REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 328 OF 1999

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF MOMBASA .....RESPONDENT

EX-PARTE MAZRUI & 2 OTHERS

RULING

In these judicial review proceedings, the applicants by a Notice of Motion dated 28th December 1999 seek the following pertinent reliefs:-

'1. An order of *certiorari* to quash the respondent's decision to contract the interested party the responsibility of providing and managing parking facilities within the municipality of Mombasa with effect from 1st July 1999 for all vehicles parked within the public parking areas in the municipality as stipulated in Gazette Notice No 3514 of 1999 appearing in the issue of Kenya Gazette of 25th June 1999.

2. An order of prohibition prohibiting the respondent by itself, its officers, employees or servants or any agents, any contractor or otherwise howsoever from collecting parking fees for all vehicles parked within the public parking areas in the Mombasa municipality within effect from 1st July 1999 as stipulated in the Gazette Notice No 3614 of 1999.'

The applicants had earlier duly received, *ex-parte*, the leave on 7th December 1999 to so file these proceedings.

The interested party being aggrieved by the grant of the above leave has filed another motion dated 14th January 2000 seeking to set aside these orders. The prayers sought are in the following terms:-

'1. That the leave to the applicants by this honourable Court on 7th December 1999 to apply for orders of *certiorari* and prohibition be set aside and the consequential order that such leave operate as a stay of any further proceedings under Gazette Notice No 3614 of 1999 until determination of the Notice of Motion to be filed by the applicants herein be vacated and/or discharged.

2. In the alternative, the honourable Court do discharge the aforesaid order for stay.

3. That the costs of this application be provided for.'

Which application is grounded on the following grounds, namely:-

1. The Court had no jurisdiction to grant leave to the applicants to apply for an order of *certiorari* as the application for leave to apply for the same was clearly time barred by virtue of order LIII rule 2 of the Civil Procedure Rules, the proceedings which the applicants sought to remove into the High Court for the purpose of being quashed having been made more than 6 months prior to the date of the application for such leave.

2. The honourable Court had no jurisdiction to grant leave to the applicants to apply for an order of prohibition against a decision or proceedings which had already been made or taken by the respondent.

3. The applicants did not establish satisfactorily or at all that they have *locus standi* to bring proceedings for the orders sought by them.

4. That in all circumstances of the case, the aforesaid order of stay is oppressive and has greatly prejudiced the respondent and the interested party in particular and Mombasa residents in general.'

This is the application being ruled upon now. I may mention here that another application has also been field by the respondent ('the Council') on 12th January 2000 seeking same orders.

Presently we shall need to set out the facts but before we do so there is a caveat which this Court ought to be mindful of and this is that it should resist, by all means, the temptation to consider the evidence before it in a way as to interfere with or prejudice the substantive hearing of these proceedings. The respected authors of *Halsbury's Laws of England* have this to caution:

"If leave is granted on an *ex-parte* application, the appropriate procedure for challenging such leave subsequently is by an application under the inherent jurisdiction of the court to the judge who granted leave to set aside such leave

.....On an application to set aside leave to apply for judicial review, the Court is constrained by the same need as in the original leave application, not to defeat the purpose of the procedure by going into the case in more depth than is necessary to consider the arguability of the substantive claim for judicial review.'

(4th Ed VI(1) para 167 & note 19)

Separating therefore the wheat from the chaff and transporting only matters germane to the application, I find the following sufficient to give a factual background.

Facts:

The entire basis of this application is that contrary to the case of the applicants that they are calling in, for quashing, the Gazette Notice referred in the Notice of Motion above, that this infact is not true. It is said that there is but only one decision susceptible of challenge by this Court and that is the one preceding the Gazette Notice. Infact it is said to be what actually gave rise to the said notice. This decision, contends the interested party, was made at an internal meeting of the Council held on 26th February 1999. The supporting affidavit of Mr Kibwana depones:

'15. That the applicants are challenging a decision that was made on 26th February 1999 of which they are clearly time-barred given that the said decision was arrived at *vide* a full Council meeting under Minute No 54/99.'

In effect, Mr Kibwana perceives from the above that what is actually sought to be challenged is not the Gazette Notice relied upon in the substantive Notice of Motion but the decision at the crucial meeting preceding that notice. It is therefore very necessary to reproduce both the Minutes (*in extenso*) and the

Gazette Notice (in pertinent parts) before proceeding further:

‘Minutes

Municipal Council of Mombasa

Extract of minute 54/99 of the 351st (special) meeting of the finance and general purposes committee held in the committee room on the Friday, 26th February, 1999 at 2.40 pm.

54/99 privatization of vehicle parking facilites – in Mombasa – expression of interest

The Municipal Engineer reported that the Council had advertised in the newspaper for expression of interest for privatization of parking facilities in Mombasa and read out to the committee the text of the advertisement. He further stated that there were parking facilities as detailed below:-

1200 free parking spaces

100 private parking bays

40 reserved parking for public transport

700 metered parking bays – but most of parking meters not in working order

He also stated that in response to the advertisement, the Council had received 13 proposals summarized and shown in the schedule, which has been tabled at the meeting.

The Town Clerk pointed out that the idea of privatization was excellent but the method had to be carefully selected in terms of revenue generation and collection, option acceptable to give the best value to the Council.

Resolved to recommend to the Council

1) that the quotation of M/s Y-Not Parking Services in the total sum of Kshs 1.2 Million per month be accepted, as shown in the schedule annexed hereto; subject to them signing a bond:

2) that the duration of the contract be for a period of five years with effect from the date of award:

3) that the sub-committee of the committee, comprising of the following, be given authority to vet and approve an appropriate contract to be drafted by the municipal advocate:

Council IA Isaak (Chairman)

His Worship the Acting Mayor (Cllr M M Mwahima)

Councillors: Ms M A Olang’, K S Khamis,

M M Ali K J Mzee, L E Liyali (Co-pted)

4) that authority be given to this committee to conclude business on behalf of the Council.

Certified true copy of the relevant Minute.

M K Mumba

Town Clerk.’

And now the Gazette Notice.

‘25th June 1999

Gazette Notice No 3614

The Local Government Act (cap 265)

The Municipal Council of Mombasa Public parked services licensee fees

In exercise of the powers conferred by section 148 of the Local Government Act, the Municipal Council of Mombasa, has with the approval of the Minister of Local Authorities, imposed the following parking fees as listed hereunder, with effect from 1st July 1999

Public parking fees Schedule

Approved

Fees and

Charges

Kshs

.....

(undated)

M K Mumba

Town Clerk.’

Mr Maurice Mumba, the Town Clerk of the respondent also gave evidence on the deliberations of 26th February and their effect. Here are some relevant portions:

‘Q: Looking at the analysis here, where did you get all other details you considered if it was not part of the Minutes?’

‘A: They were determined later at a subsequent discussion. The details were discussed later although the resolution was already made on that day. I cannot recall the date of that later discussion.

The meeting of 26th February was a conclusive meeting to the extent that it awarded the contract.

I recall there were details of the Y-Not proposals – they are not part of the minutes. The meeting was conclusive and the minutes are complete ... Bond was never signed. Resolution reads ‘subject to ...’’– the contract with YNot has been signed. I can’t recall the date.. The Municipal Engineer arranged meeting with Y-Not after the award ie 26.2.99 to discuss the designated areas.....

We relied on section 143(6) to conclude on behalf of the Council ...agreement signed on 22.4.99 and effective 1.7.99 ... the minutes are accurate in 20 minutes we discussed the matter – resolution No 3 of the minutes– – subcommittee formed— vetting of the contract draft was not the core of the agreement.’

The above then is the evidentiary skeleton reproduced sufficiently for our purposes. The salient points in the chronological order are these:-

1. On 26th February 1999 the Council held a meeting (whose recorded minutes are above). According to the minutes this was an in-house meeting. No outsiders including the applicants therefore attended it.

2. On 22nd April 1999 an agreement was signed between the Council and the interested party. This agreement is the source of dispute here.

3. On date unknown the Minister for Local Authorities approved the above agreement.

4. On 25th June 1999 the Council caused to be published the Gazette Notice No 3614 of 1999 (set out above)

5. Six days later, ie 1st July 1999, the agreement became effective for public purposes.

6. On 3rd December 1999 the application for leave to obtain judicial review orders herein is filed.

I move on to issues. I frame them as follows:-

Issues

A)Which decision or order is it that seeks to be challenged; is it

i) the resolution of 26th February 1999 as contended by the interested party, or

ii) the Gazette Notice No 3614 of 1999 undated but published on 26.6.1999 as contented by the applicants, and

B) is it caught by time-bar under section 9 of the Law Reform Act (cap 26 Laws of Kenya)?

C) Should prohibition issue?

In my respectful view issue No C is a supplementary one as it is dependent largely on the outcome of the preceding issues. This I say even though counsel addressed me on it as an independent issue. I venture to think that if the decision or order above (whichever) is found to be impeachable then, pending the outcome of the main hearing, the leave for order of prohibition should remain undisturbed.

The main relief under consideration here is that of *certiorari*. This statutory relief is available by dint of the provisions of the Law Reform Act – section 8. Section 9(3) however lays down the time limit within which to apply for leave thereof:

“9(3) In case of an application for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.’

By virtue of the powers given by section 9 above the Rules Committee has provided under order 53 the following:-

‘2. Leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by an Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.’

These clauses are commonly described as time-limit ouster or preclusive clauses. In effect it means that a subject has six months within which to challenge either the decision of an inferior tribunal or the decision-making process of a public law decision. It is now settled law that such a decision is covered by the category under 'other proceedings'. It also means that the High Court's controlling jurisdiction over decisions of inferior tribunals and the administrative decision in the public domain is similarly restricted to the same period.

For the purposes of this ruling it is important to investigate what qualifies as a decision in order for it to attract the limitation period. What characteristics should it have? Can it be a preliminary or tentative one? Revocable or irrevocable? Is notice to affected persons necessary? And can it be made through delegation? etc.

One thing is clear. If the minutes of the meeting of 26th February 1999 qualified as a decision then time-bar would operate against the applicants here. On the other hand, if the Gazette Notice is held to constitute the decision then the applicants would be well within time.

Our Court of Appeal does not, from my limited research, appear to have been asked, as yet, to pronounce on what amounts to a 'decision' in the context of section 9 (3) (which itself is silent on this point) nor it seems has the High Court. The High Court however has, at least in two instances, ruled some of the administrative decisions to be time-barred. In both cases the Court voiced considerable disquiet on the unsatisfactory state of the legislation and proposed change. These cases are *Mokompo Ole Simel – v – County Council of Narok* HC Misc No 361 of 1994 and in the Matter of *Barclays Bank of Kenya and Galerius Inv Ltd* HC Misc No 81 of 1999. Both these cases were brought to my attention by Mr Swaleh for the interested party and Mr Mburu for the respondent and I am grateful to them. Before I advert to these cases I find it instructive to view what the position in England is. For this I look to section 8(2) of our Law Reform Act which empowers this Court to make like orders as the High Court in England.

'In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of *mandamus*, prohibition or *certiorari*, the High Court shall have power to make a like order.'

Unlike Kenya where *certiorari* has a special place in legislation, in England the preclusive clauses cover the length and breath of the *corpus* of law and limitation there is for all actions including *certiorari* which is hence given no preference. Housing Act, Highway Acts, Mental Hospital Acts etc all contain, with minor modifications, standard preclusive clauses. These clauses there have evoked quite some judicial controversy as to interpretation thereof.

How should section 9(3) of our Law Reform Act be interpreted. The cardinal principle of interpretation of preclusive clause is expressed by the learned authors of '*Administrative Law*' Wade & Forsyth 7th Ed 729 in the following terms:-

"Acts of Parliament frequently contain provisions aimed at restricting, and sometimes at eliminating, judicial review ... first it must be stressed that there is a presumption against any restriction of the supervisory powers of the court. Denning L J said in one case:

'I find it very well settled that the remedy of *certiorari* is never to be taken away by any statute except by the most clear and explicit words.'

The learned authors continue:-

'there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. Finality is a good thing but justice is a better.' (underlining mine).

In a recent House of Lords decision on a matter concerning judicial review application, Lord Irvine in his speech gave the following interpretation guideline:

'However, in approaching the issue of statutory construction the Courts proceed from the strong appreciation that ours is a county subject to the rule of law. This means that it is well recognized to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive bodies should have a fair opportunity to challenge these measures and to vindicate their rights in Court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so: "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words.' As Lord Diplock put it in the *Hoffman La Roche* [1974] 2 All ER 1128 at 1154:

'. . . the Courts lean very heavily against a construction of the Act which would have this effect.'

-*Boddington v British Transport Police* [1998] 2 All ER 203 at 216 (underlining mine).

The above then are broad principles on interpretation of judicial review preclusive clauses. In *Smith v East Elloe Rural District Council* [1956] WLR 888 the House of Lords considered the following clause:

'15(1). If any person aggrieved by a compulsory purchase order desires to question the validity thereof .....on the grounds that the authorization of a compulsory purchase thereby granted is not empowered to be granted by this Act... ... he may within six weeks from the date on which notice of confirmation of making of order..... is first published..... make an application to the High Court.

16. Subject to the provisions of the last foregoing paragraph a compulsory purchase order shall not be questioned in any legal proceedings whatsoever.....'

Thus the cut-off point there was six weeks as opposed to six months here. By a majority of three, the House held that an action against the local Council could not proceed by reason of the plain prohibition of clause No 16 whereby the jurisdiction of the court was ousted. This decision was revisited by the House some thirteen years later in the celebrated case of *Anisminic – v – Foreign Compensation Commission* [1969] 1 All ER 208.

The facts were that the appellant was a British mining company with assets in Egypt . In 1956 after the Israel- Egypt hostilities the Egyptians seized, under the banner of nationalization, all British properties. In April 1957 the appellant sold the assets to an Egyptian firm TEDO for a pittance, with a saving clause in the agreement that it reserves the rights to any compensation it might be entitled to against any government authority other than Egyptian Government.

In 1959 following a treaty between respective Governments, compensation was paid to the British Government for certain properties listed in a schedule to the agreement. The appellants' assets were in the list. Funds were placed at the disposal of the British Government. The Government constituted the Foreign Compensation Commission for this purpose. The special Act creating this Commission stipulated conditions for qualification of the candidates for compensation thereunder. One of the conditions was that the candidate and/or the successor in title must have been British national at specified dates in order to establish a claim.

The appellants' application was rejected on the ground that TEDO which became the successor in title was not at anytime a British national. Section 4(4) the Act provided:

'The determination by the Commission of any application made to them under this Act shall not be called in question in any Court of law.'

It can be appreciated that whereas the clause we are dealing with is a partial ouster clause in the sense that only time - barred claims are ousted, this one is a complete ouster, or as some essayist colourfully

described it, a totally judge-proof clause. The House declared that the true construction of the word 'determination' meant a real determination as opposed to a purported determination. That when the commission rejected the appellant's claim they took into consideration a factor, to wit whether the appellant had a 'successor in title' and if so whether that successor was a British national, which they had no right to take into account. That the provisions setting up the Commission did not require it to make any determination at all about 'successors in title' or their nationality and in so doing, the Commission basing its decision on some matter it was not entitled to take cognizance of. Accordingly therefore the decision was a nullity and it could not constitute the 'determination' as it only purported to be a determination. In the circumstances, the House declared the seemingly impregnable section not to operate to exclude enquiry by a Court of law. On this basis then the Court was held to be entitled to interfere with the award.

In the course of their discourse the Law Lords considered their previous decision in the *East Elloe* case and cast serious doubts on the validity of that decision. In their view there was no fundamental difference between absolute ouster clause and time-limit clause, if anything such difference only tended to emphasize their similarity. The House then expanded the ouster limits of the jurisdiction of the court to interfere in all cases of errors of law. Previously only if the inferior tribunal had made an error of law on the face of the record did the Court intervene. Now the Court could step in any case where the apparent determination of the tribunal turns out on examination to be a nullity, because it cannot properly be called a determination at all.

Thus *ratio decidendi* of the House may perhaps be explained as follows. Where words in a statute purport to oust the jurisdiction of the High Court to review the decision inferior tribunal they must be construed strictly and if there is more than one way in which they can reasonably be construed then the construction which disarms the powers of the High Court least should be selected. The *Anisminic* has been followed in a host of subsequent cases and still retains its special niche in the realm of public law.

It is against the backdrop that I wish to return to the local authorities referred to above. In the *Mokompo Ole Simel* case (*supra*) the late Pall J (as he then was) was considering a minute of resolution of a local authority similar to the other under consideration here. Referring to section 9(3) the learned judge said:

'The Act is an Act of Parliament which has in its wisdom laid down this absolute period of six months within which an application ..... may be made. It further emphasizes that this period of six months may be shortened which by implication means it cannot be enlarged.....long established tradition in commonwealth countries is that we look in the main to the Legislature rather than to the Courts for the development of our law. Moreover, it is a different thing if a statute is ambiguous and capable of different interpretations. Here the legislation is clear and certain and not open to any conflicting interpretations.'

And he concluded:

'A copy of this ruling should be forwarded to the Honourable Attorney-General as I think the provisions of section 9 should be amended so that Court is given jurisdiction to enlarge the period of six months in deserving case like this.'

I may add here that in England the Courts now do have such powers. It can be observed here that the learned judge took a strict and literal inerpretation of the law even though as he readily acknowledged it worked an injustice.

In the *Barclays Bank of Kenya Limited & Galerius* case (*supra*) there was a challenge by *certiorari* on a decision of the Commissioner of Lands who is said to have wrongfully allocated access road to Galerius Inv. The point of time bar was taken up. Waki J gave his considered view in following terms:

'There is certainly a case for viewing with suspicion a legal provision which gives a right with one hand and takes it away with the other. The temptation in such a case is to construe the provision positively and say that the right is not taken away. And so it seems, as Mr Khanna submits, that there is a right to apply for the judicial review remedy of *certiorari* under the Rules, while at the same time such right is taken away by the imposition of a limitation period which can be easily abused. Take this case. It is ultimately

common ground, despite the attempt to wriggle out of it, that the actions of the Commissioner of Lands, whether one calls them administrative, ministerial or judicial are amenable to the remedy of *certiorari*. But the Commissioner can easily and quietly make a decision allocating land to an undeserving person, sit on it for a period of six months, and when the decision is challenged thereafter, and when he takes refuge under the limitation provision! It is one thing to say that there is a lacuna in the law which lacuna admits of abuse of power, and another to argue that the provision does not exist at all."

Finally,

'The application seeking leave to apply for an order of *certiorari* is legally time-barred and leave cannot therefore issue. That is the state of law which I am called upon to interpret, unsatisfactorily as it may appear.'

Like Pall J, Waki J preferred the literal interpretation. With tremendous respect, I am not too confident that a literal construction here would be the appropriate one bearing in mind that it is an ouster clause. It is now settled that administrative decisions are covered under the generic words 'other proceeding'. If 'other proceeding' is to be construed *ejusdem generis* then I respectfully venture to think that there are at least some qualities it must carry with it that are common with the preceding descriptions. These ought to be firstly that it must be a decision in the public domain and upon notice to all affected parties, if not the general public. In this regard, it should be noted that even a judgment cannot be said to be delivered if it is not upon notice (or if immediately, in the presence of the parties) – see rule 1 of order XX. It can be dated and even signed but it is not a judgment until delivered on notice. Secondly, the 'other proceeding' must carry the incidence of finality. It cannot be provisional, tentative or revocable for then the Court would be acting in vain in quashing a decision which is in any event subject to a recall by the maker. Thirdly, the decision must not only be lawful but also legitimate in that it does not subvert any fundamental principles of law.

These qualities are not spelt out in the statute so that to that extent, the construction of the statute must perforce lean, on the strength of the authorities cited above towards making a decision caught by its justiciable. Bearing in mind the doctrine of *stare decisis* as expounded in *Dodhia – v National & Grindlays Bank* [1970] EA 195 I regretfully have to differ with my brothers who adopted the literal, also known as golden, rule of interpretation. I can do no better than to adopt the words of Lord Reid in the *Anisminic* case, in describing our section 9(3). He said:

"The meaning of the important parts of this (Act) is extremely difficult to discover, and, in my view, a main cause of this is the deplorable modern drafting practice of compressing to the point of obscurity provisions which would not be difficult to understand if written out at rather greater length."

Coming back to the issues, we need to analyse the effect of the minutes of the meeting of 26th February 1999. It is the case of the interested party that these minutes constituted a confirmed decision of the respondent. *Prima facie* this cannot be true. It may have been a tentative decision but certainly it was not a confirmed decision. The meeting merely resolved to recommend to the full Council the four items listed thereunder. Mr Mumba says that the recommendation was not necessary because by virtue of section 143(6) of the Local Government Act the Finance Committee was empowered to conclude business on behalf of the Council. Several things to be said about this. Firstly section 143(b) can only be invoked in cases of emergency and no case for emergency was shown on the evidence. Secondly, it is said that there was a further resolution giving effect to the over-riding of this recommendation. No evidence is shown of this. Lastly the minutes are clear on the point that alot remained to be done. If any one item in the four resolutions failed to be performed or completed then there would be no decision for the resolutions were pegged to performance.

As decisions go the minutes are quite *inchoate*. The meeting was merely to recommend. It was therefore subject to recall. The full Council could, if it so chose, refuse the recommendation. Again the Minister could withhold approval which is necessary under the Act. It was therefore a tentative proposal, revocable in nature and it follows, not ripe to qualify as a decision. It could not then be amenable for quashing.

A decision means a conclusion. A judgment is sometimes referred to by lawyers as a decision. It connotes finality. In this context therefore the minutes reflect only a part of the decision making process and not the decision itself.

Again to be amenable for quashing, the decision must also be in the public domain. It is my humble view that the Council after finalizing all the requisites, including drafting and sealing of the agreement and obtaining of consent from the relevant Minister brought it to the public domain by giving notice to its residents through the publication in the Kenya Gazette of the notice. The publication was the final act of the decision. Time began from then on. I would import notice in "other proceedings' otherwise the very mischief the statute sought to curb would be available to bodies like the Council who would then have uncontrollable powers to conduct their affairs as they please. What Waki J in the *Galerius* case seems to have prophesized has not come to pass. The Council's Committee arrived at a 'decision' closetted behind the boardroom doors then sat on their laurels and at the last minute issued notice to the general public. Now can they come to his Court to claim *fait accompli* and say that the public is timebared as the decision was taken long before the public was informed ? The Act could not have intended so. Lord Reid in the *East Elloe* case delivered himself so:

"In every class of case that I can think of the Courts have always held that general words are not to be read as enabling a deliberate wrongdoer to take advantage of his own dishonesty. Are the principles of statutory construction so rigid that these general words must be so read here? Of course, if there were any other indications in the statute of such an intention beyond the mere generality of the words that would be conclusive: but I can find none.

There are many cases where general words in a statute are given a limited meaning. That is done, not only when there is something in the statute itself which requires it, but also where to give general words their apparent meaning would lead to conflict with some fundamental principle. Where there is ample scope for the words to operate without any such conflict it may very well be that the draftsman did not have in mind and Parliament did not realize that the words were so wide that in some few cases they would operate to subvert a fundamental principle. In general, of course, the intention of Parliament can only be inferred from the words of the statute, but it appears to me to be well established in certain cases, that, without some specific indication of an intention to do so, the mere generality of words used will not be regarded as sufficient to show an intention to depart from fundamental principles.'

If the Council is said to have made a decision on 26th February 1999 then such was a closetted one and for it to wait until 25th June 1999 to give a six day notice for implementation of that decision without a reasonable explanation of the hiatus, though Mr Mumba tried to explain that away by saying that there were modalities of implementation being put in place which explanation I find not plausible, then certainly the Council can fit the description of a deliberate wrongdoer.

The giving of notice is an integral part of any decision making process. Notice is everything, to paraphrase the famous words of the late Nyarangi JA in the *Lilian S,* and without notice there is no decision. Again where there is no notice the affected parties can always invoke *ignoranti facti excusat*. It is necessary now to refer to another House of Lords decision. This is *Griffins v Secretary of State* [1983] 1 All ER 439. Here the appellant sought planning permission from its Local Council. It was refused. He appealed to the Minister. The Minister dismissed the appeal. The dismissal was by a letter which was dated and posted on 8th December 1980 but received by the appellant on 13th December 1980. Under the relevant Act any person aggrieved by the Minister's decision was entitled to apply for its quashing to the High Court 'within six weeks from the date on which ... action is taken.' The appellant applied to the Court on 22nd January 1981. It was argued that he was time-barred. If the date began to run from the date of posting then he was but if, as he contended, it began from the date of receipt of the letter he was not. The House decided that on the proper construction of the section the time began from the date of posting. It should be noted that the statute under consideration there provided for notice while the one here is silent on the point. Lord Scarman in a dissenting speech at page 144 stated:

Mr Griffiths began, as he did in your Lordships' House, by asking the question: how can anyone be 'aggrieved' by action on the part of the Secretary of State until he is told what it is? Therefore, in

construing the subsection it can only be feasible to place on it a construction that time begins to run from the date on which the owner or occupier of the land affected by the decision had his first opportunity of knowing that he was aggrieved, ie the date on which he learned, or has a proper opportunity of learning, what is the action taken by the Secretary of State.

This is a powerful and attractive submission. It is difficult in terms of justice to justify a conclusion that Parliament, when conferring a right of access to the Courts, has used language which can result in the right being lost before the aggrieved landowner even knows or has a proper opportunity of knowing he has a grievance in respect of which he might wish to avail himself of the right. At the very least, Parliament could be expected to have enacted some safeguard against so unjust an eventuality.

The question, therefore, to be asked before imputing to Parliament any such disturbing intention is whether the language of s 245 (I) in its context is so specific that no other conclusion is possible. The basic case of the respondents is that it must be in the public interest that in some circumstances an applicant's right of access to the Court has to yield to the need for a swift finality of decision. This is, of course, a possible conclusion, for we are in the realm of public law where, on occasions, private right must yield to public interest. But even in public law justice remains as one of the true interests of the law, not to be cut down or immobilized further than Parliament by express enactment or necessary implication plainly requires. And it is unjust that one is given a right of access to the High Court should be at risk of losing it before he knows, or can know, of the existence of a decision which entitles him to exercise it;

Then little later,

'Since no decision can be challenged unless its existence be known, a challengeable decision must be one for which the law provides a proper opportunity to challenge.'

And concluded,

'It is true that on the facts of this case Mr Griffiths has five weeks plus a day or so in which to make his application. It is also true that this was a reasonable opportunity, even though it was not the full period of six weeks which Mr Girffiths (and others) might reasonably think was their statutory right. But the issue is not of fact, but is as to the construction to be placed on the statute. If the Secretary of State's submission is correct, the statute, because it is silent as to the giving of notice in respect of the action taken by him, imposes no legal duty on him to give notice to anyone. It follows that an owner or occupier of the land, who is aggrieved by the decision, is deprived of the right to notice under s 283. He has no right; nor has he the protection if the statutory safeguards for the giving of notice. I would not hold that Parliament intended anything so arbitrary unless the language of the enactment revealed that such was its intention. But the language of the section is wide enough to obviate the need to attribute any such intention to Parliament. For these reasons I would allow the appeal.'

On the basis of the foregoing, I refer to the issues and find that the decision of the Council was not made on the 26th February 1999. It was made on 26th June 1999 as properly stated in these proceedings by the *ex parte* applicants. The period of six months hence takes us to 25th December 1999. As these proceedings were filed on 4th December 1999, they are properly before this Court.

Accordingly the application is dismissed with costs.

Dated and Delivered at Mombasa this 24th day of October 2000.

A.B.SHAH

COMMISSIONER OF ASSIZE