**Republic v Kenya Bureau of Standards and others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 16 June 2006

**Case Number:** 532/04

**Before:** Nyamu J

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Judicial review – Civil Procedure Rules – Application brought under Order XVIII of the civil procedure rule – Striking out paragraphs in the affidavit – Applicability of the Rule to judicial review applications.*

*[2] Judicial review – Exclusively principle – Definition and application of exclusivity principle.*

*[3] Judicial review – Objectives and functions of the court – Effect of technical applications – Grounds*

*for intervention by the court.*

*[4] Judicial review – Provision for interlocutory applications.*

**Editor’s Summary**

The first interested parties made an application to expunge from the record certain paragraphs in the

Replying Affidavit of the *ex parte* applicant, Bivac International SA. The issue was whether this civil law application, grounded on Order XVIII, rules 3, 5, 6 and 8 of the Civil Procedure Rules and under the inherent jurisdiction of the court, was applicable in judicial review.

Application dismissed.

**Held** – Judicial review proceedings under Order LIII are a special procedure which are invoked whenever orders of *certiorari, mandamus* or prohibition are sought in either criminal or civil proceedings. In this case, the court was exercising its jurisdiction *sui generis* and therefore to the extent that the application has invoked the civil procedure jurisdiction, it was incompetent. (*Welamondi v The Chairman Electoral Commission of Kenya* KLR Volume [2002] 485 followed). However, it is in order to invoke the inherent power of the court especially in situations where no specific procedure has been provided by the parent Act ie the Law Reform Act (Chapter 26 of the Laws of Kenya) or Order LIII on judicial review. But the court’s inherent powers cannot be invoked so as to apply the provisions of the Civil Procedure and Rules on contents of affidavits where Parliament for what is an exclusive means to access the remedies of judicial orders. Judicial review jurisdiction is a special jurisdiction and was from its introduction intended to remain special and set apart from other jurisdiction including the civil procedure jurisdiction. The purpose of Order LIII was to provide a clear and flexible procedure which is conducive to the attainment of administrative justice with the special attributes of speed, effectiveness and finality. Where there is a convergence of possible breach of private and public rights an applicant has to choose how to approach the court depending on which is the dominant relief. In public law the objectives go beyond mere proof of particular facts or documents and very often it is a challenge to the decision making process itself or the lack of jurisdiction in making the decision. Sometimes the challenge is how the decision was arrived at and the ultimate decision of a judicial review court could turn on the presence or absence of a particular document or documents or on their meaning or validity. In such situations it is only proper that the ultimate decision be made at the final stage of the proceedings. Any challenge to particular document or documents in advance would literally mean putting the cart before the horse. The objectives of judicial review, which are much wider and go beyond those intended to serve the civil procedure jurisdiction, would be defeated by technical objections on form, content, annexures, or blind applications of rules on striking out or expunging of contents of affidavits or paragraphs thereof. The exclusivity principle means that judicial review provides exclusive means by which public matters can be challenged in court. While the principle does permit very rare exceptions, the facts of this case took it out of the exceptions. Thus the applicant desires a technical knockout of some challenged or impugned documents using the Civil Procedure Rules which were largely designed for the civil procedure process. *O’Reilly v Mackman* [1983] 2 AC 237 applied. Thus, a respondent could not and should not be allowed to use means that are strange or outside the judicial review to impair the courts ability to review the decision making process without any fetters or hindrance. If the Civil Procedure Act and the Rules do not apply to judicial review Order XVIII on affidavits would not also apply and it cannot be singled out for application. (*Ako v District Commissioner for Kisumu* CA (no citation given) applied). Further Order XLII on appeals does not apply as it refers to “prerogative orders” which were abolished on 18 December 1956 by the Law Reform Act. If such an important built in procedural and evidential safeguard as discovery was not possible and is still not possible under our current law, an application to strike out an affidavit or paragraphs thereof ought not to be allowed. The paragraphs intended to be struck out constituted the heart of the challenge in the decision-making process as set out in the main application so that if the court were to intervene at this stage, after granting leave for the entire application to be heard on merit the court shall literally have sat on appeal as regards the matters raised in the paragraphs and shall be compelled to sever the application and to go into the merits and adjudicate on parts of it before the actual application for judicial review is heard. The inherent jurisdiction of the court should not be used to frustrate hearing on merit, or create technical hurdles or unnecessarily create procedural minefields in this special jurisdiction. Although it might not be desirable to have two standards of affidavits in the entire court system the overriding concern of the court should be to endeavour to attain the overall objectives of the judicial review jurisdiction which in most cases is the court’s ability to identify the challenged decision or to trace it without any hindrance in order to determine any alleged illegality, irrationality or impropriety. The applicant would suffer no prejudice in articulating its case in the main application and there is no reason for bogging down judicial review with applications based on technicalities of procedure before the actual hearing. *R v Secretary of State for Home Department ex parte Khawaja* [1984] AC 74, applied. The main grounds for intervention are illegality, irrationality and impropriety of procedure. Thus if the intervention is based on alleged impropriety of procedure, by striking out or expunging documents on whatever procedural reason might deny the court a proper grasp or appreciation of the alleged impropriety. The court must resist the temptation to worship at the altar of technicalities and focus on the objectives of judicial review, because at the end of the day at the second stage of the hearing on merit the court holds all the cards and if a party deliberately refuses to make a full disclosure he shall have done so at his risk because the court expects full co-operation from the targeted bodies, applicants as well as the interested or affected parties. *Fothergill v Monarc Airlines Limited* [1981] AC 251, *R v Lancashire County Council ex parte Huddles On* [1986] 2 All ER 941 applied. ***Obiter*** – There is need for a judicial review court to be broadminded in order to fully allow the fullest vindication of the rule of law. Even in the context of this application which is pegged on documents, their source, veracity, validity, admissibility or relevance, judicial review jurisdiction has a much wider scope which transcends these concepts. *R v Kaka Nzoka* miscellaneous civil application number 1217 of 2003 followed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Ako v Special District Commissioner for Kisumu* [1989] LLR 1649 (CAK) – **AP**

*R v Kaka Nzoka* miscellaneous civil application number 1217 of 2003 – **F**

*Welamondi v The Chairman Electoral Commission of Kenya* [2002] KLR 485 – **F**

***United Kingdom***

*Fothergill v Monarch Airlines Limited* [1981] AC 251 – **AP**

*O’Reily v Mackman* [1983] 2 AC 237 – **AP**

*R v Lancashre County Coucil ex parte Huddles On* [1986] 2 All ER 941 – **AP**

*R v*