REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 420 OF 2001

IN THE MATTER OF AN APPLICATION FOR ORDERS IN THE NATURE OF PROHIBITION AND MANDAMUS

REPUBLIC……APPLICANT

VERSUS

1. PROFESSOR YASH PAL GHAI

2. THE CONSTITUTION OF KENYA REVIEW COMMISSION…….RESPONDENTS

(EX PARTE)

1. ARCHBISHOP SAMSON MWANGI GAITHO

2. BISHOP SILAS YEGO

3. BISHOP GERRY KIBABARA

4. DR. A.K. AKIDIVA

5. BISHOP JOSEPH OGUTU

6. REV. ELKANA SALAMBA

7. REV. STEPHEN MBURU

8. BISHOP J. WANJALA

9. BISHOP J. NYATUKA

10. REV. PATRICK GITAU

11. (BISHOP ARTHUR KITONGA)……AS OFFICIALS OF THE UNITED CHRISTIAN CHURCHES OF KENYA

RULING

In my ruling on 4-5-2001 I directed that all the parties to this application be served so that the application for leave and leave to operate as a stay can be considered together after the parties had been served. When

the application came for hearing on 8-5-2001, the applicants withdrew their application that leave operates as a stay so that the only issue left was the application for the leave to file the proceedings. The applicants raised the issue that the application proceeds ex parte since order 53 of the Civil Procedure Rules requires that the application should be made ex parte. This contention is opposed by the Respondents on the grounds that since they had already been served they ought to be heard on the application for leave.

In the first instance I have to decide whether after giving the ruling that the matter be heard inter-parties I can change this ruling without an application being made to that effect. The fact that the applicants had withdrawn the second prayer to the application does not by itself vary the order I had granted. For the application at this stage to be heard ex parte this order has to be varied first.

That I cannot vary my order without an application appear to be part of the Ruling in the Court of Appeal Civil Application No. 81 of 2000, **Dipak Shah and Another vs. The Resident Magistrate Nairobi and the Attorney-General.**

In this appeal the Judge in the High Court had granted leave to the applicant to file Judicial Proceedings and directed that leave to operate as a Stay be argued inter-parties. When on the hearing day objection was raised the judge vacated her order for the leave and ordered that the whole application be heard afresh. The Hon. Justice Ole Keiwa, J.A. said in his ruling:

> **"The Learned Judge of the Superior Court, in my view, had no basis on which to undo the grant of leave, which prayer, she had granted to the applicants. There was no application made to that effect and upon which she could review or vary her order granting leave to apply for order of prohibition.Her decision thereafter to send the file and the very same application for leave, for hearing by another judge of co-ordinate jurisdiction (Githinji J.) was without foundation in as much as the order granting leave to the application could not be set aside by the Learned Judge without an application for that purpose".**

I find the import of this ruling quite clear and it prohibits me from varying my order that the application for leave be heard inter-parties by simply ignoring its existence.

This finding would dispose of the issue as to whether the Respondents should be heard inter-parties or not I find it however necessary to comment on the issue raised by Mr. Nyakundi the Learned Counsel for the applicants as to what should be considered by the Court in deciding to grant or not grant leave for Judicial Review.

In such application the Judge should be satisfied that there is arguable case which is fit to go for further investigations at the full hearing inter-parties without going into the depth of the case.

To come to this conclusion the Judge will need to look beyond ensuring that the procedure was followed in filing the application for leave.

Although Order 53 of the Civil Procedure Rules requires that the application for leave to move for Judicial Review be made ex parte, there are instances when the court can direct that the respondents be served to appear at this first stage. This would not vitiate the proceedings. It is at the discretion of the Judge to decide whether the nature of the application necessitates the adjournment of the application for the Respondent to be served and argue the application for the leave inter-parties for the leave inter-parties solely for the purposes of assisting the court without going into the full arguments of the main application.

This approach finds support in a number of recent cases such as **IRC vs. Federation of Small Employers (1981) 2 All ER. 105 and RV Kensington and Chelsea Royal London Borough (1989) 1 All ER 1202.**

Some of these cases were cited by the Counsels during this hearing. I find them persuasive.

From these decisions it will be observed that the granting of leave is not a mere formality and which is automatic. The hearing of application for leave inter-parties when necessary should be viewed as an effort to assist the court in deciding whether the case presents an arguable case unless it occasions delay.

In the light of what I have said I find that this objection must be overruled. The Respondents in the circumstances of this application have the right to be heard in the application for the leave.

Dated and delivered at Nairobi this 9th day of May, 2001.

Kasanga Mulwa
JUDGE