REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL SUIT NO. 264 OF 1997

REPUBLIC .....APPLICANT

VERSUS

CHIEF MAGISTRATES COURT MOMBASA & ANOTHER.....RESPONDENT

EX-PARTE BAHAJJ & CO LTD & ANOTHER

RULING

The matter that was argued before me and the subject matter of this ruling is the Notice of Motion dated 1.12.1997. The Notice of Motion was filed pursuant to leave granted on 18.11.97 before Ang'awa J under order 53 rule 1 and 3 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act. It seeks the following orders:

"1. That an order of *certiorari* do issue to remove to this Court and quash the decision and order of the Chief Magistrate's Court (Mr Muchelule, Chief Magistrate) made on 16th October, 1997 relating to CMCC No 4687 of 1997 between *Bahajj Holdings Ltd and Abdo Mohamed Haji alias Abdo Bahajj*.

2. That an order of *certiorari* do issue to remove to this Court and quash the decision and order of the Chief Magistrate's Court (Kaburu, Senior Principal Magistrate) made on 4th November, 1997 relating to CMCC No 4687 of 1997 between *Bahajj Holdings and Abdo Mohamed Haji alias Abdo Bahajj*

3. That an order of *certiorari* do issue to remove to this Court and quash the decision and order of the Chief Magistrate's Court (Mr Muchelule, Chief Magistrate) (sic) relating to CMCC No 4687 of 1997 between *Bahajj Holdings Ltd and Abdo Mohamed Haji alias Abdo Bahajj*.

4. That an order of prohibition do issue directed at the Chief Magistrate's Court, Mombasa forbidding the said Court from continuing with proceedings in CMCC No 4687 of 1997 *Bahajj Holdings Limited vs Abdo Mohamed Hajj Alias Abdo Bahajj*.

5. That there be an inquiry as to damages payable to the applicant.

6. That this Court do give such consequential directions as shall be just in the circumstances.

7. The respondent and the interested party do pay the applicants the costs of these proceedings."

Prayer 5 was abandoned at the hearing of the application while prayer 6 & 7 were left in the court's discretion.

The protagonists in this saga are (1) Abdo Mohamed Bahajj also referred to as Abdo Mohamed Haji (hereinafter "Abdo") the 2nd applicant; (2) Abdo Mohamed Bahaji & Company Ltd, (AMBACO), the first applicant; (3) Bahajj Holdings Ltd (BHL), the affected party in these proceedings referred to as "interested party" (4) Mohamed Ali Taib (Mohamed).

Abdo says, and it is not denied, that he is the majority shareholder and Director of AMBACO. He also held a 33.5% shareholding (67 shares) in BHL and was a Director therein. Mohamed was also a 33.5% shareholder (67 shares) in BHL and its Director. The other Director was one Alwi Abdulkadir Mohamed (Alwi) holding 33% shareholding (66 shares). He worked for BHL as incharge of stores and finances. BHL appears to have had its Memorandum and Articles of Association executed on 28.8.1995 but is certified to have been incorporated on 27.10.1997 (or is it 27.10.95?) Reg No C67507 with its registered office at plot 3991/XI Jomo Kenyatta Avenue. It would also appear that BHL carried on its business in various premises known as Mombasa/Block/XXXVI I/58, (Flat No 1); 46/XL/ MI, a warehouse; and 124/XLVII/MI, a warehouse. AMBACO was incorporated and registered on 24.4.1997 Reg C75959.

It is averred by Abdo that he was solely carrying on business in Flat No 1 under the business name of "Bahajj Wholesalers" and was profitably doing so between 1994 and 1995. His main supplier of goods was Mohamed. But in August 1995 he was approached by Mohamed and Alwi and was persuaded to convert the said business into a limited liability company with the three of them as shareholders. By December 1995 they had made profits in excess of Shs 54 million and the shares of the profits were ploughed back into the company business. They continued to make more profits until he was unceremoniously bundled out of the company in October 1997. The epicentre of the dispute between the protagonists is BHL, and the property alleged to be owned by it, both pre and post incorporation. On both sides of the argument the property runs into millions of shillings although Mohamed professes no knowledge of the exact figure. There is also an aspect of management of BHL.

Mohamed says Abdo was, after incorporation of BHL, the Managing Director with the duties and responsibility of running the business of BHL. In neglect of those duties, Abdo failed to keep any stock records, books of accounts, vouchers, invoices, delivery notes, asset valuations or other commercial documents portraying the true and fair view of the business and capital of BHL.

In September 1997, Mohamed says, Abdo was removed as the Managing Director of BHL and BHL resolved to file suit against him demanding production of all company records and accounts documents. For that purpose BHL went before the Chief Magistrate's Court on 16.10.97 and filed CMCC No 4687/97 joining Abdo and AMBACO as the defendants. That is the suit sought to be quashed on the ground that the Chief Magistrate or the Senior Principal Magistrate, both of whom purported to issue orders thereunder, had no jurisdiction to do so. It is indeed common ground that that is the issue for decision. It becomes necessary therefore to examine the pleadings in that suit and the prayers made thereunder. The entire plaint is material and will therefore be reproduced:

Plaint

"1. The plaintiff is a limited liability company incorporated in the Republic of Kenya and having its registered office in Mombasa, and its address for service for the purpose of this suit is care of Taib A Taib Advocates Mombasa.

2. The defendant is a male adult residing and was at all material times working as a Director in the plaintiffcompany in Mombasa. Service of the summons in this suit will be effected by the plaintiff's advocates.

3. The plaintiff was incorporated as a limited liability company on the 27th October 1995 and carries on business in Mombasa in terms of its Memorandum and Articles of Association.

4. The defendant at all material times was a Managing Director of the plaintiff upto the 9th September 1997 when the plaintiff company through laid down machinery resolved to remove him as the Managing Director and stopped him from working for the plaintiff.

5. As the Managing Director of the plaintiff at the material times, the defendant owed to the plaintiff the following duties, *inter alia*:-

(a) a duty to act *bona fide* in the interests of the plaintiff.

(b) a duty to act for the proper purposes of the plaintiffs in relation to its affairs.

(c) As the Managing Director of the plaintiff the defendant was a trustee of the assets of the plaintiff and/or owed the obligations of a trustee in respect of the assets of the first plaintiff.

7. From on or about the year 1996 the defendant while managing and running the plaintiff company he wrongfully and in breach of his duty and trust sold the plaintiff's merchandise and stocks and converted the proceeds of the sale to his personal use and the defendant continues to do so.

8. The plaintiff shall further contend that since 1995 and all the material times of the defendant's managing and running the plaintiff company he kept improper accounts, no proper record of stocks and used the plaintiff's funds and facilities for personal trade and benefit.

9. In doing the aforesaid acts the defendant acted:-

(a) *Mala fide* and against the interests of the plaintiff and/or;

(b) for improper purposes in relation to the affairs of the plaintiff; and/or

(c) in breach of trust and/or in breach of his obligations as trustee in respect of the stocks and assets of the plaintiff.

10. In the circumstances pleaded above the defendant is personally liable to the plaintiff for profits converted to his own use and full accounts and disclosure pursuant to the Companies Act.

11. For several months prior to the matters complained of, serious differences have arisen between the defendant and other shareholders of the company and the defendant has on several occasions shown complete disregard to the proper conduct of the plaintiff business, its Memorandum and Articles of Association and all resolutions of the company.

12. Having regard to the aforesaid matter complained of and the conduct of the defendant to the plaintiff which is calculated to prejudice, grounding and adversely affecting the carrying on of the plaintiff business it has become impracticable for the plaintiff to carry on business with defendant who continues pilfering and removing the plaintiff 's goods and stocks and converting the proceeds of sales to his own personal use. In the alternative, unless the defendant is restrained by the Court from proceeding further with the aforesaid unlawful acts, the business of the plaintiff is likely to suffer irreparable loss, injury and harm. It is therefore just and equitable that an injunction be issued to restrain the defendant by himself, or his agents, representatives and employees from attending to and/or in any other manner dealing with the affairs of management of the plaintiff company and further be restrained from entering or gaining access into company offices, premises and godowns herein below mentioned.

13. Inspite of demand made by the plaintiff to the defendant to immediately cease and refrain from all above mentioned adverse acts to the plaintiff company the defendant has refused to do so and instead proceeded with the above mentioned unlawful acts with due haste and in complete disregard with all company resolutions.

14. By reasons of the matters aforesaid the plaintiff has suffered loss and damage and will continue to suffer irreparably financially and otherwise.

16. The cause of action arose within the jurisdiction of this honourable court.

Whereof the plaintiff prays for:

i. That the defendant be restrained until judgment in this action or until further order of the court by himself, his servants or agents or otherwise from continuing to run and manage Bahajj Holdings Limited.

ii. That the defendant be restrained either by himself, or his agents, representatives, and/or employees from participating in, attending to and/or in any manner dealing with the affairs of management of the plaintiff company and further from negotiating any issue or matter on behalf of the company and/or concluding any business, transaction, job or any other issue whatsoever for and/or on behalf of the company and/or binding the company in whatever issue or matter and in any capacity and in particular not to sign any cheques or withdraw any monies from the company's accounts, be they in the company's name, the defendant personal name or any other name.

iii. That the defendant be restrained either by himself or his agents, representatives and/or employees from going to and/ or entering or gaining access by whatever means either around and/or into company premises, more particularly the offices and shop, at plot No Mombasa/Block XXXVII/58 and the warehouse at plot No 46/XL/MI and the warehouse at plot No 124/XLVII/ MI.

iv. That the defendant be restrained either by himself or his agents and or any other person from touching, handling, removing, selling and/or dealing in whatever

manner with the goods stored at the warehouse at plot No 114/XLVIII/MI including the landlord thereof.
v. That the plaintiff be allowed to take a full inventory of the goods stored at the said warehouse on plot No 114/XLVIII/MI and further that they be given full access thereof by whoever is responsible thereof and if necessary break open to gain such access to avoid pilfering and removal of the said goods.

vi. Damages

vii. An account of the profits made by the defendant on or by reasons of the sales.

viii. Payment of all sums found due to the plaintiff on taking the accounts at (ii) above.

ix. Interest to be assessed at commercial rates pursuant to rules of equity on the same claimed and for such period as the Court shall deem fit.

x. An order that the defendant do deliver up to the accountant appointed by the plaintiff or the Court all such papers, records, accounts, stocks, receipts, vouchers, invoices, delivery notes concerning the plaintiff business herein referred;

xi. An order for the valuation and appraisement of all the plaintiff company assets both immovable and moveable for sale by private treaty.

xii. Costs and incidental to this suit;

xiii.Such other or alternative relief which this honourable Court may deem just or fit to grant. Dated at Mombasa this 15th day of October, 1997 .

Taib A Taib

Advocate for the Plaintiffs

Drawn and filed by:-

Taib A Taib

Advocates

PO Box 84236

Mombasa".

It was on the basis of those pleadings that Mohamed urged and learned counsel Mr Khanna for BHL reiterated, that there was nothing to show that the Chief Magistrate's Court had no pecuniary jurisdiction to deal with the case. There being no accounts or documents to determine any figures, it cannot be contended that there was no pecuniary jurisdiction. It was on the contrary for the defendants in that suit to submit the figures and documents sought in the suit and to object, if they wished, to the jurisdiction which the Chief Magistrate would then decide whether or not he had. It is not open to a party to decide on his own that the Court had no jurisdiction and then proceed to disobey court orders with impunity. It would set a dangerous precedent to constitute parties themselves as the arbiters of the legality of a court order.

Mr Khanna further submitted that there was no prayer in the application for the quashing of the proceedings before the Chief Magistrate's Court. All that is sought to be quashed are orders. It means therefore that the applicants endorse the proceedings and consequently acquiesced to the jurisdiction of that court. They are estopped from challenging the courts jurisdiction. What was sought in those proceedings was an order for injunction and there is jurisdiction in all Courts to grant injunctory relief. There was nothing irregular about the proceedings or the orders issued. When the orders were disobeyed that Court again had jurisdiction to punish for contempt under order 39 rule 2(3) Civil Procedure Rules without resorting to the High Court. In his submission, order 39 takes precedence over the provisions of the Judicature Act cap 8. The orders issued in those proceedings were regular also and did not exceed the monetary jurisdiction of the Chief Magistrate. There was no valuation tendered to prove that fact. In Mr Khanna's view the entire application was misconceived and ought to be dismissed or struck out.

Not so, submitted Mr Mabeya, learned counsel for the applicants. In his view the question of the monetary jurisdiction which is the central issue was too plain for argument. It did not matter how vaguely the plaintiff in the lower court pleaded in his plaint to mask the conclusion that the Court had no pecuniary jurisdiction. From those pleadings it was clear that the suit was about the assets of the interested party (BHL). It was about tracing, valuing and repossessing all the assets and property of that company. And the obvious issue for the Court was to find out what that property was and how much it was worth. Some of it was disclosed in the documents placed before that Court and one item alone was shown to be worth USD 50,000. On perusal of the documents, he submitted, the Court should have realized that it no had jurisdiction and disqualified itself. Instead it continued to issue illegal *exparte* orders.

He submitted that the applicant had shown in documents filed in this Court some of which are authored or endorsed by the directors of BHL that the company had assets in excess of Shs 100 million. The goods taken away from the company premises, which the applicants claim as their own are alone worth over Shs 20 million.

In addition to issuing illegal orders the lower court went ahead and issued instructions to the police to enforce them. Those orders were made by way of a letter from the Chief Magistrate's chambers without any application having been filed. The police, he submitted, was being used illegally in a civil dispute and there was open bias on the part of the Chief Magistrate. He cited *Kamau Mucuha vs The Ripples Ltd* CA 186/92 (UR) in support of that submission.

The bias was further expressed in the further issuance of orders to punish for disobedience when no jurisdiction lay for that purpose. The power to punish for disobedience of a court order, in this case an injunctory order under order 39 rule 2(3) Civil Procedure Rules, is reserved for the High Court under section 5 of the Judicature Act. The procedure for such enforcement has also been defined by the Court of Appeal in CA 95/88 *Mwangi Wang'ondu v Nairobi City Commission* (UR) which was followed by a different bench of the same Court in CA NAI 264/93 *Nyamodi Ochieng Nyamogo & anor v Kenya Posts & Telecommunications Corporation* (UR). Leave should thus have been sought to commence contempt proceedings in the High Court but it was not. Mr Mabeya therefore submitted, that there was consistent disregard for the due process of law and the remedy is to quash all such proceedings and orders.

I have carefully and anxiously considered the application before me and the affidavits filed on record on both sides some of which, I must observe, extend to undue prolixity and argument. I have also considered the submissions of both counsel who I must thank for their research and industry. If I do not cite the many authorities cited by them in the course of their submissions, it is not out of disrespect or because I did not consider them.

Without appearing to sidetrack or minimise the importance of the procedural issues raised and particularly the issue of punishing a party for disobedience of a court order, I must at once revert to the substantive issue as to whether the lower court had the pecuniary or any jurisdiction to deal with the matter placed before it. For it matters not that a party has to be punished for alleged disobedience of an order if there was no power in the first place to make such order. It is a consequential order which would dissipate if the principal order is set aside. In saying so I do not take lightly the dangers inherent in the situation posed by counsel for the respondent, where a party would decide on his own, and without challenging a court order, that it was not a lawful order and simply decide to ignore or disobey it. The straight answer to that of course would be that the party would be liable to heavy penalties if it turns out that the orders were after all lawful. Equally dangerous would be a situation where a party, either by design or ignorance, submits a matter before a Court which has no jurisdiction in the hope that orders issued *ex parte* by that Court would serve their purpose before they are challenged.

A passage from a House of Lords decision cited with approval by our own Court of Appeal seems to lend cover to such mischief: Per Lord Diplock in *Isaacs v Robertson* [1984] 3 All ER 140 at 142.

“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, LC said in *Chuck v Cremer* (1846) 1 Coop Temp Cott 338 at 342, 47 ER 884 at 885); “A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ..... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed.” Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the Court..... is in contempt and may be punished by committal or attachment or otherwise.”

See CA No 59/93 *Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation & 2 others (UR)* Per Gicheru JA.

Lord Diplock however distinguished such orders from others which attract *ex debito justitiae*: the right to have it set aside which include orders obtained in breach of the Rules of Natural Justice.

Tunoi JA, (*ibidem*) adverted to such orders, to wit:

“Mr Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission I agree. There cannot be as far as third parties are concerned interference with due administration of justice when the *ex-parte* order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void”.

In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (I) said:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado; Though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it

is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

I am of the view that orders purportedly granted by a Court that has no jurisdiction to do so attract *ex debito justitia* the right to have them set aside and are in the category stated in the appeal case above.

I may now examine the jurisdictional issue.

"Jurisdiction is everything. Without it, a Court has no power to make one step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downstools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or, as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." See *Words and Phrases Legally Defined* - Volume 3: I - N Page 113.

It is for that reason that a question of jurisdiction once raised by a party or by a Court on its own motion must be decided forthwith on the evidence before the Court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the Court."

Underlining supplied.

That was Nyarangi JA in CA 50/89, *The Owners of the Motor Vessel "Lillianis" vs Caltex Oil (Kenya) Ltd (UR).*

It is clear from that authority that either a party may raise the issue of jurisdiction at the earliest opportunity or the Court may do so on its own motion. It must examine the facts before it, whether scanty or limited to satisfy itself that it had jurisdiction to deal with the matter. That course assumes serious dimensions when the matter before the Court is presented *ex parte*.

It is common ground that the pecuniary jurisdiction of the Chief Magistrate has a ceiling of Kshs 500,000. The Senior Principal Magistrate also dealt with it but it is unlikely that his jurisdiction would be enhanced beyond the Chief Magistrate's. I have looked at the pleadings in the plaint placed before the Chief Magistrate and it is plain to me that it is the kind of pleading that would send instant signals about establishing the jurisdiction of the Court. It is plain to me also that the central dispute was the property or assets of the plaintiff company and it was necessary to inquire into the value of such property or assets. With utmost respect, the omission to plead the value of the property claimed may well have been a tactical ruse and should have put the learned Chief Magistrate on guard. Sample some of the *exparte* orders issued as a result the failure to inquire into jurisdiction:

"(4) That the plaintiff's property listed hereinbelow in the possession of the defendant/respondent and/or converted to the use of the defendant/respondent be attached and preserved pending the finalization of this suit.

i. Mitsubishi Pajero registration No KAJ IIIJ

ii. Toyota registration No KAE 269X

iii. Toyota Camry registration No UAE 21645

iv. All that shop on plot No 114/XLVII/M together with all the goods and property therein more specifically to be pointed out by the plaintiff/applicant herein.

5. That the defendant/respondent's accounts number 204504428 at Kenya Commercial Bank Mombasa Treasury Square Branch and numbered 0301-0017434- 0001 at Trust Bank Nkrumah Road branch both under the name Abdo Mohamed Bahajj, be frozen and the defendant/respondent and his bankers be restrained from in any manner whatsoever to activate or operate the said accounts and in particular from withdrawing any funds pending further orders of this honourable Court.

6.That it is ordered that Maersk Line and/or employees, Messrs Maersk Kenya Limited and it is further ordered that Messrs Pacific International Lines (PTE) and/or their agents and/or employees, Messrs PIL (Kenya) Limited and it is further ordered that the Kenya Ports Authority each and all of them are not to release the containers known as PCIU 2237645 80092555 and OCLU 1168374 and as more particularly described in the annexed Bills of Ladings either to the consignees or the bearers of the original Bills of Lading or endorsees thereof or any other party whosoever it may be until further orders of this court and to furnish full details of the consignments to this honourable Court."

One of the containers mentioned in paragraph (6) as pointed out by counsel for the applicants contained goods worth USD 50000 which is equivalent to an excess of Kshs 3 million. That evidence was on record before the lower court, even if it is accepted by some stretch of imagination, that all the other property combined was worth Kshs 500,000 or less.

I have said enough to satisfy myself that I cannot in all honesty find that the lower court acted within its pecuniary jurisdiction in dealing with the matter before it.

A *fortiori* the matters pleaded in the plaint are in the realm of company law and transgressions of the provisions of the Company's Act cap 486, are expressly pleaded in paragraph 10 under section 402 of that Act.

"402. (1) If in any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company) it appears to the Court hearing the case that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit."

Accusations of negligence, default, breach of duty and trust have been hurled at the 1st applicant, Abdo in the matter filed in the lower court. But the jurisdiction to look into those allegations is not thrust upon the subordinate courts. Under section 2 of the Act "Court" means the High Court. On that premise too, the Chief Magistrate's Court would lack jurisdiction.

An issue was raised as to whether in the circumstances, the applicants should not have gone before the lower court to challenge the jurisdiction instead of coming before this Court and taking out judicial review proceedings. But I think that issue was settled by the Court of Appeal when this same case went there as CA NAI 97/98. Citing its earlier decision in *David Mugo t/a Manyatta Auctioneers vs Republic* CA 265/97 (UR) the Court said:

"the remedy of judicial review is available, in appropriate cases, even where there is an alternative legal or equitable remedy. In his judgment in this case, Chesoni CJ said: "With respect to the learned judge the existence of an alternative remedy is no bar to the granting of an order of *certiorari*."

The correct view, in this matter, is that expressed by Lord Parker CJ, in the English case of *R v Criminal Injuries Compensation Board Ex P Lain* [1967] 2QB 864 when he said:

"The exact limits of the ancient remedy by way of *certiorari* have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet changing conditions ... We have reached the position where the ambit of *certiorari* can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially."

"The learned judge was at pains to limit the perimeters of *certiorari*. That was unnecessary. So long as orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions."

I am satisfied that the applicants were at liberty to challenge the orders of the lower court either before the same Court or by way of judicial review and they cannot be faulted in taking out these proceedings. There was no unreasonable delay in taking action on judicial review either.

It is common ground that I have the jurisdiction to grant the orders sought. *Certiorari* will issue to quash a decision already made and will issue if the decision is made without or in excess of jurisdiction or where the Rules of Natural Justice are not complied with or for such like reasons. Prohibition will forbid the continuation of proceedings before an inferior tribunal or Court in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it, but also for a departure from the Rules of Natural Justice. All those words are not original. They are paraphrased from the Court of Appeal decision CA 266/96 *Kenya National Examinations Council vs Republic Ex parte Geoffrey Njoroge & others (UR)*.

I am satisfied that the applicants herein have made out a case for the grant of the orders sought and it would prick my judicial conscience to hold otherwise. The application is granted with costs.

Where does that leave the parties?

I am aware that the Court need only make pronouncement on the issues submitted before it for decision. I cannot however close my eyes to the evident intense acrimony between the protagonists herein which is a real threat to peace. That is where the inherent powers of this Court come in to make orders that are necessary for the ends of justice or to prevent abuse of the process of court.

It was disclosed by the parties herein that there is already a matter before this Court between the same parties which is practically a rehash of the selfsame matters before the subordinate court. Some semblance of peace and quiet was maintained by orders obtained in both Courts. I order that the status quo as now exists shall prevail for a period of 30 days within which period the parties shall seek such orders as they may be advised to in the High Court. This matter and the matter pending before the Chief Magistrate's Court are otherwise determined.

Those will be the orders of this court.

Dated and Delivered at Mombasa this 3rd day of February 2000.

P.N.WAKI

JUDGE