REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 39 OF 2010

REPUBLIC :: APPLICANT

=VERSUS=

THE DISTRICT LAND

REGISTRAR, UASIN GISHU:::::::::::::::::::::::::::::::: RESPONDENT

E.A.C.C. I.P. CHEMEY INVESTMENTS LTD ::::::::::....:: EXPARTE

RULING

The application before me is for the setting aside or review of the Ruling delivered on 31st July, 2012.

On that date, the substantive application for Judicial Review was scheduled for hearing before **Azangalala J**. (as he then was).

When the matter was called out, **Mr. Ngumbi** advocate informed the court that he was representing the Respondent, whilst **Ms. Natome** informed the court that she was representing the Interested Party. The Ex-parte Applicant was not represented.

The Interested Party asked the Court to dismiss the application, whilst the Respondent's advocate indicated that he was not ready to respond to the application. However, because the Ex-parte applicant was not in court, the Respondent supported the application for the dismissal of the substantive application.

The learned Judge proceeded to make an order in the following terms;

"The application dated 20/11/2012 is dismissed

for non-attendance and want of prosecution. The

applicant to pay costs to the respondents."

The Ex-parte applicant now asks that the order of dismissal be set aside. **Ms Nelly C. Too**, advocate has sworn an affidavit in support of the application. She explained that on 31st July, 2012, she was due to represent the Ex-parte applicant, at the hearing. However, she failed to attend court because she had

been admitted at the Mediheal Hospital: Meanwhile, **Mr. Mbugua** advocate was bereaved, having lost his father.

In those circumstances, Ms Too opined that her court clerk was overwhelmed, and forgot to give the brief to another advocate to attend court, to seek an adjournment.

Ms Christine Natome, advocate swore a Replying Affidavit, on behalf of the Interested Party, the **Ethics and Anti-Corruption Commission (formerly the Kenya Anti-Corruption Commission).**

As far as she was concerned, the learned Judge had acted properly when he dismissed the substantive application. However, if the Ex-parte applicant was dissatisfied with the dismissal, the Interested Party submits that that could only be addressed by way of an appeal.

In any event, the applicant was faulted for failing to make available some medical evidence to prove that their lawyer had been ill on the material day.

The Interested Party also submitted that the applicant was guilty of inordinate delay in filing the application. Therefore, this court was told that it should not enable the applicant to benefit from the court's discretion.

Another reason for opposing the application was that it had been brought by an advocate who was not on record for the applicant.

Furthermore, the Interested Party believes that it would not serve any useful purpose to reinstate the substantive application, considering that it had no chances of success, as it had been filed out of time and also before a court without the requisite jurisdiction.

Having been served with the replying affidavit, the Ex-parte applicant's advocate filed a supplementary affidavit. She annexed a letter from **Dr. Pallavi Mishra**, a Consultant Gynecologist at **Mediheal Hospital and Fertility Centre.** The doctor said that Ms Nelly Too was under his care between 28th July, and 1st August,2012.

As the medical note had not been annexed to the affidavit supporting the application, the Interested Party submitted that that was an afterthought which should not be entertained by the court.

The Interested Party also submitted that the suit property had been acquired unlawfully by the applicant, therefore the applicant's alleged right to that property was not protected by law.

On the part of the Respondent, **Mr. Joseph Ngumbi**, learned Litigation Counsel, submitted that the application was incompetent, as it had been brought pursuant to the Civil procedure Rules, which do not apply in Judicial Review proceedings.

As far as the Respondent was concerned, the only remedy to an applicant whose application for judicial Review had been dismissed, was an appeal.

I have given due consideration to the application. The first issue that I wish to address relates to the medical note which the applicant's advocate attached to her supplementary affidavit. It is true that the note from the doctor was not exhibited when the application was first filed.

However, it is also an undeniable fact that Ms. Nelly C. Too advocate deponed, from the outset, that at the material time, she was indisposed, and that she had been admitted at the Mediheal Hospital.

An affidavit constitutes evidence that is tendered, on oath. And in this instance, the deponent was an officer of this court.

But even if she had not been an advocate, I would have expected that the oath which she took meant that

the evidence tendered was worthy of belief.

In my considered opinion, when a member of the learned profession casts aspersions about another member of that profession, it suggests a very worrying development. We ought to learn to believe and to trust one another, until and unless we are given reason by any particular person, to not trust him or her.

Of course, the best practice is to provide documentary evidence whenever the same was available. But when an advocate still finds it difficult to accept such documentary evidence, because he perceives it to be an afterthought, then we have a real problem in the justice system.

On my part, I find that the assertion by Ms Too, that she was indisposed, is not an afterthought.

The second issue that I wish to address is that which relates to the question as to whether or not the application had been brought by an advocate who was not properly on record.

The substantive application for Judicial Review was filed by the firm of **ONESMUS GITHINJI & CO. ADVOCATES.**

According to the Interested Party, the application now before me was filed by the firm of **NGIGI MBUGUA & CO. ADVOCATES**. As that firm had not filed a Notice of Change of Advocates, the application filed by them was said to be incompetent.

In the case of **MBOGO -VS-ASIKOYO & 3 OTHERS [2004] 1 KLR 697, Sergon J**. held as follows:-

> ***"A party suing or defending by an advocate shall be***
>
> ***at liberty to change his advocates in any cause or***
>
> ***matter, without an order for that purpose but unless***
>
> ***and until a notice of change of advocates is filed in***
>
> ***court in which such case or matter is proceeding,***
>
> ***and served in accordance with Order III rule 7, the***
>
> ***former advocate shall, subject to rules 11 and 12***
>
> ***be considered the advocates of the party until the***
>
> ***final conclusion of the cause or matter, including***
>
> ***any review or appeal."***

I have no doubt that that is the correct exposition of the law.

Bearing that in mind, I have noted that the Notice of Motion before me was actually Drawn and Filed by M/s **ONESMUS GITHINJI & CO. ADVOCATES**.

A comparison of the signature on the application dated 1st October, 2012, to that on the Hearing Notice dated 23rd September, 2011, suggests that they are by the same hand.

MS Nelly C. Too advocate signed the Certificate of Urgency. She indicated that she practiced at the firm of **NGIGI MBUGUA & CO. ADVOCATES.**

However, even that Certificate of Urgency was indicated as having been drawn by M/S **ONESMUS**

GITHINJI & CO. ADVOCATES.

In those circumstances, there appears to have been no change of advocates, as was suggested by the Interested party.

In the supporting affidavit, Ms Too made it clear as follows:-

" 1. ***THAT I am an Advocate of the High Court of Kenya practicing in the firm of M/s Ngigi Mbugua & Co. Advocates, in conduct of this matter for and on behalf of M/s ONESMUS GITHINJI & CO. Advocates for the exparte applicant."***

Nothing would have been clearer than that. Ms Too advocate was conducting the matter for and on behalf of M/s **ONESMUS GITHINJI & CO. ADVOCATES.**

In the event, there was no need for her to file a Notice of Change of Advocate, as her law firm had never purported to take over the brief from the advocates who were on record.

It is not lost on this court that whilst the Interested Party insists that the Civil Procedure Rules are not applicable to Judicial Review Proceedings, they are asking this court to invoke the same Rules in determining whether or not the application herein was competent.

I have no doubt that Judicial Review Proceedings fall under a special jurisdiction, which is neither civil nor criminal. That is clear from Section 8 (1) of the law Reform Act, which provides as follows:-

"**The High Court shall not whether in exercise of its civil or criminal jurisdiction, issue any of the prerogative writ of Mandamus, Prohibition or Certiorari."**

The Court of Appeal emphasized that point in the case of **THE COMMISSIONER OF LANDS - VRS- KUNSTE HOTEL LIMITED, CIVIL APPEAL NO. 234 OF 1995**, when it said;

" … notwithstanding the wording of S. 13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of certiorari, the Court is neither exercising Civil or Criminal Jurisdiction. It would be exercising a special jurisdiction ..."

Does that mean that an order made in Judicial Review Proceedings cannot ever be set aside or reviewed? Is the only remedy available to a party who feels aggrieved by such an order, an appeal?

Section 8 (5) of the Law Reform Act provides as follows:-

"Any person aggrieved by an order made in the exercise of Civil Jurisdiction of the High Court under this Section may appeal therefrom to the Court of Appeal ..."

That provision appears very straightforward. But I believe that a second glance at it will reveal that it is not as simple as it would first appear.

We have already been told that in Judicial Review, the High Court was not exercising either a Civil or a Criminal Jurisdiction. It is exercising a special Jurisdiction. That would suggest that Section 8 (5), which makes reference to the exercise of a civil jurisdiction would not be applicable to Judicial Review.

In any event, the dismissal of the application herein was not based on the merits or the lack thereof. The application was dismissed because the applicant and their advocate failed to attend court when the case was scheduled for hearing.

The reason for the lawyer's absence from the court appears to be plausible and reasonable. In the interest of justice, I would be inclined to accept the said reason. But I still need to ask myself if by so doing, I was utilizing the provisions of the Civil Procedure Rules.

To my mind, Justice is not dependent on Rules or technical procedures. Justice is about the right thing.

Pursuant to Article 159 (2) (d) of the Constitution;

> " ***In exercising Judicial authority, the courts and tribunals***
>
> ***shall be guided by the following principles-***
>
> ***….....***
>
> ***(d) Justice shall be administered without undue regard to***
>
> ***procedural technicalities .."***

In the case of **NAKUMATT HOLDINGS LIMITED -VRS- COMMISSIONER OF VALUE ADDED TAX, CIVIL APPEAL NO. 200 OF 2003,** the Court of Appeal dealt with a scenario in which there was an application for review of an order made under Order 53 of the Civil Procedure Rules.

This is what the Court said;

> ***"Mr. Ontweka, for the respondents in his submissions to***
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> ***us, seemed to suggest that where a law is silent on***
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> ***whether review is permissible, then the courts must***
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> ***decline jurisdiction, where review is sought. While we agree with him that judicial review is a special jurisdiction,***
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> ***we do not agree that in clear cases, courts should***
>
> ***nonetheless fold their arms and decline jurisdiction. The***
>
> ***process of review is intended to obviate hardship and***
>
> ***injustice to a party who is, otherwise, not to blame for***
>
> ***the circumstances he finds himself in. This Court in the***
>
> ***case we earlier cited of AGA KHAN EDUCATION SERVICES***

KENYA -VS- REPUBLIC, CIVIL APPEAL NO. 257 OF 2003,

expressed the view, that review jurisdiction in cases as the

present one, should be exercised sparingly and in clear-cut cases."

In this case, the ex-parte applicant found themselves in a situation in which their case was dismissed after their lawyers failed to attend court, for the hearing of the case. The said ex-parte applicant is not blameworthy for the circumstances they have found themselves in.

In the **NAKUMATT HOLDINGS LIMITED -VS- COMMISSIONER OF VALUE ADDED TAX** (supra), the Court of Appeal went on to state as follows:-

" The decision of this Court in the case of Judicial Commission

of Inquiry into the GOLDENBERG AFFAIR & 3 OTHES -VRS-

KILACH [2003] KLR 249, which Mr. Ontweka cited, does

not, with due respect to learned counsel, hold that review

is not available under order 53 of the Civil Procedure rules.

It would be oppressive and an affront to common sense in

a case like the one before us where the court precipitated

a situation for the same court to turn around and say it

lacks jurisdiction to correct what is obviously a wrong

decision ..."

In this case, the court did not precipitate the situation which the applicant found themselves it. The situation was precipitated by the failure of the applicant's advocate to attend court, for the hearing.

Nonetheless, if that situation was not addressed appropriately, it would be oppressive to the applicant.

As the Court of Appeal made clear, in the ***Nakumatt Holdings case*** (Supra);

"What is important is that the superior court in the matter

before us had the residual power to correct its own mistake."

I would add that the High Court has the residual power to do justice in each case. And in this case, justice demands that the dismissal of the substantive Judicial Review proceedings be set aside. I therefore do now set aside the order dismissing the Ex-parte applicant's application. The application dated 21st October, 2010 is reinstated.

As regards costs, although the application has succeeded, the Respondents cannot be burdened with the same. The situation which the Applicant found themselves in was due to their advocates failure to attend court on the material date. In the event, each party will bear his own costs of the application.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 5TH DAY OF FEBRUARY, 2014.

….....

FRED A. OCHIENG

JUDGE.