DEAN NAMULYA MUNG'OMBA BWALYA KANYANTA NG'ANDU AND ANTI-CORRUPTION COMMISSION v PETER MACHUNGWA GOLDEN MANDANDI AND ATTORNEY-GENERAL

Supreme Court
Chirwa, Chibesakunda and Mambilima, JJJS
On 30th April, 2002 and 4th April, 2003
(SCZ Judgment No. 3 of 2003)

Flynote

Civil Procedure – Judicial Review – Practice and Procedure

Civil Procedure – Whether Court has jurisdiction to grant interim injunction pending hearing of Judicial Review application.

Headnote

This appeal arises from a ruling during a hearing for a Judicial review in which ruling the trial judge refused an application by the appellants to join in the Judicial review or notifying one Dr Katele Kalumba. The reasons advanced by the appellants to join Dr Kalumba were that the proceedings under Judicial review are likely to affect the rights of the said Dr Kalumba. In refusing to join Dr Kalumba in the Judicial review proceedings, the learned trial Judge considered the applicability of orders 14 and 18 of the High Court Rules of the Judicial review under Order 53 of the Rules of the Supreme Court (1999 ED). He formed the opinion that since our own rules do not provide the Judicial review, Section 10 for the High Court has to be relied upon, hence the adoption by our courts of Order 53 of the Rules of the Supreme Court on judicial review. He further formed the view that Order 53 RSC was comprehensive enough to cover all aspects of the procedure as to the parties who can join as interested parties etc. He concluded that Orders 14 and 18 of the High Court Rules are inapplicable in Judicial Review. Proceedings under Order 53 of the Rules of the Supreme Court and refused the application to give orders or directions to join and/or notify Dr Kalumba of the proceedings. It is that refusal that the appellants appealed against.

Held:

1. There is no rule under the High Court which Judicial Review proceedings can be instituted and conduced. Thus, by virtue of Section 10 of the High Court Act Chapter 27 of the Laws of Zambia, the High Court is guided as to the procedure and practice to be adopted.

2. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC).

3. Order 53 is comprehensive. It provides for the basis of Judicial review: the parties; how to seek the remedies and what remedies are available.

4. An interlocutory injunction can be obtained in Judicial review proceedings pending the determination of the substantive Judicial review application. The matter or circumstance to be considered are more than the balance of convenience as between the parties concerned a very important consideration will be the public interest concerned.

Case referred to:

1. *Chiluba v Attorney-General*
2. *R v Kensington and Chelsea Royal London Borough Council*, Ex- parte Hammell [1989] 1 All E.R. 1202.

Legislation referred to:

1. High Court Act Chapter 27 of the Laws of Zambia
2. Parliamentary and Ministerial Code of Conduct Act, Chapter 16 of the Laws of Zambia.

Work referred to:

1 Rules of the Supreme Court (RSC) 1999 Edition

N. Nchito and M. Nchito of MNB Legal Practitioners for the appellants
R.M Simeza and J. Sangwa of Simeza Sangwa and Associates for the respondents.

Judgment

CHIRWA, J S, delivered judgment of the Court: -

This appeal arises from a ruling during a hearing for a judicial review in which ruling the trial judge refused an application by the appellants to join in the judicial review or notifying one Dr Katele Kalumba. The reasons advanced by the appellants to join Dr Kalumba were that the proceedings under judicial review are likely to affect the rights of or prejudice the rights of (or prejudice the rights of) the said Dr Kalumba. It should be noted that the application for judicial review was made by the 1st and 2nd respondents in this appeal and the respondent in the judicial review proceedings was the Attorney-General, the 3rd respondent in this appeal. The appellants in this appeal applied to the High Court during the judicial review proceedings as interested parties as they initiated the complaints to the Chief Justice that led the learned Chief Justice appointing a Tribunal under the Parliamentary and Ministerial Code of Conduct Act, Act No. 35 of 1994. The appellants were in fact joined to the judicial review proceedings as 2nd, 3rd and 4th respondents. It was during the hearing of the judicial review proceedings that the appellants sought to join in Dr Kalumba to those proceedings contending that the proceedings or results of the judicial proceedings are likely to affect him and that it was necessary that he be joined so that he is afforded an opportunity to be heard. The procedure adopted was the adoption of Orders 14 and 18 of the High Court Rules.

In refusing to join Dr Kalumba in the judicial review proceedings, the learned trial judge considered the applicability of Orders 14 and 18 of the High Court Rules to the judicial

review under Order 53 of the Rules of the Supreme Court (RSC) (1999 Ed.). He formed the opinion that since our own rules do not provide for judicial review, Section 10 of the High Court Act has to be relied upon, hence the adoption by our Courts of Order 53 of the Rules of the Supreme Court on judicial review. He further formed the view that Order 53 RSC was comprehensive enough to cover all aspects of the proceedings as to the parties who can join as interested parties etc. He concluded that Orders 14 and 18 of the High Court Rules are inapplicable in judicial review proceedings under Order 53 of the Rules of the Supreme Court and refused the application to give orders or directions to join and/or notify Dr Kalumba of the proceedings. It is that refusal that the appellants have appealed against. It should be noted that pending the hearing and determination of this appeal, the proceedings for judicial review in the High Court were stayed.

The memorandum of appeal contains four grounds of appeal and these four grounds of appeal were amply expanded in the written heads of arguments and oral submissions. The respondents also filed written heads of arguments in reply and made oral submissions.

The grounds of appeal can be reproduced as follows: -

(1) The court below misdirected itself at law when it held that the High Court Rules do not apply to judicial review proceedings

(2) the court below erred at law in refusing to notify Dr Katele Kalumba about the subsistence of these proceedings as a person who may be likely to be affected by the result of this action;

(3) that the court below misdirected itself in failing to appreciate that Dr Katele Kalumba is not only entitled to be heard, but must be heard because the decision of the court is likely to affect him; and

(4) The court below erred at law by holding that the clearance of Dr Katele Kalumba by the Tribunal cannot be challenged in judicial review proceedings instituted by other parties who are dissatisfied with the findings of the Tribunal.

Looking at the grounds of appeal, the written heads of arguments and the oral arguments in court, we are of the opinion that the various grounds of appeal can be sufficiently dealt with by a general discussion of the question of law that the grounds of appeal raise. It is the law and procedure that is involved. Our general discussion will involve the procedure to be followed in judicial review, the parties to judicial review and the essence of judicial review.

It is accepted that there is no rule under the High Court Rules under which judicial review proceedings can be instituted and conducted and by virtue of section 10 of the High Court Act, Cap 27, the court is guided as to procedure and practice to be adopted. Having accepted that there is no practice and procedure prescribed under our Rules, we follow the practice and procedure for the time being observed in England in the High Court of Justice. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC). Order 53 is very detailed. In it one will find the law as on what basis judicial review is founded; the parties; how to seek the remedies and what remedies are available. Under the parties, care is taken not only as to who can initially commence the proceedings, but also who can possibly join or be joined. The Order further provides the sort

and form of evidence required at the hearing.

Once it is accepted that our Rules do not provide for the practice and procedure on judicial review and we adopt the practice and procedure followed in England, our Rules for the purposes of judicial review are completely discarded and there is strict following of the procedure and practice in Order 53 of RSC. It will be noted from the learned editors of the White Book (RSC), that Order 53 created a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisionary jurisdiction over the proceedings and decisions of inferior courts, tribunals and other persons or bodies which perform public duties or functions. The procedure of judicial review enables one seeking to challenge an administrative act or omission to apply to the High Court for one of the prerogative orders of mandamus, certiorari or prohibition, or in appropriate circumstances to declaration, injunction or damages. As it is a comprehensive code of procedure on judicial review, our Orders 14 and 18 High Courts are inapplicable. These Orders are only relevant to process begun under our rules and when applicable. The first ground of appeal cannot therefore succeed and it is dismissed. As Order 53 says that any person can challenge an administrative act or omission, the people who can apply are those who feel they are affected by the administrative act or omission. If they are not originators of the process, the Order provides that they may apply for leave to join. The party must himself show sufficient interest in the matter to which the application relates; it is not for other people to show or generate interest for the party. Where a person feels that an administrative act or omission affects him, does not initiate the judicial proceedings, he may apply to the court to be heard on the hearing of the motion or summons as provided for under Order 53 rule 9. Here again it is the person who feels may be affected by the decision that moves the court and shows sufficient interest in the matter. It is not for the generous busybody philanthropist to feel the interest of the third party and apply on behalf of the third party to be joined. In the present case, it is worthy noting that the appellant joined in the proceedings after showing sufficient interest in the matter; the sufficient interest being that they originated the complaints that led to the appointment of the tribunal whose findings and recommendations are the subject of the judicial review. It is very curious how they feel, having joined as interested parties, they can proceed to involve some third party whose interest they perceive will be affected by the judicial review proceedings. What interest have they in the third party which they feel so strongly to protect by joining the third party. The judicial review application is by the respondent to this appeal who are challenging the decision of the tribunal that found against them. We are considering the 2nd and 3rd grounds of appeal in this general search to see where the learned trial judge faulted in his findings and we are doing this exercise bearing in mind the basis on which judicial review proceedings are founded. Judicial review is concerned with decision making process.

Whether the tribunal had power to act in the matter; whether they followed the procedure; whether they exceeded their jurisdiction and matters of procedural nature. Judicial process is not concerned with the merits of decision and authorities are abound on this and we may only refer to our recent decision in the case of *Chiluba v Attorney-General* (1), and the authorities cited therein. We do not wish to go into the merits of the pending judicial review, but clearly it is not shown that the circumstances or facts surrounding Dr Kalumba can be subject of a judicial review. It seems that the appellants are not satisfied with the clearance, by the Tribunal, of Dr Kalumba. Surely, that cannot be subject of judicial review. We see no merits in grounds 2, 3 and 4 based on what we have discussed above and the same are dismissed. The perceived action based on the clearance of Dr Kalumba by the Tribunal through judicial review is misconceived. There cannot be multiplicity of action arising from the Tribunal and the quoted decisions by the court on multiplicity of actions do not apply. The appeal is therefore dismissed.

There was a cross-appeal by the respondents in this appeal on two grounds, namely:

(1) That the learned trial judge erred in law when he made the appellants parties to the judicial proceedings; and

(2) that the learned trial judge erred in ordering a stay of judicial review proceedings pending the determination of the appellants appeal to this court on refusal to join Dr Kalumba to the judicial proceedings.

In the first ground of the cross-appeal, it was argued that the learned trial judge erred in joining the 2nd, 3rd and 4th appellants as under Order 53 Rule 4 of the Rules of the Supreme Court only allows interested persons to be heard not as respondents. It was argued that the decision subject of the judicial review was made by the Tribunal and the Tribunal is adequately represented by the Attorney General. It was argued that both Order 53 r 9 and Rule 14/76 of the Rules of the Supreme Court are inapplicable to the appellants to be joined as respondents to the judicial review proceedings.

As we observed in our consideration of the main appeal, Order 53 of the Rules of Supreme Court is very comprehensive on judicial review procedure and practice and as such our own rules do not apply as advocated by counsel for the appellants. Order XVIII and XIV (5) of the High Court Rules are inapplicable to judicial proceedings. Counsel for the respondents concedes that the court has power to hear any person who shows sufficient interest in the proceedings. How does one get a hearing without becoming a party to the proceedings. The nomenclature of “respondent”, “third party” or “interested party” is immaterial but once one has shown sufficient interest in the proceedings the court can hear that person under whatever name he is clothed in. The court was satisfied that as the appellants initiated the complaints under the Parliamentary and Ministerial Code of Conduct Act, they were interested parties. On the face of it we cannot fault the learned trial judge in allowing the appellants to be heard, as we said under whatever name. This first ground in the cross-appeal fails.

The second ground of the cross-appeal was that the learned judge erred in law in ordering a stay of the proceedings for judicial review pending the determination of the appeal. It was argued that the inherent jurisdiction to stay proceedings in exercisable in the proceedings pending before the court. It was argued that in the present case the appellants stayed the ruling on which they had appealed to the Supreme Court and that it was necessary for the appellant to disclose the special circumstances warranting the stay of the proceedings and that the present case does not fall within Order 59/13/2 of the Rules of the Supreme Court.

In reply, it was argued that what was stayed was not the order obtained by the appellants, but the proceedings of the judicial review and that the learned trial judge did consider that if a stay were not granted, in the event the appeal succeeding, the judicial review proceedings would have been rendered nugatory and this was in itself special circumstance and that there was no need to look for other special circumstances.

We have considered this ground of appeal. A careful study of Order 53/14/49 of the Rules of the Supreme Court and the case of *R v Kensington and Chelsea Royal London Borough Council, Ex-Parte Hammell (2)* quoted by the authors to the White Book is of great guidance. It is said that an interlocutory injunction ca be obtained in judicial review proceedings pending the determination of the substantive judicial review application and that the approach is similar to that adopted in the case of applications Under Order 29 or an

interlocutory injunction in an ordinary action. The matter or circumstances to be considered are more than the balance of convenience as between parties directly concerned, a very important consideration will be the public interest involved. In the present case the appellants were made party to the proceedings after showing to the satisfaction of the court that they had an interest which arose from their initial complaint under the parliamentary and Ministerial Code of Conduct Act. That Act involves public interest and consideration of any matter has to take into account public interest.

The learned trial judge correctly directed himself when he said he was not asked to stay a judgment but proceedings pending the hearing or happening of something, namely the results of the appeal to Supreme Court. After considering whether the stay should be refused on the ground of prejudice, delay or abuse of process, the learned trial judge was of the view that these are not matters available in the present proceedings. In not so many words, he felt that if he was wrong in not joining Dr Kalumba under Order 14 of the High Court Rules, then the judicial review proceedings would go on without affording him a chance to be heard, the whole process would be nugatory or a waste of time. We cannot fault the approach taken by the learned trial judge to granting the stay. He properly exercised his inherent jurisdiction to stay the judicial review proceedings pending the hearing of this appeal. We would also dismiss this ground of appeal.

In sum, both the appeal and cross-appeal are dismissed. The case is sent back to the High Court to continue the judicial review proceedings whose leave was already granted. The matter to be decided on its merit, with the guidance that judicial review is not an appeal or discussion on merit. Costs in this court will follow the results of the judicial review.

Appeal dismissed