

27 November 2006

Application No. 2 of 2006; Reference No. 1 of 2006

EAST AFRICAN COURT OF JUSTICE

GEORGE NANGALE AND PROF. PETER ANYANG NYONG'O AND 10 OTHERS

v.

ATTORNEY GENERAL OF KENYA AND 5 OTHERS

RULING

BEFORE: PRESIDENT: Moijo M. Ole Keiwua

VICE – PRESIDENT: J. N. Mulenga

JUDGES: Kasanga – Mulwa, Mary Stella Arach-Amoko; Harold R. Nsekela

Citation: George Nangale v. Attorney General of Kenya, App. No. 2 of 2006 Ref. No. 1 of 2006, Ruling (EACJ, Nov. 27, 2006)

RULING OF THE COURT.

[1] On 27th November 2006, this Court delivered a ruling in an interlocutory application made under the above mentioned Reference by the above named claimants, granting, inter alia, an interim injunction. Pursuant to r.67 of the East African Court of Justice Rules of Procedure (the Court Rules), the Registrar extracted and signed an order from the ruling embodying the interim injunction.

[2] By a Notice of Motion dated 30th November 2006, George Nangale, the above mentioned applicant, applied as an interested person under r.68(2) of the Court Rules, for an order that the said extracted order be corrected to correspond with the decision of the Court, which it purports to embody. The grounds of the application are that –

1. the extracted order is wider than the ruling of the Court;
2. the said order has paralysed all activities of the East African Legislative Assembly (EALA) contrary to the ruling of the Court;
3. it is in the interest of justice to allow the application.

[3] The application is supported by an affidavit of the Applicant, who deponed, inter alia, that –

- He is a member of the EALA representing Tanzania;
- In a letter dated 27th November 2006, to all Members the Clerk to the EALA suspended the activities of the EALA on the basis of the Court order aforesaid;

- At a meeting addressed by the Deputy Secretaries General, the Members were informed that there was no Assembly and that there were no members of the EALA;
- He read the judgment (sic) of the Court and found that the said order is at variance with it.

[4] The Claimants as well as the 3rd and 4th Respondents opposed the application on the grounds that the extracted order embodies and is not wider than the ruling.

[5] Through a Replying Affidavit sworn by Patrick Gichuru Gichohi, Deputy Clerk of the Kenya National Assembly, the 1st Respondent, while conceding that the extracted order was wrongly drawn in some respects, contended that the application lacked merit in that the inability of the EALA to function arises from the ruling and not from any error in extracting the order.

[6] At the hearing of the application, Mr. Ogalo Wandera, learned counsel for the Applicant highlighted the contents of the extracted order that were not part of the ruling and whose inclusion gave the extracted order an erroneously wider scope than that expressed in the ruling of the Court. He maintained that because of the inclusion of those extraneous matters the order has been applied to aspects, such as the EALA members' privileges, which were not in the Court's contemplation in its ruling. He submitted that the court ought to correct any error in its order even if it be minor, and he stressed that in the instant case the variance between the ruling and the extracted order warranted correction by expunging the extraneous contents.

[7] Mr. Mutula Kilonzo S.C., learned counsel for the Claimants, submitted that the ruling and the extracted order should not be read in isolation of the prayers in respect of which the ruling was made and the interim injunction was granted. The expressions in the order objected to by the Applicants, were the expressions employed in the prayer for the injunction. He maintained that the extracted order was on all fours with the ruling. Mr. Wanjuki Muchemi, the learned Solicitor General of Kenya, who appeared for the 1st Respondent, associated himself with the submissions of Mr. Mutula Kilonzo and stressed that there was no disparity between the ruling and the extracted order. Mr. Kaahwa, the learned Counsel to the Community, who represented the 3rd and 4th Respondents, framed two questions which the court has to consider in an application for correction of an extracted order, namely: 1) whether the extracted order embodies the Court's decision in accordance with r.67 of the Court Rules; and 2) whether the order contains grave mistakes. He answered the first in the affirmative and the second in the negative and submitted that there was no cause for correction of the order. He relied on *Moore vs. Buchanan and Another* (1967) 3 All ER 273, for the proposition that only a grave mistake in an order warrants correction.

[8] Rule 67 of the Court Rules requires every decision of this Court to be embodied in an order and directs that such order shall -

- be dated as of the date the decision was delivered;
- contain particulars of the case; and
- specify clearly the relief granted or other determination of the case.

[9] The decision in issue in this application is the ruling this Court delivered on 27th November 2006. The ruling relates to the Claimants' application under the Reference, for an interim injunction and to the Respondents' preliminary objections. The correction sought in

this application, however, relates only to the relief of an interim injunction, which the Court granted not in the terms of the application but in the following terms –

"Accordingly, we hereby grant an interim injunction restraining the 3rd and 4th Respondents from recognizing the following persons as duly elected Members of the EALA or permitting them to participate in any function of the EALA until the final determination of the reference. "

[10] That was followed by the list of names of the nine persons submitted to the 4th Respondent as the Members of the EALA elected by the Kenya National Assembly.

[11] The part of the order extracted and signed by the Registrar relevant to this application reads as follows –

"IT IS HEREBY ORDERED:

1...

2. THAT pending the hearing and final determination of the reference herein, the 3rd and 4th Respondents are hereby restrained and prohibited from assembling, convening, recognizing, administering oath of office or otherwise howsoever presiding over or participating in election of the Speaker or issuing any notification in recognition of the following persons: Messrs (names of the 9 persons) as nominated representatives of the Republic of Kenya to the EALA." (Emphasis is added)

[12] Much as we may agree with learned counsel for the Claimants and the Respondents that in substance both the order as pronounced in the ruling and as extracted amount to an interim injunction with restraints and prohibitions directed to the 3rd and 4th Respondents in respect of the nine named persons, the restraints and prohibitions are at such variance that it cannot be appropriately said that the latter was extracted from the former in compliance with r. 67 of the Court Rules. We note the explanation volunteered by learned counsel for the Claimants that some of the wording in the extracted order originate from the prayers in the Claimants' motion. In our view that per se contradicts r.67 which requires the order to embody the decision of the Court not the pleadings or prayers of the parties. What is more, we are constrained to observe, without discussing in detail, that far from clarifying the relief granted, as required under r.67, the added wording has the tendency of confusing it.

[13] The Court's power to correct errors in its judgments and orders is provided for under r.68 of the Court Rules. Sub-rule (1), provides for correction of judgments. Sub-rule (2), under which this application is brought, provides –

"An order of the Court may at any time be corrected by the Court either of its own motion or on application by any interested person if it does not correspond with the judgment it purports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as corrected. "

[14] Clearly, this is a discretionary power. While ordinarily the Court ought to correct an order that does not correspond with the judgment it purports to embody, the Court retains the discretion to refuse to correct its order in appropriate circumstances. In *Moore vs. Buchanan* (supra) the English Court of Appeal, applying the equivalent rules under the R.S.C., held that there was discretion to refuse to correct an error in an order "wherever something had intervened subsequently which rendered it inexpedient or inequitable to make the correction. " We are of a similar view in respect of r.68 (2) of the Court Rules, and

would exercise the discretion on the same criteria.

[15] In the instant case, we are satisfied that the extracted order does not correspond to the ruling it purports to embody. The parties opposing the application have not shown that it would be inexpedient or inequitable to correct the extracted order so as to make it correspond to the ruling. Indeed learned counsel for the Claimants conceded that no harm would arise from the proposed correction.

[16] For these reasons we allow the application and direct that the extracted order be corrected to correspond and be in the terms of the reliefs granted in the ruling of this Court dated 27th November 2006. We make no orders as to costs.

Dated and delivered at Arusha this day of 2007

MOIJO M. OLE KEIWUA
PRESIDENT

JOSEPH N. MULENGA
VICE PRESIDENT

AUGUSTINO S. L. AUGUSTINO
JUDGE

KASANGA MULWA
JUDGE

HAROLD R. NSEKELA
JUDGE