



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Judicial Review 58 of 2012

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR
CERTIORARI AND PROHIBITION**

BETWEEN

**REPUBLIC.....APPLICANT
VERSUS**

THE BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

KENYA FARMERS ASSOCIATION LIMITED.....SUBJECT

AND

1. OUR HERITAGE CULTURAL CENTRE

2. KIKWETU SCHOOL OF FASHION AND DESIGN.....INTERESTED PARTIES

RULING

By a notice of motion dated 19th September, 2012 brought under **orders 51 rule 1; 53 rule 4** and **section 3A** of the **Civil Procedure Rules** and Act, respectively, Our Heritage Cultural Centre and Kikwetu School of Fashion and Design herein after called “the applicants” are seeking stay, variation or setting aside of the orders made by this court on 17th September, 2012.

The applicants contend that the orders were obtained by concealment of material facts; that the court was not informed that the orders sought to be stayed had been executed; that had the court been informed of the true position on the ground, it would not have issued the orders. They further contend that owing to the orders they cannot access their business premises and that unless the orders herein sought are granted, they will suffer irreparable injury.

On behalf of the respondent, it is submitted that the application is bad in law and that the court lacks power to discharge or set aside orders it issues in respect of the prerogative orders of mandamus, *certiorari* and prohibition. It is also contended that by the time the orders were issued, the orders of the Tribunal had not been executed; that the court was given all the relevant material before making the orders

From the submissions the three broad issues for determination are:-

1. whether this court has power to discharge or set aside the orders of stay on judicial review proceedings;
2. whether citing the wrong provisions of the law renders an application fatally defective and;
3. whether the orders sought to be discharged were obtained by non-disclosure or concealment of material facts.

Starting with the first question, the Court of Appeal in **Aga Khan Education Service Kenya V. Republic through Ali Seif, Benson Nairagu, Joseph Ngethe Gitau and the Attorney General** Civil Appeal No.257 of 2003 held:

“ So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature ex parte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or another, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the superior court.”

From the foregoing, it is clear that this court has power to review its decision in respect of prerogative orders, in the appropriate circumstances.

Turning to the second issue, it has been held in numerous authorities that in Judicial review proceedings, the court is neither exercising civil nor criminal jurisdiction but special jurisdiction created under Section 8 of the Law Reform Act and Order 53 of the Civil Procedure Rules. See **Welamondi v. The Chairman, Electoral Commission of Kenya** (2002) 1 KLR 486.

The procedure for challenging orders granted by the court in the exercise of this special jurisdiction has been held to be by an application by the respondent under the inherent jurisdiction of the court. See **Judicial Commission of Inquiry into Goldenberg Affair & 3 others V. Kilach** (2003) 249 where the Court of Appeal approved and applied the principles found in the English case of **Republic V. Secretary of State, Ex parte Harbage** (1978) 1 ALL ER 324 where it was stated thus:-

“The appropriate procedure for for challenging leave granted ex-parte under RSC order 53 r3 to apply for Judicial Review was either by an application under the inherent jurisdiction of the court to the Judge who granted leave or by way of an appeal under the general appellate jurisdiction conferred by section 16(1) of the Supreme Court Act, 1981.....”

No doubt, **Order 51 rule 1** of the **Civil Procedure Rules** is inapplicable and clearly there is no specific provision for this kind of application but I am unable to agree that citing the wrong provisions of the law can prevent this court from considering and determining the application on its merits once seized of it. **Article 159(2) (d)** of the **Constitution** of Kenya enjoins this court to discharge justice to the parties without undue regard to procedural technicalities.

I hasten, however, to point out that I am by no means saying that we must disregard the importance of procedural law and practice. I fully associate myself with the sentiments of Nyamu, J. (as he then was) in **Republic V. Commissioner of Police & 2 others Misc. Civil Application** No. 445 of 2005 where he observed:

“of course we must not disregard the importance of procedural law and practice. They contribute greatly to the orderly administration of justice, certainty, predicability, scholarship and accuracy. But while all these objectives are worthwhile, they are lesser ideals. Our core business is to do justice. In the past we have all fallen short of this ideal and have occasionally chosen to worship at the altar of the lesser ideals.”

Our core business is justice. There is need to offload the technicalities in order to embrace justice.”

With regard to the last issue the Court of Appeal in **Judicial Commission of Inquiry into Goldenberg Affair & 3 others v. Kilach** (*supra*) also quoted with approval and applied the holding in **Republic V. Secretary of State Ex-parte Harbage** (*supra*) where it was held:-

“Ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession whether or not it assists his application, this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given the opportunity to review his provisional order in the light of the evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.”

It is contended that by the time this court issued the order staying the order of the Tribunal that order had already been executed. However, this contention is contested. It must be noted that if this court had knowledge or information that the orders had been executed, it would not have issued the orders. This is because such orders cannot be issued *ipso facto*.

The issue for determination is whether, truly, the orders of the Tribunal had been executed by the time this court issued the orders?

To make this determination this court has to rely on the affidavit evidence adduced by the parties. The applicants have, for instance, annexed receipts, as proof, that they hired police to assist in execution of the orders of the Tribunal. They have also annexed photographs of police officers supervising the execution of the orders. The respondent has also sworn an affidavit contending that the orders were not executed and that it had information from the O.C.S, Central Police Station, Nakuru that he never participated or allocated any of his officers to execute or supervise the execution of the orders.

Whereas the applicants have annexed evidence showing that they hired the police to assist in the execution of the orders, indicating their names, force numbers and photographs supervising the execution of the order, the respondents have only given hearsay evidence on behalf of the OCS. The OCS ought to have sworn an affidavit. That way the averments in the replying affidavit would have had some force to convince this court otherwise.

For the foregoing reasons, I am convinced that the stay orders were obtained by concealment of material facts and are hereby set aside.

I award costs of this application to the applicants.

Dated, Signed and Delivered at Nakuru this 11th day of October, 2012.

**W. OUKO,
JUDGE**