REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 65 OF 2016

PANDA CLEARING AND FORWARDING LTD.....APPLICANT

VERSUS

KENYA PORTS AUTHORITY.....1ST RESPONDENT

AROP DENG MAJOK.....2ND RESPONDENT

AND

DIAMOND EXPRESS LOGISTICS.....INTERESTED PARTY

R U L I N G

1. The 2nd Respondent and the Interested Party have both approached the court and sought an interim order that the orders that have granted to operate as stay be set aside pending the determination of the application and a substantive order that the leave granted on 29/8/2016 to commence judicial proceedings be set aside.

2. The court declined to grant any orders *exparte* but when the party appeared before it on the 29/9/2016 and after hearing both sides and after the ruling was reserved for a later date it want ordered, by way of interpreting the orders of 28/8/2016, that the said orders did not bar the Government of Southern Sudan, being not a party to these proceedings, from appointing any clearing agent for clearing its cargo. Effectively that order and the fact that the application has been heard *inter-parties* settles the prayer 2 which thus becomes spent.

3. That leaves the court with the task to determine prayer 3 which seeks to have the leave granted to apply for judicial review in the nature of Certiorari and Prohibition set aside. That prayer is sought on the grounds that:-

i. **There was non-disclosure of deliberate concealment of material facts.**

ii. **That the decision of the Government of Southern Sudan to appoint a Clearing Agent for its cargo was an internal affair of that Government for which the Kenyan courts lacked jurisdiction to interrogate or determine with a view to challenging.**

4. The application was supported by an affidavits of LT COL. AROP DENG MAJOK and DARIUS NOLE. The aggregate positions taken in the two affidavits and supported by the annextures exhibited is

that the Republic of Southern Sudan had indeed initially appointed the *exparte* applicant to be its clearance agent as pleaded but the interested party was equally appointed in June 2015 but due to some failure and lack of co-ordination the same was recalled but in June 2016, the appointment of the interested party was confirmed with the consequence that the *exparte* applicant ceased to be the sole clearing and forwarding agent and that the decision was that by the Government of Southern Sudan and not the 2nd Respondent allegedly contained in the letter of 19/8/2016. That it was a Government decision made pursuant to the resolutions arrived at the 10th & 11th summit of the heads of state of the member countries of the Northern Corridor Intergration on the deployment of customs officials of the member countries to the marine port of Mombasa, Kenya. Emphasis was then placed on the position taken that bring an internal decision of the Government of the Republic of Southern Sudan, the Kenyan courts had no jurisdiction to challenge or interfere in its operationalization and that these proceedings and the orders of stay granted *exparte* amount to interference by the Kenya Courts on the interval workings of that member state of the East African Community. The interested party on its side added that the correspondence exhibited showed that its appointment was by the Government of Southern Sudan and not the 2nd Respondent as alleged by the *exparte* applicant and reiterated that being an internal decision making by the Government of Southern Sudan it was not open to challenge or question before the Kenya Courts. And that the orders granted *exparte* were obtained by deception, non-disclosure and concealment of material facts.

5. That application was opposed by the *exparte* applicant who on the 13/9/2016 sworn and filed a replying affidavit by one EMMANUEL KACHOUL who took the position that the matter complained about are being conducted in Kenya and therefore the Kenyan courts had the requisite Jurisdiction to entertain the matter on the basis that right have been vested on the *exparte* applicant which can only be ventilated in court as the *exparte* applicant alleges violation of the rules of natural justice.

6. A point was made that as far as it is alleged in the exhibits that the appointment of the interested party was made in 2015, none of the communication or the decision was communicated to the *exparte* applicant and that even after being served with the orders for stay the 2nd Respondent went against the dictates of the order by declaring that the *exparte* applicant lacked the mandate to handle the cargo.

7. The Respondent/*exparte* applicant took the position that after the court orders issued on the 28/8/2016 the Government of Southern Sudan had suspended the appointment of the *exparte* applicant as its clearing and forwarding agent on 5/9/2016.

8. That is the summary of the positions taken by the parties on the application dated 5/9/2016 and upon which the parties appeared before court and offered submissions on the 13/9/2016.

Submissions by the 2nd Respondent and Interested Party

9. Mr Mogaka for the Respondent and Interested party largely reiterated the averments in the application and affidavits filed and added that the 2nd Respondent being an employee of the Government of Southern Sudan was only acting on behalf of the said government and that to that extent he was an agent only executing the internal decisions of the Government and could not be questioned unless and until he was declared dangerous by the Government of the Republic of Kenya. He added that only the courts in Southern Sudan determine any complaint by the *exparte* applicant and not the Kenyan courts. He then placed premium on the letter dated 19/7/2016, which he conceeded was never brought to the attention of the court, to underscore the contention that there had been concealment of material facts from the court with the consequence that an order of stay has arrested the decision of a foreign state.

10. On section 8(3) of the Law Reform Act, the advocate submitted that the same did not affect his application for two reasons:-

i. **Only leave had been granted and not substantive orders of judicial review.**

ii. **The section only applies where the court exercises its civil jurisdiction but judicial review is**

neither civil nor criminal proceedings.

11. Reliance was then placed and the decision of the court of Appeal in **Aga Khan Educational Services Ltd [2004] eKLR** for the proposition that leave and stay can be set aside on established grounds. In conclusion, the advocate referred the court to the position taken by the 1st Respondent and conceded by the *exparte* applicant that the *exparte* applicant had been suspended as a clearing and forwarding agent of the Government of Southern Sudan to underscore the fact that the development portend crisis by congestion at the port not in the interests of both the port and its users.

Submissions by 1st Respondent

12. Mr Kinyanjui for the 1st Respondent, Kenya Port Authority was brief in his submissions and wholly adopted the affidavit filed to say that it was purely concerned with port management and plays no part in the appointment of clearing agents which was, for purposes of the East African Customs Management Act, the duty of the respective community Governments and in this case the appointing authority, Government of Southern Sudan, had suspended the appointment of the *exparte* applicant. In effect Mr. Kinyanjui ostensibly supported the applicant to set aside while maintaining that they had no part to play in the dispute regarding appointment.

Submissions by *Exparte* Applicant

13. For the *exparte* applicant/Respondent, Mr. Gikandi opposes the application and relied on the Replying affidavit of EMMANUEL KACHOUL. He relied on the Provisions of Section 9(3) of the Law Reform Act for the proposition that there shall be no return to orders of judicial review even at stage of grant of leave. His point was that an aggrieved party only has a remedy in an appeal and not setting aside.

14. On the invocation of the inherent powers of the court, Mr. Gikandi submitted that no evidence had been adduced to prove abuse of court process or to meet the ends of justice. On the submissions that the court was misled or material facts conceded from it, the exparte applicant pointed out the fact that all the correspondent touching on the appointment of the interested party were never communicated nor copied to the *exparte* applicant and that as at the time of coming to court only the letter of 19/8/2016 by the 2nd Respondent was in the *exparte* applicants possession.

15. On the part played by the 1st Respondent, Mr Gikandi submitted that they had a discretion to exercise as disclosed in the correspondence exhibited and that such discretion was subject to Article 10 of the Constitution Additional emphasis was laid on the ruling by Emukule J, in which the position of the *exparte* applicant as a sole agent was, in this submissions affirmed.

16. Mr Gikandi stressed the point that having received the correspondence by the Government of Southern Sudan, there was no evidence that it rules of natural justice were applied by calling on the *exparte* applicant to comment on the letters determining its vested interests. On setting aside on the basis of suspension, Mr Gikandi submitted that the suspension came after the court order and to set aside would be to handover even the cargo already in the hands of the *exparte* applicant into the lands of the interested party. He observed that the suspension having been contrary to the court order ought not to be countenanced.

17. In his rejoinder Mr. Mogaka pointed out that the court was misled to grant the orders on the basis of the incorrect factual position that the *exparte* applicant was the sole clearing agent. On his part Mr. Kinyanjui reminded the court the question of the *exparte* applicant being the sole clearing agent had not been determined as only an interlocutory order was ever made. On congestion at the port, Mr. Kinyanjui asked the court to take judicial notice that tones of cargo land at the port daily and if not cleared in a timely manner there is bound to be congestion.

Analysis and determination

18. As pointed out, the only order this court can make now, having heard the application inter-parties is whether or not to set aside the leave granted to apply for orders of judicial review in the nature of Certiorari and Prohibition. To determine that questions, the central question that arises is:-

> **Whether this court is entitled to revisit its orders granting leave to apply for judicial review in the nature of Certiorari and Prohibition regard being Land to the Provisions of Section 8(3) Law Reform Act.**

That Provision reads:-

> **"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".**

19. To this court, an order of Judicial Review is those orders initially known as Prerogative writs of mandamus, Certiorari and Prohibition. I do not understand the law in the statute to say that leave by itself is an order for Judicial Review. It is just but a process by which the court sets the motion torwards grant of the orders. It is just but leave and is not and should not be confused for the substantive orders. I would therefore find that as yet, the Orders in the court file and issued on the 24/8/2016 are not orders of judicial review as known in law and therefore having been granted *exparte*, the person they affect had the option to seek to set them aside, as sought in this file, or wait and object to the propriety leave at the hearing of the substantive motion.

20. Secondly, the provision of the Act, is clear that the Orders sought to be protected from return or revisit are those orders issued by the court in its civil jurisdiction. In this country it has been held severally and times without number and the law has now crystalized that judicial review is neither criminal nor civil proceedings. No less than the court of Appeal has pronounced itself as much in the case of the **Commissioner For Lands vs Hotel Kunste [1995-1998]I EA I** in which the court said:-

> **" …..notwithstanding the wordings of Section 13A, above (Government Proceedings Act) which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari the court is neither exercising civil nor criminal jurisdiction. It would be exercising special jurisdiction".**

The classicus of the law in this area which has been quoted by the superior courts of this country with unwavering approval is the English decision in the **Secretary of State for Home Department *exparte* Began (1989), Admin L.R. 110**. The Court of Appeal in AGA KHAN EDUCATIONAL SERVICES LTD VS ATTORNEY GENERAL and 3 OTHERS [2004] eKLR said:-

> **"…..again by their own nature, exparte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge who granted it is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would perfectly be entitled to hear an application to set aside the grant of leave, for jurisdiction is available to all judges of the Superior Court.**

21. That decision is without doubt binding upon this court and no scintilla of an attempt was made to distinguish it, with the inevitable consequence that I have no reasons whatsoever to depart from it. That to the court disposes the applicability and interpretation of the true meaning and intent of section 8(3) of the Law Reform Act.

22. The next question therefore is when would a court a grant an order granting leave once given. To answer this question the court of Appeal in **Aga Khan Educational Services Ltd, (supra)** made it clear that it must be a clear cut case where it is demonstrated that the judge granting leave did so as a matter of course without regard to the pre-requisites aviation's being taken into account. The two clear threshold questions are the need to establish a *prima facie* and whether or not there is jurisdiction to grant leave where the application say for Certiorari is made after the prescribed time. The court said:-

"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grants leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted".

23. In the matter before me, it has not been argued that the court acted superficially without consideration to the threshold prerequisites. Indeed there is no contention that the plaintiff; claim is hopeless, listless phantom or pretended. The 2nd Respondent and interested parties position is that there was material non-disclosure of material facts and that the matter being in the nature of questioning a decision by the Government of Southern Sudan this court has no jurisdiction.

24. What is however not contested is that there was a time when the *exparte* applicant was the sole or "perceived sole" clearing and forwarding agent till the 19/7/2016 when the interested party was appointed and the work rationed between the *exparte* applicant and the interested party at 50:50. There is equally the contention by the *exparte* applicant that the decision to reduce or tinker with its vested rights was never communicated to him by the respondents. It alleges breach of rules of natural justice which I do not consider mundane.

25. Effectively, the issues raised in the application to set aside the leave go to the merits of the application and are not suitable for determination prior to such merits being delved into. I am of the view that the same are better canvassed at the hearing of the substantive motion. I say that is desirable, because to set aside the leave would be to shutout the *exparte* applicants claim which I hold the view could be unjust and injudicious.

26. I am as yet unable to say with finality that the Notice of Motion has no prospects of success. The consequence and upshot is that the application dated 5/9/206 seeking to set aside leave to apply for orders of judicial review is disallowed and is therefore dismissed with costs.

27. However taking into account that there is evidence that while the orders were inforce, there was a decision to suspend the *exparte* applicant, I direct that the Notice of Motion to which the 1st Respondent has responded be fast tracked and a data be given in court at the time of delivery of this ruling it shall be mentioned in court on 17/10/2016.

28. It is so ordered.

Dated and delivered this **10th** day of **October 2016**.

P.J.O. OTIENO

JUDGE