IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Tunoi & Keiwua JJ A)

CIVIL APPEAL NO 175 OF 2000

BETWEEN

REPUBLIC……..…..…….....…… APPELLANT

AND

COMMUNICATIONS COMMISSION OF KENYA *as successor to* MANAGING

DIRECTOR KENYA POSTS & TELECOMMUNICATIONS CORPORATION *and*

KENYA POSTS & TELECOMMUNICATIONS ..... RESPONDENT

Ex-Parte

EAST AFRICA TELEVISIONS NETWORK LIMITED ..... APPLICANT

(Appeal from an Order/Ruling of the High Court of Kenya at Nairobi (Githinji J) dated 16th November, 1998

in

H.C.MISC.C.APPLN. NO. 400 OF 1998)

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JUDGMENT

The appeal before us is brought by East African Televisions Network Limited, a limited liability company which was incorporated in Kenya on the 7th August, 1996. One of its directors at the time or times relevant to the litigation was one Sam Kruschev Shollei. There appears to have been other directors but as those are disputed matters, we need not go into them in this appeal. We shall hereinafter refer to East Africa Televisions Network Limited simply as "the appellant". We also need to state at the outset that the appeal is of an interlocutory nature and the matters which were raised before the superior court have not been determined on merit. Accordingly, the less we say on those matters the better it will be for all the parties concerned.

The appeal arises in this way. On the 9th August, 1996, the Minister for Information & Broadcasting granted to the appellant radio and television licences to enable the appellant engage itself in radio and television broadcasting. Consequent upon the grant of the licenses by the Minister, the then Kenya Posts

& Telecommunications Corporation (KP&TC), wrote another letter to the appellant on the 16th June, 1997, and the purpose of that letter was to "release" to the appellant radio and television frequencies to enable the appellant make use of the licences granted to it by the Minister. KP & TC was the body then authorised to allocate radio and television frequencies to persons interested in such undertakings. KP & TC has since been succeeded by the Communications Commission of Kenya (CCK) which was created by the Kenya Communications Act, that is, Act No 2 of 1998. By Legal Notice No 155 of 1999, the assets and liabilities of the KP & TC were taken over and vested in the CCK which is now the respondent in the appeal before us. In granting or "releasing" frequencies KP & TC was acting pursuant to powers conferred on it by the then Kenya Posts & Telecommunications Corporation Act. Matters rested there until the 15th March, 1998, when the Minister for Information & Broadcasting once again wrote a letter to the appellant informing them that the Government had cancelled the licences which it had granted to the appellant. A copy of the Minister's letter was sent to KP & TC, obviously to indicate to KP & TC that in the absence of licences, the frequencies already released to the appellant were no longer of any use to the appellant. The appellant, faced with that new situation, wrote to KP & TC on 20th March, 1998, asking KP & TC not to reassign the frequencies already allocated to it as the appellant was seeking to resolve the matter with the Minister. This, however, was all in vain for by its letter to the appellant dated 15th April, 1998, KP & TC informed the appellant that it (KP & TC) was withdrawing the frequencies with immediate effect. We only need to add that the appellant had paid to KP & TC a total of Shs 8,727,198/= as fees for the allotted frequencies.

On the 22nd April, 1998, the appellant moved to the superior court and relying on order 53 rule 1 of the Civil Procedure Rules the appellant filed a chamber summons, *ex parte*, seeking leave to apply for judicial review by way of orders of *certiorari* and *mandamus* directed to the Managing Director of KP & TC and it was prayed:

"(a) By way of *certiorari* to remove into the Court and quash the decision of the Managing Director, KP & TC contained in his letter of 15th April, 1998 cancelling and withdrawing the TV and Radio frequencies allocated to the applicant.

(b) By way of *mandamus* to restore the TV and Radio frequencies withdrawn on 15th April, 1998." The chamber summons was heard by Mbogholi, J on the same 22nd April, 1998 and the judge made the following order:

"Order:Leave granted as prayed in C/S of 22.4.98. As for stay I believe the issue should be urged at the main trial. I therefore decline to grant stay. Substantiative application shall be filed within 21 days of today. Costs in the cause."

Pursuant to this leave, the motion itself was lodged on 23rd April, 1998, and the two prayers made in the motion were exactly the same as those which had been made in the chamber summons seeking leave. On 30th April, 1998, the Managing Director of KP & TC entered an appearance through M/s Kiplagat & Associates and the appearance was accompanied by what was called "Grounds of Opposition". Those grounds were:

"1.The application is fatally defective and due preliminary objection will be taken at the earliest opportune moment.

2.The applicant's capacity to institute this suit is suspect and in the premises there is no suit on record.

3.The applicant has no interest to protect and no interest has been interfered with by the respondent.

4.This Honourable Court has no jurisdiction to entertain this suit.

5.The applicant has not shown that it would suffer any harm if the orders sought are not granted and has generally not satisfied the requirements for the grant of the orders sought."

These grounds were obviously filed in opposition to the notice of motion lodged by the appellant pursuant

to the leave granted by Mbogholi, J on 22nd April, 1998. Grounds of opposition were once filed pursuant to the provisions of the then order 50 rule 16. Order 50 is headed, "Motions & other Applications" and even if "Grounds of Opposition" were still provided for [they have become obsolete pursuant to Legal Notice No 36 of 2000] we doubt whether such grounds were permissible under the provisions of order 53. A motion filed under order 53 rule 3 (1) cannot be equated to one filed pursuant to the provisions of order 50; one does not require the leave of the Court to file a motion under order 50; leave of the Court is mandatory for a motion under order 53 rule 3.

Be that as it may, neither the appellant's notice of motion filed pursuant to leave, nor the grounds of objection filed thereto by the KP & TC were ever heard on their merit for by a chamber summons dated 27th May, 1998, and purporting to be brought under order 6 rule 13 (1) (b) of the Civil Procedure Rules, the respondent through its counsel Dr Kiplagat, asked the superior court for orders:

"1. That the notice of motion herein dated 23rd April, 1998, be struck out.

2. That the (sic) M/s Hamilton, Harrisson & Mathews Advocates be condemned to pay the costs of the proceedings herein personally."

The grounds upon which this last motion was brought were that:

"(a) Notice as required under section 109 of the Kenya Posts & Telecommunications Corporation Act has not been issued;

(b) The proceedings have been instituted in the name of a company without a members' resolution or a directors' resolution;

(c) The proceedings to institute the proceedings herein was taken by one director contrary to the provisions of the Companies Act and Common Law provisions applicable;

(d) The proceedings do not fall within the exception that a director may bring a suit in the name of the company if there is a reasonable likelihood that the assets of the company would go to waste in that:

(i) there is no property in a licence;

(ii) there is no property subject to waste herein;

(iii) there would be no irreparable damage if the notice of motion herein does not succeed;

(iv) there would be no prejudice to the company if the determination of the reliefs being claimed were not granted now but awaited the resolution of the directors' conflicts currently under litigation.

(e) The proceedings have been instituted in defiance of a subsisting Court order."

Order 6 rule 13 (1) (b) under which Dr Kiplagat brought and argued the respondent's chamber summons seeking the striking out of the appellant's notice of motion provides as follows:

"O VI rule 13:

13 (1):At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:

(a).....;

(b) it is scandalous, frivolous or vexatious;

(c).....;

(d).....".

So that despite the fact that Mbogholi, J had read the complaints of the appellant which were set out in its application for leave to institute the proceedings and despite the fact that the judge had granted leave to the appellant to bring those proceedings, the respondent, through its counsel, Dr Kiplagat, was still asking the superior court to strike out the proceedings on the ground that they were:

"scandalous, frivolous or vexatious".

It is amazing that the appellant's counsel, Mr Le Pelley, did not at any stage tell Githinji, J, who eventually heard the matter, that the proceedings could not have been scandalous, frivolous and vexatious because they (that is, the proceedings) had been instituted pursuant to the order of Mbogholi, J dated the 22nd April, 1998. It is inconceivable that Mbogholi, J could have granted leave to the appellant if the appellant's complaints were merely scandalous, frivolous or vexatious, unless of course it be contended that the High Court in such matters grants leave as a matter of course. On the issue of whether to grant or not to grant leave, this Court recently said in the case of In *The Matter of an Application by Samuel M W'njuguna & 6 others and in The Matter of The Minister for Agriculture and in The Matter of The Tea Act (Cap 343 Laws of Kenya) and The Tea (Elections) Regulations 2000*, Civil Appeal No 144 of 2000 (unreported):

"It cannot be denied that leave should be granted, if on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the Court, to the judge who granted leave to set aside such leave - see *Halsbury's Laws of England,* 4th Edition, Volume 1 (1) Paragraph 167 at page 276."

What we are saying is that we very much doubt whether any of the provisions of order 6 rule 13 (1) of the Civil Procedure Rules is applicable to proceedings instituted under order 53 of the Rules. As we have already indicated, Githinji, J eventually heard the chamber summons filed by the respondent seeking the striking out of the proceedings. We agree with him [that is, Githinji, J] that the grounds upon which he was asked to strike out the proceedings instituted by the appellant amounted to two basic complaints, namely:

(i)That by instituting the proceedings the appellant had not given to the respondent the notice of one month required under section 109 of the Kenya Posts & Telecommunications Corporation Act;

and

(ii)The capacity of one director namely, Sam Kruschev Shollei to bring the suit on behalf of the company and without a resolution of the share-holders or directors authorising the institution of the proceedings.

Githinji, J heard the matter partly by way of oral submissions made before him, but largely by way of written submissions filed by the parties. Having heard and read the submissions, the learned judge rejected all but one of the contentions advanced by Dr Kiplagat on behalf of the respondent. Dr Kiplagat had told the learned judge in the written submissions that since the application for leave to institute the proceedings were started by way of a chamber summons, there was no proper suit before him which could go to a hearing on the merits; no chamber summons had ever originated any suit, Dr Kiplagat told the judge as he persisted in telling us during the hearing of the appeal. Githinji, J's short answer to that contention was that the competency of the appellant's notice of motion was not raised in the respondent's chamber summons to strike out the motion. The learned judge proceeded thus:

"Yet Mr Kenneth Kiplagat for applicant has in his written submissions attacked the application on four distinct grounds including:

(i) No competent application for judicial review has been filed. Under this ground the form of the application and the procedure of bringing an application for judicial review are exhaustively discussed. I

need not consider this ground because it is an entirely new ground not contained in the body of the application or in the replying affidavit and no permission was sought to argue an additional ground."

It is clear to us, as it was clear to the learned judge, that in his written submissions, Dr Kiplagat paid very little attention to the grounds upon which he was asking the superior court to strike out the appellant's notice of motion. We have already set out the prayers made in the chamber summons and the grounds upon which those prayers were sought. There was no allegation, either in the prayers, or in the grounds that the notice of motion was not properly before the Court. Such an assertion had been contained in the "Grounds of Opposition" filed in answer to the notice of motion, but Githinji, J was not dealing with the grounds of opposition.

Those grounds could only be dealt with if the chamber summons to strike out had not been filed. Having asked the judge to strike out the motion under a specified rule and on specific grounds, it was not open to the respondent to abandon those grounds and concentrate on other issues not specified in the application to strike out. The only reason why we have found it necessary to deal with that point is that Dr Kiplagat himself, when faced with the appeal, filed what he called

"Notice of Grounds for Affirming the Decision" and the first four grounds in that notice were:

"1.That no competent application for judicial review has been filed;

2.That there was no commencement of suit in the superior court in that no summons had been issued and/ or served upon the respondent;

3.That there was no commencement of the suit in the superior court in that the chamber summons application dated 22nd April, 1998 was not signed by a judge or an officer appointed by a judge as required by the Civil Procedure Rules;

4.That a suit in Common Law Jurisprudence can only be instituted by an originating process and the chamber summons dated 22nd April, 1998 does not constitute an originating process as it ought to have been an originating summons."

There are other grounds in the notice to affirm the decision but they all really illustrate only one simple point, namely, that an application for leave to apply for an order of *certiorari*, prohibition or *mandamus* ought to be instituted by an originating summons and not a chamber summons as has been the practice hitherto.

On this point, we will say this. Notice of grounds for affirming the decision of the superior court is provided for in rule 91 of the Court of Appeal Rules. The rule says:

"91 (1)A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that Court shall give notice to that effect specifying the grounds of his contention."

The grounds specified by the respondent were all placed before Githinji, J and as we have said, he in effect rejected all of them as not having been properly placed before him. In our respectful view, grounds which have been specifically rejected by a judge cannot again be raised to support or affirm a decision under rule 91. If a judge has specifically dealt with a ground and rejected it, then such rejection can only be challenged either by way of an appeal or by way of a cross-appeal under rule 90 (1) of the Rules of the Court of Appeal. It was, accordingly, not open to the respondent in the circumstances of this appeal to ask us to affirm Githinji, J's decision on the very same grounds which he considered and rejected. We would have no jurisdiction to vary or reverse the learned judge when there is no proper appeal before us upon which we can do so.

But even if we consider the matter on merits we do not think that we would be prepared to hold that, because leave to bring the proceedings was obtained through a chamber summons, there were no proper proceedings for judicial review before the superior court.

Section 8 (2) of the Law Reform Act gives the High Court the power to issue orders of *certiorari*, prohibition and *mandamus*. Then section 9 of that Act provides as follows:

"9 (1)Any power to make rules of Court to provide for any matters relating to the procedures of civil Courts shall include power to make rules of Court:

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of *mandamus*, prohibition or *certiorari* is sought;

(b) requiring, except in such cases as may be specified, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the Court, other than the relief and grounds specified when the application for leave was made."

Pursuant to these provisions the Rules Committee promulgated order 53 and by the provisions of order 53 rule 1:

"1(1)No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule [This provision is directly referrable to section 9 (1) (b) of the Law Reform Act].

(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers and shall be accompanied by ....."

Now the application is to be made to a judge in chambers. Dr Kiplagat says that that does not and cannot mean that the application has to be made by chamber summons. Of course, the rule does not say so. But the rule does say the application is to be made *ex parte* and the judge has to deal with it in chambers. Order 50, as we have seen, deals with "Motions and other Applications". Order 50 rule 1 states:

"All applications to the Court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open Court."

Rule 1 (2) then provides:

"No motion shall be made without notice to the parties affected thereby:

Provided, however, that the Court, if satisfied the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise and subject to such undertaking, if any, as to the Court seems just, and any party affected by such order may move to set it aside."

It is clear from these provisions that an application for leave cannot be commenced by way of a motion, whether one calls it an originating motion or just plain notice of motion. This is so because all motions are heard *inter partes* and in open Court. A temporary order may be made *ex parte* in a motion, but that is a wholly temporary order and the motion must in the end be heard *inter partes* and in open Court. That is what the rules we have quoted state. As we have seen order 53 rule 1 (2) says the application for leave must be made *ex parte* to a judge in chambers. The provisions of order 50 regarding motions are so directly opposed to the provisions of order 53 rule 1 as to the application for leave that we have no hesitation in saying that an application for leave under order 53 rule 1 (2) cannot possibly be made by way of a notice of motion or an originating notice of motion, whatever the latter expression might mean.

Originating summonses on the other hand, are provided for in order 36 which sets out in full the circumstances in which a party may apply to the Court through an originating summons. The order even sets out the various Acts of Parliament the reliefs under which a party may apply for by way of an originating summons - for example, the Government Lands Act (section 116), the Registration of Titles Act (section 57), the Limitation of Actions Act (section 27 and 38), the Registered Land Act, the Chattels Transfer Act, etc. The provisions of sections 8 and 9 of the Law Reform Act are not mentioned anywhere in order 36 of the Civil Procedure Rules. In any case an originating summons cannot be heard and fully determined *ex parte* before a judge in chambers unless of course the other party refuses to take part in the proceedings.

These considerations must explain the practice, which Mr Le Pelley for the appellant contended has been in use for over thirty years, of bringing applications for leave by way of a chamber summons. A judge has to deal with such an application *ex parte* and in chambers; if the application is brought by way of a notice of motion, it cannot be heard and disposed of *ex parte* and it would have to be heard in open Court. If the application is brought by way of an originating summons, a judge cannot hear it and fully determine it *ex parte*; it would have to be served, and the judge may well be called upon to give directions on how the summons is to be disposed of. These procedures are clearly inappropriate or inconvenient for an application for leave under order 53. We are not surprised that an application for leave under order 53 is and has been invariably made by chamber summons. In any case that practice is now so well established that even if Dr Kiplagat had succeeded in convincing us that it is a wrong procedure, we would still have been very reluctant to throw it overboard.

Dr Kiplagat did not point out to us any particular prejudice that the use of a summons in chambers occasioned to his client or to any other litigant. With respect to Dr Kiplagat, cases such as *Boyes v Gathure* [1969] EA 385 and *Masaba v Republic* [1967] EA 488 on which he heavily relied in the superior court and in this Court are really not on the point because they did not deal with the somewhat unique procedure set out in the provisions of order 53 which as we have said are made pursuant to the provisions in section 9 of the Law Reform Act. In our view, the fallacy in Dr Kiplagat's contention lies principally in his assuming that it is the chamber summons application for leave to apply for the orders which originates the proceedings under order 53. The proceedings under that order can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion. As we have already said, we must reject the respondent's contention that there was no competent application for judicial review orders before the superior court due to the manner in which the proceedings were instituted.

As we said elsewhere Githinji, J rejected all but one of the complaints raised by the respondent in its demand to strike out the appellant's notice of motion for judicial review orders. Having rejected the other grounds, Githinji, J then proceeded as follows:

"The only remaining serious and remaining (*sic*) ground is whether or not a one month notice should have been given to KP & TC as required by section 109 (a) of KP & TC Act before the institution of the application for judicial review."

Section 109 (a) of the KP & TC provides:

"No action or legal proceedings shall be commenced against the Corporation until at least one month after written notice containing the particulars of the claim and of the intention to commence the action or legal proceedings has been served upon the Managing Director by the plaintiff or his agent."

The learned judge having considered this aspect of the matter concluded his ruling as follows:

"I have come to the conclusion that the application for judicial review dated 23/4/1998 for orders of *certiorari* and *mandamus* is not maintainable by virtue of section 109 (a) of the KP & TC Act as the applicant failed to serve a month written notice on the Managing Director before the commencement of

the proceedings. The respondent argued four grounds at length to support the application for striking out. Only one ground has succeeded. In my view the respondent is only entitled to one quarter of the cost of the application. Consequently I allow the application as stated. I strike out the application dated 23/4/1998 with 1/4 costs to the respondent on the grounds that it was commenced contrary to section 109(a) of KP & TC Act."

It was against this order that this appeal was brought. We will say very little on this aspect of the matter. We remained wholly unimpressed by Mr Le Pelley's contention that there was a distinction between a claim made against the Managing Director of KP & TC and one made against the Corporation itself. The Managing Director in purporting to withdraw the frequencies which had been allocated to the appellant was clearly acting for the Corporation just as he did when he "released" the frequencies to the appellant. Both letters were written on the letter heads of the Corporation and in our view Githinji, J was perfectly right in saying that Mr Le Pelley was splitting hairs in attempting to differentiate between a suit brought against the Corporation and one brought against the Managing Director of the Corporation. In either case the Corporation would be bound by any order made by the Court just as much as such an order would bind the Managing Director. With respect, there was no merit in this contention and it was rightly rejected.

There is however, the fact that power to issue judicial review orders of *mandamus*, prohibition and *certiorari* is given to the High Court by a separate Act of Parliament, namely the Law Reform Act. We have already referred to sections 8 and 9 of the Act and we need not set them out. Those sections set out in full the circumstances under which the High Court is entitled to issue the orders and what factors the High Court is bound to take into account. Leave is to be obtained before an application is filed and once leave is so obtained only the reliefs set out in the application for leave and the grounds relied on in that application can be argued or granted unless the High Court otherwise allows. In an application for *certiorari* leave cannot be granted unless the application is made within six months from the date of the decision sought to be quashed. All these provisions are contained in the Law Reform Act and the Act does not say that these provisions are subject to the provisions of any other Act of Parliament. There is no provision anywhere in sections 8 and 9 of the Act that where another Act of Parliament requires that notice of intention to sue be served, then such a notice must be served before leave is applied for. Section 8(4), for example, provides for other written laws and it says:

"In any written law, references to any writ of *mandamus*, prohibition or *certiorari* shall be construed as references

to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order."

So the legislature specifically had in mind other written laws; yet it never subjected the provisions of sections 8 and 9 to those other written laws. Section 109(a) of the KP & TC Act, which we have already set out does not say that it shall apply notwithstanding the provisions of any other written law. Clearly there was no basis for subjecting the provisions of sections 8 and 9 of the Law Reform Act to the provision in section 109 (a) of the KP & TC Act. Even Dr Kiplagat in the end conceded, rightly in our view, that section 109 (a) of the KP & TC Act cannot apply to proceedings commenced under order 53 of the Civil Procedure Rules. That is more so because proceedings under order 53 are concerned with the decisionmaking process and not the merits or otherwise of a decision. With respect to Githinji, J he was clearly wrong in holding that the appellant ought to have served the respondent with a notice of one month before instituting proceedings under order 53.

These matters were, however, not at all raised before Githinji, J and the point was not directly canvassed in any of the grounds in the Memorandum of Appeal. As we have said the appellant and their counsel wholly concentrated their efforts on the artificial distinction between the Corporation and its Managing Director; ie that where the proceedings are brought against the Corporation the notice under section 109 (a) must be served but where the proceedings are brought against the Managing Director, as was the case here, then such notice is not required. We have already rejected that distinction and this appeal only succeeds on the point taken by the Court with regard to the provisions of sections 8 and 9 of the Law

Reform Act.

In the event, we allow the appeal, set aside the orders made by Githinji, J striking out the appellant's notice of motion dated 23rd April, 1998 and substitute those orders with an order dismissing the respondent's chamber summons dated 27th May, 1998. We further order that each party shall bear their own costs in the superior court, and similarly their own costs in this appeal. The appellant's notice of motion dated 23rd April, 1998 shall proceed to hearing according to law before a judge other than Githinji, J.

These shall be our orders in this appeal.

Dated and Delivered at Nairobi this 4th May, 2001

R.S.C OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL