



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO 1292 OF 1994

KARANJA MULLIRI.....APPLICANT

HUHANGU KIBE.....APPLICANT

NJOGU WAWERU & 49 OTHERS.....APPLICANT

VERSUS

DISTRICT COMMISSIONER KIAMBU.....RESPONDENT

RULING

This is an application for judicial review. Two orders are sought. The first one is an order for certiorari to remove into this court a decision of the District Commissioner, Kiambu, in which he is alleged to have ordered the District Officer Kiambu, and the Chiefs of the area on 4th July 1994, to close down the applicants businesses as “miti shamba” – or herbal medicine men. The second order is an order of prohibition to stop the District Commissioner Kiambu, his servants or agents or otherwise howsoever from interfering with the applicants’ occupation as miti shamba traders. There is a third prayer for a stay of the D.C./s orders pending a decision in this matter

The application is intituted

“In the matter of an Application by Karanja Mukiri and 52 others for an order of prohibition and certiorari

And

In the matter of: Miti shamba traders

And

In the matter of Chief Authority Act

And

In the matter of the District Commissioner Kiambu.”

The manner the application has been intituted does not accord with the decision in the case of Farmers Bus Service & Others v. The Transport Licensing Appeal Tribunal [1959] EA 779. Moreover, the District Commissioner has no power to issue an order under the Chief’s Authority Act, Cap. 128 Laws of Kenya

nor is it alleged that he acted under that Act. Consequently the inclusion of the Act was superfluous. Secondly, the parties to this application have not been properly identified. True the applicants have been stated in the application for leave, but not in the motion itself. The applicants have not also put in a statement to lead the notice of motion. Mrs. Madahana's objection is therefore not without serious merit. O. 53 rule 4 Civil Procedure Rules is clear that the statement accompanying the application for leave must be served with the motion filed pursuant to the leave granted.

I must now consider the application on the merits. The affidavit in support is sworn by the applicant who avers in paragraph (1) thereof: -

“That I am one of the Applicants and therefore authorized to swear this affidavit for and on behalf of the applicants herein.”

This affidavit does not seem to bind the other applicants. There is no averment that the deponent had been specifically authorized to swear the affidavit on behalf of the others. He is the one who considers that being an applicant himself, by virtue of that he is authorized to swear the affidavit in behalf of the others. He is the one who considers that being an applicant himself, by virtue of that he is authorized to swear the affidavit on behalf of the others. The documents he has annexed to his affidavit clearly tell it all. Apart from a regulated trade license issued in the name of one Edward Kamau, all the other documents concern Karanja Mukiri. There is no evidence on record to show that the other applicant operate business of herbal medicine. The application is deficient as concerns the other applicants.

The foregoing apart the order sought to be quashed was not filed. What is on record is a newspaper cutting which, in fact, reads as follows: -

“DC bans “Miti Ni Dawa” trade:Kiambu: District Commissioner Samuel Oreta yesterday banned trading licenses for all Miti Ni Dawa operators in the area and gave the traders one week to wind up their business. The D.C. who was addressing District Officers, Chiefs and 56 Miti Traders said, the terms of their licenses had been abused since alcoholic concoctions had taken over from the medicinal liquid...”

The cutting was from the Daily Nation of 5th July 1994.

O. 53 rule 7 Civil Rules requires a certified or verified copy of the order to be filed, or in its absence an account as to why it could not be filed. Counsel for the applicants, Mr. Nyamogo submitted that the order by the D.C. having been oral could not be filed and verified.

Two problems arise. Firstly, there is the question whether such an order was made. Courts do not usually rely on newspaper cuttings as a basis for a decision. It may not be possible to ascertain the correctness of the reporting. Secondly, the full extent of the order and the full circumstances under which it was made may not be clear. Counsel for the applicants submitted that the order was verbal. If that be so then there is the difficulty of ascertaining what the D.C. may have said.

There is also the additional problem that the applicants appear to be unsure who made the order and in exercise of which powers. They seem to have originally thought that the D.C. was exercising powers under the Chief's Authority Act. Mr. Nyamogo did in the course of hearing state that the Act was cited in error. If that be so, then upon what basis is the D.C.'s order, if at all made, is being challenged. From Learned Counsel's submissions he suggested that the D.C. is purporting to cancel licenses he did not and could not grant. However Learned Counsel did not state he provisions of the law the D.C. may have violated or under which he unlawfully or wrongfully purported to act.

A legal point does seem to arise from this application which I propose to comment on briefly. I have not in the course of my work come across an application seeking judicial review of an oral or verbal order or decision. O. 53 rule 7, above as worded appears to suggest that the order or decision being challenged must be certain in its import and its full extent and circumstances under which it was made definite. An application to seek the quashing of an oral order or decision may pose problems as, firstly it might first

require oral evidence to establish its existence which evidence is not permissible in an application for judicial review. Secondly, because its terms may not be clearly discernible and a court might not properly appreciate what is to be quashed. Because of such uncertainty I doubt whether an order of judicial review may, except in the clearest of cases, issue where the decision or order is oral.

In the above circumstances, I am disclined to grant any orders and dismiss the application with costs. Orders accordingly.

Dated and delivered at Nairobi this May 31, 1995

S.E.O BOSIRE

JUDGE