

## PLEADINGS WITHOUT TEARS

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### INTRODUCTION

The Civil Procedure Act is the lawyer's bible in civil litigation. It is every practitioner's nightmare to be confronted by a technical objection to the pleadings filed in court because of some procedural defect.

This paper will attempt to highlight some of the problematic areas that are encountered on a frequent basis. It is intended that that paper will lead to the reduction of some of the common legal minefields encountered in every day practice.

The paper is by no means meant to be exhaustive but will merely scratch at the surface of some of the common problems that may be encountered. The practice of law is ever evolving and one must keep abreast with the latest developments by constant reading and discussing topical problems with colleagues. The paper will also point out some of the hidden gems in the Civil Procedure Rules that tend to be overlooked.

The journey to untangle the myriad of technicalities that are normally encountered now begins.

### **1. AMENDMENT OF PLEADINGS**

Order 6A Rule 7 (1) provides as follows:

*"Every pleading and other document amended under this Order shall be endorsed with the date of the amendment and either the date of the order*

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*allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment is made."*

Now what does this mean? Many a practitioner will amend a pleading as follows:

**"AMENDED PLAINT"**

Once that is done we normally sit back complacently waiting to take the next step in the proceedings only to have a ticking time bomb delivered vide an application to strike out the entire amended suit on the ground that the amendment was fatally defective and un-procedural. Your opponent says that you should have amended as follows and yet you did not:

**AMENDED PLAINT**

*(Pursuant to Order 6A Rule 1 of the Civil Procedure Rules) or  
(Pursuant to the Order of the Court of 14<sup>th</sup> July 2006)*

The above is the correct form to amend the pleading. Let this not come as a shock to many when it is revealed that many a practitioner has come to grief when the entire pleading has suffered a high pleading mortality rate when struck out on this innocuous technicality.

Interestingly enough the high court cases are legion on this point and the majority point out that failure to comply with the rule is fatal.<sup>2</sup> We are yet to come across a court of appeal decision on this point.

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<sup>2</sup> See the following cases which all struck out the amended pleadings: Alice Wanjiru Njihia v John Rukungu & Ano. HCCC No. 1835/99, Pan African Bank Ltd (In Liquidation) v Abraham Kipsang Kiptanui HCCC No. 106/97, Wilfred Dickson Katibi v Barclays Bank of Kenya & 2 Others Milimani HCCC No. 259/05, Giro Commercial Bank Limited v Sam Nyamweya Milimani HCCC No. 1391/00, Classic Mushrooms Ltd v The Eastern & Southern Africa Trade & Development Bank Milimani HCCC No. 537/03,

In Stockman Rozen Kenya Ltd v Da Gama Rose Group of Companies Ltd (2002) 1 KLR 572 at page 576, the court held that:

"We have all agreed that the plaintiff amended the plaint before the close of pleadings as provided for by Order 6A (1) of the Civil Procedure Rules. The amendment was done at Nairobi on the 23.9.2001. This was not done pursuant to the court's order allowing the amendment. So the plaintiff did not have to endorse the date of such an order..."

But the plaintiff was enjoined to endorse on the amended plaint the number of the rule in pursuance of which the amendment was made. The endorsement is mandatory. The word used is "shall". That means failure to comply has fatal effects."

## 2. EXTENSION OF THE VALIDITY OF SUMMONS- THE PRINCIPLES IN THE EXERCISE OF JUDICIAL DISCRETION.

One of the numerous applications that are filed on a routine basis deals with the extension of the validity of expired summons. Despite the fact the application is made *ex parte* many advocates leave the courtroom crestfallen when their applications are dismissed with costs.

This seemingly innocuous application has caused untold grief to many applicants especially when:

1. Fresh suit has to be filed at great expense.
2. A fresh suit cannot be filed because the claim has become time barred.

The amendment of Order V Rule 1 (2) of the Civil Procedure Rules by Legal Notice No. 5 of 1996 has opened a pandora's box in the aspect of judicial interpretation. The courts have given conflicting judicial interpretation to applications that have sought to extend summons that to all intents and purposes have expired.

## **THE PRE-1996 PERIOD BEFORE THE AMENDMENT**

Order V Rule 1 provides a comprehensive code that deals with the duration and the procedural aspects involved in the duration and renewal of summons.

Previously the law was as follows when it came to the aspect of the extension of the validity summons.

Order V Rule 1 provided as follows:

- 1. (1) A summons (other than a concurrent summons) shall be valid in the first instance for the twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance of the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.**
- 2. Where a summons has not been served on a defendant, the court may by order extend the validity of the summons from time to time for such period not exceeding in all twenty - four months from the date of its issue if it is satisfied that it is just to do so .**
- 3. Where the validity of the summons has been extended under sub rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.**
- 4. Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same sum which has not been served so as to extend its validity until the period specified in the order.**
- 5. Application for an order under subrule (2) shall be made by the filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.**
- 6. As many attempts to serve the summons as are necessary may be made during the period of the validity of summons.**

decree holder will only be entitled to the surplus in the event of a successful sale.

- b. After filing of the application above, the Court will issue a Prohibitory Order.

The Prohibitory Order must be:

- i. Registered against the Title with the Registrar of Lands.
  - ii. Served on the property to be attached.
  - iii. Served (if possible) on the judgment-debtor.
- c) File your affidavit of service showing compliance with i to iii. In addition, if the property is already charged, then the bank should be served as it has priority to the sale proceeds.
  - d) List the case for taking Accounts and Fixing Terms and Conditions of Sale.  
One must file a statement of account and ensure that an updated valuation report is available. Take a date for sale at least 60 days away and identify your preferred auctioneer who shall conduct the sale.

#### **LIFTING THE VEIL OF INCORPORATION AT THE EXECUTION STAGE**

The directors can be examined as to what happened to the assets of the company under Order 21 Rule 36 (b). They can no longer seek refuge behind the façade of the corporate veil if they have deliberately misappropriated the company's assets. One makes an application seeking to inspect all books of account and other relevant books such as bank statements. The directors are summoned and if they fail to appear ask that a warrant of arrest do issue to show cause why they did not appear. One can also seek a prayer in the application for the lifting of the corporate veil and have the decree executed against the directors personally.

In **Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd**<sup>15</sup> Justice Ringera's (as he then was) holding was summarised at page 42 as follows:

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<sup>15</sup> (2002) 1 EA 41(CCK)

**"An application under the provisions of Order XXI, rule 36 is premature and incompetent if it seeks the examination of a corporation because a corporation is not amenable to an order for examination.**

**An application for examination under Order XXI, rule 36 is premature and incompetent if brought before a decree is extracted. The veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a cloak, mask or sham, a device or stratagem for enabling the directors to hide themselves from the eye of equity. The corporate veil can be lifted at any stage, including execution, in appropriate cases. The veil of incorporation is not to be lifted merely because the company had no assets or it is unable to pay its debts and is thus insolvent."**

The judge once again reiterated the same point of law on lifting the corporate veil at the execution stage in the case of **Ultimate Laboratories v Tasha Bioservice Ltd**<sup>16</sup>. He cited with approval the English case of **Gilford Motor Co. v Horne**<sup>17</sup> and **Jones v Hipman**<sup>18</sup>. The judge held that the application for the lifting of the corporate veil should also be grounded on S. 3A of the Civil Procedure Act which preserves the inherent power of the court to make such orders as may be necessary to prevent the abuse of the court process or for the ends of justice.

#### **Limitation – does a decree or order for eviction become time-barred?**

The court of appeal addressed this issue in the case of **Malakwen arap Maswai v Paul Kosgei**<sup>19</sup>. The main issue was whether enforcing a judgment after twelve years was captured by limitation. The decree holder was faced with this objection when attempting to enforce an order for eviction brought 16 years after the order was made. The court considered Section 4 (4) of the Limitation of Actions Act, which provides as follows:

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<sup>16</sup> Milimani HCCC. No. 1287 of 2000 (unreported).

<sup>17</sup> (1933) Ch. 935

<sup>18</sup> (1962)1 W.C.R 832

<sup>19</sup> Civil Appeal No. 230 of 2001 (CA Eldoret) also reported in (2004) eKLR

7. Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

The case that has dealt with the interpretation of the above section prior to the amendment is **Nairobi Civil Appeal No. 85 of 1996 Udaykumar C. Rajani and 3 Others v Charles Thaithi** (unreported).

**FACTS:**

The summons were issued by the superior court on 2<sup>nd</sup> April 1987. After the superior court was dissatisfied with the mode of service, the summons were reissued on 27<sup>th</sup> March 1992. No formal application for the extension of the validity of summons had been made. The reissued summons were served and an appearance was filed on 9<sup>th</sup> September 1992.

A preliminary objection was raised to the effect that there being no valid extension of the first summons the suit ought to be dismissed. The superior court dismissed the preliminary objection.

The Court of Appeal was asked to address the issue whether before the enactment of Legal Notice No. 5 of 1996 the court had the power under Order 5 Rule 1 to extend the validity of summons beyond 24 months from the date of its issue.

**HELD:**

1. Order 5 Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by the failure to renew the summons under this Rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure.

2. The court , before 1996 , could only by order extend its validity from time to time for such period not exceeding 24 months from the date of its issue if it was satisfied that it was just to do so .
3. Since no application had been made to extend the validity of the original summons, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence. It follows therefore that the alleged service upon the defendants was ineffective and invalid and so were the summons issued on 28<sup>th</sup> August 1992.

The Court of Appeal allowed the appeal and dismissed the suit.

#### **The Post 1996- After the Amendment**

Legal Notice No. 5 of 1996 deleted Order 5 Rule 1 (2) by introducing the following amendment:

**"Where a summons have not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so." (sic).**

A subsequent amendment was introduced by Legal Notice No.84 of 1996 to rectify the clerical error by substituting the word "have " with the word " has".

The amendment on the face of it was deemed to herald a new dawn of gracious judicial discretion towards the extension of the validity of summons. But alas the euphoria was short lived as many advocates discovered to their consternation that their applications for the extension of the validity of summons were dismissed with costs.

Regrettably there are hardly any local cases that have brought succor to the advocates whose applications for the extension of expired summons have been dismissed. If the cases are there, then they have not been brought to the attention of majority of the legal fraternity.

The next local case that dealt with a suit that was filed after the 1996 amendment is **Jairo A. Okonda v Kenya Commercial Bank Milimani HCCC NO. 3089 of 1996 (unreported)**.

### **FACTS**

The suit was filed on 15<sup>th</sup> June 1999. The Plaintiff and Chamber Summons were served on the Defendant . The summons though issued by the court on 4<sup>th</sup> February 1997 had not been served on the Defendant as a result of the mistake of the Plaintiff's previous advocate who failed to serve the same for undisclosed reasons. Consequently the summons expired on 3<sup>rd</sup> February 1998 .The Defendant's advocate raised a preliminary objection to the effect that the suit had abated and no orders could be made.

### **HELD**

1. An application to extend the validity of summons has to be made within the first 12 months. If the period expired and the summons' validity expired then there was nothing to extend.

The judge accepted the Court of Appeal's decision in the case of **Rajani v Thaithi** cited above.

This is the position that has been taken by some members of the bench when dismissing applications that seek to have expired summons extended.

However as we shall demonstrate below, the superior court in the above case had not considered the fact that the court has the discretion to enlarge the time for the filing of an application seeking the extension of the validity of summons outside the 12 month period.

### **ENLARGEMENT OF TIME**

Order 49 Rule 5 of the Civil Procedure Rules provides :

**"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules , or by summary notice or by order of the court , the court shall have power to enlarge such 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 the expiration of the time appointed or allowed :**

**Provided that the costs of any application to extend such time and any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."**

The court therefore has discretionary jurisdiction to enlarge the time for the filing of an application seeking the extension of the validity of expired summons.

It must be pointed out that the jurisdiction to enlarge time can only be made under Order 49 Rule 5 and not S. 95 of the Civil Procedure Rules.

S. 95 reads:

**"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act , the court may , in its discretion , from time to time enlarge such period , even though the period originally fixed or granted may have expired."**

This distinction has been pointed out in the case of **Patel v Singh & Ano. (1956) EACA 209.**

The Court of Appeal at Nairobi in deciding an appeal from the Supreme Court of Kenya, allowed an application that sought to extend the time for the filing of an application seeking to set aside an arbitral award. The Court held that Order 5 Rule 5 of the Civil Procedure Rules applied. It however rejected the submission that the court also had jurisdiction to extend the time under S.95 of the Civil Procedure Ordinance (identical to S. 95 of our Civil Procedure Act).

The Court held as follows:

**"We do not think that this section can have any application to a case such as the present one. The expression "fixed or granted by the court" is, in our view, fatal to any submission to the contrary. "Court" is defined in section 2 of the Ordinance as meaning "any civil Court other than Muslim Subordinate Courts". That definition seems clearly to envisage a Court sitting in its judicial capacity and could not, we think, include the Supreme Court of Kenya as a rule-making authority empowered by section 20 of the Arbitration Ordinance."**

In case of **Holman v George Elliot & Co. Ltd (1944) 1KB 591** the Plaintiff had failed to serve the writ within 12 months and the writ was rendered void. He filed an application seeking the extension of the validity of the writ .The Defendant's advocate argued that as there was no application to extend the writ within 12 months then the writ was rendered void. They however conceded that the writ could be extended after the 12 months by seeking leave to enlarge time but that such renewal would not be granted if the claim would become statute barred if the renewal was granted.

The Court held that there was no rule depriving a judge of his discretion to extend the time for non-compliance of a procedural requirement and the court has the discretion to extend the time.

The Court however cautioned that there was an accepted practice as laid down in **Doyle v Kaufman (1877) 3 Q.B.D 7** not “ to extend the time for renewing a writ of summons when the claim would, in the absence of such renewal, be barred by the Statute of Limitations.”

### Grounds for the exercise of Judicial Discretion in Extending the Validity of Summons

The Supreme Court Practice 1999 Edition Vol. 1 has at pages 54 to 56 provided various considerations that the court looks at when considering applications for the extension of the validity of summons. The overriding principle is that the extension of the validity of summons is not to be granted as of course on an application, which is necessarily made *ex parte*. The courts require that good cause or sufficient reason must be demonstrated. We shall borrow heavily from the cited pages to illustrate a few instances of what the court considers in applications for the extension of the validity of summons.

#### Good Reasons for Extensions

- a) A clear agreement with the defendant that service of the writ be deferred.
- b) Impossibility or great difficulty in finding or serving the defendant , more particularly if he is evading service.

#### Bad Reasons for Extensions

- a) That negotiations are proceeding. In the absence of an actual agreement that service be deferred, it is both incorrect and dangerous to defer service in the hope that negotiations will succeed, too often a writ is forgotten until after the limitation period has elapsed; offers may be withdrawn and the plaintiff left without remedy save against his solicitors.
- b) That there is difficulty in tracing witnesses or obtaining expert or other evidence.

c) Carelessness.

Summons will not normally be renewed so as to deprive the Defendant of the accrued benefit of a limitation period.( see page 55 which also has exceptions which are the same as the two grounds cited in " good reasons for extensions 'cited above). Where application for renewal is made after the summons have expired and after the expiry of a relevant period of limitation the applicant must not only show good reason for the renewal, but must give a satisfactory explanation for his failure to apply for the renewal before the validity of the summons has expired.

From the foregoing it is clear that the court has discretion to entertain an application brought under Order 49 Rule 5 that seeks to enlarge the time to make an application brought under Order 5 Rule 1 (2). In all instances the court then has to consider whether there has been a reasonable explanation for the delay and the hardship that may be brought to both sides.

#### **SUBSTITUTED SERVICE**

Instead of going through the grief of having to extend the summons, one should consider the option of simply applying for substituted service under Order 5 Rule 17 (3) of the Civil Procedure Rules. Very few advocates have discovered that this method need not be expensive. The reason why most advertisements in the newspapers are expensive is because we set out the full title of the court case which is about half the cost of the advertisement. This method would be useful if you want the advert to loudly proclaim to the whole world about the existence of the suit and your client is prepared to foot the bill.

On the other hand the cheaper method, which in reality costs under Kshs. 10,000.00 , is to simply place the advertisement in the classified advertisement section of the daily newspaper and adopt the following format:

No. 23

**SUBSTITUTED SERVICE BY ADVERTISEMENT**

(O.V rr 17, 26)

To: Artur Margarine  
Of P.O.Box 123 00700 Nairobi

Take notice that a plaint has been filed in the Chief Magistrates at Nairobi in Civil Suit No.12121 of 2006 in which you are named as the defendant. Service of summons on you had been ordered by means of this advertisement. A copy of the summons and the plaint may be obtained from the court at P.O.Box 44810 00100 Nairobi.  
And further take notice that, unless you enter an appearance within 21 days, the case will be heard in your absence.

Kamau Onyango Advocates.

The rules actually make it so simple for us to adopt the format for advertisement in the local dailies! So the next time you have an elusive defendant do not grieve when the solution is staring you in the face. As a matter of practice, the minute the defendant cannot be traced, simply apply for substituted service and then obtain your default judgment. You can then have the luxury of time to trace him and if he has immoveable assets the same can be attached and sold.

After all, you have had the blessings of the court through every stage and no one can fault you for that!

### **3. PRELIMINARY OBJECTIONS**

A favourite tool tactically employed when the aim is to derail the hearing of the suit leading to escalation of costs. A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a

plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.<sup>3</sup>

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.<sup>4</sup>

Careful thought must be given when raising vague preliminary objections whose intent is shrouded in mystery that cannot be discerned from the pleadings. It is insufficient to say that you will raise a point of law when that point is not apparent from the body of the pleadings or set out precisely in the preliminary objection.<sup>5</sup>

Avoid raising a preliminary objection which is not part of the pleadings.

#### **4. THE LAWYER'S ETERNAL SAVING GRACE- SECTION 3 A**

The general rule is that the inherent powers of the court should not be invoked if there is specific rule dealing with the issue at hand.

There are however instances when the court's inherent jurisdiction will be invoked.

The following are summaries of when the inherent powers are invoked to aid the litigant.<sup>6</sup> The summaries are not exhaustive.

- To stay proceedings where the ends of justice so required or to prevent an abuse of the process of the court; but where the circumstances of the particular case do not call for such exercise , the court will not exercise this power.<sup>7</sup>

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<sup>3</sup> Mukisa Biscuits Co v West End Distributors Ltd (1969) 697 per Law J at page 700 para D-

<sup>4</sup> Per Sir Charles Newbold, P at page 701 para. B in Mukisa supra.

<sup>5</sup> Per Ringera J in Agricultural Finance Corporation & Ano. v Kenya Alliance Insurance Company Ltd & Ano. (2002) 1 KLR 231 at 232.

<sup>6</sup> As extracted from **Judicial Hints on Civil Procedure** Volume 1 by R Kuloba 1984 at pages 35-36.

- To stay execution. The court had inherent power, *ex debito justitiae*, to order a stay of execution pending the determination of an application for leave to appeal out of time and subsequent determination of the appeal.<sup>8</sup> The writer has used this effectively when a record of appeal was struck out. Another instance is when the stay of execution had expired while the application for stay in the court of appeal had been listed for hearing outside the expired stay period.
- Where a judgment is not regularly obtained the power to set it aside may stem from the court's inherent jurisdiction.
- A mandatory injunction can only be brought under S. 3A and not Order 39.<sup>9</sup>
- The inherent powers will be used when lifting the corporate veil at the execution stage.<sup>10</sup>

## 5. AN ALLEGATION OF FACT UNLESS TRAVERSED IS ADMITTED.

Order 6 Rule 9 (3) of the Civil Procedure Rules provides:

**"Subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them."**

Believe it or not - defences have been struck on this point.

In the case of **Pharmaceutical Manufacturing Co. v Novelty Manufacturing Ltd**<sup>11</sup> the court held:

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<sup>7</sup> Sir Newham Worley , V-P in Jasvra Karsan v Harnam Singh Bhogal (1953) 20 EACA 74 AT 76. See also Nganga v Kimani (1969) EA 67. The court held that the court had inherent power to grant a stay of execution pending an appeal from a refusal to set aside an *ex parte* decree.

<sup>8</sup> Lucie-Smith , Ag CJ in Olivia Da Ritta Siqueira E Facho and another v Siquiera , Rodrigues and Ribero (1933) 15 KLR 34 at 36.

<sup>9</sup> See below on the discussion on injunctions.

<sup>10</sup> Infra at page 17.

<sup>11</sup> (2001)2 EA 521

**"As the defence did not sufficiently traverse the allegations of fact made by the plaintiff on the registered trade mark, its manufacture and distribution, the reputation its product enjoyed and the manner in which it was marketed, by dint of Order VI, rule 9(1) and (3) of the Civil Procedure Rules those allegations were deemed admitted."**

One must either admit or deny every material allegation of fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. Care must be therefore be taken to deal specifically with every material allegation of fact in a claim or counterclaim. It is in the power of the party either to admit or to deny each allegation in his opponent's plea, as he thinks fit. If he decides to deny, he must do so clearly and explicitly. Any ambiguous phrase will be construed into an admission of it. If the judge does not find in the pleading a specific denial or a definite refusal to admit, there is an end of the matter; the fact stands admitted. Moreover it looks weak to deny everything in your opponent's pleading. It suggests that you have no substantial defence to it.<sup>12</sup>

## **6. NOTICE OF WITHDRAWAL OR DISCONTINUANCE OF A SUIT**

Order 24 Rule 1 provides as follows:

**"At anytime before the setting down of the suit for hearing the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action."**

There is actually an important distinction which may not be a matter of mere terminology, since it may affect the question of costs or the continuation of a new action or the making of a new claim, between "discontinuance" and a "withdrawal". The term "discontinuance" appears to be directed to the final termination of the whole action or counterclaim, so that no part of it survives an effective discontinuance, whereas the term "withdrawal" appears to be directed to the termination of part only of an action, namely in action begun by writ, of a particular claim

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<sup>12</sup> Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 21<sup>st</sup> Edition 1975 at pages 126 to 128 makes excellent reading on this point.

made in the action or counterclaim, and in an action begun by originating summons, of a particular question or claim raised in the summons.<sup>13</sup>

It is attractive for one to withdraw a suit simply because an *ex parte* injunction order was denied and then proceed to immediately file a fresh suit seeking identical relief before a different court. But be warned- this may horribly backfire. Here is why.

In the case of **Theluji Dry Cleaners Ltd v Muchiri & 3 Others**<sup>14</sup> the plaintiff had filed and sought an injunction in the high court. After it was declined, the applicant withdrew the suit and filed a fresh suit in the subordinate court and obtained an injunction. One of the serious issues raised was the effect of the withdrawal of the suit and the implication of the endorsement of the withdrawal by the registrar 6 days later. The question posed was when the withdrawal took effect. Justice Etyang in an explosive ruling held that the notice of withdrawal did not take effect from the date of its filing but from the date it was adopted as an order of the court when it was endorsed by the Deputy Registrar.

## 7. EXECUTION OF DECREES AND ORDERS.

An examination shall be made of some areas of execution of a decree. Read the relevant forms in Appendix D at the back of the Civil Procedure Rules as they are standard and should be adopted.

### *Attachment and sale of immovable property*

Read the Order 21 carefully. The summary of the essential steps now follows:

- a. Obtain AN ABSTRACT of TITLE from the Registrar of Lands.

Order 21 Rule 10 specifies production of a certified extract from the land registries. It is important that this is filed in court together with the execution application, as it will show if the property is encumbered. In the event that it is charged then the

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<sup>13</sup> See the Supreme Court Practice 1997 Volume 1 PART 1 at pages 379 para.21/2-5/1

<sup>14</sup> (2002) 2 KLR 764.

**"An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date in which the interest became due."**

The court approved the dicta in the English cases of **Lamb & Sons v Rider**<sup>20</sup> and **Lougher v Donovan**<sup>21</sup> which dealt with similar provisions under the relevant English statutes. It was held in both cases that an action to enforce a judgment after the period is statute barred.

The court also followed **Njuguna v Njau**<sup>22</sup> the court of appeal in that case held that "action" in the context of section 4 (4) of the Limitation of Actions Act is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings.

#### **Payment of Auctioneers Fees upon proclamation/attachment- should they be based on value of goods attached or the decretal sum?**

This is one area that has caused concern when the party paying the auctioneers fees is faced with a colossal fee-note especially when the decretal sum is in the millions. The practice has been for auctioneers to base their fees on the decretal sum and not the value of the goods that were proclaimed. This has lead to unjust enrichment in many instances when the auctioneer had done nothing more than carry out a general proclamation without even stating the value of the goods attached.

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<sup>20</sup> (1948) 2 ALL E.R 402

<sup>21</sup> (1948) 2 ALL E.R 11

<sup>22</sup> (1981) KLR 225

This point was decided by the court of appeal in the case of **National Industrial Credit Bank Limited v S.K Ndegwa**<sup>23</sup>.

In this case the auctioneer taxed his fees based on the decretal sum of Kshs. 75,772,501.50 and not on the value of the attached goods.

The court held:

- The wording of paragraph 4 of Part II of the Fourth Schedule of the Auctioneers Rules 1997 does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some cases, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.
- The main object of paragraph 4 is intended to provide values on the basis of which the auctioneer's charges or attachment should be based on the value of the goods attached and not on the decretal sum.
- It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum.

## 8. REVIEW.

Order 44 Rule 1 provides for an aggrieved party to apply for review of a decree or an order. When the application is filed the applicant often fails to extract the decree or order. An astute adversary will simply have the application dismissed simply because the decree or order has not been extracted and attached to the application.

The court of appeal for Eastern Africa first considered this issue in 1930 in the case of **Gulamhusein M. Jivanji & Ano v Ebrahim M. Jivanji & Ano**.<sup>24</sup> The Court held at pages 44-45:

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<sup>23</sup>Nairobi Civil Appeal No. 195 of 2004

<sup>24</sup> Law Reports of Kenya 1929-30 Vol.12 page 41

"Apart from any consideration whether the course adopted by the learned Judge in relation to the *ex parte* order of the 8<sup>th</sup> July 1930, was or was not well founded, the question emerges as to the precise character of the grievance, which must be experienced by a person applying for a review of a judgment under Order XLII. A person applying for a review under that Order must be "aggrieved by the decree or order." The words "decree" and "order" are here used in the sense set out in the definitions section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But in my opinion, however aggrieved a person may be at that various expressions contained in the judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The *ratio decidendi* expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to the suit. In these proceedings no resultant decree on the 29<sup>th</sup> August 1930, had yet come into existence. Indeed no attempt to draw up any has as yet been made. It is the duty of a party who wishes to appeal against, or apply for a review of, a decree or order to move the Court to draw up and issue the formal decree or order."

This case has been followed in the high court case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others.**<sup>25</sup>

Remember the golden rule when applying for review: do not delay and do extract the decree or order, which must form part of the application.

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<sup>25</sup> Milimani HCCC No. 29 of 1995 (unreported)

## **9. INSTITUTING LEGAL PROCEEDINGS ON BEHALF OF COMPANIES.**

Be wary when instructed by the directors of small companies who have fallen out with each other. The need to seek immediate injunctive relief is usually the first instruction that we receive, especially when the majority of the directors seek vengeance against a director who has breached his fiduciary duties to the company.

In the absence of a resolution instructing your firm to institute legal proceedings against the recalcitrant director never ever take up this brief. You will simply be jumping out of the frying pan and into the fire when the defendant's advocate applies to strike out your suit and have your firm condemned to bear costs of the suit. Your professional indemnity cover may not even be sufficient to come to your aid, if at all!

The cases on this point are numerous- **L.Z Engineering Construction Ltd<sup>26</sup>, Bugere Coffee Growers Ltd v Sebaduka & Ano<sup>27</sup>, Affordable Homes Africa Ltd v Ian Henderson & 2 Others<sup>28</sup> et cetera.**

This horror scene has been played out in numerous other cases. Do not be a victim.

## **10. CHALLENGES TO AFFIDAVITS- SHUTTING PANDORA'S BOX.**

We may all have been victim at one time or another when faced with a challenge to the affidavits that we have filed in court. The decisions on this point are numerous and conflicting.<sup>29</sup> An attempt will be made to highlight some of the technicalities that have arisen with a view to avoiding the altar of judicial destruction when the affidavits are struck out.

- Order 18 Rule 4 of the Civil Procedure Rules requires that every affidavit shall state the description, true place of abode and postal address of the deponent, and if the

<sup>26</sup> Nairobi Civil Appeal No. 14 of 1998.

<sup>27</sup> (1970) E.A 147

<sup>28</sup> Milimani HCCC No.524 of 2004 (unreported)

<sup>29</sup> Charles Kanjama has written an excellent summary of the various decisions on the topic of affidavits in "The Besieged Affidavit" an update by Law Africa in its series called HOT FROM THE BENCH. The writer has gleaned most of the highlights from the article.

deponent is a minor shall state his age. The writer was once faced with a challenge to an affidavit simply because the abode was omitted.<sup>30</sup>

- Make sure that the affidavit discloses who drew it. This omission has led to the striking out of an affidavit. This omission has been found to offend the provisions of Section 35 (1) of the Advocates Act.<sup>31</sup>
- Make sure the deponent states that he has authority to swear the affidavit.<sup>32</sup> Failure to do so will lead to the affidavit being struck out on the ground of that the person was not competent to swear the affidavit.
- The verifying affidavit must be confined to matters that the plaintiff can depose from his own knowledge to be correct.<sup>33</sup>
- The jurat must not be on an isolated page as this will lead to the affidavit being struck out.
- Do not date the verifying affidavit prior to dating the plaint. It has been held that dating a verifying affidavit one week before plaint was held to render it fatally defective.<sup>34</sup>
- The commissioner's exhibit seal must be endorsed on the actual exhibit and not on a cover blank page. Failure to comply may lead to the annexures being expunged.<sup>35</sup> Any document to be used in conjunction with an affidavit must be exhibited and not annexed to the affidavit.<sup>36</sup>

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<sup>30</sup> Jovena EA Ltd v Onyango & Others (2002) LLR 2016 (CCK). Nyamu J. held that for an affidavit not to disclose the deponent's true place of abode, or verify the correctness (as opposed to the "truth") of the contents of the plaint and failure to depone to authority were fatal defects. His lordship cast his view in stone when he held in Pastificio Garafalo v Security and Fire Ltd (2001) 1 EA 184 that the challenges were (to the affidavits) were not irregularities in form capable of being regularized under Order 18 rule 7 because they were substantive irregularities. A violation of statute could not be an irregularity of form.

<sup>31</sup> See the cases of Johann Distelberbger v Joushua Kirinda Muindi & Ano. HCCC No. Misc. App. No. 1587 of 2003 (unreported), Apidi v Shabir (2001) LLR 5635 (HCK)

<sup>32</sup> Commerce Bank Ltd v Paradiso Court Ltd (2000) LLR 2681 (CCK)

<sup>33</sup> Gulam & Ano. v Jirongo (2003) LLR 2592 (CCK).

<sup>34</sup> Jovenna EA Ltd v Onyango & Others (2002) LLR 2016 (CCK)

<sup>35</sup> Anna Wangui v Victoria Commercial Bank Ltd (2000) LLR 2418. See also the case of Diamond Trust Bank (K) Ltd v Garex (K) Ltd & 2 Others Milimani HCCC No. 1474 of 2001 (unreported) where the court expunged the affidavit that had its pink blank cover pages endorsed with the exhibit stamp instead of the actual exhibits.

<sup>36</sup> Order 41 Rule II (1) of the Rules of the Supreme Court 1982 edition. Rule 9 of the Oaths and Statutory Declarations Rules provides that all exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.

- Ensure that the commissioner for oaths has a valid practising certificate lest your entire affidavit or suit is struck out.<sup>37</sup>Do also note that the court of appeal has held that a practicing certificate issued later in the year does not have retrospective effect and that any act done by an advocate prior to its issuance is invalid.<sup>38</sup>
- When making an application for summary judgment do adopt Form 3A of Appendix A which sets out the format of the affidavit as follows<sup>39</sup>:

### **NO. 3A**

#### **AFFIDAVIT (O. XXXV, r 2)**

I,.....of.....make oath and say as follows:

1. The defendant(s) .....is (are jointly) and truly indebted to .....in the sum of Sh.....for .....and was (were) so indebted at the commencement of this suit. The particulars of the claim are set out in the plaint filed herein.
2. I verily believe that there is no defence to this suit.
3. The facts herein deposed to are within my own knowledge and I am duly authorised by the plaintiff to make this affidavit.

(Strike out paragraph 3 if affidavit made by plaintiff)

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### **11. INJUNCTIONS**

Be careful when filing your injunction application and avoid overlooking some of the following issues:

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<sup>37</sup> In Kenya Commercial Bank Ltd & Ano. v Kenya Hotels Ltd Civil Application No. 40 of 2004 the court of appeal struck out an application because the affidavit had been commissioned by an advocate who did not have a practising certificate.

<sup>38</sup> Kenya Power and Lighting Company v Chris Mahinda T/A Nyeri Trade Centre Civil Appeal (Appli) 148 2004 reported in (2005) eKLR.

<sup>39</sup> Deposit Protection Fund Board Suing as Liquidator of Trade Bank Ltd v Sunbeam Supermarket Limited and 2 Others Milimani HCCC No. 3099 1996 (unreported). See also the court of appeal case of Mwanthi v Imanene (1982) KLR 323 where the court held that failure to strictly comply with the manner of making the application for summary judgment as prescribed in form 3A was not fatal. It reasoned that the deposition that the defendant was justly and truly indebted to the plaintiff was another way of verifying the plaintiff's belief that there was no defence to the suit and that, in any case , the defect of form was saved by the provisions of section 72 of the Interpretation and General Provisions Act as the same did not affect the substance of the affidavit and it was not calculated to mislead.

- *Mandatory Injunction*

This aspect has been admirably dealt with in the case of **Morris and Co. Ltd v Kenya Commercial Bank**<sup>40</sup>. Justice Ringera (as he then was) held as follows:

“(I)t is trite law that interlocutory mandatory injunctions are not contemplated by Order XXXIX of the Civil Procedure Rules. That Order only contemplates interlocutory prohibitive injunctions. An application for a mandatory injunction can only be made pursuant to the provisions of section 3A of the Civil Procedure Act and the procedural mode in that case is a motion on notice pursuant to Order L, rule 1 of the Civil Procedure Rules. The plaintiff herein appears to have been half alive to the foregoing for its application does invoke section 3A but failed to realise that that could only be done in a motion. So in this application where the plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a matter partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely the motion, is to be invoked. Having failed to do so, the plaintiff’s application is also incompetent for this additional reason.”

- *The danger of omitting the prayer for “permanent injunction” will leave you in tears.*

Under Order 39 rule 2 of the Civil Procedure Rules, unless an application for a temporary injunction contains a prayer for a permanent injunction in the plaint, the application is incompetent and the application is ripe for striking out on that point alone. This point was considered by Justice Ringera (as he then was) in the cases of **Morris and Co. Ltd v Kenya Commercial Bank**<sup>41</sup> and **Kihara v Barclays Bank of Kenya**.<sup>42</sup>

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<sup>40</sup> (2003) 2 EA 605 (CCK) at page 607

<sup>41</sup> *supra*

<sup>42</sup> (2001) 2 EA 420 (CCK)

The learned judge summarised the position in the latter case by distinctly elaborating the remedies sought under Order 39 rules 1 and 2.

- ***Failure to serve summons.***

Always remember that Order 39 Rule 3 (3) requires that when an *ex parte* injunction is granted the applicant shall within three days from the date of the order, serve the order, the application and the pleading on the party sought to be restrained. Section 2 of the Civil Procedure Act defines pleading to include , *inter alia*, a petition or summons, and the statements in writing of the claim or demand of any plaintiff. Order 4 Rule 3(5) makes it mandatory that every summons shall be prepared by the plaintiff or his advocate and filed with the plaint. Now the common danger that befalls many advocates is that in their zeal to serve the injunction application, plaint and *ex parte* order, they fail to expeditiously serve the summons. Time passes by and after a year has passed from the institution of the suit the diligent defendant's advocate simply applies to have the entire suit dismissed because valid summons had not been served.

#### ***Material Non-disclosure- the bane of the secretive client.***

Woe betide the client who either chooses to walk the path of deceit or spin tales of woe spiced with half-truths and suppression of material facts. Gloom and despair awaits you once the deceit is exposed. Take heed- the truth shall set you free if you come clean *ab initio*.

The most concise exposition on the law pertaining to serious material non-disclosure was adroitly analysed by the late Justice Hewett in the case of **John Muritu Kigwe Ano v Agip (Kenya) Limited**<sup>43</sup>. The plaintiff's deliberate concealment/suppression of material facts drew the judge's wrath and indignation and ordered that the injunction application be dismissed with costs to be taxed on an advocate-client basis. The judge summarised the position on material non-disclosure after considering with approval several English authorities on the point. The summary is as follows:

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<sup>43</sup> Milimani HCCC No. 2382/99 (unreported)

- a. It is the duty of a party asking for an injunction to bring under a notice to the court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.<sup>44</sup>
- b. The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by assessment of the applicant or his legal advisers.
- c. The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries.
- d. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (i) the nature of the case which the applicant is making when he makes the application; and (ii) the order for which the application is made and the probable effect of the order on the defendant.
- e. If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains (an *ex parte* injunction) without full disclosure is deprived of any advantage he may have may have derived by that breach of duty.
- f. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application.
- g. It is not for every omission that the injunction will be automatically discharged. The court has the discretion notwithstanding proof of material non-disclosure

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<sup>44</sup> Citing the dicta in the cases of *The King v General Commissioners for Income Tax* (1917) 1 KB 486 ,and *Brinks Mat. Ltd v Elcombe & Others* (1988) 1 WLR 1350.

which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms.

- *Undertaking as to Damages*

By the undertaking as to damages the party obtaining the order undertakes to abide by any order as to damages which the court may make in case it should afterwards be of the opinion whether the defendant has, by reason of the order, sustained any damages which such party ought to pay.<sup>45</sup>

The plaintiff's undertaking as to damages on an order for an injunction remains in force notwithstanding the dismissal or discontinuance of the action, and if the plaintiff ultimately fails on the merits the defendant is entitled to an inquiry as to the damages sustained by reason of the interlocutory injunction, unless there are special circumstances. The undertaking applies, even if the plaintiff has not been guilty of misrepresentation, suppression or other default in obtaining the injunction, and is equally enforceable whether the mistake in granting the injunction was on a point of law or on the facts.<sup>46</sup>

## Conclusion

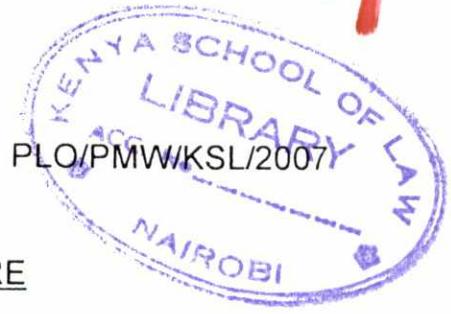
As pointed out at the outset, this exposition was not meant to be exhaustive in pointing out all the areas where blunders or oversights are made. There are numerous other instances where care and caution should be taken. The first step is to follow the Civil Procedure Act and the Rules to the letter. The next step is to ensure you are up to date with the law. The practice of law is a continuous learning process that does not stop with law school. There is no greater investment than keeping abreast with topical areas of concern in the legal practice.

**Allen Waiyaki Gichuhi**

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<sup>45</sup> Halsbury's Laws of England 4<sup>th</sup> Edition Reissue Volume 24 at paragraph 982 quoting the case of *Tucker v New Brunswick Trading Co. of London* (1890) 44 ChD 249 CA.

<sup>46</sup> Halsbury's *supra* at paragraph 983



## KENYA SCHOOL OF LAW LECTURES ON CIVIL PROCEDURE

SUBJECT: -

PROCEDURE OF APPLICATIONS FOR  
JUDICIAL REVIEW UNDER KENYAN LAW

Introduction

The Meaning of Judicial

Administrative excesses must be checked through judicial intervention.

Administrative law relates to decisions of officers or organs of central public authorities and other administrative bodies exercising judicial or quasi judicial functions which may affect the rights or liberties of the citizens (which are enforceable by or recognized by the courts of law (see **Lords Diplock "Judicial Control of the Administrative Process"** current Legal Problems 1971 P.1.

### **The History of Prerogative Writ's**

#### **(a) In England**

There were three remedies which were granted by the court to persons injured by the exercise of administrative or judicial power. The three statutory orders were mandamus, prohibition and certiorari. The origin of these orders lie in the expansion of the common law in England and of the jurisdiction of the court of the King's Bench to acquire superintendence over the observances of law by officials. Decisions of public officials. Decisions of public officials and authorities affect majority of the people collectively and

individually. Judicial Review affords judicial scrutiny of such administrative decisions and actions.

Certiorari (drives from the Latin word certiorari which means to be certified, informed, appraised or shown) would issue to quash decisions of inferior courts and tribunals where they made invalid decisions e.g exceeds of jurisdiction, error or in face of record or breach of rules of natural justice.

Mandamus (derived form the Latin word 'mandare' meaning we command) compels fulfilment of a public duty.

Prohibition issues to prohibit the assumption of unlawful jurisdiction or excess of jurisdiction or threatened breach of the rules of natural justice.

Administrative Law in England has a long history, but the subject in its modern form did not emerge until the second half of the seventeenth century. A considerable number of its basic rules can be dated back to that period, and some such as the principles of natural justice, are even older. Judicial review has been treated as an arm of administrative law and this has been so because judicial review is meant to keep administrative excesses in check.

Judicial review developed from the ancient prerogative writs which are in form commands issuing in the name of the crown but only writs that were considered as stating in a special relationship, with the crown came to be regarded as 'prerogative writs' (see S.A de Smith Judicial Review of Administrative action 3<sup>rd</sup> Ed. London Steven p. 507).

The modern, unified process is regulated by order 53 of the Rules of Supreme Court (introduced in 1977) and section 31 of the Supreme Court Act of 1981, though there is still room for the courts inherent jurisdiction. The 1977/81 regime was seen: (a) to have removed old technicalities and disadvantages which faced the (would be) applicant; but (b) to have retained important safeguards protecting the (would not be) respondent.

The procedural disadvantages under which applicants for this remedy laboured remained substantially unchanged until the alteration of order 53 in 1977. The 1977/81 regime saw some procedural changes. The adoption of the new procedural regime in 1977 was said neither to have extended nor diminished substantive law. In the words of Lord Scarman:

"The application for judicial review is a recent procedural innovation in our law. It is governed by RSC Order 53 r. 2 which was introduced in 1977. The Law made no alteration to the substantive law, nor did it introduce any new remedy." (**R -vs- IRC ex parte ROSSMINISTER (1980 AC 952 1025E).**

The changes made in the procedure introduced in 1977 by RSC order 53 for judicial review were first given statutory authority by primary legislation in section 31 of the Supreme Court Act, 1981. Thus the purpose of section 31 is to regulate procedure in relation to judicial review, and not to extend the jurisdiction of the court.

#### (1) In Kenya

The Kenyan Law relating to judicial review has borrowed heavily from the

English System. Order 53 of the civil procedure rules governs the procedure for applications of prerogative orders. The prerogative orders that are issued under order 53 are mandamus, prohibition and certiorari. The Statutory authority for the orders of mandamus, prohibition and certiorari is the Law Reform Act (Cap. 26). The relevant sections of the Act are sections 8 and 9. The Act does not set out the forms of the proceedings under which these orders are sought. Order 53 is likewise silent on the forms. However, the Court of Appeal in **FARMERS BUS SERVICES –VS- TRANSPORT LICENCINE APPEALS TRIBUNAL [1959] E.A 779** stated that the ruling in **MOHAMED AHMED –VS- R [1957] E.A 523** applies to Kenya as in Uganda. The court stated that 'the orders are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be instituted and served accordingly. The crown cannot be both applicant and respondent in the same matter.'

### **The scope**

Prerogative writs of prohibition and certiorari lies not only for excess of or absence of jurisdiction but also for departure from the Rules of Natural Justice: **1 Halsbury's Laws of England (4<sup>th</sup> edition) P. 138 paragraph 130.** The High Court in deciding whether or not to grant an order of prohibition would not be fettered by the availability of an alternative remedy. Prohibition may issue against a local authority, statutory body or any administrative body exercising judicial or quasi-judicial functions.

**In R vs Electricity Commissioners [1924] 1KB 171 Lord Atkin LJ at pg. 205 noted that:**

'the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised, as courts ..... whether any body of persons having legal authority to determine questions affecting the right of subjects and having a duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in those writs.'

The early cases in this area tended to distinguish between a public right and a private right. If the right of an individual breached was private and therefore could be enforced through the ordinary common law remedies the prerogative writs could not issue. The case which illustrates a recent illustration in R vs. East Barkshire Health Authority, exp. Walsh [1984] 3 WLR 818. The case involved an application for certiorari by an employee of a public body whose services were terminated by the District Nursing Officer. The employee took two parallel steps (i) he set in motion the appropriate industrial dispute procedure and (ii) he applied for certiorari to quash his dismissal. In relation to the preliminary point raised by the health authority that judicial review proceedings were incompetent, as relating to a matter of private law, Sir John Donaldson HR said at 824:

- ☞ The remedy of judicial review is only available where an issue "public law" is involved but as Lord Wilberforce pointed out in Dary vs Spelthorne Borough Council [1934] 3 AILER 278, the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since English Law traditionally fastens not so much upon principles as upon remedies.

On the other hand, to concentrate on remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of 'certiorari' might well be available if the health authority is in breach of a 'public law' obligation but would not be if it is only in breach of a 'private law' obligation.....'

The public may have no interest in the relationship between servant and master in an 'ordinary case,' but where the servant holds office in a great public service the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them. It follows that, if in the exercise of my discretion I conclude that the remedy of certiorari is appropriate, it can properly go against the respondent authority.'

In Kenya the orders of certiorari and prohibition have been extended to cover master and servant relationships especially where the rules of natural justice were breached. The courts have adopted the broadened view of the English courts stated in R vs East Berkshire Health Authority ex parte Walsh (1984):

- (i) In PETER OKECH KADAMAS AND JOHN MONDAY ODUOR OLOO -VS- MUNICIPALITY OF KISUMU (1982 -88) 1KAR 838 the Court of Appeal after thorough analysis of the English Authorities on Judicial Review held that where the council had dismissed two employees from their employment had infringed their public rights as citizens to fair treatment and distinguishing R vs Post

Master General [1928] 1KB 291 and R vs East Berkshire Health Authority

Ex parte Walsh [1984] 3 WLR 818 held further that the applicants were correct in seeking an order for prohibition. The court granted the order for prohibition reversing the decision of Schofiled J who the court said had taken too narrow a view of the nature of infringement of the appellants rights.

- (ii) In the more recent case of RONALD MUGE CHEROGONY –VS- CHIEF OF GENERAL STAFF, KENYA ARMED FORCES & TWO OTHERS HCCC NO. 671 OF 1999 (unreported) Visram Commissioner of Assize in a ruling delivered on 3<sup>rd</sup> March 2000 granted an order of certiorari to quash the decision to convene a court martial to try the applicant and an order for prohibition to prevent the holding of a court martial. The learned Commissioner held that the specified procedure laid down under the Armed Forces Act, Rules and Standing Orders was not followed. He ordered reinstatement of the applicant with full privileges and benefits.
- (iii) In another recent ruling delivered on 12<sup>th</sup> April, 2000 by K.W. Rawal Commissioner of Assize in CHARLES ORINDA DULO VS KENYA RAILWAYS CORPORATION HC. MISC. CIVIL APPLICATION NO. 208 OF 2000, the court granted an order of stay (at inter parties stage) in a situation where the Kenya Railways Corporation had written a letter to the applicant retiring him from employment without affording the applicant an opportunity to make representations in utter breach of the rules of natural justice. Commissioner K.H. Rawal said in her ruling:

"I also must add that I am also fortified by the leave granted to Dulo by Alouch J which leave shall be meaningless if the stay is not granted. I am thus satisfied that the case of Dulo is not frivolous and if the stay is not granted it shall be nugatory as he shall be compelled to proceed on leave and his right to make representatives shall be rendered nugatory.'

#### PARTIES TO JUDICIAL REVIEW APPLICATIONS

As on all civil proceedings (see section 2 of Cap. 21), the rules governing joinder of parties and of causes of action are governed by the provisions of order 1 rules 1,2, and 3 of the civil procedure rules:

All persons may be joined in one suit as plaintiff's if the following two conditions are satisfied;

- (i) the right to relief alleged to exist in each plaintiff arises out of the same act or transaction; and
- (ii) the case is of such a character that, if such persons brought separate suits, any common questions of law or fact would arise.

All persons may be joined in one suit as defendants if the following two conditions are satisfied:

- (i) the right to relief alleged to exist against them arises out of the same act or transaction; and
- (ii) the case is of such a character that, if separate suits were brought against such persons, any common question of law or fact would arise.

The plaintiff may join in one suit all or any of the persons severally or jointly and severally liable on any act. Similarly, where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in one suit.

In RE BECK (1918) 87 LJ ch 335 Swinfen Eady MR said this rule should be construed in a liberal sense. The word 'transaction' should be read as meaning a set of circumstances rather than being limited to contractual relationship. However, it would be wrong to join someone as a defendant solely for the purpose of obtaining discovery from them (DOVIHECH –VS- FINDLAY [1990] 3 ALL ER 1180 )

### Necessary and proper parties

There is a essential distinction between a necessary party and a proper party to a suit. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding. In other words,

in absence of a necessary party no decree can be passed, while in the absence of a proper party a decree can be passed so far as it related to the parties before the court. The presence of such party however, enables the court to adjudicate more 'effectually and completely'.

Order II rule 2 deals with joinder of causes of action. The rule contemplates the following situations:-

- (i) One plaintiff, one defendant and several causes of action. In such a situation the plaintiff can join several causes against the defendant subject to the discretion of the court preserved under order 1 rule 2.
- (ii) Joinder of plaintiff's and causes of action. The several plaintiffs must be jointly interested in the action against the defendant. This rule is of course subject to the conditions for joinder of parties stated above in (order 1 rule 1).
- (iii) Joinder of defendants and causes of action where there is one plaintiff and two or more defendants and several causes of action, the plaintiff may unite in the same suit several causes of action against those defendants if the defendants are jointly interested in the causes of action. This provision must also be made subject to the conditions pertaining to the joinder of defendants:

- (a) the relief claimed must have been based on the same act or transaction; and
  - (b) common questions of law or fact must have been involved.
- (iv) Joinder of plaintiffs, defendants and causes of action – where there are two or more plaintiffs, two or more defendants and several causes of action, the plaintiffs may unite the causes of action against the defendants in the same suit only when all the plaintiffs are jointly interested in the causes of action and the defendants are also jointly interested in the causes of action.

## SUMMARY OF THE PROCEDURAL STEPS

### 1. Introduction

Initially, proceedings for Judicial Review are commenced by the applicant when he applies for leave to apply for prerogative orders. Once leave to apply has been obtained the Republic is joined. (See District Comissioner, Kiambu –vs- Rex parte Njau (1960) E.A 109 at 114 F.).

Once leave to apply has been obtained the substantive application is governed by order 53, rules 3 to 7. The application at this second stage is made by Notice of Motion to the High Court. The proceedings at this stage are inter parties and service of the Notice of Motion must be made on all persons directly affected (order 53 r. 3 (1)).

2. **Sources (including Legislative History)**

- (i) Law Reform Act Chapter 26 of the Laws of Kenya Sections 8 to 10.
- (ii) Law Reform (Miscellaneous Provisions) Ordinance, No. 48 of 1956 came into effect on 18/12/1956 substituting orders for writs.
- (iii) Law Reform (Miscellaneous Provisions; (Amendment) Ordinance No. 16 of 1960 – replaced proviso to S.8(2) of the 1956 ordinance which had hitherto barred applications for prerogative orders where other orders could be obtained.
- (iv) Statute Law (Miscellaneous Amendments) Act no. 21 of 1966 replaced the word Crown with Government.
- (v) Legal Notice nO. 164 of 1992 introduced the following:-
  - Application for Judicial Review.
  - Elimination of leave stage.
  - Allowed a single Judge to entertain Application.
  - Gave judges discretion to extend time.
- (vi) Legal Notice No. 5 of 1996.
  - Reinstated the position prior to L. Notice No. 164 of 1992 to the extent that the 1992 changes were ultra vires the provisions of the Law Reform Cap. 26.

3. **Form of Proceedings**

The form is not prescribed under Cap. 26 or under Order 53 therefore recourse is to S. 9 (4) Law Reform Act (Cap. 26).

Cases:

- (i) Farmers Bus Service –vs- Transport Licensing Appeals Tribunal (1959)  
EA 779
- (ii) \* Mohammed Ahmed –vs- R (1957) EA. 523 (4)  
Procedure
  - (a) Ex Parte, application for leave to apply for order 53 r.1
  - (b) The Application shall be before a single Judge in chambers. The Application will contain:
    - (i) Notice to the Registrar (Mandatory)
    - (ii) A chamber summons endorsed 'ex parte' with prayer for leave.
    - (iii) A statement filed pursuant to order 53r 1(2) with name and description of Applicants facts relied on, relief sought and grounds on which it is sought.
    - (iv) Affidavits setting out the facts and verifying the same.

Documents and Orders in issue should be annexed unless absence is explained order 53r 7(1) (for certiorari).

(v) Under Order 53r 1(1) notice must be given to the Registrar of intention to lodge statement and affidavits.

(vi) Application for leave is heard by a single Judge.

(vii) Under Order 53 r.4 (1) statement cannot be amended save with leave of court.

#### 4. Time Limitation

- S.9 (2) of Cap. 26 allows for rules to be made within which the remedies may be sought.
- In case of certiorari the Order 53. R.2 requires that it be sought within a maximum of six (6) months from the day of the order, decree or decision in issue.
- Under 53 r.2 – Application may be adjourned to allow for an appeal to be determined.
- Costs – These will be normally be in the cause.

## 5. Seeking the Order

- (a) The order is by Notice of Motion [Order 53 rule 31]
  - It must be within 21 days of obtaining leave.
  - Service to the opposing side must be eight (8) clear days between the day of service and the hearing date.
- (b) \* The Notice of Motion is served on all affected parties together with the:
  - Statement
  - Affidavits
  - Amended affidavits (if any) r 4(1)

### Note:

- (i) R. 4(2) allows for amendment of statements and introduction of other Affidavits.
- (ii) R.4(3) required parties are to exchange documents.

## 6. Hearing

- Hearing is now before a single <sup>Judge</sup> order 53 r3(1).
- Order 53 r.5 gives the Applicant the right to begin.
- Order 53 r. 6 allows any proper person to be heard in opposition.

B. APPLICATION

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CAUSE NO. 647 OF 1990

REPUBLIC ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

EX PARTE THE NAIROBI LAW MONTHLY/KAIBI LIMITED

NOTICE OF MOTION

(Order 53, Civil Procedure Rules, The Law Reform Act, Cap. 26 and all other enabling powers and provisions of law)

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C. **IN THE COURT OF APPEAL AT NAIROBI**

CIVIL APPEAL NO. 1 OF 1991

REPUBLIC ..... APPELLANT

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

**EX PARTE NAIROBI LAW MONTHLY/KAIBI LIMITED**