



REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

Misc Civ Case 73 of 1998

IN THE MATTER OF: An Application by the Owners of the Motor Vessel "GLOBE TOUR" for leave to apply for Orders of Prohibition and Certiorari

AND

IN THE MATTER OF: Chief Magistrate's Misc. Cause No.71 of 1997 (Mombasa)

AND

IN THE MATTER OF: Chief Magistrate's Misc. Cause No.46 of 1997 (Mombasa)

AND

IN THE MATTER OF: Chief Magistrate's Misc. Cause No.25 of 1997 (Mombasa)

RULING

On 21.5.98, in Misc. Civil Application 39/98 I struck out a Notice of Motion filed by the same Applicant in this application purportedly in pursuit of an earlier order made on 26.3.98 granting leave to file such Notice of Motion. The Notice of Motion was for orders of Judicial Review of Mandamus, Prohibition and Certiorari. The leave granted was spent and the Notice of Motion was therefore filed out of time.

There was no appeal against that Ruling. Instead Mr. Kinyua Kamundi, learned counsel who had appeared for the Applicant in Misc. Civil Application No.39/98 drew up another chamber summons seeking the same orders for Judicial Review. The relief sought in the fresh application was:

"a. An order of prohibition to prohibit the Chief Magistrate Mombasa, from selling, by himself, Court Brokers or Agents the APPLICANTS Motor Vessel "GLOBE TOUR" pursuant to Judgment, rulings, orders and warrants given in Chief Magistrates Misc. Causes Number 25 of 1997, 46 of 1997 and 71 of 1997.

b. An Order of Certiorari directed to the Chief Magistrate, Mombasa, to bring the warrants of attachment and sale of the Motor Vessel "GLOBE TOUR" issued by him in Chief Magistrate's Misc. Causes No.25 of 1997, 46 of 1997 and 71 of 1997 for purposes of quashing them."

In the earlier application, the Relief sought was:

"a) An order of prohibition to prohibit the Chief Magistrate, Mombasa from selling, by himself, Court

Brokers or Agents the Motor Vessel "GLOBE TOUR".

b) An order of Certiorari directed to the Chief Magistrate Mombasa to bring into this court the proceedings, judgments, rulings, orders and warrants against the owners of the Motor Vessel "GLOBE TOUR" in Chief Magistrate's Misc. Cause No.25 of 1997, 46 of 1997 and 71 of 1997 for the purposes of quashing them."

I shall revert to those Reliefs shortly.

The chamber summons was filed on 25.5.98 four days after the Notice of Motion was struck out. Mr. Kinyua appended a Certificate of Urgency and appeared before my brother Hayanga, J. on the same day. In a brief hearing, leave was granted as prayed and the grant of leave operated as a stay of further proceedings. The following day 26.5.98 the Notice of Motion was filed under 0.53 r.3(l) Civil Procedure Rules.

Upon being served with the Notice of Motion, the affected parties through their counsel Mr. Kishore Nanji who also represented them in the previous application, took out a chamber summons under the inherent powers of the court seeking the setting aside of the leave and stay order, on several grounds, The orders are sought in these words:-

"1. THAT the leave granted to the Applicant by this honourable Court on 25th May 1998 to apply for orders of prohibition and certiorari be set aside and the consequential order for stay be vacated on the ground that this Honourable Court had no jurisdiction to grant such leave de novo, leave to do so having been previously granted to the Applicant by this Honourable Court in Misc. Civil Application No,39 of 1998 and the Notice of Motion purportedly filed pursuant to the said leave having been struck out by this Honourable Court on the ground that the same was not filed within the period stipulated in Order LIII r.3 (1).

2. THAT alternatively and/or further the leave granted to the Applicant by this Honourable Court on 25th May 1998 be set aside and the consequential order for stay be vacated on the following grounds:-

(i) that the application for leave to apply for orders of prohibition and certiorari is misconceived and bad in law in that it purports to join in one application 3 separate and distinct judgments and/or orders made by the Chief Magistrate in 3 separate and distinct suits;

ii) that the application for leave to apply for orders of prohibition and certiorari is misconceived and bad in law in that the same cannot lie with regard to the warrants of sale issued by the Chief Magistrate, Mombasa but can only lie in respect of the judgments delivered by him pursuant to which the warrants of sale were issued;

iii) that the application for leave to apply for an order of certiorari is clearly time-barred under Order LIII r.2 of the Civil Procedure Rules;

iv) that since the decisions and/or the orders in Misc. Civil Cause Nos.25, 46 and 71 of 1997 of the Chief Magistrate's Court, Mombasa already been made an order of prohibition cannot be efficacious against the said decisions and/or orders;

v) that the application for leave to apply for orders of prohibition and certiorari is an abuse of the process of this Honourable Court in that it is designed to circumvent the rulings of the High Court in Misc. Civil Application No.39 of 1998 dated 26th March 1998 and 21st May 1998 and/or to circumvent the time-

bar contained in Order LIII r.2 of the Civil Procedure Rules by purporting to attack the validity of the warrants of sale issued by the Chief Magistrate rather than the judgments of the Chief Magistrate in consequence of which the said warrants were issued;

vi) that the Applicant has not shown the utmost good faith and there has been an important and material nondisclosure on his part in that when he applied in Misc. Civil Application No.39 of 1998 for leave to apply for an order of prohibition and certiorari the Chief Magistrate had already issued warrants of sale in respect of which the present application has been made. Notwithstanding this the Applicant refrained from only attacking the said warrants of sale in that application and instead he sought to apply for leave to issue an order of certiorari to quash the said judgments; and

(vii) that the Applicant is merely described and not named. The application being for leave to apply for orders of prohibition and certiorari under Order LIII r.1 of the Civil Procedure Rules and not being an admiralty action in rem, the Applicant cannot be described but should be named."

The submissions that ensued from both counsel were fairly extensive. None of the parties disputed this court's jurisdiction to set aside or review, in exercise of its inherent powers, orders granted ex-parte. On this point I defer to the Ruling of my brother Ole Keiwua, J. in Mike J.C. Mills & Anor. -vs- Kenya Posts & Telecommunications, H.C. Misc.1013/96 in which the English decision of R. -vs- Secretary of State, Ex-parte Herbage [1987] 1 All E.R. 324 was relied on.

Without minimising the gravity of the other submissions made by both counsel, I consider two issues to be of considerable weight and in themselves sufficient to dispose of this application.

Firstly whether a party in Judicial Review proceedings is at liberty to file successive applications seeking leave of the court when the first application is disposed of Secondly, if the answer to the first issue is in the affirmative, whether the application is misconceived in law and that therefore leave does not lie.

Mr. Nanji's submissions on the first issue was that 0.53 r.3 (l) of the Civil Procedure Rules was a mandatory provision. It requires the filing of a Notice of Motion within 21 days of grant of leave. If it was envisaged that a party could file an application for leave de novo on the first one being struck out, dismissed or lapsing, then Order 53 r.3(l) would be an insignificant provision. It would make non-sense of the provision if a party can approach the court several times to obtain fresh "leaves". At any rate, he submitted, the Act which promulgated the requirement for leave did not provide for obtaining of leave more than once in one matter or for leave to be applied for de novo. The court has therefore no discretion to exercise in granting leave de novo.

The right procedure for the Applicant to have followed, in Mr. Nanji's submission was to invoke S.8(5) of the Law Reform Act and appeal against the court's decision. Not returning to the same court. In support of that submission he cited C.A. 6/95, Wilson Ogolo -vs- John Ochola & Anor. (Akiwumi/Tunoi/Shah, JJ.A.) where it was held that there was no jurisdiction to obtain leave de novo. The Ruling delivered by this court in Misc. Civil Application No.39/98 dealt with the issue at hand and also the jurisdiction of the court under Order 53 and therefore the filing of a further application would be an abuse of the court process. The grant of leave before Hayanga, J. should therefore be set aside.

In response Mr. Kinyua submitted that there was no express provision under 0.53 to bar any party from applying for leave more than once. It cannot be implied, in his view, the Applicant was attempting to raise issues of Res Judicata which cannot be applied in applications under 0.53. That Order is for special jurisdiction and not in respect of suits as defined in the Civil Procedure Act. At any rate the earlier

application was not decided on merits and therefore Res Judicata would be inapplicable. He cited Regina -vs- Secretary of State for the Environment Ex Parte Hackney London Borough Council & Anor. [1983] 1 WLR 524 for the proposition that estoppel, which was considered in that case and would be tantamount to Res Judicata in this application, was not applicable in Judicial Review proceedings. Mr. Kinyua then drew a parallel with the Civil Procedure Provisions allowing a party whose plaint was struck out, to bring a fresh suit regardless of the feelings of the Defendant. The Applicant was therefore at liberty to bring a fresh application where the first one was not dealt with on its merits. In his submission when leave dissipates then there is no leave granted and therefore there is nothing to prevent the party from coming back to court. He distinguished the Osolo case on the ground that the delay in seeking fresh leave in that case was 12 years and there was already another Notice of Motion on record.

I have considered these respective submissions. The starting point is the enactment relating to the requirement for leave. The procedural provisions are made in Order 53 itself. In terse provisions 0.53 r.1 states:-

"No application for an order of Mandamus, Prohibition or Certiorari shall be made unless leave therefor has been granted in accordance with this rule."

And in Rule 3 in part:

"When leave has been granted to apply for an order of Mandamus, Prohibition or Certiorari the application shall be made within 21 days by Notice of Motion"

The underlined parts are clearly mandatory.

Those mandatory provisions did not issue forth from the Rules Committee casually. It was a command from Parliament itself which established the Rules Committee under the Law Reform Act, Cap.26, Laws of Kenya

S.9 of the Act:

"9.(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court -

a).....

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

Then follows other provisions for time limits.

It seems to me that Parliament could not have gone to the extent of enacting specific provisions relating to leave unless the matter of leave was of absolute significance. It need not have spelt out the consequences for failure to obtain such leave in accordance with the Rules established by the Rules Committee. That has been left to interpretation by the courts and it has been severally held that any subsequent proceedings would be a nullity.

In the matter before me leave was obtained in Misc. Civil Application No.39/98. and on the face of it, properly so obtained. But it lapsed before another mandatory provision of the law was complied with. It is now contended that the lapse or dissipation of such leave was of no consequence and only meant that

fresh leave was required before the Applicant can proceed to the next stage in the Judicial Review process. I am urged to ignore the first grant of leave and confirm the leave granted de ново by my brother Hayanga, J. Should I do so" I think not.

As stated above, the matter of leave has been enacted by Parliament itself as the very foundation of proceedings for Judicial Review, It made provisions for time limits also. As such, it would make no sense, and I would not be persuaded to make such interpretation, for a court to hold that the grant of leave was of no consequence and that as many applications- for leave as an Applicant desires may be made, if for some reason the previous leave becomes inoperative. The parallel drawn by Mr. Kinyua where a Plaintiff is allowed to file a fresh suit where one is dismissed on technical grounds is not available to the Applicant. For there is an express provision under 0.9B r.7 of the Civil Procedure Rules to that end. The parallel which is applicable and which I would invoke in deciding this matter is that discussed by the Court of Appeal in Meshallum Wanguku -vs- Kamau Kania. (1982 - 88) 1 KAR 780. One of the issues decided was the propriety or otherwise of filing successive applications seeking the same or similar relief.

And it was held:-

"The bringing of a second application although not Res Judicata by reason of the first application not having been decided on its merits, was an abuse of the process of the court as it amounted to ignoring the order of dismissal of the first application which continued to be in force".

A decision of this court had been made in relation to the first application for leave. It was spent and could not therefore form the basis of a Notice of Motion as mandatorily required under the Rules. It would be an abuse of the court process to circumvent

such decision by considering a similar or same application, albeit, brought before the court as a fresh matter. There is provision under the Law Reform Act for appeals and I agree with Mr. Nanji, that the leave granted herein on 25.5.98 is for setting aside. On that ground alone I would grant the order accordingly.

However, if I should be wrong on that finding, and I do not say I am, then I would examine the second issue raised. The submission by Mr. Nanji was essentially that the relief sought in the application for leave was limited to quashing by way of certiorari "Warrants of attachment" of the Motor Vessel "Globe

Tour" in three cases decided by the Learned Chief Magistrate. Then an order of Prohibition is sought to prohibit the sale of the Motor Vessel.

Mr. Nanji observed that the relief sought in relation to Certiorari deliberately left out reliefs sought in the earlier application for leave (Misc.39/98) where the Applicant sought to quash "proceedings, judgments, rulings, orders and warrants". The omission of such reliefs, he submitted, was a realisation by the Applicant that the law did not allow him to seek the quashing of the Chief Magistrate's proceedings, judgments, rulings and orders in the three cases. The Applicant was time-barred under the law. What then was the purpose of quashing "Warrants of Attachment" when the proceedings and judgments giving rise to those warrants remain valid and enforceable in law" Although there is no time limit for orders of prohibition, it would not be efficacious against the decisions of the Chief Magistrate. That is because prohibition looks to the future and cannot be used to correct the course practice or procure of an inferior tribunal or a wrong decision on the merits of the proceedings. The warrants of attachment sought to be quashed were issued on 18.2.98 long before the application was filed. Prohibition is therefore not available to the Applicant. As for Certiorari, he submitted, warrants of

attachment cannot be considered in isolation as they flow from the judgment of the Chief Magistrate which has not been challenged. They were not issued in limine. It is another way of circumventing mandatory provisions of the law -relating to limitation of actions. The application was not made in good faith and should therefore be set aside.

In response, Mr. Kinyua submitted that "warrants of attachment" were covered under provisions of 0,53 r.2 which includes "other proceeding". That phrase should be construed eiusdem generis and the court should find that warrants of attachment are included and are amenable to an order of Certiorari. Once they are quashed it is not for us to say what happens to the judgments or other orders made earlier. There is no time bar in respect of the warrants ,and there is nothing to prevent the court from quashing them. After they are quashed Prohibition will issue to prevent any intended sale. The application is therefore properly before the court.

I agree with Mr. Kinyua that the rubric "other proceeding" in 0.53 r.2 includes warrants that may be issued in the process of executing the Decree or orders of the court. Indeed under 0.53 r.7 it is mandatory for the Applicant to lodge with the court and verify by affidavit, a copy of the document sought to be quashed and that includes "Warrant". That would be at a time unspecified before the hearing of the Notice of Motion, which stage has yet to be reached. But it seems to me that the "Warrants of Attachment" in a civil matter may only be challenged if in themselves they were issued contrary to the law or in breach of procedure relating to execution. Although there is no copy annexed with the application for leave to show the "Warrants of Attachment" which are attacked, there is no challenge, as far as I can see, that they were, in themselves, defective. The challenge, if I understand it, is that the warrants, which would otherwise be valid, were issued pursuant to "proceedings, Rulings, Judgments and Orders" which were themselves bad in law. But the forum for deciding the latter issue was blown by the Applicant because he did not come to court in accordance with the law, as he was time-barred. For all intents and purposes therefore the Chief Magistrate's Judgments and Decrees are valid and enforceable. A decree-holder has a right to enjoy the fruits of his judgment unless there is a compelling reason to deprive him of that right, and the reason must be lawful. Mr. Kinyua was unable to say what would happen to such lawful judgments (lawful in the sense that they remain unchallenged) if the warrants were quashed and the Decrees remain in limbo.

Orders for Judicial Review are discretionary and the court would look with disfavor at a party who comes to court in a manner to suggest that he was attempting to circumvent the provisions of the law. Whatever the merits of the Applicant's case it behoved him to come to court within the time allowed by the law failing which he would face the consequences, however unpalatable. They are self-inflicted.

On this issue therefore I would, in my judgment, find that the application for leave was made in abuse of the court process and. I would set aside the order for grant of leave of that ground also.

The upshot is that the chamber summons dated 24.6.98 granted with costs to the Applicant.

Dated at Mombasa this 10 day December 1998.

PN Waki



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