



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO 361 OF 1994

SIMEL & OTHERS.....APPLICANTS

VERSUS

COUNTY COUNCIL OF NAROK & OTHERS.....RESPONDENTS

RULING

The applicants have applied for leave to apply for judicial review to quash the decisions of the County Council of Narok affecting the applicants' right to prohibit similar decisions being taken by it and to prohibit the Minister for Local Government from approving them.

There are the following two decisions in question which the applicants seek to be reviewed by the Court.

1. Minute No 52/93 of 3rd September, 1993 Re Naimina Enkiyio Forest in Narok district whereby it was resolved by the Narok County Council "that the said Naimina Enkiyio Forest will continue to be under the Narok County Council and all communities around it should consult with the Council for their benefit."

2. Minute No 69/93 of 26.11.1993 whereby the Narok County Council resolved that the Registrar of Companies be requested to deregister the 7th applicant namely Loita-Naimina Enkiyio Conservation Trust

Company which has lost direction by claiming to hold in trust Naimina Enkiyio Forest.

So far as the minute 69/93 is concerned I hereby grant leave to the applicants to apply for its judicial review and further direct that the grant of this leave shall operate as a stay of the proceedings in pursuance of this minute until determination of these proceedings.

However the first minute No 52/93 does not present itself with an easy answer. By legal notice No 164 of 1992, the Rules Committee amended order 53 of the Civil Procedure Rules whereby their existing rules 1 & 2 of order 53 were deleted and new rules were inserted in their place. The object of the deletion of the said existing rules and insertion of the new rules was to provide that an application for judicial review could be brought without leave of the Court.

There is no dispute that the provisions of order 53 are the procedural rules of court made under section 9 of the Law Reform Act (cap 26), (hereinafter called the Act).

Section 8(1) of the Act enjoins that High Court shall not in the exercise of its civil or criminal jurisdiction

issue any order of prerogative writs of *mandamus* prohibition or *certiorari*. However s 8(2) of the Act provides “In any case in which the High Court in England is by virtue of the provisions of s 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938 of the United Kingdom empowered to make an order of *mandamus*, prohibition or *certiorari*, the High Court shall have power to make a like order. Under s 9 (1) (b) of the Act the Rules Committee set up under s 81 of the Civil Procedure Act is empowered to make rules of court requiring (*inter alia*) except in such cases as may be specified in the rules that leave shall be obtained before an application is made for any order for *mandamus* prohibition or *certiorari*.

Coming back to legal notice No 164 of 1992, the Rules Committee did not specifically say in so many words that leave shall not be necessary before an application is made for a judicial review although its intention was so clearly that, as I have already said. It merely deleted the existing rule 53 according to which no application for an order of *mandamus* prohibition or *certiorari* may be made unless leave therefore has been granted. This amendment has been criticised by the High Court in High Court Civil Application No 790 of 1993 in which Bosire, Mbogholi and Oguk JJ have held that the present amended rule 1 which says that an application for an order of *mandamus*, prohibition or *certiorari* shall be made by an

application for judicial review in accordance with the new provisions of order 53 and without obtaining leave before the application is made is *ultra vires* of section 9(1) of the Act. Consequently original rule 1 of order 53 still stands and leave of the Court is necessary before any application is made for an order of judicial review.

Mr Mwenesi has therefore followed the correct procedure in applying for leave before making an application for an order of judicial review.

According to rule 2 of order 53 before LN 164/92 no leave could be granted for an order of *certiorari* unless the application for leave is made not later than 6 months after the cause of action arose. Legal notice No 164/92 deleted this provision and inserted new rule 2.

Rule 2(1) of order 53 inserted by the said legal notice No 164 of 1992 reads;

“2(1) An application for judicial review shall be made promptly and in any event within six months from the date when the grounds for an application arose unless the High Court considers that there is good reason for extending the period within which the application shall be made.”

Thus according to the new rule the High Court has power to extend the period within which an application for judicial review could be made. This discussion has become necessary because the said minute No 52/93 is dated 3.9.1993 whereas the applicants brought this application for leave on 18.3.1993. That is outside the said period of six months. Questions for my consideration is: can I extend this period of six months for good reason shown?

Subrule 2 of section 9 of the Act says:

(2) Subject to the provisions of sub-section 3, rules made under sub section 1 may prescribe that applications for an order of *mandamus*, prohibition or *certiorari* shall in specified proceedings be made within six months or such shorter period as may be prescribed after the act or omission to which the application for leave relates.

And sub-section 3 (so far as material) says

(3) In the case of an application for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceeding for the purpose of being quashed

leave shall not be granted unless application for it is made not later than six months after the date of that judgment order decree conviction or other proceeding or such shorter period as may be prescribed under

any written law.

The Act is an Act of Parliament which has in its wisdom laid down this absolute period of six months within which an application such as the present one may be made. It further emphasizes that this period of six months may be shortened which by implication means that it cannot be enlarged. Can the rule made as a subsidiary legislation under the Act supersede the express provisions of the same Act and empower the Court to enlarge the said period of six months? The answer obviously is no. Thus in my view the present rule 2 of order 53 is in direct conflict with s 9 of the Act and I hold that it is *ultra vires* of the said section 9 of the Law Reform Act. This rule cannot go outside the absolute period of 6 months laid down by the Act. See *Re exparte Githunguri* [1962] EA 526.

Mr Mwenesi urges me to exercise my jurisdiction under o 49 r 5 whereby I am empowered to enlarge time. Rule 5 of order 49 (*para materia*) says where a limited time has been fixed for doing any act or taking any proceedings under these Rules or by summary notice or by an order of the Court, the Court shall have power to enlarge time upon such terms (if any) as the justice of the case may require.

If it were a limited time prescribed under the Civil Procedure Rules or by an order of the Court of by summary notice. I could have enlarged that period. But here absolute period of six months has been laid down by a different statute namely the Law Reform Act. I cannot invoke rule 5 of order 49 to supersede the express provisions of the Act.

Here I may however mention that under the English procedure the Court may extend the time under o 3 r 5 which corresponds with our o 49 r 5. However the wording of section 9 sub-section (2) and (3) is so strongly prohibitive that I do not think that I can disregard it and follow the English procedure.

Mr Mwenesi has further argued that as this period of six months has been intervened by the Christmas vacation of the year 1993, under o 49 r 3A the period between 21.12.1993 and 6.1.1994 should be omitted from computation of time laid down (whether under the Rules or any order of the Court). Again this provision of order 49 rule 3A is a piece of delegated legislation. It cannot have the effect of amending express provisions of

sub-section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament.

Mr Mwenesi has forcefully argued that the Court cannot dismiss social issues from our legal conscience by adhering to a strict and technical interpretation of statutes and that it must strike down a law which is found inimical to the public welfare. But long established tradition in commonwealth countries is that we look in the main to the Legislature rather than to the Courts for the development of our law. Moreover, it is a different thing if a statute is ambiguous and capable of different interpretations. Here in this case the legislation is clear and certain and not open to any conflicting interpretations. The duty of a Court is to expound what the law is and not what in view of social changes it should be. To change the law according to social dictates of society is the function of Legislature.

I cannot strike down or disregard the express provisions of s 9 of the Act. I therefore reject the applicant's application for leave to apply for an order of judicial review to quash the said resolution under minute No 52/93 of the Narok County Council. As the application is essentially an *ex parte* application I make no order as to costs of the application.

I may make it clear here that had I any power to enlarge the said period of six months I would have exercised it in favour of the applicants and granted them leave to apply.

A copy of this ruling should be forwarded to the Honourable Attorney General as I think the provisions of section 9 should be amended so that Court is given jurisdiction to enlarge the period of six months in a deserving case like this.

Dated and Delivered at Nairobi this 11th day of April 1994

G.S.PALL

JUDGE