



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), SICHALE & KANTAL, JJA]

CIVIL APPEAL NO. 309 OF 2017

BETWEEN

REPUBLIC.....APPELLANT

AND

COMMISSION ON

ADMINISTRATIVE JUSTICE .....RESPONDENT

YUSUF MAHAMED FAZUL .....INTERESTED PARTY

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (G.V Odunga, J) dated 25<sup>th</sup> May, 2017

IN

JUDICIAL REVIEW MISC. APPL. NO. 517 OF 2016)

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JUDGMENT OF THE COURT

**Yusuf Mohammed Fazul (Fazul)** named as an Interested Party herein filed a Notice of Motion application dated **14<sup>th</sup> November, 2016**, in which a ruling was rendered on **25<sup>th</sup> May, 2017**, being the subject of this appeal at the Judicial Review Division of the High Court. He sought orders that:

*“(1) spent*

*(2) This Honourable Court be pleased to stay the implementation of the Investigations Report published by the Respondent relating to the Applicant pending the hearing and determination of this suit,*

*(3) This Honourable Court be pleased to grant the Applicant leave to amend the Notice of Motion application filed herein to include appropriate reliefs to quash the Investigation Report released by the Respondent,*

*(4) This Honourable Court directions as it may circumstances, be pleased to grant any other orders and or deem fit and just to issue under the*

*(5) Costs of this application be provided for”.*

The motion was supported by **Fazul’s** affidavit sworn on the same day (**14<sup>th</sup> November, 2016**). He deponed that on **27<sup>th</sup> October, 2016**, the High Court issued an order staying the respondent’s decision to investigate him or to publish the investigations report and /or issue it to relevant authorities; that the court order was served on the respondent (Commission on Administrative Justice) on **1<sup>st</sup> November, 2016**; that notwithstanding the stay and the service thereof, the respondent proceeded to complete the report and vide its letter of **10<sup>th</sup> November, 2016**, forwarded the report to the Cabinet Secretary, Ministry of Devolution and National Planning as well as other Government Offices; that on **10<sup>th</sup> November, 2016**, the respondent issued a press statement on the report, thus publishing the report in the media. He sought orders to forestall the implementation of the investigations report as well as leave to amend his pleadings “... to include prayers to

**quash the investigation report released by the respondent”.**

The motion was opposed by the respondent who filed a Notice of a Preliminary Objection dated **16th November, 2016** on the basis that the motion “...**is incurably defective, incompetent and bad in law**”. In addition, **Leonard Ngaluma**, the respondent’s Commission Secretary swore a replying affidavit, dated **17<sup>th</sup> November, 2016**. It was his deposition that following several complaints against **Fazul**, the respondent carried out investigations which were completed before **27th October, 2014** when the court granted leave to the appellant to file Judicial Review proceedings which leave operated as a stay.

Having considered the rival positions, in his ruling of **25<sup>th</sup> May, 2017, Odunga, J**, (in respect of the motion of **14<sup>th</sup> November, 2016**), rendered himself as follows:

**“In this application, the ex-parte applicant seeks an order staying the implementation of the investigation report. He however appreciates that the said report has been handed over to the implementing authorities. Those authorities are not parties to these proceedings. To grant such orders would itself amount to a violation of the rules of natural justice in so far as the said authorities are concerned. In my view to grant the said order would, with due respect be a mischievous way of seeking leave against such persons yet no leave was sought and granted to commence judicial review proceedings against them. To allow the instant application would in my respectful view, turn these proceedings into a circus and render them a theatre of the absurd”.**

As regards amendments, the judge stated that order 53 rule 4(2) of the Civil Procedure Rules:

**“... allows the amendment of the statement and the filing of further affidavits but only where they deal with new matters arising out of affidavits of any other party to the application. It is important to note that the provision deals with proceedings “on the hearing of the motion” which is a clear indication that the drafters of the rules were clear in their mind that at that time, the motion is already part of the record. Yet they did not deem it fit to expressly provide for the amendment of the motion as well. In my view if it was intended that the motion could be amended at that stage, nothing would have been easier than for the rules to provide for the same. To my mind, the omission to expressly provide for the amendment of the motion was intentional and was intended to avoid the introduction of other reliefs at the stage of the hearing of the motion for which leave was neither sought nor granted”**

The appellant was dissatisfied with the said outcome and hence this appeal.

In a Memorandum of Appeal dated **30<sup>th</sup> August, 2017**, the appellant listed nine

(9) grounds of appeal faulting the judge for:

- (i) finding that Order 53 rule 4(2) of the CPR does not provide for the amendment of a Notice of Motion;
- (ii) finding that an order of stay of implementation of the investigation report would amount to a violation of the rules of natural justice in respect of implementing authorities not being party to the proceedings;
- (iii) finding that a grant of an order of stay of implementation of the investigation report is tantamount to granting leave to commence judicial review proceedings in respect of parties not named in the proceedings;
- (iv) finding that the proceedings on the basis that the motion was brought solely under the CPR and the Law Reform Act to the exclusion of the Constitution of Kenya and the Fair Administrative Action Act of 2015;
- (v) failing to find that the scope of Judicial Review has greatly expanded post the Constitution of Kenya, 2010;
- (vi) failing to allow an amendment;
- (vii) erred in relying on technicalities at the expense of fidelity to the Constitution;
- (viii) failing to sufficiently or at all to consider the material placed before him and the submissions; and finally,
- (ix) failing to appreciate that the respondent was in breach of an order of the court.

On **9<sup>th</sup> July, 2019**, the appeal came up before us for plenary hearing. **Miss Kungu**, learned counsel for the appellant made oral submissions, highlighting the appellant’s written submissions dated **23<sup>rd</sup> November, 2018**. It was submitted that there was need to amend the Judicial Review application dated **4<sup>th</sup> November, 2016** which *inter alia* sought orders restraining the respondent from investigating the appellant and from publishing the investigations report as circumstances had since changed given the fact that the respondent had completed and published the investigation report; that the High Court has inherent power to avert an injustice being visited on the appellant; that Judicial Review proceedings have greatly expanded post the Constitution of Kenya, 2010 and in view of the enactment of the Fair Administrative Action Act. The appellant relied on several authorities as per his list of authorities dated **24<sup>th</sup> January, 2018**.

In opposing the appeal, **Miss Fundi**, holding brief for **Mr. Chahale** for the respondent made oral submissions, having chosen not to file written submissions.

It had however filed its list of authorities dated **8th May, 2019**. Counsel contended that an application for judicial review is based on a statement of facts and the motion is a reflection of what was considered at the time leave was sought. Further, that the impugned report was already in possession of other entities, who were not parties to the judicial review proceedings.

We have considered the record, the rival oral submissions made before us, the appellant's written submissions, the authorities cited by each of the parties and the law.

The background facts giving rise to this appeal are largely uncontested. On **27th October, 2016**, the appellant was granted leave to institute Judicial Review proceedings. The appellant contended, and rightly so, in our view that: **"... the leave so granted operated as stay of the respondent's decision to investigate the appellant, to publish the investigation report and / or issue the same to relevant authorities for implementation."** It is this leave granted on **27th October, 2016** that led to the filing of the motion of **4th November, 2016**. According to the appellant, in spite of the order of stay being served upon the respondent on **1st November, 2016**, the respondent released and circulated the report on **10th November, 2016**. It then became necessary to file the motion of **14th November, 2016** seeking stay of the implementation of the Investigation Report and for leave to amend the motion dated **4th November, 2016** so as to reflect the circumstances that had since changed.

In the Chamber Summons dated **27th October, 2016**, and the statement of the same date, the appellant sought leave to file the Judicial Review proceedings.

On the same day (**27th October, 2016**), the court granted the appellant leave to apply for, *inter alia*,

**"(a) An Order of Certiorari to remove to this Honourable Court for purposes of being quashed, the Respondent's decision to investigate the Applicant on account of alleged forgery and falsification of academic documents, abuse of power and official misconduct as set out in the Respondent's letter dated 17th August, 2016 and addressed to the Principal Secretary, Planning and Statistics, Ministry of Devolution.**

**(b) An Order of Prohibition prohibiting the Respondent from investigating the Applicant on account of matters which are currently being handled by the High Court in Petition No. 107 of 2016, the Employment and Labour Relations Court in Petition No. 34 of 2016 and matters which are currently being investigated by the Ethics and Anti-Corruption Commission as well as the Directorate of Criminal Investigations.**

**(c) An Order of Prohibition prohibiting the Respondent from publishing the Investigations Report containing findings and recommendations against the Applicant to any relevant authorities or whomsoever".**

As stated above, following the leave, the appellant filed the Notice of Motion dated **4th November, 2016**. In the motion the appellant sought the following orders, *inter alia*:

**"(a) An Order of Certiorari to remove to this Honourable Court for purposes of being quashed, the Respondent's decision to investigate the Applicant on account of matters which are currently being handled by the High Court in Petition No. 107 of 2016, the Employment and Labour Relations Court in Petition No. 34 of 2016 and matters which are currently being investigated by the Ethics and Anti-Corruption Commission as well as the Directorate of Criminal Investigations.**

**(b) An Order of Prohibition restraining the Respondent from investigating the Applicant on account of matters which are currently being handled by the High Court in Petition No. 107 of 2016, the Employment and Labour Relations Court in Petition No. 34 of 2016 and matters which are currently being investigated by the Ethics and Anti-Corruption Commission as well as the Directorate of Criminal Investigations.**

**(c) An Order of Prohibition prohibiting the Respondent from publishing the Investigations Report containing findings and recommendations against the Applicant to any relevant authorities or whomsoever"**

Given that the horse had bolted in that the respondent had allegedly published the report on **10th November, 2016**, the appellant sought to have the motion of **4th November, 2016** amended so as to forestall the implementation of the report, hence the motion of **14th November, 2016** which was premised on several grounds including ground 7 thereof which stated:

**"the applicant additionally requires leave of court to amend its pleadings in order to seek additional reliefs in the substantive motion already filed herein".**

Additionally, in the affidavit in support of the motion of **14th November, 2016**, the appellant deponed in paragraph 12 as follows:

**" For the reasons aforesaid, it would be in the interests of justice for this Honourable Court to issue orders staying the implementation of the Investigations Report and the recommendations contained therein and such other orders as it may deem fit and just to issue under the circumstances"** and in paragraph 13 thereof, he deponed:

**"I also seek the leave of this Honourable Court to amend the pleadings to include prayers to quash the Investigation Report released by the Respondent".**

The appellant, as stated above, found it necessary and expedient to amend his motion of **4<sup>th</sup> November, 2016** as the report which he sought to forestall was already in the hands of other authorities other than the respondent. As stated above, the judge declined to grant the orders sought in the motion of **14<sup>th</sup> November, 2016**.

In our view, the judge was correct in declining to grant orders to amend the Notice of Motion of **4<sup>th</sup> November, 2016** to include orders that would affect parties who were not named at the time of seeking leave to file Judicial Review Proceedings. It is our position that a motion filed in pursuance to leave being granted under Order 53 of the CPR is a mirror image of the application seeking leave to file Judicial Review proceedings and the Statement made thereof. In this instance, leave was granted on **27<sup>th</sup> October, 2016** and the respondent was the only party in the proceedings. The leave sought did not name entities that are said to be responsible for the implementation of the investigations report. As rightly pointed out by the judge, to issue leave sought in the application would have been in violation of the rules of natural justice as against persons not named at the time leave was sought.

The judge cannot therefore be faulted for declining to amend the motion of **4<sup>th</sup> November, 2016** to include persons not named at the time leave was sought.

Secondly, we are in agreement with the learned judge that the Civil Procedure Rules do not provide for amendment of the motion in Judicial Review which motion is preceded by an application for leave. Order 53 rule 4 (2) provides:

***“The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new mater arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavit”.***

The judge’s comments on the provisions of order 53 rule 4(2) of the CPR are:

***“It is clear that the said provision expressly allows the amendment of the statement and the filing of further affidavits but only where they deal with new matters arising out of affidavits of any other part to the application. It is important to note that the provision deals with proceedings “on the hearing of the motion” which is a clear indication that the drafters of the rules were clear in their mind that at that time, the motion is already part of the record. Yet they did not deem it fit to expressly provide for the amendment of the motion as well. In my view, if it was intended that the motion could be amended at that state, nothing would have been easier than for the rules to provide for the same.***

***To my mind, the omission to expressly provide for the amendment of the motion was intentional and was intended to avoid the introduction of other reliefs at the stage of the hearing of the motion for which leave was neither sought nor granted.”***

We agree. The procedure for Judicial Review being a two-pronged approach, it is unfathomable that the motion can be amended to reflect what was not contained in the application seeking leave and the supporting statement at the time leave was sought. If this were to be allowed, the application seeking leave to file Judicial Review proceedings and the amended Judicial Review motion would be incongruous as the latter will not be based on the leave granted.

The upshot of the above is that we find that the appeal has no merit. It is hereby dismissed with costs.

***Dated and Delivered at Nairobi this 24th Day of January, 2020.***

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**