



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. E005 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

IN THE MATTER OF ARTICLES 10, 23, 27, 35, 41, 46 AND 47 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF THE CODE OF GOVERNANCE OF STATE CORPORATION (MWONGOZO)

IN THE MATTER OF THE ENYA PORTS AUTHORITY ACT

IN THE MATTER OF APPOINTMENT OF AMBASSADOR JOHN MWANGEMI AS ACTING MANAGING DIRECTOR KENYA PORTS AUTHORITY

- BETWEEN -

REPUBLIC

- VERSUS -

THE CABINET SECRETARY MINISTRY OF FINANCE &

NATIONAL TREASURY.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS.....2ND RESPONDENT

KENYA PORTS AUTHORITY.....3RD RESPONDENT

-AND-

JOHN MWANGEMI.....INTERESTED PARTY

- AND -

COMMISSION FOR HUMAN

RIGHTS AND JUSTICE (CHRJ).....EX-PARTE APPLICANT

(Before Hon. Justice Byram Ongaya on Friday 26th November, 2021)

RULING

The 3rd respondent filed a notice of preliminary objection on 21.07.2021 through Cootow & Associates. The notice was based upon the following grounds:

- 1) The leave to commence judicial review proceedings granted by the Court on 07.07.2021 lapsed when the ex-parte applicant failed to serve all documents on record by the 09.07.2021 and without the requisite leave these proceedings are bad in law and an affront to order 53 Rule 1 of the Civil Procedure Rules 2010.
- 2) In the absence of leave to continue these proceedings, the court lacks jurisdiction to entertain these proceedings.
- 3) The ex-parte applicant is in contempt of court order issued on 07.07.2021 for his failure, neglect and refusal to serve all the documents by the 09.07.2021 and therefore the applicant has no audience with regard to these judicial review proceedings.

The 3rd respondent filed submissions on the preliminary objection on 08.11.2021 and the ex-parte applicant filed submissions on 16.11.2021 through Mkan & Company Advocates.

It is not in dispute that on 07.07.2021 the Court made orders including:

“(b) Leave is hereby granted for the ex-parte applicant to apply for the judicial review orders of prohibition and certiorari as prayed for in prayers 2(a) and (b) of the application on record.

(c) The substantive notice of motion be filed and served within 3 days with an endorsed hearing date fixed at registry on a date not later than 22.07.2021 as the matter is certified urgent accordingly.

(d) All the documents on record herein be served upon the respondents forthwith and not later than close of 09.07.2021.”

The preliminary objection urges that the documents were not served as was required in order (d) thereof. Further, because of that failure the ex-parte applicant was in contempt of court. It is stated at paragraph 8 of the replying affidavit of John Kinyanjui Turasha (filed on 22.07.2021) that the ex-parte applicant served the order and substantive motion dated 08.07.2021 upon the 3rd respondent on 08.07.2021 but failed, refused, or ignored to serve the application for leave, the statutory statement and the verifying affidavit upon the 3rd respondent at the time of serving of the order. Further as per exhibit JKT5 the notice of motion when served with the missing other papers on record it was endorsed thus, **“Received Notice of motion application served without the verifying affidavit and statutory statement.”** It is urged that the leave lapsed when the ex-parte applicant failed to serve the documents and further the ex-parte applicant is in contempt and should not be heard before the Court. The 3rd respondent has stated that service of the documents in issue was subsequently effected upon its counsel belatedly on 13.07.2021. That the leave granted having been conditional to effecting service as was ordered but which service was not so effected, the leave lapsed.

For the ex-parte applicant it was submitted that service was effected as ordered. The affidavit of one Michael Otieno, a licensed process server was filed in Court on 22.07.2021. At paragraph 2 Michael I. Otieno, Court process server stated, **“That on 8th July, 2021 I received a copies of Cause No. E005 of 2021, filed under Notice of Motion Application dated 7th July, 2021, together with Order issued on 7th July, 2021, Notice of Motion dated 8th July, 2021 documents from M. Mkan & Company Advocates with instructions to serve the same upon the Respondents’ herein.”** The affidavit proceeds to state how the other parties were served.

The Court has considered the affidavit evidence and the parties’ respective positions. The Court finds that upon affidavit evidence and without cross-examining the process server Michael I Otieno as well as John Kinyanjui Turasha whose replying affidavit was filed on 22.07.2021, it is impossible to establish who between the two is telling the truth about the documents served on 8th July 2021. The Court finds that the preliminary objection is based on disputed facts about the service in issue. It is trite law that a valid preliminary objection is based upon undisputed facts but which is not the case in the instant case. The Court therefore returns that the preliminary objection was misconceived in so far as it was not based upon undisputed facts about the service in issue. It will fail.

The Court further returns that the procedure to establish contempt of Court is not by way of filing a preliminary objection as purportedly done in the instant case. The Court considers that a finding of culpability for contempt of court is an extremely serious undertaking by the Court and must be undertaken within the prescribed procedural and substantive safeguards of written law including the applicable rules of procedure. The notice of preliminary objection is found to have been an abuse of court process in so far as it set out to establish a liability in contempt of Court against the ex-parte applicant and upon the disputed fact of service of the Court order in issue.

The Court has also considered the submission that service of the documents as had been ordered was a precondition to the continued existence of the order for leave. The Court finds that the terms of the order as reproduced above were clear and nowhere did the Court order provide that if service was not effected as was ordered, then, the leave granted would lapse or be deemed to have lapsed. The submission for the 3rd respondent in that regard is found misconceived and misleading.

In conclusion therefore, the preliminary objection dated and filed on 21.07.2021 for the 3rd respondent is hereby determined with orders:

- 1) The notice of preliminary objection is dismissed with costs in the cause.
- 2) The parties to take steps towards the expeditious hearing and determination of the substantive notice of motion.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 26th November, 2021.

BYRAM ONGAYA

JUDGE