IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPEAL NO. 25 OF 2015

BETWEEN

PAULINE KITTI NYALE

(as a legal representative of the estate of

GEOFFREY KATANA TOKALI)…..……..…...…….APPELLANT

AND

PRINCIPAL MAGISTRATE'S COURT, KILIFI…....…..RESPONDENT

AND

JUMA NGALA MWAMBENGU……...……..INTERESTED PARTY.

(Being an appeal from the Ruling/ Order of the High Court of Kenya at Malindi (Angote, J.) dated 27th January, 2015

in

H.C. MISC. APP. NO. 5 of 2015)

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JUDGMENT OF THE COURT

The appellant believed that the suit brought by the respondent in the Kilifi Senior Resident Magistrate's Court, **Civil Case No. 21 of 2001** had abated following the death of the original defendant (the deceased). Pursuant to that belief and based on the provisions of **Order 24 Rule 4** of the Civil Procedure Rules, the appellant filed a notice of motion asking the court to confirm that the suit had indeed abated. She deponed in the affidavit in supporting of the motion that during the pendency of the suit, the deceased passed away on 17th September, 2009; that it was not until 10th June, 2013 that the appellant was substituted in place of the deceased; that without an application to cause the legal representative of the deceased to be joined in the pending proceedings, the suit against the deceased abated on 17th September, 2010, one year after his death; and that joining the appellant as the deceased's personal representative to the suit, did not revive the abated suit.

That application was dismissed by the Principal Magistrate who held that after the appellant joined the proceedings, the application for abatement of the suit was overtaken by that event, stating:-

"…in the interest of justice and because this is a land case where the deceased's wife continues to live or has interest in the suit plot, it is pertinent that the matter is heard and determined and a just and fair decision reached. The plaintiff/respondent had already been permitted to enjoin the deceased defendant's widow in the suit.

The appellant was aggrieved by that decision but instead of challenging it by way of an appeal, commenced judicial review proceedings for *certiorari* and prohibition by instituting, first, an application for leave to commence those proceedings. The appellant explained that she was compelled to adopt this course upon realizing that she would not obtain leave to appeal after the ruling was not delivered on the scheduled date but one month later and in the absence of the appellant or her advocate.

By an arrangement between the bar and the bench in Mombasa *exparte* applications are considered by the Judge in chambers without being addressed by counsel or the applicant. The registry would merely place the file before the judge in chambers to consider the *exparte* application and after making orders the file would be returned to the registry and the outcome communicated to the applicant or the applicant's advocate. It is contended by the appellant that when the chamber summons for leave was placed before **Angote, J**. in chambers, he, without hearing counsel, not only rejected the application for leave but also proceeded to strike out the entire application which had also sought that leave,if granted should operate as a stay. While striking out the application, the learned Judge remarked that;-

"It is trite law that one cannot challenge the merits of a decision of the lower court by way of judicial review unless the said court did not have jurisdiction or if the legal process of arriving at the said decision was not followed. In view of the fact that it is the merits of the decision that is being challenged, I decline to grant ...leave to commence judicial review proceedings. I therefore strike out the chamber summons dated 26th January, 2015."

That very day counsel appeared before the learned Judge and urged him to review his decision. The request was similarly dismissed with the learned judge reiterating the same sentiments, prompting this appeal. Two decisions having been made on the same day, one rejecting the application for leave and striking out the chamber summons and another dismissing an application to the learned Judge to review the first decision, it is important to ascertain which decision is being appealed against.

Learned counsel for the appellant has not been helpful in clarifying this question. In his written submissions he has maintained that when he addressed the learned Judge after the application for leave was rejected, what he sought from the learned Judge did not amount to seeking a review but a "*reconsideration*" of the decision; that he could not have been asking for review because such request can only be by a formal application; and that in any event the rejection of the second application, whether a reconsideration or review, was itself appealable and indeed was ground 4 of the amended memorandum of appeal. In other words learned counsel has argued that it is immaterial which decision was being challenged in this appeal, or in the alternative he contends that both decisions were, after all, covered by the same memorandum of appeal.

That submission is not tenable in view of the provisions of **Rule 75 (3)** of the Court of Appeal Rules that requires that the notice of appeal lodged to challenge a decision of the courts below be in respect of a specific decree or order. It cannot therefore be argued that separate decisions can be the subject of a single notice of appeal. Secondly, the notice of appeal was expressed to have been lodged pursuant to leave granted on 27th January, 2015. Of the two decisions leave to appeal was granted only in respect of the second decision.

Thirdly, despite learned counsel's maintenance that, when he returned before the learned Judge after the chamber summons had been struck out, he was seeking the latter's "*reconsideration*" of the matter and not a review, the record is, once again clear that counsel addressing the learned Judge specifically asked him to review the first decision. In the entire Civil Procedure Rules there is no such relief as

"*reconsideration of a decision*" and therefore we fail to see how counsel would have asked for that kind of relief.

Although under **Order 45** of the Civil Procedure Rules, a party aggrieved by an order from which an appeal is allowed but not preferred or from which an appeal is not permitted can apply to the Judge who made the order to review it, depending on the circumstances of a particular case, nothing stops such a party from applying orally for review. In this particular case we have seen that,the application for leave to institute a motion for judicial review was placed before the learned Judge in chambers, who, without hearing counsel, struck it out. In those circumstances it was proper, in our considered view,the application having not been served on the opposite side, for counsel to have sought review orally.

Having said that,we reiterate that the solitary question in this appeal is whether or not the learned Judge properly exercised his discretion in refusing to review the order striking out the application for leave.

To begin with we think it is a good practice to hear counsel or party in any *ex parte* application even when the court is minded to grant the orders sought so as to have a full record of submissions and also to avail an opportunity to the presiding officer to seek and obtain any clarifications. The first of the two-stage process of judicial review requires the applicant to apply for leave *ex parte* to a judge in chambers. From the language of **Order 53 Rules 1(3)** and **2** of the Civil Procedure rules the Judge in considering an application for leave may grant it and in so doing may impose such terms as to security as he may think fit. Leave will, however, not be granted unless the application is made not later than six months after the date of the proceedings sought to be challenged in the judicial review proceedings by way of *certiorari*. Apart from this last provision giving express authority to the judge to strike out an application for leave, the terms of proviso to **Rule (4)** suggests that at this stage, and depending on the circumstances of the case, where the Judge is not inclined to grant the *exparte* order the course of action provided for is to order the application to be served for hearing *inter partes* before the grant of leave or where the leave is granted but the judge has doubts on the efficacy of making an order for leave to operate as a stay, direct the question of stay be heard separately and determined after hearing parties.

Without expressing any opinion on the merit of the appellant's application, we think that the learned Judge improperly exercised his discretion in failing to review his first decision striking out, in *limine*, the application. This Court has on several occasions emphasized that the main purpose of application for leave to apply for judicial review is to eliminate at an early stage frivolous, vexatious and hopeless claims so as to save both judicial time and expense on the parties. Leave may only, therefore be granted if, on the material available the court is of the view, without going into the matter in depth, that there is a case fit for further investigation when the main motion is lodged and argued *interpartes*. In **Mirungi Kariuki v Attorney General, [1992] KLR 8** the Court explained that:-

"… the applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief-makers."

In this appeal, the issue was whether the appellant demonstrated a *prima facie* case to warrant the court to grant leave to bring a motion for orders of *certiorari* and prohibition.

It is not in doubt that many and distinct factors are considered before granting an order of *certiorari* or prohibition. Without hearing the appellant in his application for leave and the respondent in opposition we do not see how the learned Judge would have established whether there was a *prima facie* case or not. That is why we have come to the conclusion that by rejecting the oral application for review of his first decision, he was in error.

Consequently, we allow this appeal with no orders as to costs, set aside the order declining the review of the earlier orders and substitute therefor an order of review of the earlier decision with the inevitable result that the earlier orders striking out the application dated 26th January, 2015 are also set aside. The application for leave to be placed before a judge (besides Angote, J.) of the Environment and Land Court (in Mombasa) for fresh consideration.

Dated and delivered at Mombasa this 26th day of February 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR