



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Misc Civil Appli 141 of 1998

IN THE MATTER OF: THE LAW SOCIETY OF KENYA CAP 18 LAWS OF KENYA

AND

**IN THE MATTER OF: JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES IN
KENYA**

RULING

This is an application by way of Notice of Motion under

S.8(5) of the Law Reform Act Cap.26 of the Kenya Laws and 0.41

r.(4) and 0 XLII r. (2) of Civil Procedure Rules asking that:-

"This Honourable Court be pleased to order that stay of execution be issued pending the determination of an intended appeal staying all proceedings set forth and ordered in the Ruling delivered by Hayanga J on 16-9-98."

S. 8(5) of Cap 26 and 0.42 r.(1)(ee) of the Civil Procedure Rules and not 0.42 r.2 as cited on the motion, both only say that appeal lies to the Court of Appeal as of right from a decision of the High Court on order given under prerogative orders.

The application is supported by the affidavit of Jonah Kip Ngeno, a State Counsel in Mombasa sworn on 24-9-98. In it

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2. He states that as Counsel for the Respondent, the Attorney General on whose authority and behalf he swore the affidavit, the Respondent has arguable appeal against the judgement/ruling of Hayanga, J delivered on 16-9-98 as the Judge did not consider issues of law or fact raised on Respondent's behalf. The further reasons contained in the affidavit are two and they are:-

Para 5:- THAT I further believe that the appeal may be rendered nugatory unless the execution of the order is stayed.

Para 6:- THAT I verily believe that the intended appeal raises points of law of general public importance.

Mrs. Onyango Chief Litigation Counsel in her usual forceful presentation showed on prima facie basis the grounds she hopes would secure the success of her client's intended appeal, pointing out that the extracted

Decree or Order is at variance with the actual pronouncement in the judgement or rulings, and that the-

"Commission is bound to suffer enormous loss because unlimited audience given to LSK will cause the Commission to contradict its own terms of reference.

"It will fetter the jurisdiction of the Commission. That the participation of LSK will hamper the progress of the

3. Commission by causing delay as the life of the Commission is only upto 31st December, 1998, the important points raised in this appeal will have been overtaken by events because the Commission will have ended and they will only remain academic."

She said that on balance what the applicant needs to show is that if stay is refused what it will lose in view of its operations is greater than what the LSK stands to lose which is minimal if stay is allowed.

Mr. Gikandi learned counsel for the Respondent LSK relied on the Replying affidavit of Haron Ndubi sworn on 28-9-98. In it he says that since the High Court order LSK has fully participated in the proceedings of the Commission and it (LSK) has already issued notices to call certain notable witnesses whom they say are standing in senior position, over the two assisting counsel. So the two assisting counsel will be too shy or too intimidated to solicit any meaningful evidence from them of what they know of the tribal killings and clashes which the Commission has been appointed to inquire into. Secondly, that the position of the AG is ambiguous in that being already amicus curie he is also appearing as an advocate of the Commission making it appear as if the Commission is an appendage. That there are no grounds of appeal enclosed and no where in the affidavit is there evidence showing that if this order is NOT made the appeal will be nugatory.

Mr. Gikandi together with Mr. Lumatete raised some legal issues which were originally intended to be argued in limine. This included representation of the Commission by the AG, and the State Counsels and that the filing of this application is irregular and that the application is incompetent. Secondly that to bar LSK is to interfere with the independence of the Commission and it will make it impossible for LSK to call 30 witnesses they have enlisted. Thirdly he called for striking out of supporting affidavit of Kip Ngeno because although the affidavit is based on belief and on information it has failed to state the sources of its information and grounds of beliefs.

Fourthly he said that S.8(3) of the Law Reform Act Cap 26 forbids a "Return" of the Order of mandamus already made and that applying for a "Stay" is making a "return" to that order which should not be allowed. He said the applicant has not shown the substantial loss it would suffer.

My view over the submissions is that the parties stretched their arguments beyond the scope of the application. All that the application asks for is a stay under O. 41 r. 4 of Civil Procedure Rules to pend the hearing of the intended appeal. However because they have argued these points. I will try to answer some of the issues as raised by Mr. Gikandi and Mr. Lumatete, answering them in a random order.

First S. 8(3) of Law Reform Act Cap 26 says:-

"No Return shall be made to any such order, and no prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by Section 5 of this Section"

My understanding of Mr. Gikandi's submission is that the Court having given an order of Certiorari and mandamus those became "final" orders which cannot be stayed because it was a determination on a substantive application for prerogative orders. If I am right and Mr. Gikandi did not say anything more than that; then I must say Mr. Gikandi is not correct. The Section Mr. Gikandi reads was introduced into law in England under the Administration of Justice (Miscellaneous Provisions) Act 1938 which was an Amending Act and which among other things amended the law relating to proceedings usually dealt with on the Crown Side of Kings Bench Division. It substituted "orders" of mandamus, prohibition and certiorari for prerogative "writs" of mandamus, prohibition and certiorari under S.7 (4) of the said Act it

provided that:-

"(4) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final subject to any right of appeal therefrom"

6. This was imported whole into our Cap 26.

"Return" meant here was the Order Nisi which would previously be made initially to be made final on "return" after some period, That was the return meant in the Act. It was now no longer to be an order Nisi but a final order.

Mr. Gikandi's second point against the AG's representation was actually argued by Mr. Lumatete Learned Counsel who with Mr. Gikandi appeared for the LSK. They say the AG should not represent the Commission. To my view this is an issue that Parliament is the one to concern itself with and not this Commission which is a creature of Statute under Cap 102. That Statute does not say whether the Commission should or should not have a lawyer leave alone the A.G.. Dr. Leonard Arther Hallet in his book called Royal Commissions and Boards of Enquiry Some Legal and Procedural Aspects 1982 pp210 says:-

"Nearly all inquisitorial inquiries need the assistance of an advocate and some circumstances, investigatory inquiries also benefit from such assistance whenever submissions are being received there is any conflict in the evidence it is desirable that an inquiry be able to leave the presentations and eliciting of evidence to an advocate whose task it is to assist it.".... and speaking for employing the help of State Counsels (in Australia called "Royal Solicitors") the writer said that to employ private lawyers for Commission of Inquiries would be too expensive. He said of what happened in one Australian Province at one time:-

"It was concluded that no firm of private practitioners would be able to take on the work, because to do so would virtually entail ceasing to carry on their private practice. In addition the cost to the Government would be extremely heavy.

This refers to state of Victoria in Australia. However while agreeing with these reasons the writer said:-

"However while the Crown Solicitor (State Counsel) — (bracket mine) might be the most appropriate person to act as a Solicitor [advocate] to a Commission or Board that conclusion does nothing to solve the possible conflict of interests involved."

But that is a policy matter and not for the Commission. Besides in a place like ours it would be less expensive to use State Counsels.

About the Attorney General appearing as Counsel to the Commission, this depends on different jurisdictions. In places like Province of Victoria in Australia that function is fulfilled by an independent council. In England before the Salmon Royal Commission 1966 Attorney General appearing as Counsel to Conduct Proceedings on behalf of a Tribunal of Inquiry like the Commission was the practice even though as Dr. Hallet says in the book quoted above such Commissions "might have highly charged political background."

9. Here in this country the AG is the Constitutional legal advisor to the government. He is also professionally the head of the Bar. He has duties to perform under the Constitution independently without any direction from any quarter. It has been said that in that role it is his duty to represent the public at an inquiry, so as to represent the public interest. Lord Shaw Cross submitting to the Salmon Royal Commission (1966) on inquiries said:-

"The Attorney-General should have a general responsibility for presenting the evidence to the Tribunal, because the occasions for intervention by the State in the affairs of private citizens was multiplying and the power of the bureaucracy ever on the increase, he saw it as all the more important that the Attorney-General should regard himself as acting on behalf of the public.

Lord Show cross emphasized the fact that the Attorney-General is an independent legal officer of the Crown and that it was misconceived to argue that some other "independent" person should be appointed for the task. "

"See ROYAL COMMISSIONS AND BOARDS OF INQUIRY SOME LEGAL AND PROCEDURAL ASPECTS-by:

LEONARD ARTHUR

HALLET - PAGE 225"

What Mr. Gikandi and Mr. Lumatete are saying is akin to what Salmon Commission 1966 adopted when in their recommendation they said AG should not assist inquiries or tribunals

9. "Because some of the matters investigated by Tribunals are of a highly political nature it was considered to be most confusing to the public for the Attorney-General to be engaged. Further, because persons involved sometimes have an interest inimical to the Attorney-General, they would feel that because he was a member of the government he might "pull his punches" or not be hitting hard enough. Further because of the political affiliations that the Attorney-General has there would always be some criticism of him for either cross-examining too vigorously or for not cross-examining with sufficient vigour.

It was concluded that it was undesirable for the law officers of the Crown to be exposed to such criticism. (QUOTATION FROM THE BOOK ABOVE) pp 225 but that is only one side of the Coin and it is only one factor that would be considered if there was to be a legislation on the matter. Here the AG is only amicus Curie, but if the State Counsel are assisting it may be for those understandable reasons. This cannot vitiate the Commission. I think with respect the two learned counsel may find the subject requires deeper debate and perhaps legislation.

The second last issue raised by Mr. Gikandi is of an affidavit of Kip Ng'eno which although is an affidavit based on information and belief does not show the sources and grounds for belief:-

"0.18 r.3(1) of the Civil Procedure Rules says affidavits shall be confined to such

10. Facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the Court an affidavit may contain statements of information and belief showing the sources and grounds therefore."

Mr. Gikandi says that it is by such omission a defective affidavit. Mrs. Onyango defended this by saying it was sworn on behalf of the Commission, but that is the more reason that information given to him should have been sourced to the Commission. Even if they were to be facts from his own knowledge he ought to have said as much. The Court of Appeal for East Africa said in STANDARD GOODS CORPORATION LTD VS. HAKACHAND NATHU & CO. [1950] 7 EACA 99-

"An affidavit of such kind ought never to be accepted by a Court as justifying an order based on the so called "facts"

Again in ASSANAND & SONS (UGANDA) LTD VS. EAST AFRICAN RECORDS LTD E60, Sir O'Connor P. [1959] EA 360

"The affidavit of Mr. Campbell was diffident in three respects first it did not set out the deponent's means of knowledge or his grounds of belief regarding the matters stated of information and belief and secondly it did not distinguish between matters stated of information and belief and matters disposed of from the deponent's knowledge.

11. The Court should not act on such affidavit and Mr. Gikandi says I should strike it out, but, it would

appear now that the rigidity of those pronouncements in the quoted cases here have been ameliorated by the Court of Appeal in recent decision in the East African Packaging Industries Ltd. vs. Zoeb Alibhai Civil Appeal No.124 of 1996 (unreported) where they said per Bosire J.A.-

"To my mind the Source of information and the grounds of belief are primarily essential for purposes of veracity. Consequently a failure by a deponent to disclose with particularity the sources of the information he has deposed to has the effect of weakening the probative value of the information and even render it worthless. It does not in my view render the relevant paragraph defective."

The affidavit objected to has 7 paragraphs of which paragraphs 4, 5 and 6 are pertinent:- Paragraph 4 states:-

"THAT I believe that the Respondent/Applicant has an arguable appeal with an overwhelming chance of success; as the Learned Judge on his ruling (order) did not fully consider issues of law and fact raised on the Respondent/Applicant's behalf. A copy of the ruling is annexed hereto marked Exhibit JKN2."

But here the deponent would seem to be basing his belief on the ruling and this is enough source.

12. Paragraph 5:

"THAT I further believe that the appeal will be rendered nugatory unless the execution of the order is stayed."

This paragraph is based on no ground or source either of fact or of law to support it. Very little is to be bestowed in it.

Paragraph 6:

"I verily believe that the intended appeal raises points of law of general public importance."

This although does not show any ground or source, I think it is a mere belief of law based on general knowledge of law a lawyer would be possessed with. He is a State Counsel acting on behalf of AG for the Commission. I think it is proper.

So that all in all, I would follow Bosire J.A.'s decision here. The statements cannot be struck off, the only weak part is the belief that failure to stay will render the appeal nugatory, but even this is merely as to the strength of the statement on veracity. I would decline to strike the paragraphs leave alone the whole affidavit off as Mr. Gikandi has urged.

The last and, more important issue is whether the applicant has made a case for stay. The order of 16-9-98 by

13. this court said in material part:-

"There will therefore be order for CERTIORARI and of MANDAMUS to issue against the ruling of the Commission of 26-8-98 and order commanding to allow LSK to present its testimony, views, statement and or give oral evidence by its spokesman and be allowed to present and cross examine any witness and be represented by counsel in conformity with Statute, the terms of reference and the procedure the Commission has laid out for itself. The said decision will be and is hereby cancelled, and the Commission is by Mandamus commanded as above"

Where an application is made for stay of execution of appealable decree or order the Court may order stay on sufficient reasons being shown, but the Court must under 0.41r.4 of the Civil Procedure Rules be satisfied (a) that substantial loss may result to the applicant unless the order is made;

(b) That the application has been made without unreasonable delay, and

(c) Security has been given by the applicant for the due performance of such decree or order as may be ultimately binding upon him-.

Looking at these criteria, against the nature of this case, I do not think (c) is a practicable criterion unless it is that

14. the Commission would guarantee that the LSK if they win they will be allowed to participate.

It is now established that a person should prefer an appeal when he has a strong reason for so doing, hence if the appeal is frivolous the order may be refused. The order to be appealed against allowed LSK to participate as a person in the subject Commission under the terms of reference and of procedure the Commission has laid out for itself and in conformity with the Statute i.e. Cap 102. Unless an appeal is based against the finding that LSK is a "person", I with great respect do not see how any such appeal can be a serious appeal.

Mrs. Onyango learned Chief Litigation Counsel excluded any complaint against the order as to certiorari and stated that the intended appeal is only against the order of Mandamus but that order only directed LSK to be allowed to function within the rules and the law, and procedure. How can an appeal directed against that be a serious appeal? I with respect has failed to see it. The suggested grounds of appeal were not filed so may be there may be other reasons, secondly, the most important requirement for an application under 0.41 r. 4 of Civil Procedure Rules is that the applicant will suffer substantial loss, but here which loss will the Commission suffer if LSK participates? Kip Ngeno's affidavit has not disclosed it. Mrs. Onyango the Learned Chief Litigation Counsel attempted to fill the gap

15. left in the supporting affidavit by saying what I have referred to above. She particularly said that unlimited audience given to the LSK will make the Commission contradict their terms of reference, but this cannot be true because the order allows LSK to participate within the Terms of Reference, the Rules of Procedure formulated by the Commission and the Statute under which the Commission is founded.

There is nowhere however where the LSK can cause the Commission to act in contradiction to its terms of reference on that account. She also said that LSK stands to lose very little compared to what the Commission will lose if I disallow this application. But first I am of the view that, while this is an argument describing balance of convenience in injunction application, it really is not a criteria in assessing substantial loss under considerations for stay.

The Principle in awarding an order of stay pending appeal has been stated succinctly by the Court of Appeal in the KENYA SHELL LTD V. KARUGA & ANOTHER 1982-88 IKAR 1018-, there Hancox J.A. said:-

"I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory then a stay can properly be given. Parallel with that is the equally important proposition that a successful litigant should not be deprived of the fruits of a judgement in his favour, without just cause."

16. There should be evidence that the appeal will be rendered nugatory if stay is refused. The affidavit in support ought to have set out facts showing that the appeal will be rendered nugatory.

This was a requirement stated by Piatt J.A. in that same judgement but as I have said above Kip Ngeno's affidavit showed nothing about it neither did it say anything about substantial loss. Piatt J.A. had said about it in the said judgement as follows:-

"It is usually a good rule to see if Order 41 r. 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without that evidence it is difficult to see why the respondents should be kept out of their money (judgement) bracket (mine)."

There is no evidence of substantial loss in this application. Decision under 0.41 r.4 of Civil Procedure Rules is discretionary and as in acts of judicial discretion must be exercised in accordance with sound judicial principles. Stay order here if granted will in my view be contrary to these principles I have referred to and I refuse to exercise my discretion in favour of the applicant. The application comes late because in execution of that same order of mandamus the

17. LSK has for sometime now been operating in execution of it To order a stay now; is actually to stop what is going on already. It would be a moot point whether really this is an application for stay of execution because the order had already been "executed". I think appropriately there ought to have been a suit and an application for injunction. I feel constrained to dismiss this application with costs to Respondent

Dated at Mombasa this 2nd Day of October, 1998

A.I HAYANGA

JUDGE