



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 996 OF 2003

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF: THE DECISION OF THE PUBLIC PROCUREMENT COMPLAINTS REVIEW AND APPEALS BOARD DATED 28TH AUGUST, 2003 IN APPEAL APPLICATION NO. 23 OF 6TH AUGUST 2003 (GETRIO INSURANCE BROKERS LTD VS. NAIROBI CITY COUNCIL)

AND

IN THE MATTER OF: THE EXCHEQUER AND AUDIT (PUBLIC PROCUREMENT) REGULATION, 2001 (LEGAL NOTICE NO. 51 OF 30TH MARCH, 2001) THE LOCAL GOVERNMENT ACT, CAP 265 AND AUDIT ACT CAP 412 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

THE PUBLIC PROCUREMENT COMPLAINTS

REVIEW AND APPEALS BOARD.....RESPONDENT

EX PARTE.....INVESCO ASURANCE COMPANY LIMITED

RULING

By a Notice of Motion dated 29th June 2004, the Respondent herein, **The Public Procurement Complaints Review and Appeals Board**, seeks an order that this Court be pleased to enlarge the time for filing the Respondent's Replying Affidavit and that the already filed Replying Affidavit by the Respondent be deemed as duly filed. It is also seeking orders that it be allowed to serve the same affidavit on the applicants herein and for an order that the costs of the application be in the cause.

The application is supported by a supporting affidavit sworn by **Ernest Kaka**, a State Counsel at Sheria House, in which it is deposed that the Respondent filed a Replying Affidavit on 16th June 2004. However, when he attempted to serve the same on the applicant's counsel, the latter declined service citing Order 50 rule 16(1). On 16th June 2004 when the matter came up for hearing he applied for leave of the Court for the said affidavit to be deemed duly filed. The matter was however adjourned due to the fact that the time

allocated was taken up by the parties in arguing whether or not the said affidavit ought to be allowed to be filed. It is deposed that consequently the three day rule under Order 50 rule 16(1) was rendered immaterial. In the deponent's view the applicant will not suffer any prejudice since it will have sufficient time to study the affidavit. In his view, it is in the interest of justice that the application be allowed.

In his submissions in support of the Motion **Mr Wanga** learned State Counsel for the Respondent submitted that the Respondent has not demonstrated that it will suffer any prejudice if the orders sought are granted. In his view it is in the interest of justice that the Respondent be afforded an opportunity of being heard. In his view the applicant's contention that the supporting affidavit contains falsehoods and untruths has no basis.

In opposition to the application the Respondent on 11th November 2004 filed grounds of opposition in which it was stated that the application is frivolous and lacks merit; that the subject replying affidavit was struck out on 16th June 2004 hence the prayers sought in the application are res judicata and the Court has no power to grant the same; that consequently the supporting affidavit contains deliberate and untruths; and that the applicant has continuously and consistently ignored to file his Replying papers despite having had ample opportunity to do so since September 2003 when the suit was filed and that equity does not assist the indolent.

On behalf of the ex parte applicant **Ms Mwangi**, learned Counsel for the Respondent while reiterating the grounds of opposition submitted that on 16th June 2004 when the matter came up before **Hon. Lady Justice Mugo**, the Replying Affidavit was struck out after the Court declined the Respondent's application to have the same deemed properly filed and served out of time. Learned Counsel further submitted that the Court ordered that the matter proceeds on the basis of the documents on record. It was her submission that by virtue of the said order the present application is res judicata as the issue of admission and service out of time was determined by the said order hence the only options for the Respondent are to either appeal or apply for review of the said order but it cannot seek the same orders. In her view the supporting affidavit consist of falsehoods especially in paragraph 5 thereof where it is stated that time was taken in arguing whether or not the affidavit should be filed whereas a decision was made thereon.

I have considered the foregoing and this is the view I form of the matter.

The instant Motion is expressed to be brought under the provisions of Order 49 rule 5 and Order 50 rule 1 of the **Civil Procedure Rules** as well as section 3A of the **Civil Procedure Act**. Section 3 of the **Civil Procedure Act** on the other hand provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the **Civil Procedure Act** are inapplicable. It must be remembered that apart from Order 53 of the Civil Procedure Rules, the provisions of the **Civil Procedure Act** and the Rules made thereunder do not apply to judicial review proceedings. Accordingly the provisions of the Civil Procedure Rules do not apply to these types of proceedings. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the **Civil Procedure Rules** render the application wholly incompetent. Similarly in **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 Of 1983** it was held that the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the **Civil Procedure Act** and Rules do not apply unless expressly provided by such an Act and the provisions of the **Civil Procedure Act** and rules cannot be applied merely because the special procedure does not exclude them. In fact in **Paul Kipkemoi Melly vs. The Capital Markets**

Authority Nairobi HCMA No. 1523 of 2003, it was held that under Section 9 of the *Law Reform Act* the procedure has been prescribed and Order 53 does not give any powers of review and secondly because the purpose of the special jurisdiction has not been said to have been defeated by lack of such powers to enable the Court invent any such procedure the only relief being the statutory right of appeal against the judicial orders and thirdly the *Civil Procedure Rules* do not apply to judicial review in view of the clear provisions of section 3 of the *Civil Procedure Act* concerning special jurisdiction. Similarly in **Republic vs. Lutta Kasamani Ex Parte United Insurance Company Limited Nairobi HCMCA No. 1047 of 2004**, it was held that in exercising its powers under section 8(2) the High Court is exercising its civil jurisdiction though the jurisdiction is undoubtedly special in the sense that it is created pursuant to section 8 of the Act. The Court further held that although the Court in judicial review proceedings would be exercising civil jurisdiction, it is a special jurisdiction which in itself does not mean that the *Civil Procedure Act* and the rules made thereunder are applicable as where an Act of Parliament confers special jurisdiction, *Civil Procedure Act* and the Rules made thereunder do not apply.

However, the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists. The Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same.

It was in recognition of this fact that **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** expressed himself as hereunder:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

Similarly, in **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593**, Hancox, JA (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.

In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court and that the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa**

HCMA No. 365 of 2006 that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

It follows therefore that whereas section 3A of the **Civil Procedure Act** may not be invoked in aid of proceedings in judicial review the Court always has reserved unto itself inherent powers to ensure that the ends of justice are met. Accordingly nothing turns upon the reliance on section 3A of the said Act.

Having said that the decision whether or not to enlarge time is purely discretionary and that discretion like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily or capriciously. The Court's discretion being judicial and must therefore be exercised on the basis of evidence and sound legal principles.

From the record of the proceedings, on 16th June 2004, **Mr Kaka** learned counsel is indicated as having applied for adjournment on the ground that he had just filed and served a Replying Affidavit that morning and his attempt to serve the same was refused. He at the end of his application sought for indulgence of the Court to serve. **Ms Mwangi** opposed the application on the ground that on 17th March 2004 the Court had indicated that no adjournment would be applied for at the hearing and was of the view that the Respondent should have sought for extension of time. She proceeded to ask the Court to strike out the said affidavit. In his response **Mr Kaka** pleaded with the Court that an adjournment ought to be allowed. In her ruling the learned Judge declined to grant the adjournment sought and proceeded to similarly decline leave to serve the said Replying Affidavit. She directed that the application be heard on documents already on record on a date to be taken at the registry.

I have set out in extensor what exactly took place on 16th June 2006 for the better understanding of the genesis of the present application.

It is clear that whereas the Court in its decision declined to grant the adjournment sought, it proceeded to grant the adjournment all the same. It is also clear that whereas the Court expressly declined to grant leave to serve the said replying affidavit, the Court made no order with respect to the said affidavit as there was no express order made striking out the same. Having not specifically struck out the said affidavit, it is clear that the same is still part of the record as irregularly as it may be. In **Trust Bank Limited vs. Amalo Company Limited Civil Appeal No. 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350**, the Court of Appeal while relying on its own decision in **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & Others Civil Appeal No. 75 of 1998** held that the court is obliged to look at the documents on record even though filed out of time unless for a reason other than mere lateness, it considers it undesirable to do so. In fact in the latter case the said Court expressed itself as follows:

“Rule 16(2) of the Civil Procedure Rules does not say that documents filed out of time must be ignored as the subsection does not talk of any time frame and a document filed out of time (like a written statement of defence which under Order 9 rule 1, is acceptable although filed late but before judgement is entered), is acceptable and valid if filed before the application is called for orders..... Order 50 rule 16(2) does not say that the applicant may proceed *ex parte*, but empowers the Court to make orders *ex parte* on being satisfied that the Respondent has no good reason or reasons for not filing its papers at all and therefore it is not true that documents filed out of time in response to an application are necessarily invalid and should not be looked at. A court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so.....It is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders *ex parte* as the applicant is not relieved of the onus on him of justifying his application.”

Therefore as the learned Judge did not expressly strike out the Replying Affidavit albeit having been filed irregularly, the said affidavit remained part of the record and her subsequent order that the application

would be decided based on the documents on record included the said affidavit.

It is however argued that having declined to grant the order for service of the affidavit, the issue of service is res judicata. For res judicata to be successfully invoked the matter in issue in the subsequent suit must have been directly and substantially in issue in the earlier or former suit. In **Samuel Kiiru Gitau Vs. John Kamau Gitau Nairobi HCCC No. 1249 of 1998** it was held by **Visram J** (as he then was) that “a matter cannot be said to be “directly and substantially” in issue in a suit unless it was alleged by one party and denied or admitted expressly or impliedly by the other and it is sufficient if the matter was in issue in substance and that matter is in issue if the Court considers the adjudication of the issue to be material and essential to its decision and a matter is also “directly and substantially” in issue if it is one which might or ought to have been made a ground of attack by the plaintiff to substantiate the relief claimed or made a ground of defence by the defendant against the claim against him.” In this case it is clear from the proceedings that the matter which was directly and substantially in issue before the Judge on 16th June 2004 was an application for adjournment.

Apart from the foregoing in determining a matter before the Court, account must now be taken of the provisions of Article 159(2)(d) of the Constitution which mandates the Court, in exercising judicial authority to be guided inter alia with the principle that justice shall be administered without undue regard to procedural technicalities. In this case as the replying affidavit was never struck out and as the Court ordered that the matter be determined based on the documents on record which in my view included the offending affidavit and further as no prejudice has been alleged by the ex parte applicant, it is my view that it would amount to elevating the elevating procedural requirements to a fetish if the Court were to disallow the application on that basis. To do so would in my view amount to overindulging the rules of procedure which though constitute the handmaidens of the Court and converting to them into a relentless mistress. As was held by **Ringera, J** (as he then was) in **Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460**:

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue.”

Having considered the matter in its totality it is my considered view that justice will be better served by allowing the Notice of Motion dated 29th June 2004 taking into account the fact that the provisions of Order 50 rule 16(1) [Now Order 51 rule 14(2)] are meant to give the respondent adequate time to consider the opposition to the application and adequately prepare to deal with the same. In this case the said replying affidavit was filed nearly 10 years ago hence it cannot be said that the contents thereof amount to an ambush on the part of the respondent.

In the result the application dated 29th June 2004 is hereby allowed and the subject replying affidavit by the Respondent is hereby deemed duly filed and the respondent is directed to serve the same within 5 days and in default thereof the same shall be struck out.

The costs of this application will be to the ex parte applicant in any event.

Dated at Nairobi this 2nd day of December 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties