



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS CIVIL APPLICATION NO. 638 OF 2001

SAMUEL AMOKE NYAKERIGA & 8 OTHERS.....APPLICANTS

V E R S U S

THE UNITED NATIONS HIGH COMMISSION

FOR REFUGEES & 6 OTHERS.....RESPONDENTS

R U L I N G

This Application dated 14th June, 2001 is brought under Order LIII Rules 1 and 2 of the Civil Procedure Rules. In it, the Applicants seek leave to apply for judicial review against the Respondents. The 1st and 2nd Respondents are important in determining whether the leave sought ought to be granted. The 1st Respondent is a special agency of the United Nations. The 2nd Respondent is an international non-governmental organization (NGO) and allegedly registered under the Non-Governmental Organizations Co-ordination Act, 1990 which works closely with the 1st Respondent with respect to issues concerning refugees in our continent. The Applicants also seek that such leave, if granted, do operate as stay of the proceedings and decisions under challenge.

The brief facts of this matter are obtained from the statement which accompanied this application.

The Applicants, who are Kenyan lawyers of African origin were employed by the 1st Respondent through the agency of the 2nd Respondent as eligibility officers at an eligibility center established within the 2nd Respondent under the auspices of the 1st Respondent. Although the 2nd Respondent's letter of 11th January, 2001 stated that the contracts of service were to end by 31st March, 2001, the Applicants allege that those contracts had been extended orally to the last day of this year. On 9th March, 2001, the Applicants were suspended from that employment to enable an investigation for "alleged corruption deals." It is alleged that a day before that, African employees of the 1st Defendant including the Applicants had been humiliated by being denied entry to the place of work and being treated inhumanly. On 30th April, 2001 the Applicants were informed that their contracts of service would not be renewed. The Applicants' case is that their employment was terminated in a discriminatory manner and against the United Nations Staff Rules and Staff Regulations (1990) as amended in 1991 and in 1993 and against the rules of natural justice as they were not given any opportunity to present their cases. When Mr. Amollo for the Applicants appeared before me on 19th June, 2001 I was cautious to grant him the leave and asked him to file brief submissions on why leave should be granted. The reason for doing that was in view of the unusual nature of this application since it is brought against an agency of the United Nations which enjoys certain immunities in this country. I was also compelled to follow that course since the papers filed in Court were quite voluminous.

Before I consider the submissions filed by Mr. Amollo, I would like to state that, contrary to popular

belief, the granting of leave to bring judicial review proceedings is not a matter of course. It may well be that most of my brother Judges, being overwhelmed by work as it is, do not get time to inquire into the substance of the application and invariably grant the leave, leaving all the other matters to be argued at the hearing. Although that course is understandable in view of what I have said concerning the heavy workload with which a Judge of this Court has to deal with, to grant leave as a matter of course would be to down-play the purpose for which that requirement was created. The Rules Committee, in its wisdom recognized the special nature of Judicial Review and made a provision that in order to bring proceedings in that respect, one needed to obtain the leave of the court. If that requirement was not necessary, I do not think that the Committee would have taken the trouble to add to a Judge's already heavy workload. As I have already said, Judicial Review proceedings are special not only because of the nature of the orders that can be obtained there-under but also because those proceedings are dealt with expeditiously in some respects than normal suits. In Judicial Review suits, it is unnecessary to call witnesses and the case can be determined on affidavit evidence. It is, therefore, the function of this Court, in an application for leave to bring Judicial Review proceedings, to determine whether the case is a good one to be disposed of in that manner. In his submissions, Mr. Amollo did not bring to my attention any authorities on the exact principles to be considered in determining whether to grant leave to bring Judicial Review proceedings or not. I for myself doubt whether there is any clear authority on the point in this jurisdiction. This may be attributed mainly to the fact that leave, once granted, is seldom challenged. However, based on my own research, I came across one Court of Appeal decision in which this matter was considered, although not in extensive detail. **In Samuel Muchiri W'Njuguna & Others v. Minister for Agriculture** Civil Appeal No. 144 of 2000, Justices of Appeal Omolo, Shah and O'Kubasu said:-

“It cannot be denied that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave.”

In addition to the above authority, I should have thought that this matter could be dealt with in the same way as where leave is allowed to bring an action out of time. The application being ex parte, the other side should be allowed to challenge the leave and the trial Court be given an opportunity to consider whether the leave was properly granted. Be that as it may, what principles are to be applied by this Court in determining whether leave to bring Judicial Review proceedings should be granted? For my part, I would draw from the principles to be applied in determining whether to grant leave to appeal where there is no right of appeal. In **Mohamed Yakub & Mohamed Yusuf T/A Yasser Butchery v. Mrs. Badur Nasa & 2 Others** NAIROBI C.A. Civil Application No. NAI 285 of 1999 (106/199 UR) (Unreported) (GICHERU, OMOLLO & LAKHA, JJ.A.) the Court of Appeal stated the following principles as governing the granting of leave to appeal:-

(a) Leave should generally be given where the case has realistic prospects of success. This should imply that leave is available where there is a pri ma facie case in an application for Judicial Review;

(b) Leave may be given in exceptional circumstances even though the case has no such prospect of success if there is an issue which, in the public interest, should be examined by the Court. This includes cases of general policy or cases which seek a reconsideration of a binding authority;

(c) If the issues are not generally important and the costs of the appeal will far exceed what is at stake, the leave should be denied;

(d) The application should be made promptly; and

(e) Leave is not available to appeal against an order for execution .

The last principle (e) would be unavailable in an application for leave for Judicial Review but all the other principles would be relevant. It is always the duty of the Applicant to show why leave ought to be granted. However, I am carefully warned that at this stage, this Court is not called upon to determine the

merits of the case. I was concerned whether the Applicants were entitled to sue the Respondents. Mr. Amollo made very useful submissions on the matter which allayed my fears. He has demonstrated that there is an arguable case before this Court. A reading of **Tononoka Steels Ltd v. The Eastern and Southern Africa Trade and Development Bank** NAIROBI C.A. Civil Appeal No. 255 of 1998 (unreported) (KWACH, TUNOI & LAKHA, JJ.A.), deals with the question adequately.

I, therefore, grant leave as per prayer 2 of the application dated June 14, 2001. I decline to grant prayer 3 that such leave do operate as a stay of the proceedings.

DATED and DELIVERED at NAIROBI this 31st day of July, 2001.

ALNASHIR VISRAM

JUDGE