



**IN THE MATTER OF AN APPLICATION BY THE OWNERS OF MOTOR VESSEL**

**"GLOBE YOUR"**

**AND**

**IN THE MATTER OF CHIEF MAGISTRATE'S MISC. CAUSE NO. 71 OF 1997• (MOMBASA)**

**and**

**IN THE MATTER OF CHIEF MAGISTRATE'S MISC. CAUSE NO. 46 OF .1997 (MOMBASA)**

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**IN THE MATTER OF CHIEF MAGISTRATE'S MISC. CAUSE NO. 25 OF .1997 (MOMBASA)**

**RULING**

On the 26.3.1998 I. granted leave to the Applicants to institute Judicial Review proceedings under Order 53 Rule 1 of the Civil Procedure Rules. The orders intended to be sought were those of Prohibition and Certiorari. Rule 3(1) of that order provides:

**"Where leave has been granted to apply for an order of Mandamus, prohibition or certiorari, the application shall be made within 21 days by Notice of Motion to the High Court, and there shall unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion- and the day named thereon for the hearing".**

The last day for the filing of the Notice of Motion pursuant to the leave granted was therefore the 16th April 1998. But as at that date no Notice of Motion had been filed. This much was indeed conceded by Counsel for the Applicants Counsel for the affected party had in the meantime filed an application to set aside the leave granted which application was still pending hearing. It became superfluous however when after 21 days there was no Notice of Motion filed. But on perusing the court file on 23.4.98, Counsel for the affected party found a document placed on record purporting to be the Notice of motion for which leave was granted.

He intimated that he would take up a preliminary point of law on the matter, as it went to the jurisdiction of the court to entertain the Application. Notice was then served on the Applicants Counsel to the effect that

"... at the commencement of the hearing of the Application for the setting aside or variation of the ex parte orders made by the

court on 26.3.98, (I) (the affected party) shall raise a preliminary point of law to the effect that the leave granted to (the applicants) to apply for orders of prohibition and certiorari is now of no consequence by reason of the fact that the application filed pursuant to the leave is time barred under the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules".

That was the matter that was argued before me and the subject matter of this Ruling,

The short point I am called upon to decide, as I see it, is whether upon expiry of 'the period provided for the filing of a Notice of Motion consequent upon the grant of leave, the court has any express or residual powers to admit any Notice of Motion filed thereafter.

Mr. Nanji, Counsel for the affected party emphatically submitted that upon expiry of the leave granted it was not open to the Applicant to file any Notice of Motion or to seek extension of time to do so. The order for leave is simply spent and there is no provision for its extension. Any Notice of Motion filed thereafter would be filed without leave and would be incompetent. On this submission he cited the decision of Bosire & Githinji JJ in HCMisc.C 438/95 Republic ~Vs~ the Minister for Transport & Communications, & 2 Others (U. R. ). On the aspect of filing the Notice of Motion out of time although no issue was raised by any party on the matter, the learned Judges stated:

"By dint of Order 53 Rule 3(1) which deals with the period in which an application should be filed, an application is mandatorily required to be filed within 21 days after the granting of leave. The application having not been brought within the stipulated period it means it was brought without requisite leave and is therefore incompetent. Assuming for a moment that the applicant applied and were granted leave under Order 49 Rule 5 Civil Procedure Rules, we think that the power donated by that rule does not extend to the provisions of Order 53 since the Rules under that order are made pursuant to the provisions of Section 9 of the Law Reform Act Cap 26 laws of Kenya. The power to make rules donated by that Section does not to our minds extend to making Rules enlarging time within which to take the essential step in an application for Judicial Review".

Mr. Nanji therefore submitted that the document placed on the court record purporting to be a Notice of Motion ought to be struck off for being incompetent and the court has no jurisdiction to deal with it. To stress the point that the issue being taken up was not a mere technicality but a basic one on jurisdiction, Mr. Nanji cited HCCC 128/94 (O.S.) 'RE YING -Vs- QUI REN (UR) where a preliminary point was taken up on the entertaining of an Originating Summons under Section 17 of the Married Women Property Act of 1882. Rejecting the submission that the objection made was a mere technicality Ringera J. stated:

"The statutory requirement that an election dispute be brought, by way of a petition; that a Bankruptcy action is to be initiated by-petition that a declaratory suit is to be stated by way of a plaint, that an application under the Guardianship of Infants Act is to be made by way of Originating Summons unless there is a pending action in the matter, or that a claim as to adequacy of compensation for property compulsorily acquired is to be made to the High Court by way of an Appeal from the Land Acquisition Tribunal, may all in a sense be said to be technical requirements. Yet these forms must be employed and any action in the nature of the matters set out would be struck out as misconceived and incompetent unless the prescribed form of pleading were adopted. In short the technicality of the form of pleading in a dispute between former spouses as regards property, is not one that can be waived. It goes to the jurisdiction of the court to grant relief in a matter brought in that form. As an issue of jurisdiction it cannot be belated to raise it at the submission stage or any other stage of the proceedings including an Appeal from a decision in which the issue was never raised at all. That is because without jurisdiction the proceedings would be coram non judice and the court would be acting in vain. All its decisions and orders would be a nullity."

As the matter goes to the jurisdiction of the court, it should be determined forth with and the interim orders granted discharged, Mr. Manji concluded.

In response Mr. Kinyua for the Applicants submitted that the delay in this matter was only one day and the Applicants should be Given an opportunity of explaining that delay. He opined that the Judges in' the authority cited above—435/95 - were dealing with a delay in excess of two and a half months and they would probably have come to a different decision if an, explanation for the delay was offered. In this case the applicants, had after realising that they had filed the Notice of Motion out of time, filed another application seeking an extension of time and he wished to have time to urge the application. He will be

relying on an array of provisions including Section 3A of the Civil Procedure Act, Order 49 Rule 5 of the Civil Procedure Rules, Section 26 and 37 of the Limitation of Actions Act, Order 3 Rule 5 of the Rules of the Supreme Court of England as read with Sections 8 & 9 of the Law Reform Act, Chapter 26 Laws of Kenya.

In essence, Mr. Kinyua was of the view that Order 53 Rule 3(1) was ultra vires the Provisions of the Law Reform Act which does not limit the time for filing Applications. The Law Reform Act, he submitted gave power to the Rules Committee to make Rules and Order 49 Rule 5 empowers the court to extend time. Order 53 does not therefore exist independently of other provisions of the Civil Procedure Act. Section 3A would also apply since the court has inherent powers. If all that fails he was free to invoke the Limitation of Actions Act which becomes applicable when no other statute applies. That is if Part III is applied to the Law Reform Act then there would be a ground for asking for extension. If that fails to' he would invoke Order 3 Rule 5 of the Rules of the Supreme Court, of England which admits an extension of time and is applicable within our jurisdiction by virtue of Section 8 & 9 of the Law Reform Act. In view of all these channels which are available to the Applicant, Mr. Kinyua submitted that the issue has never been considered in any other case and an opportunity should be given to the Applicants to agitate the matter. Finally he submitted there would be no prejudice if the time was extended as the affected party would still be at liberty to raise the same jurisdictional point.

With respect to Mr. Kinyua, I am of the humble view that he was embarking on a fishing expedition in citing the various provisions of the law which he wished to rely on to show that the Applicant should have an extension of time. The very concession that there was non compliance with a mandatory provision of the law instantly raises the question of jurisdiction, that is the power of the court to consider and issue valid orders. Arguments related to the discretionary powers of the court to waive such jurisdiction were to say, the least irrelevant. The jurisdiction to deal with a Notice of Motion filed under Order 53 of the Civil Procedure Act is given under Rule 3 thereof. It is a mandatory provision and it is conceded that it was not complied with,

I see no room for the exercise of any discretion under that order. The straight answer to the issue would therefore be that the document filed in these proceedings purporting to be the Notice of Motion for which leave was granted was incompetent for having been filed without leave and should be struck off.

Although that finding disposes of the preliminary point raised before me I must point out that Order 53 and the Rules there under was not enacted by the Rules Committee in exercise of their powers under Section 81 of the Civil Procedure Act. They were enacted pursuant to the power given to the Rules Committee under Section 9 of the Law Reform Act and the Rules appear in Legal Notice No.299/1957. The Legal Notice is subsidiary legislation and is as good and binding a law as an Act and should be interpreted and applied as a statute. The Rules cannot therefore be said to be ultra vires the Law Reform Act.

It has also been stated and rightly so that

".... these prerogative Orders fall under a special jurisdiction of this court created by a statute whereby an institution of the Republic is empowered to supervise the functions of 'its subordinate institutions. There are no pleadings involved. The whole process becomes a nullity if leave is not first obtained from a Judge in chambers. '\* - See Walter Odhiambo -Vs- Registrar of Trade Unions HCMisc 2.1.0/09 (Cockar & Amin JJ)

The "technicality" as it, were considered in that case was the failure to serve Notice to the Registrar which is another mandatory requirement under the Rules and -therefore one of jurisdiction.

That Order 53 was a provision apart from those others in the Civil Procedure Act and Rules was indeed recognised by the Court of Appeal in CA 234/95 The Commissioner of Lands -Vs- Kunste Hotel. Ltd. (Akiwumi, Pal] and Bosire 3JA) (UR). Apart from making a finding that a matter falling under Order 53 was neither an "action" as defined under the Interpretation and General Provisions Act or "suit" as defined under the Civil Procedure Act, the learned Judges held that:

"... In exercising the power to issue or not to issue an order of certiorari the court is neither exercising civil nor criminal jurisdiction. It would be exercising special jurisdiction ..."

Reliance was made for that finding on Section 8 of the Law Reform Act which provides

"8(1) ' The High Court shall not whether in the exercise of its Civil or Criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari".

In view of that legal position therefore, I do not see how the Applicants could invoke provisions outside those under Order 53 to confer jurisdiction on the court. The Order seems to be complete in itself.

The upshot is that the preliminary objection is sustained. I strike out the Notice of Motion purportedly filed pursuant, to the leave granted on 26.3.98. The leave so granted has dissipated as have all the interim orders granted there under. Costs to the affected party.

Dated at Mombasa this 21st day of May, 1998

P.N. Waki JUDGE