

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

JUDICIAL REVIEW APPLICATION NO.E001 OF 2020

THE SECRETARY COUNTY GOVERNMENT OF

BUSIA.....RESPONDENT

VERSUS

ANTAF COMPANY LIMITED.....EX PARTE APPLICANT

RULING

[1] The Notice of motion dated 14th October 2020 and filed herein on 11th October 2020, is said to be brought under **Order 53 Rule 3** of the **Civil Procedure Rules** and **S.8 & 9** of the Law Reform Act.

Whereas the Law Reform Act provides the substantial Law for Judicial review, the **Civil Procedure Rules** in particular **Order 53**, provides the procedural Law.

Therefore, under Rule (1) of Order 53, no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with the rule and under Rule (1) (2), an application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and grounds on which it is sought, and by affidavits verifying the facts relied on.

[2] The requirement for leave is mandatory and although the notice of motion dated 14th October 2020 giving rise to the present application was purportedly brought pursuant to leave granted on the 6th October 2020 in Busia High Court Civil Misc Application No.65 of 2020, the original record in respect thereof was not availed to confirm the said grant of leave, neither were copies of the proceedings and the ex-parte order issued by the court annexed to the notice of motion. It would therefore follow that this application was made without the pre-requisite leave in terms of Rule (1) (1) of **Order 53 Civil Procedure Rules** as there is no proof of grant of such leave and such proof could not be discharged by simply stating on the notice of motion that the motion is brought pursuant to the leave granted on such a day in such an application before such court.

[3] The failure of the applicant to prove the existence of the ex-parte order for leave to file this application for mandamus against the respondent, was fatal and even though the omission may not have been deliberate it clearly pointed to lack of diligence on the part of the applicant especially considering that the application was anchored on the Law Reform Act for which Order 53 of the Civil Procedure Rules applies and which provision grants necessary jurisdiction to the High Court to issue judicial review orders for application made under the Law Reform Act such as the present application.

It is trite that the jurisdiction for any court provides the foundation of its exercise of judicial authority and as a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order (see, **Mumo Material Vs. Trusted Society of Human Rights Alliance & others Civil Appeal No.290 of 2012)C/A**).

[4] In this case, the evidence that the applicant sought and was granted leave to institute judicial review proceedings under Order 53 of the Civil Procedure Rules for an order of mandamus is lacking. This procedural step was a question of jurisdictional pre-requisite which could not even be remedied by constitutional principles pronounced by Article 159 of the Constitution as was observed in the Supreme Court decision in the case of **Patricia Cherotich Sawe Vs. Independent Electoral & Boundaries Commission [IEBC] & others (2015) eKLR**.

As hand maidens of justice, rules of procedure are designed to help secure justice not to override it. However, the circumstances of this case do not permit this court to excuse the technical lapse arising herein as it goes to the jurisdiction of the court to deal with this matter and issue the orders sought by the ex-parte applicant.

[5] Consequently, the application dated 14th October 2020, together with the supporting submissions and those in opposition thereto do not fall for consideration and determination by this court for want of necessary jurisdiction. This, notwithstanding the fact that the respondent's written submissions apparently contains documents which include a court ruling made on 6th October 2020 in Busia Misc Application No.65 of 2020 which is cited and/or invoked in the notice of motion dated 14th October 2020, giving rise to the present application. It is instructive to note that the ruling and the proceedings giving rise to it were never availed herein by the ex-parte applicant to confirm and formally prove grant of leave to the applicant to institute judicial review proceedings against the respondents. In any event, the respondents could not purport to introduce documentary evidence to this application by way of submissions instead of affidavit evidence. Their action in that regard was irregular, hence null and void. The statement of facts dated 3rd June 2020, in the applicant's documents ought to be in the application for leave.

[6] In sum, equity does not aid the indolent or an otiose undertaking. Thus, the present application must and is hereby struck out and dismissed for want of necessary leave in terms of Rule (1) of Order 53 of the **Civil Procedure Rules**. However, the ex-parte applicant shall

be at liberty to file a fresh and proper application for judicial review orders. Otherwise, the parties shall bear their own costs of the present application.

Orders accordingly.

J.R. KARANJAH

J U D G E

[READ AND SIGNED THIS 13TH DAY OF JULY 2021]