern that an application for an Order of Certiorari or any of the prerogative orders is not an action. S.8(1), of that act provides as follows:

"8(1) The High Court shall not, whether in the exercise of its Civil or Criminal jurisdiction, issue any of the prerogative Writs of Mandamus, prohibition or Certiorari".

By virtue of the provisions of S.7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 , of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So. S.8(1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of s.13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari the Court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S.136 (1) of the Government Lands Act and also, S.13 a of the Government Proceedings Act , which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S.13, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "suit" in S.2 of the Civil Procedure Act is envisaged".

The perception of those findings by Learned Counsel for the Applicant Mr. Bryant is that it should be

confined to its own facts and should not be used as a proposition that Judicial Review proceedings are not Civil proceedings governed by the Civil Procedure Act and Rules. If the latter was the intention, he submitted respectfully, then the Court of Appeal erred. The Law Reform Act itself which donated the power to make Rules under S.9(1) refers to "Civil Courts" not "Special Courts". Referring to the jurisdiction exercisable in Judicial Review as Special and not Civil is erroneous. S.2 of the Civil Procedure Act defines suit and that includes Judicial Review proceedings. Moreover Order 53 which covers Judicial proceedings is an Order under the Civil Procedure Act and therefore under that Act they fall under the definition "suit" which may not be an "Action" because "Action" is wider than "Suit" and that was the main concern of the Court of Appeal; to escape from the injustice of the Government Proceedings Act.

Mr. Bryant further submitted that an interpretation that puts Judicial Review proceedings in a compartment of their own and does not apply the rest of the Civil Procedure Rules would work injustice. It should be possible to access and apply those other provisions and a Purposive Construction of section 9 of the Law Reform Act should instead be made because the Rules Committee has not made other Rules. Failing that the Court could invoke its inherent powers reserved under S.3A of the Civil Procedure Act and grant in this case a temporary injunction to restrain the respondents and the interested parties from interfering with the subject matter of the suit pending its determination, otherwise irreparable loss may ensue.

I have considerable sympathy for Mr. Bryant since I shared the same views before the Kunste Hotel Case. But I do not have the liberty he has to brush aside the findings of the Court of Appeal. They are binding on me.

Whether or not the Court was dealing with a specific interpretation of Judicial Review proceedings as amounting to "action" or "suit" under a specific Act and therefore the findings should be confined to that decision, there is no denying, with respect, that the Court of Appeal decided that Judicial Review proceedings were neither Criminal nor Civil. If that be a correct perception of the Judgement, I do not see how procedures designed for civil matters should apply. It would appear that the Rules promulgated under S.9 of the Law Reform Act were meant to self-regulate such proceedings without resorting to other provisions. If they are found wanting or inadequate, it is for the Rules Committee so authorized to take remedial measures. The Applicants would appear to be on firm ground in their preliminary objections and I uphold them.

All this discourse would seem however to be academic.

Firstly, because there is no power to grant the first prayer sought, that is an injunction against the Government or its officers acting n the cause of their duty and within their authority. Secondly, because orders were granted at the time of granting leave which appear to have been flouted and the procedure exists for redress. S.3 A of the Civil Procedure Act is not a panacea for all wrongs. The inherent powers of the Court ought not to be used indiscriminately when there are specific provisions of the law which can be invoked. The doctrine of Lis Pendens may also apply.

I strike out the Application with costs to the interested parties.

Dated at Mombasa this 11th Day of Januaury, 2001.

P.N. WAKI

J U D G E