IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appeal 11 of 2002

REPUBLIC …….…….. APPELLANT

AND

ISAAC THEURI GITHAE ……..…….. 1ST RESPONDENT

THE PRINCIPAL MAGISTRATE, NYAHURURU **……. 2ND RESPONDENT**

(Being an appeal from the Ruling and Orders of the High Court of Kenya at Nakuru (Rimita J.) dated 31st October 2001

in

H.C.MISC. APPL. NO.67 OF 2001)

****

JUDGMENT OF THE COURT

This appeal is from the decision of the superior court dated 31st October, 2001 in its Misc. Civil Application No. 67of 2001. The applicant in that matter, Isaac Theuri Githae, sought orders of prohibition and certiorari pursuant to the provisions of O.LIII of the Civil Procedure Rules. Proceedings under that Order are commenced by seeking leave ex-parte, by summons to commence judicial review proceedings. O.LIII rule 1(3) requires that prior notice of the application be lodged with the registrar, along with copies of the statement and affidavits in support of the proposed application. In this case however, instead of the said notice being lodged on the day preceding the filing of the application, it was filed along with the application for leave, on 9th March 2001. Issue has been raised on this as the appellant contends that the failure to lodge the notice to the registrar as required by the relevant rule rendered the entire proceedings for judicial review invalid. We propose to deal with the issue later on in this judgment.

The applicant was granted the leave, which leave was ordered to operate as a stay of the proceedings of the Principal Magistrate's Court, at Nyahururu, in its Criminal Case No.75 of 2000. In that case the applicant and five other persons were the accused persons . The applicant then filed a motion, pursuant to that leave, seeking the following orders:

(1) An order of prohibition restraining the Principal Magistrate Nyahururu from proceeding with the hearing and or exercing jurisdiction in Nyahururu Principal Magistrate's Court Criminal Case No.75 of 2000 or any other proceedings or subsequent cases against the applicant or his co-accused arising from the order made on 5th January 2000 in Nyahururu PMCC No.1 of 2000 and/or any other

matter related thereto.

(2) An order of certiorari issue to remove and bring the same before the court the decision of Nyahururu Principal Magistrate made on 14th February 2001 in the said proceedings for purposes of quashing the same

(3) Order on costs.

In Criminal Case No.75 of 2000, the applicant and seven others were jointly charged with two counts, the first one of malicious damage to property contrary to **section 339 (3**) of the Penal Code, and the second one of Arson contrary to **Section 332** of the Penal Code. The applicant was separately charged with two counts, one of contempt of court contrary to **section 121** of the Penal Code, and two , incitement to violence contrary to **section 96** of the Penal Code. In all those counts, the complainant was Ignatius Ngunjiri Kamakia, and they appear to have arisen from an order of the same court in its Civil Case No.1 of 2000, in which the said Ignitius Ngunjiri Kamakia (Kamakia) is the plaintiff, with the applicant and six others as the defendants.

In the aforesaid suit Kamakia prayed for a restraining injunction against the applicant and his co-defendants. He was granted interim orders upon application pursuant to the provisions of **O.XXXIX** of the Civil Procedure Rules. The applicant allegedly breached that order and upon application under **O.XXXIX 1(3)**, the Principal Magistrate, Nyahururu, committed him for contempt. He imposed a term of three months imprisonment against the applicant which sentence was later stayed by the High Court. The criminal charges we earlier indicated were concurrent to the civil contempt proceedings. According to the applicant, the charges were based on the same facts as the contempt for which he stood convicted.

Rimita J. heard the Judicial Review application. He upheld the applicant's contention that the criminal charges were brought and sustained, in the learned Judges' words "to give the interested party/complainant a collateral advantage in the civil dispute." In our understanding what the learned Judge propounded was that the criminal charges were meant to bolster the complainant's civil claim and to pressurize the applicant and his co-defendants to "probably give up the dispute." He then proceeded to allow the application with costs, and thus provoked this appeal.

Seven grounds of appeal have been raised, as follows:

1) The learned Judge failed to appreciate that the suit in the High Court was improperly instituted and should, therefore, have been struck out.

2) He erred in holding that the parties were involved in a land dispute.

3) He erred by not appreciating sufficiently or at all that four distinct counts were laid against the applicant and others, all which had no relevance to Civil Case No.1 of 2000.

4) He erred in not appreciating sufficiently or at all that the order of certiorari was not available in law in respect of judicial proceedings which took place before the Resident Magistrate on 14th February 2001.

5) He erred in fact in allowing the order for prohibition on the basis; inter alia, that the civil suit is competent.

6) He erred in law and fact in importing improper motives to the charges laid against the 1st respondent and considering that the appellant would obtain a collateral advantage.

7) He erred in law and fact in not appreciating sufficiently or at all the purpose and purview of the orders of prohibition and certiorari.

When this appeal earlier came for hearing the court raised, suo motu, the question as to the locus standi of

the appellant to bring this appeal considering that he was merely a witness in the Criminal case. The decision against which this appeal is brought was given on 31st October, 2001.

In that decision orders were made against the appellant on costs. On that account, he was entitled as of right to appeal if as it is now clear, he was aggrieved with the said decision. That right is made available to him by **section 8(5)** of the Law Reform Act, Cap 26 Laws of Kenya. Whether he had the right to challenge the entire decision under the circumstances of this case is not in dispute.

Ex Parte Lilley [1951]2KB 749 was cited to us as authority for the proposition that the appellant had the right to challenge the whole decision. Lord Goddard, C.J, who delivered the leading opinion expressed himself thus on the issue:

"**His grievance is that he has been ordered to pay costs and, of course, when he appeals against an order to pay costs, it follows that he must be able to go into the merits, because it is only on a decision on the merits that the appellate court can determine whether he ought to have been ordered to pay costs or not."**

We are of the same view. All counsel appearing in this matter also agree that the appellant is exercising his undoubted right of appeal in view of the order against him on costs.

Mr. Ngatia for the appellant submitted before us, relying on the authorities of **Lawrence Nginyo Kariuki v. County Council of Kiambu & Another**, High Court Misc. 1446 of 1994, and **Kenya Telecommunications Investment Group LTD v. Telecommunication Commission of Kenya**, Misc. Civil Application No. 1267 of 2003 (unreported), that the judicial review application was a nullity. In both cases he cited the superior court held that failure to serve a notice to the registrar as required by **O.LIII rule 1(3)** is fatal to the suit;

O.LIII rule 1(3), states thus:

"**1 (3) The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits:**

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown."

The rules are silent on the mischief the rule is meant to cure. In England this requirement is only necessary if the application relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein. (See O.53 rule 5(3) 1999 Edition Vol. 1 of the Supreme Court Practice – p.895). In absence of any explanatory notes for requiring the notice of the application for judicial review being lodged with the registrar, we can only possibly guess what the rules making authority had in mind. It cannot possibly be to warn the Attorney General of the proposed application because had that been so express words would have been used. The object might possibly be to enable the registrar to organize for a Judge to hear the application as such an application is always regarded as being urgent. Whatever the object of the provision we are unable to hold that it is mandatory. In our view a failure to comply with that sub-rule is only an irregularity which is curable. The rule is merely directory. That would explain why the rule has a proviso empowering the court either to extend the time within which to comply with the sub-rule or to excuse the failure to comply with it. The power of the court under that rule is discretionary and hence the use of the phraseology "the court may …" The court will be inclined to strike out a suit if the failure to comply with the provision is or would be prejudicial either to the respondent or any party likely to be affected by an order in the application. No such prejudice can be discerned in this matter.

In view of the conclusion we have come to, above, it is our judgment that the proceedings before the High Court were not a nullity. It then follows that grounds (1) and (5) of the memorandum of appeal

must fail.

We propose to deal with grounds (2) and (3) together. Isaac Theuri Githae (Githae) was committed for contempt under civil suit No.l of 2000. As we stated earlier Kamakia was the plaintiff, and Githae with five others, the defendants. Paragraph (11) of the plaint alleges that the defendants jointly and or severally published to the public within a place known as Ndemi Scheme, Gichungo area and Ol'Kalou Town that it is desirable to remove a fence Kamakia had erected round a parcel of land known as Nyandarua /Ndemi/3002. Kamakia's right of fencing the land was being challenged. Clearly the dispute related to the land in question. In our view whether the dispute concerned title to land or the right to work on it or otherwise, such dispute will undoubtedly be referred to as relating to the land in question.

Likewise civil case No. 1 of 2000 was concerned with the same parcel of land. Githae faces among other charges a contempt of court charge. Although the particulars allege disobedience of a court order, the order he allegedly breached is referable to civil case No.1 of 2000. The order will not stand independent of the case. Likewise the particulars in the incitement and malicious damage to property counts are referable to a fence round the same parcel of land.

Grounds 4 and 7 may also be handled together. The purpose and purview of judicial review proceedings is confined to the decision making process. The Court in an application for an order of judicial review is not concerned with the merits or otherwise of the decision or threatened action. It is intended to ensure that an inferior tribunal or authority he has been subjected to has given the individual affected fair treatment. The authority is the one mandated to make a decision on the merits and the court should not attempt to substitute its decision or opinion in place of that of the tribunal or authority constituted by law to decide the matters in issue.

The court intervenes where the authority has acted in excess of its jurisdiction or without jurisdiction, where there is an error of law on the face of the record, where it has failed to observe rules of natural justice or where the authority has acted unreasonably. In those circumstances the court will call for the decision for purposes of quashing it by an order of certiorari. But normally where there is a threatened breach of any of the foregoing principles the court will issue an order of prohibition to prevent the threatened breach.

In this appeal Mr. Ngatia for the appellant argued that orders of certiorari and prohibition were sought against the magistrate instead of the Attorney General being the person who generally institutes criminal proceedings on behalf of the state. In his view what was being sought was immunity from the criminal process, and in those circumstances, neither certiorari nor prohibition would lie. He cited the English case of **General Medical Council v. Spackman** [1943] AC 627, a decision of the House of Lords, and more specifically, the words of Lord Wright at P.640, in which the learned Law Lord rendered himself thus:

"**Certiorari is not an appellate power. Its use may nullify or discharge an order made by the council but the grounds on which certiorari may be granted are strictly limited. They may, I think for purposes of this case, broadly be taken to be (1) the ground that the council's proceeding was ultra vires (2) the ground which without any very great precision has been described as a departure from "natural justice".**

As for prohibition learned counsel submitted that the application for prohibition was sought against an order made on a given date, and no such order had been made.

If we pause there a little, on 14th February, 2001 the court made an order declining to adjourn the criminal case. A further order was made directing that the trial proceed. In our understanding it is this order Githae had in mind when he sought prohibition. The trial magistrate was bent on going on with the trial notwithstanding objection from Githae's counsel.

On his part Mr. Ombwayo, Principal State Counsel for the 2nd respondent agreed with Mr. Ngatia that orders had been wrongly sought against the magistrate. In his view as **section 26** of the Constitution vests

prosecutorial powers on the Attorney General he was the proper party who should have been cited as respondent. Besides, in his view, the applicant in the judicial review motion had a right of appeal which he did not exercise.

Mr. Gakuhi for the 1st respondent submitted that the magistrate should not have entertained a second contempt of court charge against the 1st respondent. He had been convicted and punished for that contempt. No new charges based on the same facts could properly be preferred against the 1st respondent. In those circumstances, he said, the magistrate was properly made a respondent instead of the Attorney General.

In **R. v. Epping and Harbow General Commissioners, ex parte Goldstraw** [1983]3 ALL ER 257 at p.262 Sir John Donaldson MR authoritatively stated:

"**It is a cardinal principle that, save in the most exceptional circumstances [the jurisdiction to grant judicial review] will not be exercised where other remedies were available and have not been used."**

There may however exist special circumstances which will make the court grant relief by way of judicial review notwithstanding that alternative remedy exists - for instance where grave consequences would follow unless the court exercises that jurisdiction. What will amount to grave consequences will depend on the facts and circumstances of each case.

It is now important to look at the facts and circumstances of the matter before us. It is common ground that Githae was cited for and convicted of contempt of court and was sentenced to three months imprisonment which, as we stated earlier, is the subject matter of an appeal which is pending for hearing, to wit Nakuru High Court Civil Appeal No. 75 of 2000. The subsequent charges were pending in concurrent proceedings under Nyahururu Magistrate's Court Criminal Case No.75 of 2000. So he did not have a right of appeal under that case as no conviction or order had been entered against him which could be appealed against. What he says in this application is that his plea of **autre fois convict** with regard to the contempt of court charge was summarily rejected. There were other charges in addition. It cannot be said that he had an alternative remedy at that stage. Had the contempt charge been the only one, he would then possibly have been entitled to challenge the continuation of the proceedings against him. But was he right to cite the magistrate instead of the Attorney General in the judicial review proceedings?

The magistrate's court was seised both of the Civil Case under which the conviction against Githae was entered, and the criminal case No.75 of 2000. That court's attention was drawn to the fact that Githae had been convicted by it for contempt of court in civil case No.1 of 2000. Why did the court insist on going on with the case that fact notwithstanding ? It is true that under section 26 of the constitution, the power to prefer criminal charges against any person is vested in the Attorney General. The court has also power under section 89 of the Criminal Procedure Code to reject any charge if it does not disclose an offence. Likewise under **section 138** CPC there is a bar to prosecuting a person who has previously been prosecuted and either convicted or acquitted of the same charge on the same facts, if the conviction or acquittal has not been reversed or set aside.

Criminal case No.75 of 2000 was pending when Githae was convicted of contempt. Although the conviction was still in place the trial magistrate in the above criminal case made an order on 14th February 2001 that the trial would proceed. This was not a matter for which the Attorney General could be held responsible. It was not him who insisted on going on with the case against Githae. The court had convicted him and it was the same court which made the order for the continuation of the criminal proceedings. The court had due notice of the conviction it had entered in civil case No.1 of 2000, because a Notice of Preliminary Objection dated 27th October, 2000 had been filed on behalf of Githae, in Criminal Case No.75 of 2000. Section 138 CPC , provides:

"**A person who has been once tried by a court of competent jurisdiction for an offence and conviction is acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence."**

The injunction against trying the accused person concerned is not against the Attorney General, but the trial court. That order was amenable to judicial review. In our view therefore, the application for judicial review properly cited the magistrate as a respondent. We find no basis for holding that the magistrate was improperly made a respondent in this matter

As regards ground 6, it was contended on behalf of the appellant that the learned Judge of the superior court imported wrong motives to the charges laid against Githae. The learned Judge remarked in his ruling that the criminal charges against the 1st respondent were intended to give the appellant collateral advantage. The learned Judge rendered himself thus:

"**From the material placed before me, I am able to gather that the dispute between the subject and the complainant/plaintiff in the cases under review is a land dispute. I have not seen the copy of the defence but under the circumstances I cannot say that the criminal case is not brought to give the interested party/complainant a collateral advantage in the civil dispute**. **The criminal case will also exert pressure on the subject and probably give up the dispute. This is illustrated by count 1 where the interested party seeks to have the subject punished twice, i.e. by both the civil and the criminal court."**

It is possible that the appellant did not have the intention of getting a collateral advantage from the criminal prosecution. Prima facie, however, he appears to have wanted Githae, and those sympathetic to him to stop whatever acts they were perpetrating relating to or touching the appellant's land. In our view whether or not the appellant had such a motive is neither here nor there. What is important is whether Githae was receiving fair treatment from the magistrate. We appreciate that in the criminal case, he was not alone. He was jointly charged with persons who were allegedly incited by him to commit various acts relating to the appellant's property. We also appreciate there were other counts in addition to the contempt of court count. Githae was committed for contempt on or about 28th June, 2000. As at that date the criminal charges were pending against him having been presented to the court on 29th March 2000. Why was it necessary to pursue Githae's contempt both in the civil and criminal courts concurrently? The conduct clearly smacks of harassment and those are the circumstances we think Rimita J. was alluding to in his judgment. Clearly the conduct of the appellant was suspect and there was a firm basis for the learned Judge's remarks.

In the circumstances, while it is generally undesirable to stop criminal proceedings by order of prohibition there may arise circumstances which when looked at objectively may justify intervention to obviate improper treatment against certain accused persons. It is our view that Githae's was such a case, and Rimita J. properly exercised his discretion in the matter.

We find no basis for interfering with his order. In the result the appeal fails and it is accordingly dismissed with costs.

Dated and delivered at Nakuru this 30th day of March, 2007.

S.E.O. BOSIRE

…….……..

JUDGE OF APPEAL

E.O O'KUBASU

……..

JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR