



Goetz & 3 others v Commissioner for Co-operatives Development; Kenya North America Diaspora Sacco Limited (Interested Party) (Judicial Review Application E171 of 2022) [2023] KEHC 25665 (KLR) (Judicial Review) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E171 OF 2022
JM CHIGITI, J
NOVEMBER 23, 2023**

BETWEEN

**MARYANNE WANGECI GOETZ 1ST APPLICANT
REGINA MBUTE MWISA 2ND APPLICANT
JANE WANGARI NGUNGU 3RD APPLICANT
PURITY WARINGA ATEKU 4TH APPLICANT**

AND

**THE COMMISSIONER FOR CO-OPERATIVES
DEVELOPMENT RESPONDENT**

AND

**KENYA NORTH AMERICA DIASPORA SACCO LIMITED INTERESTED
PARTY**

RULING

1. Before this court is a Chamber Summon dated 23rd November, 2023 - brought under Order 53 Rule (Sic) of the *Civil Procedure Rules*, 2010; Sections 8 and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya – the Applicants seeks for orders:
 1. Spent.
 2. That this Honourable Court be pleased to exempt the Applicants from the obligation to exhaust the dispute resolution remedy of the Co-operatives Tribunal as provided for under Sections 74 and 76 of the *Co-operative Societies Act*, 2012.



3. That the Applicants be granted leave to apply for an order of certiorari to remove into the high court and quash the inquiry report, consequential findings, recommendations and orders of 26th February, 2022 prepared by the Respondent which effectively removed them from office as Members of the Management Committee of the Interested Party.
 4. That the Applicants be granted leave to apply for an order of prohibition directed to the Respondent, its agents, servants, nominees, assigns or anyone acting on its behalf from implementing and/or proceeding with recommendations given pursuant to the inquiry report of February, 2022.
 5. That leave be granted to the Applicants to institute judicial review proceedings seeking for an order of prohibition restraining the surcharging of the members of the Interested Party's management committee.
 6. That the Applicants be granted leave to apply for an order declaring the decision of the Respondent to remove the Applicants from office as ultra vires and void ab initio.
 7. That the grant of leave to apply the above orders do operate as a stay in respect of prayer 2,3,4,5 and 6 above until the hearing and determination of the Judicial Review Application.
 8. That this Honourable Court be pleased to grant any other or further relief that it may deem just and fit to grant in the circumstances.
 9. That the costs of this Application be in the cause.
2. The Application is accompanied by a Statutory Statement, and a Verifying Affidavit sworn by Jane Wangari Ngungum both dated 23rd November, 2022. The Application is based on the grounds set out in the Statutory Statement. In sum, the Applicants' case is that they were removed as members of the management committee in an unfair and illegal manner; that the Respondent acted ultra vires in usurping the jurisdiction of the Environment and Land Court; and that Respondent acted unfairly and contra statue.
 3. The Applicants conceded that this dispute ought to have been first filed at the Cooperatives Tribunal before coming to the High Court - as was delivered in a similar and related matter in a ruling dated 22nd day of July, 2022 in HCJR NO. E030 OF 2022 - Maryanne Wangechi Goetz and 3 Others versus the Commissioner for Cooperative Development and Another. However, that there are exceptional circumstances that would warrant this matter to be exempted from the obligation to exhaust the remedies under the tribunal.
 4. In response to, and opposing the Application, the Respondent filed their Replying Affidavit dated 8th September, 2023 deponed by David K Obonyo Commissioner at the Respondent. It was contended that an inquiry was conducted on the Interested Party, in lawfully and procedurally manner, where all the respective persons were accorded an opportunity to be heard. Also, that the inquiry and the findings therein were legally, and rationally arrived at taking into account relevant considerations/facts.
 5. Additionally, it was the Respondent's position that the Co-operative Tribunal is vested with the proper jurisdiction to hear and determine an appeal against a surcharge order; which appeal should be made within thirty (30) days of making of the surcharge order. Consequently, that the Applicants ought to exhaust the mechanism for appeal as provided in the Act before instituting the current proceedings. Therefore, to the Respondent's this instant judicial review application offends the doctrine of Res Judicata - since the Applicants have on previous occasions filed suits on the same subject matter, which have been dealt with, and dismissed by this honourable court.



6. In further opposition to the Application, the Interested Party filed their Replying Affidavit dated 8th May, 2023 sworn by Nancy Muchina, who is their chairperson. It was averred that the instant Application is incurably defective for being a replica of similar and related matters/suits. As per the Interested Party, the Applicants are forum shopping using multiple suits, in hope of getting a favourable outcome.
7. Also, that the instant suit is tantamount to having the ruling delivered by Hon. Justice Jairus Ngaah, and also the ruling delivered by Hon. Justice Anthony Ndung'u reviewed and appealed at the same time, by this Honourable Court. That there are no exceptional circumstances to warrant invocation of this Honourable Court's jurisdiction as the same were previously denied by this Court vide its ruling of 9th March, 2023 before Hon. Justice Anthony Ndung'u.
8. Additionally, in opposing this Application, the Respondent filed a Notice of Preliminary Objection dated 20th April, 2023, challenging this court's jurisdiction to hear and determine this Application - on grounds of Doctrine of Estoppel, and Doctrine of Res Judicata - on the basis of multiplicity of suits filed by the Applicants on the same subject matter.
9. This Application was canvassed by way of written submissions. To advance their cases, parties filed their respective submissions. Applicants' submissions dated 2nd June, 2023; while the Respondent's submissions dated 18th September, 2023; And the Interested Party's submissions dated 22nd June, 2023.
10. After a careful consideration of the Application, Responses, annexures thereto, and the submissions; the main issues for determination are: Whether the Application for leave to commence judicial review proceedings is merited; and if so, Whether the leave so granted merit to operate as a stay.

Analysis and Determination

11. On the first issue, on leave, leave it is a requirement of the law under Order 53 Rule 1 of the [Civil Procedure Rules](#) 2010, that an Applicant must seek leave to institute judicial review proceedings.
12. Leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the Applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. This reason for leave was discussed in the case of [Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others](#), Mombasa HCMCA No. 384 of 1996.
13. The Learned Judge, in [County Council of Kwale & Another Ex-Parte Kondo & 57 Others](#) (supra) case, further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant; the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion, but as always it has to be exercised judiciously.
14. From the foregoing, in an Application for leave, such as the instant one, this court ought not to delve deeply into the arguments of the parties; but should make cursory perusal of the evidence before it [court] and make the decision as to whether an Applicant's case is sufficiently meritorious to justify leave.



15. Also, in *Republic v National Transport & Safety Authority & 10 others* [2014] eKLR, the court held that in judicial review, the threshold for obtaining leave to commence judicial review proceedings is low, and obtaining leave is not in itself evidence of a strong case. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case.
16. In the instant matter, the gist of the Application before this court is that the Applicants are seeking leave to commence judicial review proceedings for orders of certiorari, and prohibition.
17. Having invoked the judicial review jurisdiction of this court, it was upon the Applicants to demonstrate an arguable case that requires ventilation at a substantive hearing. I have carefully perused through the record and submissions. A *prima facie* case is established to warrant the grant of the leave sought.
18. Nevertheless, it is worth noting that the parties delved into the substantive issues of the case, prematurely. The case as ventilated herein, as regarding the doctrine of estoppel, doctrine of Res Judicata, and doctrine of exhaustion and/or exemptions thereto; to my mind, are best fit for substantive stage of the case. To that end, I find that the Application for leave before this court is merited.
19. On the second issue, on stay, the applicable law on whether leave granted should operate as a stay is Order 53 Rule 1(4) of the *Civil Procedure Rules*, which provides as that;

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”
20. In the case of *Taib A. Taib v The Minister for Local Government & Others* Mombasa HCMISCA. No. 158 of 2006 Maraga J (as he then was) observed that:

“...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... I also want to state that in judicial review applications like this one the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore, where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction” The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant’s case is deserving of a stay order. The Ex-parte Applicant seeks:

“that the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councillor in the Municipal Council of Mombasa.”



Can I grant this prayer in view of the scope and purpose of the stay order as stated above, “I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant’s application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councillor or to hold the elections or elect the Mayor of Mombasa.”

21. Further, Odunga J. (as he then was) in *Republic v Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others* [2014] eKLR; and in *James Opiyo Wandayi v Kenya National Assembly & 2 Others*, [2016] eKLR, the learned judge observed that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.
22. It is then evident that in an application seeking orders for leave granted to operate as a stay; the main consideration is whether the proceedings would be rendered nugatory should stay not be granted.
23. In the instant matter, there is no evidence that the decision/inquiry report is implemented in complete. Further, the question of an arguable case is moot for this court found the Application merits granting of leave. To guard the outcome of the substantive motion from being rendered nugatory, it thus befits granting of leave to operate as stay.
24. The upshot is that the Chamber Summons dated 23rd November, 2023 succeeds in part.

Order:

1. The Applicants are exempted from the obligation to exhaust the dispute resolution remedy of the Co-operatives Tribunal as provided for under Sections 74 and 76 of the *Co-operative Societies Act*, 2012.
2. The Applicants are granted leave to apply for an order of certiorari in terms of prayer 3.
3. The Applicants are granted leave to apply for an order of prohibition in terms of prayer 4, and 5.
4. The Applicants are granted leave to apply for a declaration order in terms of prayer 6.
5. The leave so granted to operate as a stay pending the hearing and determination of the substantive suit.
6. The Applicants shall file and serve the substantive motion within 7 days of today’s date.
7. The Application shall be canvassed by way of written submissions.
8. The Respondents and the Interested Party shall file and serve their responses to the substantive Application within 7 days of service.
9. The Applicants shall thereafter file and serve its submissions within 7days.
10. The Respondents and the Interested Party shall thereafter file and serve their submissions within 7days of service.
11. The Submissions shall be limited to 10 pages each.



12. The cost shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

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J. CHIGITI (SC)

JUDGE

