REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(Coram: Nyamu, Ibrahim JJ & Makhandia Ag J)

MISCELLANEOUS APPLICATION NO 534 OF 2003

REPUBLIC……. APPLICANT

VERSUS

COMMISSIONER OF POLICE ..……..RESPONDENT

EX PARTE: NICHOLAS GITUHU KARIRA

RULING

The applicant Mr Nicholas Gituhu Karira has filed a Notice of Motion dated 29th May 2003. The Notice of motion is expressed to be under s 8 and 9 of the Law Reform Act, cap 26 and order 53 of The Civil Procedure Rules, section 60, 70 and 75 of the Constitution of Kenya, rules 10 (a) (b) of the Constitution of Kenya, (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, sections 6 and 7 of Civil Procedure Act, order L rules 1, 2, 3, 7, 12 and 15 of Civil Procedure Rules, the inherent jurisdiction of this Honourable Court and all other enabling provisions of the Law.

The Application seeks four orders namely;

(1) In the first instance, this matter be placed before the Honourable Chief Justice for diredctions to constitute a bench to hear and determine the application and or other directions.

(2) An order of *mandamus* do issue directing and compelling Mr Ediwn Nyaseda the Commissioner of Police and his agent Mr Patrick Mitemo the OCPD, Eldoret to vacate and deliver up vacant possession of

LR No Eldoret Municipality Block/7/210 to the applicant.

(3) An order of prohibition do issue prohibiting Mr Edwin Nyaseda the Commissioner of Police by himself and/or his agents in particular Mr Patrick Mitemo the OCPD Eldoret from interfering with Nicholas Gituhu Karira's enjoyment and exclusive use of his property namely LR Eldoet Municipality Block 7/210

(4) Costs of the application be provided for. The Attorney General has filed a Notice of Preliminary objection dated 26the August, 2003 and filed on 28thAugust, 2004 raising the following grounds:

(1) That the application is bad in law and cannot be sustained in a court of law

(2) That the prayers sought are for prerogative orders and as such cannot be used to determine the ownership of the property in question.

(3) That an order of *mandamus* and prohibition can only issue to a public body in its official capaciaty and acting as such under recognized laws or statutes of the land.

(4) That the annexures to the application are not genuine are contradictory and lack verification as true copies of the original and should be struck out.

(5) That the issues raised by the said application are not constitutional by nature but are in the nature of fraud committed by parties claiming to have sold/bought the suit property.

(6) That it is my contention that the issues raised can only be determined by *viva voce* evidence during a trial and not on such application.

(7) That this application is brought in bad faith as the respondents will show during the hearing of the preliminary point.

The reason the applicant gives for bringing the application by way of a Notice of Motion instead of an Originating Summons is that there are still pending proceedings by way of judicial review in that Hon Mr Justice Rimita (retired) had given leave to the applicant to institute judicial review proceedings on 28th May 2003. The applicant therefore argues that those proceedings are still pending and this does satisfy the requirements set out in rule 10(a) of the Constitution of Kenya (Protection of Fundamental rights and Freedoms of the Individual) Practice and Procedure Rules 2001.

The applicant has also through his advocate Mr Gitobu Imanyara contended that s 84 of the Constitution gives the High Court original jurisdiction to make such orders issue such writs and give such directions it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

It is clear to this Court that possession, disposition and control of property are concepts or rights within the realm of the Constitution and can if violated be redressed under s 75 of the Constitution. We do therefore embrace the Hon Chief Justice ruling on this at the time he was giving directions in the matter when he directed that there be a full debate on this in this Constitutional Court. All the same, this Court having been duly constituted as a constitutional court must consider

(a) Whether the procedure adopted by the applicant does give this Court jurisdiction to hear the reference.

(b) In particular whether the applicant is right in invoking the High Court's special jurisdiction in respect of judicial review and at the same time invoke this Court's original jurisdiction under s 84 of the Constitution.

(c) Whether failure to invoke the correct procedure can lead to prejudice or injustice.

Issue (a)

Leave having been granted in the *ex-parte* chamber summons seeking leave the only outstanding proceedings can only be the current Notice of Motion before the Court which also doubles up as constitutional reference.

We do not agree that once leave is granted, it then becomes a pending suit as submitted by counsel for the applicant. In our view once leave is granted, it is spent. The applicant must move to the next level and file a substantive motion in accoradance with the rules. It is while the Notice of Motion is pending hearing that perhaps one may says there is a "pending suit". This is not the case here. Leave on its own cannot sustain a suit. In the circumstances we find that the requirements set out in rule 10(a) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) *supra* have not been

satisfied. Under order 50 of Civil Procedure of Kenya rules L N 133 /2001 the challenged party can either file an affidavit in reply or grounds of opposition. The choice of the challenged party was to file grounds of opposition which have resulted in this notice of preliminary objection. Under this procedure there is no provision for framing issues or allowing *viva voce* evidence, cross examination discovery or for treating the affidavits as pleadings etc. The subject matter of the question to be determined by this Court involves ownership of land, and the rights which accompany ownership namely, occupation, disposition and control. The applicant has also not sought any declaration under the constitutional provisions relied on or alleged to have been violated. Instead judicial orders of *mandamus* and prohibition have been sought against the individuals named. It is not explained why judicial review remedies have been sought since the individuals are not alleged to have been performing statutory duties or that they represent a public authority while occupying the premises in question. It is not disputed that they could be occupying the premises by virtue of a tenancy or a lease. If there is a tenancy or lease judicial review remedies would be out of reach and unavailable because the performance of a public duty must arise from a statute and not a contract such as a tenancy or a lease.

We think it is important to set out the scope of judicial review orders.

1. *Certiorari:* quashes an unlawful decision of a public authority.

2. Prohibition: prohibits an unlawful act which a public authority is proposing to perform ie it operates as to the future. See *R v Kenya National Examination Council Ex Parte Geoffrey G Njoroge & 9 Others* caps 226 of 1996.

3. *Mandamus*: this remedy compels a public authority to perform a public duty.

In the Notice of Motion the orders sought are prohibition and *mandamus*. Both remedies cannot lie in the circumstances described in the application – the individuals are not public authorities and the complaint is the occupation or possession of the premises described. The respondent has in his grounds of opposition said that ownership is disputed and also repeated the same in a brief affidavit in reply. A title has been issued and there is nothing to prohibit in future nor is there a public duty which has not been performed and ought to be enforced by an order of *mandamus*. Notwithstanding the existence of a certificate of title the respondents have *inter alia* alleged fraud and also the existence of a tenancy. This Court cannot possibly give its blessings to a challenged title without a trial.

We uphold the objection of the respondents counsel to the effect that the application is so far as it grounded on judical review jurisdiction is incompetent in law for the above reasons.

Turning to the constitutional jurisdiction invoked by the Notice of Motion, no declaration has been sought under s 75 of the Constitution and only judicial orders have been sought and we cannot possibly give that which has not been sought.

It is apt to consider the scope of declarations when sought. Declarations state parties rights, set out the true construction of the Constitution or of a statute or state that a law is invalid or that an administrative act is invalid. The applicant has not sought any of these orders in the application.

In *R v BBC exparte Lavelle* [1983] 1 W L R 223 Lord Woolf held that order 53 could not be used to challenge the decisions of purely private or domestic tribunals such as the disciplinary body within BBC which derives its power solely from the contract between Miss Lavelle and the BBC.

In the situation before this Court if the occupation or possession stems or arises from a lease or a tenancy judicial review jurisdictions would be unavailable to the applicant and we would adopt the reasoning of Lord Woolf in the *Lavelle* case.

On the other hand jurisdiction in judicial review as in the case of *R v Panel – On Take Overs and Mergers, Exparte Datafin Plc* [1987] QB 815 was extended to an unincorporated body – see judgment of Lloyd LJ who reasoned that the Court ought to look not only to the source of power ie if it be from statute

but the nature of power must also be considered. The body in this case had considerable power and influence in the stock exchange dealings although it was largely private and self-regulating and not a public authority.

We find that since there were no pending proceedings and only the Notice of Motion has commenced the proceedings before us the applicant ought not to have invoked rule 10(a) but should have invoked rule 11 (a) by way of an Originating Summons which is one one of the recognized methods of commencing constitutional references in the High Court. Had the applicant done so the following important procedural safeguards could have been invoked.

(a) order 36 rule 8 any party has the liberty to apply for directions.

(b) order 36 Rule 10 could be invoked in the face of contentions issues as in the case on the issue of ownerships and whether or not there is a lease or whether the allegations of fraud are founded and their effect on the alleged constitutional violation or contravention.

We think it is important to set out order 36 rule 10 which is one of the provisions invoked when rule 11(a) is applicable.

Order 36 rule 10(1) reads

1. Where on an originating summons under this order it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint it may order the proceedings to continue as if the casue had been so begun and may, in particular order that any affidavits filed shall stand as pleadings with or without liberty to any of the parties to add to, or to apply for particulars of those affidavits.

2. When the Court makes an order under sub-rule (1) order LI applies as if a summon for directions (now abolished) had been taken out and such orders as are appropriate under order LI may be made (now repealed). These included orders on discovery etc.

3. This rule applies notwithstanding that the cause could have been begun by filing a plaint.

4. Any reference to these Rules to proceedings begun by a plaint shall unless the context otherwise requires be construed as including a reference to a cause proceeding under an order made under sub-rule (1)”

We have already found as above that commencing these proceedings under rule 10(a) instead of rule 11 (a) violates the rules and subverts the purpose of the rules:

Firstly, no issues can be framed and questions for determination ascertained in advance of the hearing.

This does occasion prejudice to the challenged parties because they can only content themselves with filing grounds of opposition or an affidavit. Affidavit evidence or grounds of opposition or an affidavit. Affidavit evidence or grounds of opposition is certainly not the best way of ascertaining ownership and the attendant rights. The challenged party is therefore restricted and cannot for example articulate his case concerning the alleged fraud and the ownership position before the title was issued. This also gives rise to inability of this Court to fully exercise its original jurisdiction by for example giving directions that the affidavits filed be treated as pleadings thereby allowing the taking of oral evidence, cross examinations, particulars and discoveries. All this are tested methods of ascertaining the truth. Failure to invoke this when the subject is so contentious would in our view occasion a miscarriage of justice. On the other hand had the proper procedure under rule 11 (a) been invoked this Court would have been in a position to utilize its power as per o 36 rule 10 as set out above.

Issue (b)

On this we find that it is improper for the applicant to have combined judicial review relief applications with a Constitutional application

i. becase both judicial review jurisdiction and constitutional jurisdiction are special and each jurisdiction has a set of special rules. The first jurisdiction is donated by an Act of Parliament namely the Law Reform Act cap 26 and the secnd constituonal jurisdiction springs directly from the Constitution itself with rules made pursuant to s 84 (6) of the Constitution.

ii.The Constitution is the supreme law and all other laws must conform to the Constitution. The rules of interpretation are different and the methods of amendment or repeal of ordinary laws are different from those of the ordinary Acts of Parliament. See *Njoya & 6 others v Attorney General & 3 Others (No 2)* [2004] 1 KLR 261.

iii. At the moment although desirable it is not statutorily possible in judicial review proceedings to grant, declarations, injunctions and damages wheras under S 84 of the Constitution, the court has a wide discretion to grant such orders as may be appropriate.

A combination as in this case unnecessarily muddles up and confuses both the parties and the Court and we hold that such a combination is fatal to the application as well.The Court of Appeal had occasion to make a finding on the importance of adhering to the prescribed rules in the case of Speaker of *The National Assembly v Njenga Karume* CA 92/92 in these words:

“In our view, there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”

In the case of *William Kipruto Arap Chelashaw v Republic* 2002 Hon Justice Kubo delivered himself as under

“Prodecural rules are not made for fun but for a purpose” and went ont to dismiss an application not brought under the rules made under s 84 (6) of the Constitution. Also in Miscellaneous C R App 173/2003 a constitutional court consisting of 3 judges in the case of *Livisngstone Maina Ngare v Attorney General,*

The Chief Magistrate, Anticorruption Court Nairobi struck out an application brought contrary to the rules made under s 84 (6) of the Constitution. We may add that although we agree with the submissions of the learned counsel, for the applicant that section 84 of the Constitution gives the High Court original jurisdiction to make such orders, issue such writs and give such directions it may consider appropriate, the Court can only do so when properly moved in accordance with the prescribed rules and procedures.

While still on issue (b) above we find considerable merit in the objection taken by the Attorney General that the court does not have any evidence to adjudicate upon in that the affidavit purporting to verify the statement is in fact a 4 paragraph affair devoid of any factual basis and violates order 53 rule 1(2) of the Civil Procedure Rules and the Court of Appeal decision in the case of *Commissioner General of the Kenya Revenue Authority v Stephano Owaki T/a Mirenga Filing Staion* CA KSM 45/ 2000 (unreported) where the Court held that it was fatal for an applicant to set out facts in the statement. They should be set out in the affidavit verifying the statement.

On this point it is quite evident that the Notice of Motion is without a proper verifying affidavit and hangs in the air and ought to be struck out.

A court cannot be expected to strike it out by invoking its judicial review jurisdiction and at the same time save it for the purpose of the constitutional provisions relied on. We hold that the two jurisdictions are distinct and separate applications are absolutely necessary. Indeed under the judicial review jurisdiction the Notice of Motion cannot stand and the objection is upheld.

S 84(1) of the Constitution contemplates the possibility of an applicant invoking the provisions of the fundamental rights and freedoms even where other actions with respect to the same matter are lawfully available. The section reads:

"Subject to subsection 6 if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to his (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person) then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

Surely the underlined words contemplate a separate action but not a combines action such as in this case. It could not have been a bar to this constitutional reference if the applicant could have instituted eviction proceedings in the matter just to give an illustration. This we believe is the ratio in the recent Court of Appeal decision in *Rashid Odhiambo Aloggoh & 245 Others v Haco Instustries* CA 110 of 2001. At page 9 the Court observed that the appellants ought to have proved those allegations to determine whether or not the allegations if proved amounted to a contravention of the constitutional provisions in which the appellants relied.

The learned judges in the High Court had on the other hand held that because the applicant had other avenues they could use those avenues to ventilate their grievances.

Of course that is not what we are saying in this matter. What we are saying is that the combined application is incompetent and prejudical.

The Notice of Motion does not allow the parties to fully articulate their positions and the Court is also inhibited in taking proof of evidence in terms of order 36 rule 10.

Our interpretation of the *Haco case* (*supra*) is that it is in line with the provisions of o 36 rule 10 the Civil Procedure which have been specifically incorporated by rule 11 (a) of the Rules made under s 84 (6) of the Constitution. At page 10 of the *Haco decision* the Court of Appeal observed that the facts on which the contravention is based must either be proved or admitted or agreed.

The burden of proof is obviously on the person alleging the contravention.

As regards application under rule 11 (a) there cannot be a higher or authoritative authority on the procedure to be followed other than order 36 itself and the *Haco decision* which is clearly based on the interpretation of the order.

Issue (c)

The effect of invoking rule 10(a) where there are in fact no pending proceedings is in our view fatal to the application. It would result in prejudice to the challenged parties and would inhibit the method of proof, thereby occasioning a miscarriage of justice. Most rules of procedure are aimed at maintaining the scales of justice evenly and in an adversarial system of justice such as ours they have over the years served as faithful handmaids of justice. See the recent decision by Honourable Mr Justice Nyamu in HC Misc Application No 1181 of 2004 *Kamau John Kinyanjui v Attorney General* where other effects of failing to invoke the correct procedure have been analysed. In that case the applicant had concealed the fact that there was a pending appeal and declined to file a constitutional reference in those proceedings in court under rule 11(a). The irregularity was fortunately spotted in time thereby averting the unhappy situation of two High Court judges of coordinate jurisdiction hearing the matter at the same time with the possibility of having jurisdictionally conflicting positions.

We are therefore not elevating the rules of procedure at the expense of justice but we have by the above illustrations demonstrated that on the contrary failure to adhere to the prescribed rules can result in prejudice, injustice and inability by the Court to have sufficient evidence upon which it can adjudicate on the question raised for constitutional determination.

The above reasons are singly or cumulatively sufficient to warrant the striking out of this application and the same is struck out. However in order not to prevent a party from properly invoking the correct procedure to obtain a constitutional remedy we make no order as to costs.

Dated and delivered at Nairobi this 5th day of November, 2004

J.G NYAMU

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JUDGE

M.K. IBRAHIM

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JUDGE

M.S.A. MAKHANDIA

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Ag JUDGE