REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Case 187 of 2009

IN THE MATTER OF AN APPLICATION FOR LEAVE TO

APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE DECISION OF THE RUIRU

MUNICIPAL COUNCIL, THE RESPONDENT, TO PUBLISH THE DRAFT VALUATION ROLL FOR 2004 AND TO LEVY RATES FOR 2004 TO 2009 ON RATEABLE PROPERTIES OF THE APPLICANTS

AND

IN THE MATTER OF THE VALUATION FOR RATING ACT, CAP 266

AND

IN THE MATTER OF THE RATING ACT, CAP 267

BETWEEN

1. **ALPHA KNITS LIMITED**
2. **KIRANKUMAR C. MALDE, R.C. MALDE AND S.C. MALDE**
3. **JETLAK FOODS LIMITED ……..…… APPLICANTS**

AND

RUIRU MUNICIPAL COUNCIL ……..…… RESPONDENT

R U L I N G

An ex-parte Chamber Summons dated 31st March, 2009 was filed on the same date by M/s Gadhia & Mucheru advocates on behalf of the applicants **ALPHA KNITS LIMITED, KIRANKUMAR C. MALDE, RC MALDE and SC MALDE, and JETLAK FOODS LIMITED.** The respondent was named as **RUIRU MUNICIPAL COUNCIL**. It is an application filed under Order 53 rule (3), 2 & 3 of

the Civil Procedure Rules requesting for leave to file judicial review proceedings for prohibition, as well as a request that the leave do operate as a stay of the decision of the Municipal Council of Ruiru to levy rates pending determination of the substantive application.

On 31st March, 2009, I certified the application as urgent, and ordered that it be served at once for hearing inter-partes I fixed the inter-partes hearing for 30th April, 2009.

On 30th April, 2009 Mr. A.B. Shah advocate appeared for the applicant. He submitted that the service was not effected on the respondent because, the application herein must be heard ex-parte. Counsel stated that the court was wrong in ordering that the application be served and heard inter-partes. Counsel cited a number of court decisions on the matter. The first case cited was the case of ***REPUBLIC -VS- COMMISSIONER OF COOPERATIVES –Ex Parte Kirinyaga Tea Credit Society Ltd. [1999] IEA 245***, at pages 246, and 247, where Gicheru, Omolo and Shah JJA stated-

"***If the application must be made ex-parte, then it follows that it must be heard and granted or refused ex parte. If the application is granted, then rule 4 of Order 53 must also be dealt with because it is at the granting stage that the Judge is required to deal with the issue of whether the leave granted shall act as a stay. From the provisions we have set out it is clear to us that a judge has no power to separate the granting of leave ex parte from the issue whether or not such leave shall act as a stay. There is no power to make one portion of the Chamber Summons ex-parte and the other portion of it to be heard inter-partes. There was however, no appeal from the order of Aluoch J. made on 11th June, 1996……"***

Reliance was also placed on the case of ***OIL COM KENYA LTD -VS- PERMANENT SECRETARY MINISTRY OF ROADS & PUBLIC WORKS*** – Nairobi Civil Appeal No. 10 of 2007, wherein Tunoi, Onyango Otieno and Aganyanya JJA stated at page 9-

"***As the Rule itself provides, the application for leave is supposed to proceed ex-parte and in our view the Judge has no discretion to conduct this application on inter-partes basis as the stage for inter-partes hearing comes under the main application by Notice of Motion filed under rule 3(1) of that Order, see REPUBLIC -Vs- COMMISSIONER OF COOPERATIVES – ex-parte Kirinyaga Tea Growers [1999] IEA 245."***

Further reliance was placed on the case of **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS –VS- KILACH –** Nairobi Civil Application No. 77 of 2003 (UR. 40/03), where Omolo, Tunoi and Owuor JJA stated at page 262-

"***First we note that the exparte order before Sir Donaldson was an Anton Piller Order. Such orders can be made ex parte, not because the rules provide that they be made ex-parte but because of the urgency of the matter. The same situation applies in our ex parte injunctions and like Sir, Donaldson, we cannot think of a situation, where a party would be allowed to come to this Court before going to the judge who made the ex parte order for an injunction with a view to persuading him to set aside the order. The usual practice in dealing with applications for interlocutory injunctions, whether they be by Anton Piller Injunctions or what else, is to hear such application inter-partes. Ex parte orders are granted only in exceptional circumstances. But with respect to applications for leave to apply for prerogative order, the rules under Order 53 provide-***

"***53 (1) No application for an of mandamus***

Prohibition or certiorari shall be made unless leave thereof has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers and ……"

So that the only procedure provided under the rules for making an application for leave to apply for a prerogative order is that the application-

"*……..* ***shall be made ex parte to a judge in chambers."***

Counsel emphasized that this court is bound by the decisions of the Court of Appeal, therefore I should proceed to hear the application ex-parte.

Indeed, the Court of Appeal made the above observations and conclusions. It is also true that this court is bound by the decisions of the Court of Appeal. However, the decisions of the Court of Appeal on the subject have not been uniform. In **SHAH –vs- RESIDENT MAGISTRATE NAIROBI [2001]1 EA 208**, the Court of Appeal comprising a bench of Gicheru, Keiwua & Owuor JJA appreciated what was stated in ***Republic -vs- Commissioner of Cooperatives (supra),*** and concurred in the view expressed by Keiwua JA thus –

"***In my respectful view, it is within the discretion of a judge to adjourn the whole application for leave, and leave to operate as a stay of proceedings, for hearing inter partes, but I do not think that that discretion extends to enable such a judge to hear that application both ex parte and inter partes as was about to happen in this case before Aluoch, J***".

At no point have I been shown an authority that the Court of Appeal has considered its conflicting decisions and decided that this is the specific legal position. In this face of conflicting decisions of the Court of Appeal, I have to make a choice.

Since the rules under Order 53 of the Civil Procedure Rules provide that the application "***shall be made" not shall be heard***" exparte, my view is that, the discretion of a judge to decide to hear the application inter-partes is left open. In my view, each case has to be considered on its own merits, depending on the peculiar circumstances of the case, and the orders sought. I therefore adopt the reasoning of the Court of Appeal in the case of ***SHAH -VS- RESIDENT MAGISTRATE, NAIROBI*** **(supra).** In the present case I am of the view that the particular fact and circumstances are such that the application be heard inter-partes, which I have already decided upon.

In the result, I will not vacate or review my orders that the Chamber Summons application be served and heard inter-partes.

Dated and delivered at Nairobi this 7th day of May, 2009

GEORGE DULU

JUDGE

In the presence of-

Mr. AB. Shah and Ms. Mucheru for applicants

Kevin – Court clerk.