REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

Misc Civ Appli 141 of 1998

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

LAWS OF KENYA

AND

IN THE MATTER OF: JUDICIAL COMMISSION OF INQUIRY INTO

TRIBAL CLASHES IN KENYA

R U L I N G

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 toorder that stay of execution be issuedpending the determination of an intendedappeal staying all proceedings set forthand ordered in the Ruling delivered byHayanga J on 16-9-98."

S. 8(5) of Cap 26 and 0.42 r.(l)(ee) of the Civil ProcedureRules and not 0.42 r.2 as cited on the motion, both only saythat appeal lies to the Court of Appeal as of right from adecision of the High Court on order given under prerogativeorders.

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

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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

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Commission by causing delay as the lifeof the Commission is only upto 31stDecember, 1998, the important pointsraised in this appeal will have beenovertaken by events because theCommission will have ended and they willonly remain academic."

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

Mr. Gikandi learned counsel for the Respondent LSK reliedon the Replying affidavit of Haron Ndubi sworn on 28-9-98. Init he says that since the High Court order LSK has fullyparticipated in the proceedings of the Commission and it (LSK)has already issued notices to call certain notable witnesseswhom they say are standing in senior position, over the twoassisting counsel. So the two assisting counsel will be tooshy or too intimidated to solicit any meaningful evidence fromthem of what they know of the tribal killings and clasheswhich the Commission has been appointed to inquire into.Secondly, that the position of the AG is ambiguous in thatbeing already amicus curie he is also appearing as an advocateof the Commission making it appear as if the Commission is anappendage. That there are no grounds of appeal enclosed andno where in the affidavit is there evidence showing that ifthis order is NOT made the appeal will be nugatory.

Mr. Gikandi together with Mr. Lumatete raised some legalissues which were originally intended to be argued in limineThis included representation of the Commission by the AG, andthe State Counsels and that the filing of this application isirregular and that the application is incompetent . Secondlythat to bar LSK is to interfere with the independence of theCommission and it will make it impossible for LSK to call 30witnesses they have enlisted. Thirdly he called for strikingout of supporting affidavit of Kip Ngeno because although theaffidavit is based on belief and on information it has failedto state the sources of its information and grounds ofbeliefs.

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

My view over the submissions is that the partiesstretched their arguments beyond the scope of the application.All that the application asks for is a stay under 0. 41 r. 4of Civil Procedure Rules to pend the hearing of the intendedappeal. However because they have argued these points. Iwill try to answer some of the issues as raised by Mr. Gikandiand 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 suchorder, and no prohibition shall beallowed, but the order shall be final,subject to the right of appeal therefromconferred by Section 5 of this Section"

My understanding of Mr. Gikandi's submission is that the Courthaving given an order of Certiorari and mandamus those became"final" orders which cannot be stayed because it was adetermination on a substantive application for prerogativeorders. If I am right and Mr. Gikandi did not say anythingmore than that; then I must say Mr. Gikandi is not correct.The Section Mr. Gikandi reads was introduced into

law inEngland under the Administration of Justice (MiscellaneousProvisions) Act 1938 which was an Amending Act and which amongother things amended the law relating to proceedings usuallydealt with on the Crown Side of Kings Bench Division. Itsubstituted "orders" of mandamus, prohibition and certiorarifor prerogative "writs" of mandamus, prohibition andcertiorari under S.7 (4) of the said Act it provided that:-

"(4) No return shall be made to any such orderand no pleadings in prohibition shall beallowed, but the order shall be finalsubject to any right of appeal therefrom"

This was imported whole into our Cap 26.

"Return" meant here was the Order Nisi which would previouslybe made initially to be made final on "return" after someperiod, 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'srepresentation was actually argued by Mr. Lumatete LearnedCounsel who with Mr. Gikandi appeared for the LSK. They saythe AG should not represent the Commission. To my view thisis an issue that Parliament is the one to concern itself withand not this Commission which is a creature of Statute underCap 102. That Statute does not say whether the Commissionshould or should not have a lawyer leave alone the A.G.. Dr.Leonard Arther Hallet in his book called Royal Commissions andBoards of Enquiry Some Legal and Procedural Aspects 1982 pp210 says:-

"Nearly all inquisitorial inquiries needthe assistance of an advocate and somecircumstances, investigatory inquiriesalso benefit from such assistancewhenever submissions are being receivedthere is any conflict in the evidence itis desirable that an inquiry be able toleave the presentations and eliciting ofevidence to an advocate whose task it isto assist it."....

and speaking for employing the help of State Counsels (inAustralia called "Royal Solicitors") the writer said that toemploy private lawyers for Commission of Inquiries would betoo expensive. He said of what happened in one AustralianProvince at one time:-

"It was concluded that no firm of private

practitioners would be able to take onthe work, because to do so wouldvirtually entail ceasing to carry on

their private practice. In addition thecost to the Government would be extremelyheavy.

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

"However while the Crown Solicitor (StateCounsel) — (bracket mine) might be themost appropriate person to act as aSolicitor [advocate] to a Commission orBoard that conclusion does nothing tosolve the possible conflict of interestsinvolved."

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

About the Attorney General appearing as Counsel to theCommission, this depends on different jurisdictions. Inplaces like Province of Victoria in Australia that function isfulfilled by an independent council. In England before theSalmon Royal Commission 1966 Attorney General appearing asCounsel to Conduct Proceedings on behalf of a Tribunal ofInquiry like the Commission was the practice even though

asDr. Hallet says in the book quoted above suchCommissions” might have highly charged political background."

Here in this country the AG is the Constitutional legal

8advisor to the government. He is also professionally the headof the Bar. He has duties to perform under the Constitutionindependently without any direction from any quarter. It hasbeen said that in that role it is his duty to represent thepublic 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 ageneral responsibility for presenting theevidence to the Tribunal, because theoccasions for intervention by the Statein the affairs of private citizens wasmultiplying and the power of thebureaucracy ever on the increase, he sawit as all the more important that theAttorney-General should regard himself asacting on behalf of the public.

Lord Show cross emphasized the fact thatthe Attorney-General is an independentlegal officer of the Crown and that itwas misconceived to argue that some other"independent" person should be appointedfor the task. "

"See ROYAL COMMISSIONS AND BOARDS OFINQUIRY SOME LEGAL AND PROCEDURALASPECTS-by:

LEONARD ARTHUR

HALLET - PAGE 225"

What Mr, Gikandi and Mr. Lumatete are saying is akin to whatSalmon Commission 1966 adopted when in their recommendationthey said AG should not assist inquiries or tribunals

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"Because some of the matters investigatedby Tribunals are of a highly politicalnature it was considered to be mostconfusing to the public for the Attorney-General to be engaged. Further, becausepersons involved sometimes have aninterest inimical to the Attorney-Generally, they would feel that becausehe was a member of the government hemight "pull his punches" or not behitting hard enough. Further because ofthe political affiliations that theAttorney-General has there would alwaysbe some critism of him for either cross-examining too vigorously or for notcross-examining with sufficient vigour.

It was concluded that it was undesirablefor the law officers of the Crown to beexposed to such criticism. (QUOTATIONFROM THE BOOK ABOVE)pp 225.

but that is only one side of the Coin and it is only onefactor that would be considered if there was to be alegislation on the matter. Here the AG is only amicus Curie,but if the State Counsel are assisting it may be for thoseunderstandable reasons. This cannot vitiate the Commission.I think with respect the two learned counsel may find thesubject requires deeper debate and perhaps legislation.

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

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

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facts as the deponent is able of his ownknowledge to prove:

Provided that in interlocutoryproceedings, or by leave of the Court anaffidavit may contain statements ofinformation and belief showing thesources and grounds therefore."

Mr. Gikandi says that it is by such omission a defectiveaffidavit. Mrs. Onyango defended this by saying it was swornon behalf of the Commission, but that is the more reason thatinformation given to him should have been sourced to theCommission. Even if they were to be facts from his ownknowledge he ought to have said as much. The Court of Appealfor East African said in STANDARD GOODS CORPORATION LTD VS.HARAKCHAND NATHU & CO. [950]l7 EACA 99-

"An affidavit of such kind ought never tobe accepted by a Court as justifying anorder based on the so called "facts"

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

"The affidavit of Mr. Campbell wasdiffident in three respect first it didnot set out the deponents means ofknowledge or his grounds of beliefregarding the matters stated oninformation and belief and secondly itdid not distinguish between mattersstated between information and belief andmatters diposed from the deponentsknowledge.

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The Court should not act on such affidavit and Mr. Gikandisays I should strike it out, but, it would appear now that therigidity of those pronouncements in the quoted cases here havebeen ameliorated by the Court of Appeal in recent decision inthe East African Packaging Industries Ltd. vs. Zoeb AlibhaiCivil Appeal No.124 of 1996 (unreported) where they said perBosire J.A.-

"To my mind the Source of information andthe grounds of belief are primarilyessential for purposes of veracity.Consequently a failure by a deponent todisclose with particularity the sourcesof the information he has deposed to hasthe effect of weakening the probativevalue of the information and even renderit worthless. It does not in my viewrender the relevant paragraph defective."

The affidavit objected to has 7 paragraphs of which paragraph4, 5 and 6 are pertinent:-Paragraph 4 states:-

"THAT I believe that theRespondent/Applicant has an arguableappeal with an overwhelming chance ofsuccess; as the Learned Judge on hisruling (order) did not fully considerissues of law and fact raised on theRespondent/Applicant's behalf. A copy ofthe ruling is annexed hereto markedExhibit JKN2."

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

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Paragraph 5:

"THAT I further believe that the appealwill be rendered nugatory unless theexecution of the order is stayed."

This paragraph is based on no ground or source either offact or of law to support it. Very little is to be bestowedin it.

Paragraph 6:

"I verily believe that the intendedappeal raises points of law of generalpublic importance."

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

So that all in all, I would follow Bosire J.A.'s decisionhere. The statements cannot be struck off, the only weak partis the belief that failure to stay will render the appealnugatory, but even this is merely as to the strength of thestatement on veracity. I would decline to strike theparagraphs leave alone the whole affidavit off as Mr. Gikandihas urged.

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

13this court said in material part:-

"There will therefore be order forCERTIORARI and of MANDAMUS to issueagainst the ruling of the Commission of26-8-98 and order commanding to allow LSKto present its testimony, views,statement and or give oral evidence byits spokesman and be allowed to presentand cross examine any witness and berepresented by counsel in conformity with

Statute, the terms of reference and theprocedure the Commission has laid out foritself. The said decision will be and ishereby cancelled, and the Commission isby Mandamus commanded as above"

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

(b) That the application has been madewithout unreasonable delay, and

(c) Security has been given by the applicantfor the due performance of such decree ororder as may be ultimately binding uponhim-.

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

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

It is now established that a person should prefer anappeal when he has a strong reason for so doing, hence if theappeal is frivolous the order may be refused. The order to beappealed against allowed LSK to participate as a person in thesubject Commission under the terms of reference and ofprocedure the Commission has laid out for itself and inconformity with the Statute i.e. Cap 102. Unless an appeal isbased against the finding that LSK is a "person" , I with greatrespect do not see how any such appeal can be a seriousappeal.

Mrs. Onyango learned Chief Litigation Counsel excludedany complaint against the order as to certiorari and statedthat the intended appeal is only against the order of Mandamusbut that order only directed LSK

to be allowed to functionwithin the rules and the law, and procedure. How can anappeal directed against that be a serious appeal? I withrespect has failed to see it. The suggested grounds of appealwere not filed so may be there may be other reasons,

secondly, the most important requirement for anapplication under 0.41 r. 4 of Civil Procedure Rules is thatthe applicant will suffer substantial loss, but here Whichloss will the Commission suffer if LSK participates? KipNgeno's affidavit has not disclosed it. ' Mrs. Onyango theLearned Chief Litigation Counsel attempted to fill the gap

15left in the supporting affidavit by saying what I havereferred to above. She particularly said that unlimitedaudience given to the LSK will make the Commission contradicttheir terms of reference, but this cannot be true because theorder allows LSK to participate within the Terms of Reference,the Rules of Procedure formulated by the Commission and theStatute under which the Commission is founded.

There is nowhere howsoever where the LSK can cause theCommission to act in contradiction to its terms of referenceon that account. She also said that LSK stands to lose verylittle compared to what the Commission will lose if I disallowthis application. But first I am of the view that, while thisis an argument describing balance of convenience in injunctionapplication, it really is not a criteria in assessingsubstantial loss under considerations for stay.

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

"I accept the proposition that if it isshown that execution or enforcement wouldrender a proposed appeal nugatory then astay can properly be given. Parallelwith that is the equally importantproposition that a successful litigantshould not be deprived of the fruits of ajudgement in his favour, without justcause."

16There should be evidence that the appeal will be renderednugatory if stay is refused. The affidavit in support oughtto have set out facts showing that the appeal will be renderednugatory.

This was a requirement stated by Piatt J.A. in that samejudgement but as I have said above Kip Ngeno's affidavitshowed nothing about it neither did it say anything aboutsubstantial loss. Platt J.A. had said about it in the saidjudgement as follows:-

"It is usually a good rule to see ifOrder 41 r. 4 of the Civil ProcedureRules can be substantiated. If there isno evidence of substantial loss to theapplicant it would be a rare case when anappeal would be rendered nugatory by someother event. Substantial loss in itsvarious forms is the cornerstone of bothjurisdictions for granting a stay. Thatis what has to be prevented. Thereforewithout that evidence it is difficult tosee why the respondents should be keptout of their money (judgement) bracket ismine)."

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

17LSK has for sometime now been operating in execution of it Toorder a stay now; is actually to stop what is going on already.It would be a moot point whether really this is an applicationfor stay of execution because the order had already been"executed". I think appropriately there ought to have been

asuit and an application for injunction. I feel constrained to dismiss this application with coststo Respondent

Dated at Mombasa this 2nd Day of October, 1998

A.I HAYANGA

JUDGE