

SUMAYYA ATHMANI (MD NOCK) :::::::::::::::::::: 13TH INT. PARTY.

PATRICK MWAURA NYOIKE :::::::::::::::::::: 14TH INT. PARTY.

CHINA NATIONAL OFFSHORE OIL CORP. :::::::::::::::::::: 15TH INT. PARTY.

EXPARTE

INTERSTATE PETROLEUM COMPANY LTD. :::::::::::::::::::: 1ST SUBJECT.

MONENA M. KENGARA :::::::::::::::::::: 2ND SUBJECT.

EDWARD KINGS ONYANCHA MAINA :::::::::::::::::::: 3RD SUBJECT.

R U L I N G.

Pursuant to a Notice of Motion dated 8th December, 2011, necessary leave was granted to the ex-parte applicants to apply for orders of **Mandamus** and **Prohibition** against the respondents who numbered six and included the Permanent Secretary, Ministry of Energy “*inter-alia*”. The ex-parte applicants or subjects included **Interstate Petroleum Co. Ltd.**, **Monena M. Kengara** and **Edward Kings Onyancha Maina**.

A number of companies and individuals were enjoined as Interested parties. These included **Turkana Drilling Consortium Ltd** (1st Interested party), **Africa Oil Corporation** (2nd Interested party), **Lundin Kenya B.V.** (4th Interested party), **Keith Hill** (10th Interested party), **Centric Energy Corporation** also known as **0903658 B.C. Ltd** (3rd Interested party), **Tullow Oil PLC** (6th Interested party), **Africa Oil Turkana Ltd** (7th Interested party), **Africa Oil Kenya B.V** (8th Interested party) and **Angus McCoss** (12th Interested party) “*inter-alia*”.

The grant of leave was effected on 30th January, 2012 but the same did not operate as stay.

The substantive judicial review application dated 4th February, 2012, was filed on 6th February, 2012 and is pending hearing together with the application by the ex-parte applicants for leave to operate as stay. These applications were stalled by subsequent applications by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 12th Interested parties dated 20th February, 2012, 18th April, 2012, 20th April, 2012 and 8th May, 2012 seeking orders to strike out, set aside or discharge the leave granted to the ex-parte applicants on 30th January, 2012.

The aforementioned applications by the said interested parties were heard by this court which on the 5th March, 2013, ruled that there was no legal basis for setting aside and/or discharging the leave granted on 30th January, 2012 which allowed the ex-parte applicants to institute judicial Review proceedings against the respondents and by extension, the interested parties. It was however ordered that further proceedings in the matter be stayed pending the hearing and determination of Civil Appeal No. 64 of 2011 arising from the same subject matter and involving more or less the parties herein. The said appeal was however struck out on 8th March, 2013.

Being aggrieved by the ruling of this court, the 1st, 2nd, 3rd, 6th, 7th, 8th, 10th and 12th Interested parties filed respective applications for leave to appeal and on 24th February, 2014 necessary leave was granted by consent of all the relevant parties.

The 1st, 2nd, 4th and 10th Interested parties went a step further and filed the present application dated 18th March, 2013, seeking orders that all further proceedings in this matter be stayed pending the filing, hearing and determination of the intended appeal to the Court of Appeal against the ruling of this court made on 5th March, 2013 and that costs of the application be provided.

The application was based on the ten (10) grounds contained in the appropriate Notice of Motion dated

18th March, 2013 as fortified in the averments contained in a supporting affidavit deponed by **Donald Mahaga**, dated 18th March, 2013.

The 3rd and 9th Interested parties are in support of the application which is opposed by the first and third ex-parte applicants/subjects on the basis of the grounds of opposition dated 16th May, 2014.

At the hearing of the application on the 19th May, 2014, the 1st, 2nd, 4th and 10th Interested parties were represented by the Learned Counsel, **M/s. Macharia**, while the Learned Counsel, **Mr. Omondi**, appeared for the 3rd and 9th Interested parties.

Learned Counsel, **Mr. Wetangula**, appeared for the 6th, 7th, 8th and 12th Interested parties while Learned Counsel, **Mr. Kiarie**, appeared for the first ex-parte applicant.

The third ex-parte applicant appeared in person.

The court directed that written submissions be filed before the 28th July, 2014 and by that date submissions had been filed by the applicants (i.e. 1st, 2nd, 4th and 10th Interested parties) and the first ex-parte applicant.

The 3rd and 9th Interested parties indicated that they would rely on the submissions by the applicants.

The third ex-parte applicant/subject appears to have relied on his submissions filed earlier on the 19th May, 2014 and dated 16th May, 2014.

Having considered the application and its supporting grounds in the light of the submissions presented by the applicants and the first and third ex-parte applicants, the basic issues that emerges for determination is whether an order staying proceedings may issue in a judicial review application and whether the court dealing with such matter has power to grant such order.

The present application is anchored on the inherent jurisdiction of the court, section 8 and 9 of the Law Reform Act, sections 3 and 3A of the Civil Procedure Act and Orders 42 (6) (1) and 53 (1) of the Civil Procedure Rules, 2010.

Apart from Order 42 (6)(1) of the Civil Procedure Rules, none of the other provisions of the law provides for stay of execution or proceedings pending appeal.

Section 8 of the Law Reform Act, confers jurisdiction to the High Court to issue judicial review orders of **Mandamus, Prohibition and Certiorari**.

This provision together with section 9 of the Act vests in the High Court the necessary power to issue judicial review orders and are not subject to any other Act of Parliament (see, **Republic Vs. Communication Commission of Kenya (2001) EA 199**) and although in judicial review proceedings the court would be exercising civil jurisdiction, it is a special jurisdiction which is neither Civil nor Criminal (see, **Commissioner of Lands vs. Kunste Hotels Ltd. (1995-1998) 1 EA 1**).

Under section 8 (5) of the Law Reform Act, 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.

This is exactly the position in this matter. The interested parties being aggrieved by the decision of this court made on 5th March, 2013, have exercised or intend to exercise their right of appeal to the Court of Appeal. However, they have by this application sought to have proceedings in this matter stayed pending the hearing and determination of the intended appeal.

The Law Reform Act (Cap 26 LOK) which is the substantive law for judicial review does not provide for stay of proceedings neither is it subject to any other Act of Parliament such as the Civil Procedure Act and the Rules it comes with. This therefore means that the only part of the Civil Procedure Act and Rules

applicable to judicial review proceedings is Order 53 of the Rules which has no provision for stay of proceedings pending appeal. It is doubtful whether the other provisions of the Civil Procedure Act and Rules invoked in this application are applicable to judicial review proceedings. Indeed, in the case of **Republic vs. Commissioner of Customs and Excise Misc. App. No. 832 of 2003**, the High Court in Nairobi held that the only part of the Civil Procedure Rules which is applicable to judicial review is Order 53 whose rules, were in turn made under section 9 of the Law Reform Act (Cap 26).

In that regard, the same court went on to hold that section 3 and 3A of the Civil Procedure Act have no application to judicial review.

It would therefore follow that this application is incompetent in so far as it is brought under the provisions of the Civil Procedure Act and Rules which do not apply to judicial review applications. (see also, **Republic Vs. Communication Commission of Kenya (supra)**, **Welamondi vs. The Electoral Commission of Kenya (2002) KLR 486** and **Paul Kipkemoi Melly vs. The Capital Markets Authority NBI Misc. APP. No. 1523 of 2003**). It would also follow that the applicant's supporting grounds No. 3 to 9 which largely fall under the purview of Order 42 rules 6 (1) of the Civil Procedure Rules are inapplicable and irrelevant for purposes of judicial review applications and in so far as they form the backbone of this application, the application would invariably collapse.

However, other than the jurisdiction donated by section 3A of the Civil Procedure Act, the application is also made under the inherent jurisdiction of the court. Indeed, it was submitted by the applicants that whereas section 3A of the Civil Procedure Act may not be invoked in aid of proceedings in judicial review the court nonetheless reserves unto itself inherent powers to ensure that the ends of justice are met. Further, that such power is the authority possessed by a court implicitly without it being derived from the Constitution or Statute.

To buttress the argument, the case of **Equity Bank Ltd. vs. West Link Mbo Ltd. (2013) e KLR**, was cited by the applicants. The case was heard by a five judge bench of the Court of Appeal and it primarily dealt with the jurisdiction of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules and in the process dealt with the concept known as “*inherent jurisdiction*”. It was thus observed “*that Courts of Law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a court implicitly without its being derived from the Constitution or Statute. Such power enables the judiciary to deliver on their constitutional mandate.*”

It was further observed that:-

“..... from the very meaning of the term, inherent jurisdiction must mean the full range or panoply of powers, authority and competence that a court is possessed of by the very nature of being a court. That jurisdiction is not conferred or granted by any rule or law but is rather of the essence of being a court of law, sworn and instituted to achieve the ends of justice and possessed of the unquestioned ability to take such steps, make such orders and give such directions as will ensure that its existential purpose and its processes are not abused, scuttled or negated by any mischievous or nefarious conduct.”

The court noted that such jurisdiction is not donated but is merely recognized since section 3A of the Civil Procedure Act is couched in exact terms as Rule 1 (2) of the Court of Appeals Rules, 2010 save for having the term “**Act**” in place of “**Rules**” and that section 3A bears the marginal note “saving of inherent powers of court” thereby denoting that neither Statute nor Rules grant those powers but only acknowledges them.

The Court of Appeal emphasized in the same case (i.e. **Equity Bank Ltd vs. West Link Mbo Ltd.**) that inherent powers are essential and permanent attributes of the courts and the same cannot be curtailed as long as courts remain courts. The Court adopted a passage from the publication “**The Inherent Jurisdiction of the Supreme Court**” by **Jerold Taitz** to wit:-

“The inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the court is unable to function with justice and good reason, such powers are enjoyed by the court by virtue of its very nature as a superior court modeled on the lines of English Superior Courts and the Superior Courts which succeeded them are deemed to possess such inherent jurisdiction.”

It is clear from the foregoing observations and holdings of the Court of Appeal that the concept of **“Inherent jurisdiction”** is a tool which may be used or applied by a superior court to grant orders which are not provided for under statute, the sole intention being to meet the ends of justice in a given situation.

The High Court in the case of **Kenya Bus Services Ltd. & Others Vs. Attorney General & Others (2005) 1, KLR 787**, appears to have taken that route much earlier when it stated that:-

“Where there is no specific provision to set-aside the courts power, jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or Statutes, the inherent powers stem from the character or the nature of the court itself-it is regarded as sufficiently empowered to do justice in all situations.”

In so stating, the court extracted a valuable paragraph from the book by **Sir, Isaac JH Jacob, entitled “The Reform of Civil Procedure Law and Other Essays in Civil Procedure 1982”** in which he describes the inherent powers in clear terms, thus:-

“The answer is that the jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a Superior Court of Law, and for this reason such jurisdiction has been called “inherent”. This description has been criticized as being “Metaphysical” but I think nevertheless that, it is apt to describe the quality of this jurisdiction. For the essential character of a Superior Court of Law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a Superior Court, it is its very lifeblood, its very essence. Its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a Superior Court of Law is that which enables it to fulfil itself as a Court of Law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”

The learned author could not have put it any better.

Any Superior Court by its very nature of existence is called upon to do justice and by dint of its inherent powers may issue orders of stay depending on the peculiarity or circumstances of each particular case notwithstanding the absence of specific provisions of the law to that effect.

Herein, there is a pending appeal or at least a manifested intention to appeal against the decision of this court refusing to set aside and/or discharge the leave granted to the ex-parte applicants on 30th January, 2012. Whereas it is not for this court to decide whether or not the appeal will be rendered nugatory if the orders sought by the applicants are not granted, it must be appreciated and acknowledged that the inherent jurisdiction principles are not a vehicle for judicial caprice spawning all manner of unjust and deleterious consequences and that their proper place is merely procedural and wholly incapable of conferring rights (see, the Equity Bank Case (supra)).

The purpose of appeals as defined by Lord Woolf's final report on **“Access to Justice”** (HMSO, July 1996) is firstly, to serve the private purpose which is to do justice in particular case by correcting wrong decisions and secondly, the public purpose which is to ensure public confidence in the administration of justice by making such corrections to and to clarify and develop the law and to set precedents”.

It was in recognition of that purpose that the parties herein with the approval of the court readily consented to the grant of leave to appeal against the decision of this court dated 5th March, 2013.

Notices of appeal have already been filed by the applicants meaning that the appeal process was started and therefore the present application ought to have been made in the Court of Appeal as contended by the ex-parte applicants.

However, the existence or intended existence of the appeal would not preclude this court from hearing and determining an application made under the inherent jurisdiction of the court even in judicial review matters guided by the Law Reform Act which contains provisions for appeal to the Court of Appeal but not for stay of execution or proceedings pending appeal.

This court appreciates the fact that its decision may or may not be reversed by the Court of Appeal. The circumstances of this case are peculiar. The subject matter is of tremendous importance to the entire nation. There is a pending application by the ex-parte applicants for the leave granted on 30th January, 2012 to operate as stay yet the exploration of oil is ongoing within the County of Turkana. If proceedings in this matter are not stayed and the application for stay by the ex-parte applicants is allowed prior to the hearing and determination of the intended appeal the entire Nation will suffer a monumental economic blow. The situation would worsen should the intended appeal succeed. Public interest would be defeated by what is essentially private interest. It is against the foregoing background that this court feels compelled to invoke its inherent jurisdiction and grant the stay order sought by the applicants notwithstanding that this is a judicial review matter. Such jurisdiction should indeed be exercised in such matters but only in exceptional circumstances for the sole purpose of doing justice to all.

Accordingly, this application is granted as prayed in prayer (1) of the Notice of Motion dated 18th March, 2013, on condition that the applicants do deposit as security for costs a sum of Ksh. Five (5) million into an interest earning joint bank account in the joint names of Counsels for the applicants and the first ex-parte applicant/subject (i.e. Intestate Petroleum Company Ltd.) within the next twenty one (21) days from this date hereof failure to which the stay order shall forthwith lapse.

Parties shall bear own costs of the application.

Ordered accordingly.

[Read and signed this 9th day of October 2014.]

J.R. KARANJA.

JUDGE.