



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. 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 this application the applicants are asking for ex-parte orders for leave to move for a Judicial Review and for the leave to operate as a stay. The application is made under Order 53 of the Civil Procedure

Rules and the application is made ex-parte.

It has been the practice in the High Court for the Judge hearing the application to grant the leave where it found that there are enough grounds to justify the leave and to hear the application for the leave to operate as a stay inter parties. The Court of Appeal has however ruled that the two application for the leave and the leave to operate as a Stay must not be separated and must be heard at the time of considering the application for leave.

This was the decision of Civil Application No. 81 of 2000. Dipak Shah and Another and the Resident Magistrate Nairobi and the Attorney General.

The Court went further to direct that the Judge although not allowed to separate the two prayers the Judge may adjourn the application so that he can hear both applications inter parties. Says Justice Ole Keiwa J.A. in the Ruling:

“In my respectful view, it is within the discretion of a judge to adjourn the whole application for leave, and for that leave to operate as a stay of proceedings for hearing inter parties but I do not think that that discretion extends to enable such a judge to hear that application both ex parte and inter parties....”.

In deciding whether the leave should operate as a stay, I have to consider the practical implications of the stay. In most cases the stay acts as an injunction. In this application the applicants are seeking for orders inter alia that the leave operate as a stay of the activities of the second respondent and also to prohibit the first respondent Yash Pal Ghai from participating in the affairs of the Commission. The matters of the Constitution of Kenya Review Commission are matters of national interest. Where as the applicants have the right to bring this action as they brought, in a matter like this justice demands that the Respondents be given a chance to be heard. Although the application is brought under Judicial Review under Order 53 of the Civil Procedure Rules it raises matters, which touch on the Constitution as Mr. Nyakundi the Learned Counsel for the Applicants rightly points out. It is only fair that the Respondents be given a chance to be heard. In the recent case of the English Court of Appeal in **R.V. Kensington and Chelsea Royal London Borough Council Ex Parte, Hammel (1989) 1 ALL ER 1202** the Court expressed the view that it would be a good practice for the applicant to give the Respondent notice of any Ex Parte application for interim relief so that he could be present and save time. The provision of the relevant English Law on this issue are identical to our Order 53 (1) (4) of our Civil Procedure Rules. I accept this as valid guide. After all, the objective is to do justice and not for parties to out do each other on technicalities.

I consider it necessary that all the parties be served so that the Judge who will hear the application for leave and the leave to operate as a stay will have heard all the parties for these reasons and following the Court of Appeal ruling, I will adjourn the whole application so that the other parties can be served. The application will be heard on

Dated and delivered at Nairobi this 4th day of May, 2001.

Kasanga Mulwa

JUDGE