REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Judicial Review 64 of 2011

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

AND

IN THE MATTER OF REQUEST FOR MUTUAL LEGAL ASSISTANCE BY THE KENYA ANTI-CORRUPTION COMMISSION DATED 6TH MAY 2008

BETWEEN

APEX FINANCE INTERNATIONAL LIMITED.....1ST APPLICANT

ANGLO-LEASING AND FINANCE INTERNATIONAL LIMITED.....2ND APPLICANT

AND

KENYA ANTI-CORRUPTION COMMISSION.....RESPONDENT

RULING

Introduction:

Pursuant to a Chamber Summons predicated upon the provisions of Order 53 Rule 2 and Order 50 Rule 7 of the Civil Procedure Rules and Section 8 and 9 of the Land Reform Act, *(Cap 26 Laws of Kenya)* I granted the Applicants herein orders enlarging time for applying for the orders of certiorari and

granted them leave to do so within 14 days. The applicants consequently filed a substantive Notice of Motion dated 7th June, 2011 on 8th June, 2011. In the said Notice of Motion(the motion), the Applicants sought the following orders:-

(1) This Honourable court be pleased to grant order of certiorari, to remove and bring to the High Court for the purposes of quashing, the fie (5) requests for Mutual Legal Assistance issued by the Respondent to the Federal Office of Justice and Police Section of Mutual Assistance in Criminal Matters of Switzerland dated 6th May, 2008 relating to the applicants LETTERS, viz KACC/INV.6/2/3/1 VOL III (96), KACC/INV.6/2/3/1 VOL III (97), KACC/INV.6/2/3/1 VOL III (99), KACC/INV.6/2/3/1 VOL III(100), KACC/INV.6/2/3/1 VOL III (101).

(2) This Honourable court be pleased to grant an order of prohibition directed against the Respondent, prohibiting it through its servants and/or agents from soliciting, inquiring, demanding and/or seeking information about the applicants from the Federal Office of Justice and Police Section of Mutual Assistance in Criminal Matters of Switzerland pursuant to its request to Mutual Legal Assistance dated 6th May, 2008

(3) Costs of this application be provided.

The Motion, like the Chamber Summons aforesaid was premised upon the Statutory Statement and the Affidavit Verifying the Facts sworn by one Patrick Onjoro on 3rd June, 2011. Following service of Motion, the Respondent filed a Notice of Motion under Section 1A, 1B and 3A of the Civil Procedure Act, Section 9 of the Law Reform Act, and Order 53, Rule 2 of the Civil Procedure Rules and sought a determination by the court of the following issues:

(a) whether the ex-parte applicants are legal persons and therefore proper applicants in this suit,

(b) the order granting extension of time be set aside;

(c) pursuant to (b) above, the order granting extension of time be set aside and consequently the Notice of Motion of 7th June, 2012 (above) be struck out;

(d) the court do find the application for judicial review herein as fatally defective;

(e) In view of all the foregoing, these proceedings be struck out with costs to the Respondent;

(f) costs to the Respondent;

That application was supported by the Affidavit of one Ignatius Wekesa sworn on 16th June, 2011 and the grounds on the face thereof. That application as well as the Ex-parte Applicants\' Notice of Motion is the subject of this Ruling.

The Respondent\'s second Notice of Motion is dated 26th July, 2011. That motion sought orders under Article 165 (4) of the Constitution, namely-

(1) ***that the applicants\' Notice of Motion raised substantial questions of law;***

(2) that the file be referred to the Hon Chief Justice for directions;

(3) that costs be provided for.

In my Ruling delivered on 3rd February, 2012, while agreeing with the Respondent that the Applicants Motion raised weighty and substantial questions of law, I opined that the issues raised are all matters which are within the competence of a single judge to determine. I declined to certify the matter as requiring the formation of an even bench of three or more judges to determine the issue raised and therefore dismissed the Respondent\'s application and directed that costs be in the cause.

THE ISSUES

So far as the Applicants\' case is concerned, there is basically one issue, that the decision of the Respondent to seek Mutual Legal Assistance from the Federal Office of Justice and Police Section in Criminal Matters of Switzerland, per letters (i) KACC/INV 6/2/3/1 Vol.III)(96), (ii) KACC/INV.6/2/3/1/ VOL.III (97), (iii) KACC/INV.6.2.3.1 Vol..III(100) and (iv) KACC/INV,6/2/3/1 Vol.(v) (101) dated 6th May, 2008 relating to the Applicants be removed into this court and quashed by an order of certiorari. In support of its contentions for said orders, the Applicants relied upon thirteen grounds which the Applicants contend were breached by the Respondents. The grounds were:

(1) the respondent\'s actions were ultra vires the law and the Constitution;

(2) that the Respondent acted in bad faith

(3) *that the Respondent exercised its prosecution powers irrationally;*

(4) that the Respondent breached the Applicants\' right to be heard

(5) that Respondents were guilty of jurisdictional error

(6) the respondents erred in law,

(7) the Respondents failed to make sufficient inquiry of the Applicants;

(8) that the Respondents were guilty of substantive unfairness,

(9) that the Respondents were guilty of acting inconsistently;

(10) *that the Respondents acted unreasonably within the Wednesbury unreasonableness*

(11) the Respondents were guilty of substantive unfairness

(12) the Respondents acted without considering the principles of proportionality

(13) the Respondent\'s breached the Applicants right of legitimate expectation

(14) that the Respondents acted with improper motive

(15) that the Respondents breached the principle of constitutionalism.

These are all legitimate grounds for the grant of the judicial review order of certiorari. Indeed one of the grounds, illegality was the basis upon which I enlarged time for hearing the application for judicial

review following the expiration of the statutory six months under Section 9(2) of the Law Reform Act, and rule Order 53 Rule 2 of the Civil Procedure Rules respectively, and consequently granted the applicants leave to institute judicial review proceedings for the orders of certiorari. At the leave stage, all the applicants had to show or establish was a prima facie case with some likelihood of success.

However, in their Notice of Motion of 16th June, 2011, the Respondents oppose the grant of these orders and seek f**irstly** that the same be set aside, and secondly, the applicants Notice of Motion be struck out *in limine*

The Respondents while acknowledging that they have been conducting investigation into various contracts entered into by the ex parte Applicants with the Government of Kenya pursuant to which it has sought legal assistance from Swiss authorities, contend inter alia that:

(i) the applicants are not juristic persons and are not registered in the jurisdictions in which they claim to be domiciled;

(ii) the purported Applicants are faceless, non-existent and ghost companies deficient of any capacity or any legal capacity to enjoy or lay claim on any constitutional rights envisaged under Article 22 (1) on the Constitution of Kenya.

(iii) Being non-entities, the purported Applicants are incapable in law of instituting any legal proceedings including proceedings in their names and are equally incompetent to authorize any other person to act or plead on their behalf;

(iv) the Respondent has readily expressed this doubt in letters of requests forming the basis for these proceedings and is indeed one of the reasons for seeking assistance;

(v) despite being put on Notice, the Applicants have not demonstrated their juristic status but merely averred that they are international companies;

(vi) it is therefore necessary for this court to make a determination as a preliminary point as it is a matter which goes to jurisdiction. Counsel relied on the case of OWNERS OF M/V LILLIAN S. vs. CALTEX OIL (KENYA) LTD [1989] K.L.R

(vii) as suitors of justice the applicants must make material disclosures before enjoying the court\'s orders;

(viii) the court has no jurisdiction to extend time within which to apply for orders of certiorari as sought by the Applicants;

(ix) the court has no jurisdiction to extend such time ex parte;

(x) the order extending time is null and void, and that everything proceeding or founded on a nullity is a nullity;

(xi) no sufficient reasons were given why time should be extended in particular, the Deponent of the supporting Affidavit was only appointed in April, 2011 and had no personal knowledge of matters relating to the Applicants since 2008 when the request were made;

(xii) the application is incurably defective as the applicants have liberally invoked both

constitutional and judicial review jurisdiction and misjoinder of parties;

(xiii) in the premises the application, should be struck out with costs to the Respondents.

These grounds are substantially reiterated in the supporting Affidavit of Ignatius Wekesa, *(the Respondent\'s investigating officer)*, sworn on 16th June, 2011, and who in paragraph 6 of his Affidavit states on advice from his counsel on record - ***"that legal personality is not to be presumed but a matter of strict proof unless the same is conceded by the adverse party\' and it is therefore necessary for this court to make a determination as it is a matter which goes to jurisdiction".***

In addition to the affidavit of Ignatius Wekesa (cited above), the Respondents also filed a substantive Replying Affidavit by Kevin Njuguna sworn on 21st June, 2011 and in which the deponent has justified extensively the right of the Respondents to seek Mutual Legal Assistance from the Swiss Federal Authorities. By a Further Affidavit to the application dated 16th June, 2011, Sworn by Kevin Njuguna, this deponent reiterated the Respondents contention that the Applicants have no juristic standing and that the court had *no jurisdiction to extend time, or to extend the ex parte.*

The ex parte Applicants were granted leave to file further Affidavits in response to the Respondents\' Replying Affidavits and to the points raised by the Respondents. Instead the Applicants opted to rely upon their Affidavit Verifying the Facts sworn by their Agent Partrick Onjoro on 3rd June 2011 and to the submissions of their counsel dated and filed on 20th July, 2011.

In summary, the arguments raised by the Applicants and the Respondents demanded a response in two parts – the Preliminary Objection and determination on issues of:

(a) (i) Juristic status of the applicants,

(i) the legality of the court\'s order extending time to apply for leave for an order of certiorari and subsequent grant of leave,

(iii) the Applicants invocation of both constitutional and judicial review jurisdiction and

(iv) the issue of misjoinder of parties.

(b) depending on the outcome of the determination on the preliminary Points, whether the ex parte Applicants prayer for an order of certiorari should be granted.

I will commence with the Preliminary Objection by the Respondents. Following herein the same paragraphs and stated above.

(1) Legality of Court\'s Order extending time to apply for leave for an order of certiorari and subsequent grant of leave, and 2 juristic status of the Applicants.

The twin issues raised by Mr. Murei were **firstly** that the court ought not to have granted leave to the applicants, or **secondly** at least ought not to have granted leave ex parte. Counsel relied on the provisions of Section 9(2) of the Law Reform Act,*(Cap 26, Laws of Kenya)*, and Order 53 rule 2 of the Civil Procedure Rules.

Before discussing these twin issues, I will mention briefly other provisions of the law relating to

extension of time in proceedings. These other provisions are SS.58 and 59 of the Interpretation and General Provisions Act, *(Cap. 2 Laws of Kenya)* and the Limitation of Actions Act *(Cap 22, Laws of Kenya)*.

Section 58 of the Interpretation and General Provisions Act *(Cap 2 Laws of Kenya)*, provides:

58. Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises

And S.59 of the same Act provides:

Section 59; ***"Where in a written law a time is prescribed for an act or taking a proceeding, and the power is given to a court or other authority to extent that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority upon expiration of time prescribed."***

The primary statute for extension of time is the Limitation of Actions Act (Cap 22, Laws of Kenya) Part II of that Act prescribes the provisions of limitation on various actions including, contract tort and certain other actions; slander or libel, account or judgment recovery of penalty or forfeiture, other actions **in rem** in respect of the court\'s admiralty jurisdiction, and other actions referred in other sections of the Act.

Part III of the Act provides for Extension of Periods of Limitation (A). In cases of Disability, (S.22) and (B) in cases of acknowledgement and part payment (SS.23 – 24) and (C) in cases of **Fraud**, **Mistake and Ignorance of Material Facts** (SS.26 -and 27) of the Act. Section 42 of the Act excludes certain proceedings from the Application of the Act is. There is no limitation period for example in criminal proceedings, matrimonial proceedings, recovery of possession of Trust Land, government land, penalties or taxes.

These provisions give the jurisdiction to the courts to enlarge time whenever the time prescribed for doing any act or taking any proceedings has expired.

Procedurally, Order 50 rule 5 grants the court power to enlarge time upon such terms *(if any)* as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. The costs for extension of time shall be borne by the parties making such application, unless the court orders otherwise. Parties may also through their advocates agree in writing to extend expired time.

That is the position in civil litigation generally. The situation in Judicial Review matters is different.

The jurisdiction of the court in judicial review is not governed either by the Civil Procedure Act or the Civil Procedure Rules. The inclusion of Order 53 *(Judicial Review)* under the Civil Procedure Rules is for convenience only. Order 53 is not made under Section 81 of the Civil Procedure Act. The rules under Order 53 are made pursuant to the Law Reform Act *(Cap 26 Laws of Kenya)*.

Section 9(1) of the Law Reform Act confers the power to make rules upon the authority which makes rules relating to the procedure of the civil courts.

Section 9(1) provides for the making of rules – that leave be obtained before application for any of those reliefs is sought.

Section 9(2) provides that rules made under sub-section (1) may prescribe that applications for an order of mandamus, prohibition or certiorari; shall in specified proceedings be made within 6 months or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

Sub-section (3) prohibits the grant of leave in respect of judgments, orders, decrees conviction or other proceedings unless the application for leave is made within six months following the making of such orders etc.

The issue raised by Mr. Murei, learned counsel for the Respondents was really that no leave should be granted after the expiration of six months for the act or omission complained of by the Applicants and if the complaint relates to a judgment, order, conviction or other order of the court, no leave may be granted in proceedings for an order of certiorari.

Does this submission, or do these provisions, suggest an absolute bar to the granting of extension of time to grant leave in respect of applications to institute judicial review matters" Or could such applications be entertained subject to service to the interested parties, or the respondents at least"

In the cases **Re An Application by Gideon Waweru Gathunguri [1962] E.A 520** and **Mahaja V Khutwalo [1983] KLR 553,** it was held that all actions in quest of the discretionary order of certiorari must be commenced either within the six months limit following of the taking of the decision impugned or outside this limit when the court\'s leave has been secured outside this limit."

Hon. J.B. Ojwang Ag J (as he was then) cited with approval the above passages in Nairobi Misc Application No. 229 of 2003 , **Republic V Githunguri Land Disputes Tribunal** *(Senior Resident Magistrate\'s Court Githunguri case NO. 85 of 2009).*

In **Girado Othieno Mahaja Khafulu Khatwalo and Dormas Anjande** *(supra)* Hancox J.A (as he then was- as he also became Chief Justice of Kenya) discussing earlier in his judgment the question of enlargement of time, and the grant of leave, the learned Judge said-

"The decision in Re an Application by Gideon Vs. Githunguri (supra), laid down quite clearly that Section 9(3) of the Law Reform Act imposes an absolute period of limitation which cannot be extended and the basis of the decision as I understand it, was that no power of enlargement the rules, being subsidiary legislation, could defeat an express provision in substantive enactment."

Discussingfurther the question of enlargement of time in the Mahaja case, the learned Judge of Appeal said-

"While subsection (3) of section 9 gives power to make rules prescribing that an application for mandamus, prohibition or certiorari shall be made within six months, subsection (3) to which subsection (2) is expressly made subject, applies specifically for an order of certiorari to remove any proceedings for the purpose of being quashed. Subsection (3) is in very similar terms to rule 2 of Order LII(Order 53), which also relates only to an order of certiorari to remove proceedings for the purpose of being quashed, in contrast for instance, to rule 3(1). For my part I find it very difficult to appreciate the essential differences between the power conferred by subsection(2) and what was described as the absolute period of limitation in subsection (3). However, it is true to say that the one is permissible and the other contains a prohibition on the court to grant leave, (as does rule 2 of Order LIII and it is possible that the only explanation of that distinction is that the power to enlarge time was not intended by the legislature to exist in relation to this kind of

application for an order of certiorari.

Nonetheless, I would hesitate to reach a finding, that no power to enlarge time was intended to be given in such cases, for there are instances in which to deprive the applicant of the right to apply therefor would work definite injustice Unless persuaded by cogent argument to the contrary I would lean against an interpretation of the subsection which would impose an absolute time limit. I derive support for this view from R. vs. LONDON COUNTY COUNCIL, ex parte Swan and Edgar [1927] 1927 LTD, [1929]141LT at p./591, where the Divisional court held that rules of the Supreme court did give power to enlarge the limit set by by rule 21 of the Crown Office rules"

At p.8 of his judgment the learned Justice of appeal continued:

"... while I agree that the application for leave must be made exparte, as Mr. Oraro said, if it was coupled with an application to extend time then, very probably, notice, of that part at least, ought to be given to the other side; subject of course to the question, which follows from the third point, raised Mr. Oraro, who is the other side in a certiorari application".

Posing for a moment to answer the rhetorical question, who is the other side in a certiorari application, the answer must be at least be two or more parties – the Respondent – the party whose decision is sought to be impugned and the interested party or parties, who are or may be beneficiaries of that decision. Those are parties whom the applicant knows.

For instance in the current application the ultimate beneficiaries are the citizens of Kenya through the Respondent – the Ethics and Anti-corruption Commission whose decision to seek mutual legal assistance is being challenged in these proceedings.

This is however a digression, the question posed by Mr. Murei learned counsel for the Respondent is that where an applicant seeks leave of court to institute judicial review proceedings within the period of limitation, that is six months permitted by order 53 rule 2 of the Civil Procedure Rules, from the date of the decision being challenged such an application may be granted ex parte as the rules provide, that is to say, without notice to the party whose decision is being challenged, and is sought to be quashed. However if the period of limitation has expired, then at least notice ought to be given to the party whose decision is sought to be quashed. This is the first scenario.

The second scenario concerns applications in respect of leave to institute judicial review proceedings for orders of certiorari in respect of judgments, decrees, orders, convictions or other proceedings. (ejusdem generis), after the expiration of six months, in light of subsection 3 of section 9 which declares that leave shall not be granted if the application is made after the expiration of six months. As noted from the discussion by Hon Mr. Justice Hancox in the Mahaja case the learned judge shied away from making a definitive finding t that no leave shall be granted.

In **AKO Vs SPECIAL DISTRICT COMMISSIONER KISUMU & ANOTHER [1989] 163,** the Court of Appeal, endorsed its decision in MAHAJA Case *(supra)*, as in conformity with its views that subsection (3) of section 9 of the Law Reform Act *(Cap 26)*, leave shall not be granted unless application for leave is made inside six months after the date of the judgment, and that the prohibition is absolute and is not challengeable under the provisions of the Civil Procedure Rules, more specifically, order 49 rule 5 which makes provision for enlargement of time.

While endorsing those views on the sub-section 3 of section 9 aforesaid , that Court went on to say -

"the views of Hancox JA in which he leaned towards a liberal Construction were not essential to the decision, were not expressly shared by the majority and were based on rules of the Supreme Court of England which do not automatically apply this jurisdiction."

In **WILSON OSOLO -VS- JOHN OJIAMBO OCHOLA and ATTORNEY GENERAL [1996]eKLR, t**he Court of Appeal was categorical, using Section 9(3) of the Land Reform Act, that an application for leave to apply for order of certiorari cannot be made six months after the order being sought to be quashed.

While agreeing with the latter Court\'s view that rules of Supreme Court of England do not automatically apply to Courts of Kenya, and for my part I entirely agree with the views expressed by Hancox JA in the Mahaha Case:

"I would hesitate to making a finding that no power to enlarge time was intended to be given in such cases for there are instances in which to deprive the applicant of the right to apply therefore would work definite injustice."

These are my reasons. Quite often, an innocent citizen finds, well after the expiration of the six statutory limitation imposed by subsection (3) of Section 9 of the Law Reforms Act, that his title to a parcel of land has been taken away in an award by a Local Land Disputes Tribunal to a person who is either a complete stranger or is a neighbour infected with the peculiar Kenya disease called, "*Land Grabbiosis"* the decision has been adopted as a judgment of the subordinate court, the stranger or neighbour has even obtained title to the land as a result of such decision and adoption of the award as an order of the Court.

In the majority of cases, that decision is made ultra vires or made without jurisdiction by the Tribunal. Would this court sit back, fold its arms, and say subsection 3 of section 9 of the Land Reform Act bars and prohibits the Court absolutely from granting leave to commence judicial review proceedings for orders of certiorari" I do not think so. Those rules were developed in climes where honesty and respect for other people rights are honoured and respected, and where infectious malaise such as **Land grabbiosis are rare**.

In my view where a body, a person, a court or Tribunal invested with powers to do certain acts, exercises powers beyond it or without, in excess of their jurisdiction, this court must in exercise of its supervisory jurisdiction act, and call into question those acts. To deny itself those powers and act otherwise, would mean that this court too will be perpetrating injustice if it shut its eyes to acts of illegality.

In **PAUL NJUNGE CHEGE & ANOTHER VS. MANDAINE REPOE SURUM & 2 OTHERS [2012] KLR**, I observed -

"14. Article 159 (1) of the Constitution of the Second Republic says that judicial authority is derived from the people and vests in, and is exercised by the Courts and tribunals under the Constitution. Article 159(2) says that in exercise of judicial authority, the courts and other tribunals shall be guided by the principles inter alia that justice shall be done to all, irrespective of status".

*"15**. The question I would ask myself would be, what will the people, untrained in the mechanisms of the law think and decide in a situation such as this one, where the applicants purchased property within Kenya (and Kenyans are entitled to live anywhere in Kenya) and have been forced to move away for personal security, and now approach the court to enable them to***

pursue procedures which would enable them to return to their property" If the time within which these procedures has expired and no prejudice would be done to the respondents, I would certainly extend or enlarge that time. This would ensure that substantial justice is done to all, both the applicants and the respondent or the Minister or his authorized agent under section 29 (4) of the Adjudication Act would hear all sides of the rival claims."

And in **REPUBLIC VS. JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS**,ex parte Mwalulu and 8 others, the court referred to the decision of the English House of Lords, **DPP VS. HUTCHINGS [1990] AC 283**, where Lord Lowry said -

"The basic principle is that an ultra vires enactment such as a bye- law, is void at initio and of no effect."

And said that;

We also hold the maxim *ex nihilo nihil fit*" - "out of nothing comes nothing."

and concluded -

"we hold that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of nullities. We further hold in line with GITHUNGURI VS. REPUBLIC [1986] KLR 1 that this court has inherent powers to exercise jurisdiction over tribunals and individuals acting in administrative or other quasi – judicial capacity and we would invoke this jurisdiction to quash nullities and illegalities"

In **REPUBLIC VS. LAND DISPUTES TRIBUNAL COURT CENTRAL DIVISION AND ANOTHER, ex Parte Nzoka [2006] 1 KLR 475 Nyamu J,** as he then was held:

"… as regards time for applying for certiorari in the cases set out in order 53 rule 2 it was limited to 6 months and in those cases the court was prohibited from granting leave after the period of 6 months and the application for leave must be made not later than six months after the date of the proceedings i.e judgment, order decree, conviction or other proceedings. The rule applied only to the formal orders set out therein and did not apply generally and in addition, the exclusion did not apply where there was lack of jurisdiction and that the court should be able to reach out and attack nullities arising out of lack of jurisdiction of the targeted decision-making bodies. The application must however be made within reasonable time and the delay explained in the cases outside the rule. Hardship and prejudice to other parties were major factors in these cases and in the exercise of any discretion."

In **R VS. ASHFORD (KENT)JUSTICE,** ex parte RICHLEY, [1955] 2 ALL E.R.327 Lord Goddard C. J. Said:

"There is one matter on which I want to say a word of general application with regard the orders of certiorari, R.S.C Order 59, rule 4(1), provides, as the Crown Office Rules had done for a long period, that applications for leave to apply for orders certiorari must be made "not later than six months after the date of the proceedings" which it is sought to quash. The court has power under R.S.C. Order 64, rule 7 to extend time and the present is a case in which it would be right to apply for the time to be extended; but a person who intends or is required to apply to the court for an extension of leave must give notice to the person whom he would serve in the ordinary way and who must be affected if the order challenged was quashed.

Thus an applicant for extension of the term limited by R.S.C, Order 59, rule 4(3) must give notice to the person who in the ordinary way would be made respondent to the motion in order that he may be heard on the question whether or not it is a fit case in which to extend time."

The decision of the Respondent to seek judicial Legal Assistance from the Swiss Federal Authorities was of course not a judgment, decree order or other proceedings from which no leave may be granted after expiration of six months for the grant of orders of certiorari. But even if it were, and the Court was, at the leave stage, of the view that the decision may have been tainted with illegality, I think the court ought to grant such leave even ex parte, where a delay would be prejudicial to an applicant. Such leave does not prejudice the Respondent or Interested Party at all. It may be set aside on application by those parties, as there is no assurance or guarantee to the applicant that the ultimate motion would succeed, and it may ultimately be dismissed if the court comes to the conclusion that it had no basis at all.

This is not to say or to shut out at all, the possibility in appropriate cases for the court to direct a party to serve the affected side with the application for leave, particularly, where such application is coupled with an application for enlargement of time. It may in the end be the preferred practice, to filter out both frivolous applications and to guard against excessive application of the court\'s inherent jurisdiction. The better option would of course be to amend both Section 9(3) and order 53 rule to require service of process in applications for enlargement of time. However, failure by the court to so direct, does not, in my humble view, render the grant of leave and subsequent motion fatal.

I therefore hold that, the enlargement of time in this case was within the court\'s discretion, basically because of the alleged illegality, and about which I make no finding at this stage of this Ruling.

Having come to this conclusion on the Respondent\'s first preliminary objection, I now turn my attention to the applicant\'s second point of preliminary objection, whether, the applicants are juristic persons, and whether there is a competent application before this court.

(2) JURISTIC STATUS OF THE APPLICANTS:

The Respondents case is that the purported applicants are shadowy, faceless, non-existent and ghost companies deficient of any capacity or any legal capacity to enjoy or lay claim on constitutional rights as envisaged under Article 22 (1) of the Constitution of Kenya. The Respondents also contend that being non-entities the purported Applicants are incapable in law of instituting any legal proceedings including these proceedings in their names and are equally incompetent to authorize any other person to act or plead on their behalf.

In answer to these contentions, the Applicants have in their counsel\'s submissions of 20th July 2011 thrown the question back to the Respondents and say that it is upto the Respondents to show by evidence that the Applicants are not juristic persons and who are therefore incapable of instituting these or any other proceedings. As part of their answer the Applicants cite the provisions of Section 107 (i) of the Evidence Act, (Cap 80 Laws of Kenya) which provides:

Section 107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist;

The Applicants also find umbrage in the provisions of Articles 31 and 24(1) (2) and 47(1) of the Constitution of Kenya. Article 31 gives the right to privacy, which includes the right not to have;

(a) their persons, home or property searched,

(b) their possessions seized,

(c) information relating to their family or private affairs unnecessarily required or revealed,or

(b) the privacy of their communications infringed.

The Applicants also contend that those rights can only be abridged or limited in the manner provided in Article 24(1) of the Constitution. The said Article says:

24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extend that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking to account all relevant factors, including:

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitations;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose, and Article 24(2) says:

The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

The Applicants also found solace in Article 47(1) and (2) of the Constitution:

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.

The Applicants consequently concluded that the Respondents requests offended the provisions of Article 47(1) and (2) of the Constitution on the grounds:

Firstly, that the Respondents failed to comply with the requirements of Sections 28 Anti-Corruption and Economic Crimes Act (ACECA), requiring that in order to carry out certain investigations, court orders are necessary, including for instance production of books, returns of bank accounts or other accounts, reports, legal or business documents and correspondence;

Secondly, the Respondents breached the provisions of section of 29 of ACECA which require a warrant to enter and search any premises for any record, property or other thing or reasonably suspected to be in or on the premises and that has not been produced by a person pursuant to a requirement under the foregoing Section 28 ACECA. The Respondents also breached the requirements of the said Section 29.

The Applicants consequently concluded that in light of the breach of the above provisions the Respondent is not entitled to demand from the Applicants the production of records, search of the Applicants premises of its own motion, and that such actions must be sanctioned by the courts with notice to the affected parties, the applicants herein. The Applicants concluded that this is the procedural fairness envisaged by the Constitution.

OPINION

I have considered the Applicants\' answer to the Respondents Preliminary point, that the Applicants are not juristic persons as known in law. Instead of providing a straight forward answer by way of evidence, the applicants have gone into polemics of alleged breaches by the Respondents of the various provisions of the Anti Corruption and Economic Crimes Act, and alleged lack of procedural fairness in dealing with the Applicants.

Firstly, Section 107 of the Evidence Act (that whoever alleges a fact must prove it) is not an answer to the question whether the Applicants are juristic persons and not merely a name and some ghost outfits only existing on paper in some attorney\'s offices.

Under the corporate law or law of associations, or company law of most trading nations much as Switzerland and in particular common law jurisdictions including the United States of America, juristic persons are a creation of statute. In legal fiction they are equated to natural persons. So where two or more persons agree under a **memorandum of association** (that is, their contract of association) to carry out business under names which are not theirs or a combination of their names, and seek to be known in their trade or business – name and agree to be registered as such with their **Articles of Association** (the rules of operating or managing their business or enterprise) and pay required fees to the registering authority and, sometimes known the Board of Trade, a Chamber of Summons, but in our jurisdiction called the Registrar of Companies, they are then issued with a Certificate of Incorporation or as the case may be, a Certificate of Registration.

Once issued with such a certificate, the association of the two or more persons is deemed duly incorporated and the association acquires, legal personality separate from the founders or individuals whose liability is defined as limited by the use of the term **“Limited**” at the end of the business – name so incorporated. The issue of the certificate is conclusive proof of the registration of such association. That is the effect of the provisions of Sections 16 – 18 of the Companies Act (Cap 486), Laws of Kenya).

If a company or an association as aforesaid such as the Applicants herein, were to have a branch office in Kenya it would have been required under Sub Section (365 – 375) of Companies Act, to deliver to the Registrar of Foreign Companies in Kenya:

(a) a certified copy of its charter, statutes or memorandum or articles of the company, or other instruments constituting or defining the constitution of the company, and if the instrument is not written in English, a certified translation thereof.

(b) a list of the directors and secretary containing particulars in respect of an individual -

i) his present Christian name and surname and any former Christian name or surname his,

ii) his nationality

iii) his business occupation

(c) a statement of all subsisting charges created by the company,of property in Kenya or elsewhere,

(d) the name and postal addresses of some one or more persons resident in Kenya authorized to accept on behalf of the company service of process and any notices required to be served on the company;

(e) the full address of the registered or principal office of the company.

Once a foreign company has delivered the documents referred to above, then it is entitled to be issued with a certificate of incorporation certifying that the company has complied with the foregoing requirements, and again such certificate is conclusive evidence that the company is registered as a foreign company for the purposes of the Act, and as such the company can hold land in Kenya as if it were a company incorporated in Kenya.

The Applicants argument might be that they are not resident or do not have a branch or business office in Kenya, and have no need to meet the above requirements. True. This does not still answer the question whether they are juristic persons for purposes of the Respondents\' Preliminary Objection.

In ordinary social intercourse if a person meets another, a stranger at a social place or business conference, and starts a conversation, and stretches out a hand in greeting, and says **"I am Fulani"** or so and so, who are you" The other person may answer, I am **"glad to meet you**, I **am George"**, or could simply ignore the greeting and turn away or maintain a stony silence. In such a situation he could have made an acquittance or a friend or lost an opportunity to make one.

In litigation the situation is different. Specific consequences flow from certain averments or issues. For instance if a Plaintiff makes certain averments against the Defendant, the incidence of the legal burden is upon him to prove that averment. This is because the legal burden of proof normally rests upon the party desiring the court to take action. Thus a claimant needs to satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. Halsbury\'s Laws of England, 4th Edition Vol. 17, paragraph 14 says:

14 – "Incidence of the Legal Burden - …. in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues"

The authors of Husbury\'s Laws of England give the example of an action in negligence, the burden of proof of duty, breach of duty and damage is upon the plaintiff, and of contributory negligence upon the defendant. This means that the incidence of the evidential burden, though initially resting upon the party wearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift tot the party who would fail without further evidence.

In its statutory statement dated and filed on 3rd June, 2011, the applicants claim to to be " ***International Limited Liability Companies which had entered into various contracts with government of Kenya on diverse dates between the years 1997 and 2003 …"***

In response to these averments, the Respondent in the Replying Affidavit of Kevin Njuguna sworn and filed on 21st June,2011, says in paragraphs 17 and 18.

17 – that the Commission has reason to believe that the Applicants do not in fact exist and were used as fronts by state agents acting together with corrupt businessmen to siphon money from State Coffers, In the contracts, the 1st Applicant describes its address as P. O. Box 3655, 1211 – 877 Geneva 3, Switzerland while the 2nd Applicant as Alpha House, 100 Upper Parliament Street, Liverpool L, 19DA, UK. The Applicants do not exist at the addresses mentioned and there is no evidence to show they are registered in the respective jurisdictions in which they claim to have their office"

18 - That attempts to establish whether the Petitioners were registered in Kenya revealed that there were no details at the Companies Registry …"

The answer to these averments which caused serious doubts about the juristic status of the appellant is not to throw to the court Section 107 of the Evidence Act,- **"you the Respondents say, we are not juristic person,you prove it to us"** Once there is challenge to the legal existence of the Applicants, the evidential burden of proof shifts to the applicants, Section 107 of the Evidence Act is of no avail or assistance to the Applicants. But if the Respondents were to take up that burden, they would rely on Section 112 of the Evidence Act, which says:-

Section 112 "In Civil Proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving it is upon him".

This is an incidence of the evidential burden. It means that once the defendant/Respondent raised the bar that the applicants may not be what they say they are – that is to say,juristic persons, the legal burden of proving otherwise shifted to the plaintiffs/Applicants. It is not an answer to that contention, to say to the Respondents ***"Sorry, we cannot answer the question who we are because you are in breach of this or that provision of your constituting instrument or statute"*** Under Section 112 of the Evidence Act, to which these proceedings are also subject, the applicants are bound to answer that contention. It is fundamental to the continuation of their action, against the Respondents.

Similarly, the citation to a right of privacy under Article 31, of the Constitution of Kenya 2010, does not constitute any legal shield or defence to the Respondents contention; neither does Article 47 of the Constitution offer the applicants any such solace.

Counsel for the applicants cited to the court, a passage by the court in the case of Githunguri vs. Republic [1986] KLR 1, cited in **FLORICULTURE INTERNATIONAL LIMITED AND OTHERS VS. ATTORNEY – GENERAL Nairobi MSIC/HCC application No. 114 of 1997**) where the court intoned inter alia -

"From time to time, the constitution and administration of the criminal justice system are put on the anvil. Breaches of the law are alleged here and there. The need for prosecutions to be undertaken is almost invariably felt and urged. In the normal course of things it is as much in the public interest that the breach of the law should be detected, punished, redressed and provided as it were to ensure that in the process of redressing wrongs and violations of laws the people are not bashed about and prosecuted resulting in loss and respect for the law. Where there is reckless or ill-timed or unmeasured indulgence in excessive criminal process, public confidence in the rule of law is gravely undermined and where the law falls into disrepute it has a shuttering effect upon the society sense of the security of personal freedom, peace, order and possession and engagement of property"

These are indeed noble and powerful words in defence of the right to property, personal freedom,

and abuse of the criminal justice system. It is still no answer to the question whether the applicants are juristic persons.

In the Nigerian case of **GOODWILL & TRUST INVESTMENT LTD AND ANOTHER VS. WITT & BUSH LTD. Nigerian SC 266/2005**, the issues as framed by Hon. Justice Ayelola Adekeye Olufunla were:

a) Whether the suit at the trial court was properly constituted for want of proper parties,

b) Whether the 1st appellant has legal personality to institute the suit , that is, to sue and be sued.

c) the competence of the court to adjudicate the matter.

The court observed that the issue of juristic personality ..."is a fundamental issue of law which touches jurisdiction, Jurisdiction is defined as a term of comprehensive import embracing every kind of judicial action. The term may have different meanings in different contexts. It has been defined as the limits imposed on the power of a validly constituted court to hear and determine issues between persons seeking to avail themselves of its process by reference to the subject matter of the issues or to the purposes between whom the issues are joined or to the kind of relief sought – A court is competent when:

(a) it is properly constituted as regards members and qualifications of members of the Bench that no member is disqualified by one reason or another;

(b) the subject – matter of the action is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction,

(c) proper parties are before the court;

(d) the action is initiated by due process of law and upon fulfillment of any condition precedent to the exercise of its jurisdiction

Two issues immediately arise from the above propositions, **firstly,** the competence or jurisdiction of the court, and **secondly,** the competence of the parties before the court.

On the first issue, the competence or jurisdiction of the court, whereas under Article 165(3)(a) of the Constitution of Kenya 2010, the High court has unlimited original jurisdiction in criminal and civil matters, that jurisdiction\'s is in fact and in law shared between the High Court and the Subordinate Courts. The subordinate courts exercise jurisdiction over civil and criminal matter\'s reserved to them under the Magistrates Courts Act *[Cap 10, Laws of Kenya]* and the Criminal Procedure Code *(Cap 75 Laws of Kenya)*. The Courts-Martial, also a court subordinate to the High court, under the Armed Forces Act *(Cap 199; Laws of Kenya)* and the Kadhi Courts under both Article 170 of the Constitution and Kadhi Courts Act, *(Cap 11,Laws of Kenya)* have jurisdiction reserved to them under those statutes.

The High court has also no jurisdiction in matters reserved to other superior courts, the Suprement Court and Courts with the same status as the High Court, established by Parliament pursuant to Article 162(2) of the Constitution, namely, the Environment and Land Court – and the Employment and Labour Relations Court. Any purported exercise by the High Court of jurisdiction in matters reserved as aforesaid would be without jurisdiction and any decisions made would be a nullity.

In addition to those limitations, the High Court\'s jurisdiction , may be subjected to conditions precedent before it is exercised. The classic situation is that described in case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL (KENYA) LTD [1989] K.L.R) 1.**

That case involved the exercise by the High Court of its admiralty jurisdiction. Under Section 4 of the Judicature Act, *(Cap 8 Laws of Kenya)*, that jurisdiction is exercised in accordance with the same procedure as in the High Court in England. That procedure is found in the Supreme Court Act 1981, *(of England)*, and specifically Sections 20 and 21 of the Act. Section 20(1) of the Act conferred jurisdiction upon the High Court in these terms:

20(1) the admiralty jurisdiction of the High court shall be as follows, that is to say:

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

(2) the questions and claims referred to in subsection (1) are:

(a) - (l)

(m) and any claim in respect of goods or materials supplied to a ship for her operations or maintenance.

After considering the provisions of Section 20 and 20(2) …. the Court of Appeal found and held that in order to maintain an action under Section 20(2) of the 1981 Act, it is necessary to demonstrate a sufficiently direct connection between the Agreement relied on and operation of the ship. Since that condition was not satisfied the claim did not fall under section 20(2) (m) and the High court therefore did not have admiralty jurisdiction.

Besides, that holding, the court also held that a question of **jurisdiction may be raised by party or the court of its own motion and must be decided forthwith on the evidence before the court;**

Any purported exercise by the High Court of jurisdiction in matters reserved as aforesaid, would be a nullity. There is no such claim or objection in the application. If there were, the Respondents would have been required to demonstrate that this court has no jurisdiction to determine the issues in this matter. They have not raised it, and there is therefore no challenge to the court\'s jurisdiction. The challenge here is that there is no proper party in the form of the Applicants. The Applicants are non-existent in law.

On the questions of proper parties being before the court, the Supreme Court of Nigeria had this to say in the case of **Goodwill and Trust Investment Ltd and another vs. Witt and Bush Ltd *(supra):***

"It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, "where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned."

The Courts of Kenya have said as much but with difference.

In the case of **HOUSING FINANCE CO. OF KENYA LTD VS. EMBNAKASI YOUGH DEVELOPMENT PROJECT [2004] 2 KLR 548, Ojwang Ag. J *(now Justice of the Supreme Court of Kenya)* said"-**

"Only a juristic person that is, an entity endowed with legal personality can have locus standi before the court and can be subject of rights and obligations as may be declared by the court".

The same conclusion was reached by another court in **Milimani Commercial Courts Nairobi, HCCCNO. 13 of 2003, MEIR MIZRAI and STANLEY KINYANJUI** (suing as **Outdoor Association of Kenya vs. Nairobi City Council.**

Emphasizing the same point in **SIETCO (KENYA) LTD VS. FORTUNE COMMODITIES LTD AND THE COOPERATIVE BANK OF KENYA LTD [2005] eKLR,** I said in part:

"... perhaps in fairy tales but matters of law are matters of flesh, blood and bones, where there is no such persons of blood flesh and bones, or where the law has not created such an artificial or juristic person with separate legal existence from its creator, the flesh, blood and bones person, no such non-person can institute proceeding of this or any other kind. Such proceedings are from the very beginning a nullity and no amount of amendment can cure a nullity. It is not only bad, but every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

I will conclude discussion on the question of jurisdiction, and proper practice being before court by reference to the case of the **OWNERS OF MOTOR VESSEL "LILLIANS" vs. CALTEX OIL (K) ltd *(supra)***. The court in that case referred to the judgment of the English Court in **BANAKE INTERNATIONAL COMMERCE de PETROGRAD VS. GOUKASSAOW** [1923] 2KB 682, at p.688 – where BANKERS L. J said -

"The party seeking to maintain the action is in the eye of our law not a party at all but a mere name only, with no legal existence."

And earlier at p.475 said:

"A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent and therefore incapable of maintaining the action it cannot allow the action to proceed. The order of the court is that the action be struck out as the alleged plaintiff has no existence. Since a non-existent plaintiff can neither pay nor receive costs, there can be no order as costs."

Where an issue of jurisdiction is raised, it must be addressed at once. Only the court before which it is raised can address it. If the court before which the issue of jurisdiction is raised has no jurisdiction, it may either decline to hear the matter and refer it to a higher court for determination or if it determines it, the determination may be subject of appeal such as in the **"Lilian"** case *(supra)*. It cannot be said that the court has no jurisdiction to determine a matter merely because there are no proper parties before it. The determination of there being no proper parties before it must be made by the court, for if the court does not make such determination who else will make such determination or guide the parties" The court must itself determine the question of jurisdiction.

In this case, the question of the Applicants\' juristic status having been raised by the Respondents, and the Applicants having failed to address it at all, the proper finding to make is that there are no proper

applicants before court.

Legality of the Respondents Request for Mutual Assistance

Although it is neither a ground nor material to the conclusion reached on the twin preliminary issues of the legality of the court\'s order extending time for instituting application for the judicial review order of certiorari, and the juristic status of the applicants, I wish to revert to the question I raised earlier in this Ruling, whether the requests for Mutual Legal Assistance to the Swiss Authorities by the Respondent was legal.

It was the Applicants\' argument that the Respondent had no legal authority under its constituting statute to seek mutual legal assistance from the Swiss authorities or any other party.

I do not with respect to the Applicants and their counsel share their view regarding the Respondent\'s legal authority to seek mutual legal assistance not merely from the Swiss authorities, but in my view from any other source, within, and without Kenya. These are my reasons.

Firstly, even before the passage of **the Mutual Legal Assistance Act 2011 (No. 36 of 2011) Section 11(3)(a) of the Prevention of Corruption Act *(Cap. 65, Laws of Kenya)*** empowered the Respondent\'s predecessor *(the Kenya Anti-Corruption Authority)* to take necessary measures for the prevention of corruption in public, parastatal and private sector. Section 7(1) of the Anti-Corruption and Economic Crimes Act, 2003, similarly empowered the Kenya Anti-Corruption Commission (a) to investigate any matter that, in the Commission\'s opinion, raises suspicion that any of the following have occurred or about to occur -

(i) conduct constituting corruption or economic crime,

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime.

These provisions which were in force at the time when the Requests for Mutual Assistance were made, cannot be read narrowly merely to refer to investigations within Kenya alone. The provisions must be read in the widest possible sense to confer upon the Respondent and its predecessors, the power in the course of their investigations to request for and obtain assistance from any source without and within Kenya.

Secondly, even without the benefit of these provisions, Kenya and Switzerland maintain both Consular and Diplomatic Relations. Under the Vienna Convention of 1963 on Consular Relations, Article 5 empowered both Kenya and Switzerland to maintain diplomatic and consular relations and both are entitled by lawful means to ascertain conditions and developments in the commercial, economic, cultural and scientific life of their respective States and giving information to persons interested.

This Article of the Convention is codified under the Privileges and Immunities Act *(Cap. 179, Laws of Kenya)*, and both the Government of Kenya or its national agencies, in addition to individuals and other body corporates, may request the Swiss or other Government authorities for mutual assistance. The mode of granting such request is of course strictly dependent upon the laws of the country from which the privilege or information is sought.

It cannot consequently be heard for the Applicants to plead that the Respondent had no authority to seek such mutual assistance.

Thirdly, the passage of the Mutual Legal Assistance Act 2011 *(No. 36 of 2011)* has put the matter beyond any pale of doubt. Not merely the Republic of Kenya but any of its competent agencies such as the Respondent, has authority to request for the assistance it may seek. It was up to the Swiss authorities to grant or deny it in accordance with their laws and procedures governing such requests.

CONCLUSION

The preliminary issues raised herein were **firstly** whether the court had jurisdiction to enlarge time and grant the Applicants leave to commence judicial review proceedings for orders of certiorari after the expiration of the statutory six months. After reviewing the authorities, I have held that it was within the court\'s jurisdiction to both enlarge the period, and grant leave ex parte. The **second** issue was whether there were proper juristic persons before the court. I held that there were no proper applicants before the court. That being so the order of the court must be that the Applicants Notice of Motion be struck out.

There shall therefore be an order striking out the Applicants\' Notice of Motion dated 7th June, 2011 and filed on 8th June, 2011. A non-existent Applicant can neither pay nor receive costs there shall be no order as to costs.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE