REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 7 OF 2015

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NYERI.....RESPONDENT

ex parte

JOSEPH KANYUKI KINUTHIA

WILLIAM MAINA GITONGA

JOHN KING'ORI GATOGO

(Suing as the officials of Nyeri Lorries Self-help Group)

RULING

By a motion dated 12 June 2015, the *ex parte* applicants invoked order 53 Rule 1(1)(2)(3) & (4), 3, and 4 of the Civil Procedure Rules, 2010 and sought for orders for certiorari and prohibition against the County Government of Nyeri. The application was dismissed for want of prosecution on 31 July 2018.

The applicants have now come back and moved the court under sections 1A, 1B and 3A of the Civil Procedure Act, cap. 21 and Order 51 Rule 4 of the Civil Procedure Rules seeking the setting aside of the dismissal order and reinstatement of their substantive motion for judicial review. Their motion is dated 20 August 2018 and is supported by the affidavit sworn by their learned counsel, Gichuki Gatumbu, Esq.

The application is opposed and Mr Gikonyo, the learned counsel for the respondent filed grounds of objection in that regard; he contended, amongst other grounds, that the application is misconceived and incompetent; that it is bad in law and an abuse of the process of the court and, that it is incurably defective.

One of the questions that I have had to grapple with and which I think is central in determination of the applicants' present application is whether, having dismissed their suit, this court has jurisdiction to entertain an application that is effectively seeking to review its order so as to vary or set it aside.

One thing that is clear is that Order 53 of the Civil Procedure Rules which lays out the procedure for the application of judicial review orders does not provide for such an application; perhaps it is for this reason that the applicants have opted to invoke the inherent jurisdiction of the court rather than cite any particular rule that would ordinarily address the circumstances of their application. In an ordinary civil suit Order 45 would come in handy but the applicant's is not such a suit; rather it is a suit sui generis whose processes are, as noted, encapsulated in Order 53 of the Civil Procedure Rules.

The jurisdiction of the High Court to issue prerogative writs of mandamus, prohibition and certiorari has always been found in section 8 (2) of the Law Reform Act cap. 26. Article 23(3)(f) of the Constitution also empowers the court to grant a judicial review relief but only in proceedings under Article 22 to uphold and enforce the bill of rights; that, however, is not the case here as the applicants have not petitioned the court under article 22 of the Constitution; they have, rather, filed a substantive application for judicial review which no doubt, is predicated on section 8(2) of the Law Reform Act. Section 8, in its entirety reads as follows:

PART VI – MANDAMUS, PROHIBITION AND CERTIORARI

8. Orders of mandamus, prohibition and certiorari substituted for writs

(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) 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, (1 and 2, Geo. 6, c. 63) 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.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.

Subsection (5) provides what, in my humble view, is the appropriate answer to the question whether this court can entertain an application to reconsider its orders made on a substantive motion for judicial review orders and, in particular, such an order as dismissing the motion. I understand this subsection to say that a party who is aggrieved by an order made on an application for judicial review, which obviously is founded on section 8 of the Act, has only one recourse which is to appeal to the Court of Appeal.

It is trite that where the statute expressly provides a procedure for a particular action, it has to be followed; in such circumstances neither the aggrieved party nor the court before which an application is placed can overlook the express provisions of law and, in case of the court, purport to exercise its inherent powers. In **Methodist Church in Kenya Trustees & Another versus Rev. Jeremiah Muku &Another (2012) eKLR**, the Court of Appeal, discussed several decisions on this point and came to the conclusion that ordinary errors made in the course of adjudication by the courts should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review. In the present case it has not been suggested that the court made an error but even if it had the point put across is that where a procedure is prescribed, it has to be followed. The procedure prescribed in addressing the applicants' grievances is an appeal and that in my view is what they ought to have filed.

I would therefore agree with the learned counsel for the respondent that the applicant's application is misconceived at least to the extent of seeking to invoke this court's inherent jurisdiction and essentially seeking for review of the impugned order when the statute is clear that they ought to have moved to the Court of Appeal for appropriate orders. I would dismiss the application on this score alone.

I doubt the applicants would have gone very far even if their application was properly before court. Mr Gichuki for the applicants has sworn that the delay in the prosecution of this matter and its ultimate dismissal was caused by confusion on representation; this confusion, as I understand him, was occasioned by Kabira Kioni, Esq. who purported to take over this matter from Messrs. Sichangi Partners Advocates where he was previously employed as an advocate. The notice to show cause why the suit should not be dismissed was thus served upon Kabira Kioni's new firm of advocates without the knowledge of Sichangi Advocates.

The record, however, shows that Mr Gichuki was in court on 31 July 2018 when the notice to show cause came up for hearing. He made representations on behalf of the applicants to the effect that the delay in the prosecution of their case had to do with representation of the applicants but that the issue had now been resolved. I was not satisfied with this explanation and so I dismissed the suit.

It is logical that Mr. Gichuki who is an advocate in the applicants' instructing firm appeared in court on the material date and further made representations on their behalf because he was aware that the matter was set for dismissal for want of prosecution. And if Mr Kioni was on record as at 31 July 2018 then he ought to have been in court to show cause why the suit should not be dismissed. In the end, I do not find the explanation given by Mr Gichuki for setting aside the dismissal order tenable.

For reasons I have given I am inclined to dismiss the applicants' application with costs. It is so ordered.

Dated, signed, read and delivered in open court this 20th day of September, 2019

Ngaah Jairus

JUDGE