



**Kihingo Village (Waridi Gardens) Management Limited v Attorney General & 2 others (Judicial Review 169 of 2023) [2023] KEHC 26714 (KLR) (Judicial Review) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26714 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW 169 OF 2023  
JM CHIGITI, J  
DECEMBER 20, 2023**

**BETWEEN**

**KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT LIMITED ..... APPLICANT**

**AND**

**THE HONORABLE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES (BUSINESS REGISTRATION SERVICES) ..... 2<sup>ND</sup> RESPONDENT**

**JAMES NDUNGU GETHENJI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant by a Notice of Motion dated 2<sup>nd</sup> November, 2023 – brought under Article 10, 19, 20, 22, 23, 27, 47, & 50 of *the Constitution* of Kenya, 2010; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; Sections 3, 4, 7,8, 11 of the *Fair Administrative Action Act* No. 4 of 2015; Section 2 of the *Vexatious Proceedings Act*; and Order 53 Rule 1 of the Civil Procedure Rules – Seeking for orders that:
  1. The matter be certified urgent and the court be heard ex-parte in the first instance.
  2. Leave be granted to the Applicant to institute judicial review proceedings for orders of certiorari, prohibition and mandamus as follows:
    - a. An Order of Certiorari be issued to remove to this Court for purposes of quashing the decision of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> March, 2023.



- b. An Order of Prohibition be issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from setting aside the 2<sup>nd</sup> Respondent's decision contained in the letter dated 29<sup>th</sup> January, 2021 and from entertaining any complaint by the 3<sup>rd</sup> Respondent, his servants, employees or agents howsoever and in any manner whatsoever from challenging the Special General Meeting Resolution of 13<sup>th</sup> April, 2019 by the shareholders of the Kihingo Village (Waridi Gardens) Management Limited.
  - c. An Order of Mandamus be issued directing the 1<sup>st</sup> Respondent within 30 days of the court order to formally commence proceedings against the 3<sup>rd</sup> Respondent pursuant to Section 2 of the *Vexatious Proceedings Act* for habitually and persistently and without any reasonable ground instituting vexatious proceedings and complaints against the Applicant, 95% of its shareholders and its directors.
3. The grant of leave do operate as a STAY and a temporary interdict be issued staying the 2<sup>nd</sup> Respondent's decision dated 7<sup>th</sup> March, 2023 and maintaining the status quo ante prior to 7<sup>th</sup> March, 2023 in accordance with the arbitral award dated 28<sup>th</sup> July, 2016 and adopted as a decree in ELC No. 1225 of 2013 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd, that was implemented by the Applicant's majority shareholders at the Special General Meeting held on 13<sup>th</sup> April, 2019.
  4. The Applicant do file the substantive Notice of Motion within 7 days of the grant of leave.
  5. This Honourable Court be pleased to issue urgent directions on the filing of Responses and submissions for the determination of the Application, within 30 days of the date of filing to allow the court of sufficient time to render its determination within 90 days from the date of filing the Application in accordance with Section 8 of the Fair Administrative Actions Act.
  6. Costs be in the cause.
2. The Application is based on the grounds on the face of it, on the Statutory Statement, and the Verifying Affidavit of Gitahi Gethenji; all similarly dated. Also, on the Supplementary Affidavit dated 24<sup>th</sup> November, 2023 similarly deponed.
  3. The Applicants case is that the court (Hon. Justice Chigiti) dismissed the judicial review application in Nairobi JR No. E033 of 2023 Kihingo Village (Waridi Gardens) Management Ltd v The Hon. Attorney General & Others on 24<sup>th</sup> May 2023 seeking, inter alia, judicial review orders, on the ground that leave to commence the suit under the Fair Administrative Actions Act had not been obtained.
  4. That on 28<sup>th</sup> June, 2023 I, (Hon. Justice Chigiti) granted an order of interdict staying the 2<sup>nd</sup> Respondent's decision dated 7<sup>th</sup> March, 2023 and maintaining the status quo ante dismissed the application for review of his decision.
  5. Further that there has been no delay in filing the present application following the review decision, and it is urgent leave be granted and orders of stay and interdict be granted as prayed as the court has previously granted stay orders of the decision of the 2<sup>nd</sup> Respondent dated 7<sup>th</sup> March, 2023.
  6. To the Applicant, the Respondents violated the rules of natural justice contrary to Articles 47 and 50 of *the Constitution* by condemning the Applicant unheard and rendering the decision on 7<sup>th</sup> March 2023 without notification to the Applicant.



7. Natural justice concerns procedural fairness and it ensures that a fair decision is reached at by an objective decision maker which was not the case in the present instance as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents exhibited bias by condemning the Applicant unheard.
8. The administrative decision of 7<sup>th</sup> March, 2023 was a collateral attack on the arbitral Award dated 28<sup>th</sup> July, 2016, the SGM of 13<sup>th</sup> April 2019, four (4) decisions of the high court and one (1) decision of the Court of Appeal.
9. The 2<sup>nd</sup> Respondent is estopped from overturning the decision of 29<sup>th</sup> January 2021 and waiting for two years to capriciously condemn the Applicant unheard.
10. Justice Majanja held in ELC No. 1225 of 2013 Kifaru Investments Ltd & Others v Kihingo Village (Waridi Gardens) Ltd and Kihingo Village (Waridi Gardens) Management Ltd that as there were only two equal shareholders, Ndung'u (3<sup>rd</sup> Respondent herein) and Gitahi (Deponent herein), ratification of subsequent acts would be impossible. The suit could not be sustained on the back of one shareholder to the exclusion of the other. Similarly, no authority to lodge the past complaints was ever obtained granted by the company as the 3<sup>rd</sup> Respondent.
11. The Court of Appeal in Civil Apctn No. E025 of 2021 Kihingo Village (Waridi Gardens) Management One Limited v William Pike & Others dismissed the application whose affidavit was sworn by the present 3<sup>rd</sup> Respondent for lack of a resolution to file the application
12. The Application is opposed by the Respondents.
13. In opposition to the Application, the 3<sup>rd</sup> Respondent filed his Replying Affidavit dated 14<sup>th</sup> November, 2023 and deponed by James Ndungu Gethenji, the 3<sup>rd</sup> Respondent herein.
14. He contends that the firm of Wamae & Allen Advocates have no instruction from Applicant [Kihingo Village (Waridi Gardens) Management Limited] to represent them in these proceedings.
15. That the company has reverted to its status as it was as at 13<sup>th</sup> April, 2019; thus, that the 3<sup>rd</sup> Respondent is the chairman of the company. As chairman, that he is not aware of any meeting to authorize the advocates herein, and/or Mr. Gitahi Gethenji to represent the company.
16. To the 3<sup>rd</sup> Respondent, the Applicant is not aggrieved by the decision of the 2<sup>nd</sup> Respondent; and where anyone is dissatisfied with the same they ought to lodge their grievances in their own personal capacity.
17. It is averred that the Application for leave is improperly brought by way of a Notice of Motion as opposed to a Chamber Summon as required by law. In the end, that the Application ought to be struck out and/or dismissed.
18. The 1<sup>st</sup> Respondent, opposing the Application, filed their Grounds of Opposition dated 21<sup>st</sup> November, 2023 on the grounds:
  1. That the Application is frivolous vexatious and an abuse of court Process.
  2. That the Application as drafted offends the provisions of section 8 & 9 of the [Law Reform Act](#) and Order 53 Rule 1& 2 of the Civil Procedure Rules, 2010.
  3. That the order of mandamus as sought as the 1<sup>st</sup> Respondent is premature as there was no formal request and there no failure and/or neglect of performance of any legal.



4. That the Orders sought against the 1<sup>st</sup> Respondents the provisions of Articles 27 and 48 of the Constitution of Kenya, 2010.
  5. That application as presented is unmerited as it seeks to direct the 1<sup>st</sup> Respondent to exercise discretion in a particular manner which is not in the purview of Judicial Review.
  6. That the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.
  7. That this Application be dismissed with costs to the 1<sup>st</sup> Respondent.
19. While, the 2<sup>nd</sup> Respondent filed their Grounds of Oppositions dated 21<sup>st</sup> November, 2023 on the grounds:
1. That the Notice of motion application is scandalous, frivolous, vexatious defective, has no merit, is an abuse of court process and is based on a misconception of the law.
  2. That by dint of the judgement delivered by this court on 24<sup>th</sup> May, 2023 and the subsequent ruling this court has no jurisdiction to handle this matter as it is functus officio.
  3. That by dint of Section 3 of The Companies Act No 17 of 2015 and practice directions issued by the Chief Justice on the 18<sup>th</sup> November, 1997, this court lacks jurisdiction to preside over this matter.
  4. That the issues and the subject matter raised in the applications herein are res judicata as they have been heard and determined in JR 033/2023.
  5. That the substratum of the application in its entirety is a commercial dispute which squarely falls within the ambit of Companies Act and therefore the right forum should be The Commercial & Admiralty Division of the High Court.
  6. That the application is an appeal against the decision of this court in Judicial Review 033 of 2023 disguised as a judicial review application yet a judicial review court does not sit as an appellate court.
20. The Application was canvassed by way of written submissions. On one hand, in advancing their case, the Applicant filed their submissions dated 14<sup>th</sup> November, 2023 and supplementary submissions dated 27<sup>th</sup> November, 2023.
21. On the other hand, in buttressing their cases, the Respondents filed their respective submissions: 1<sup>st</sup> Respondent's submissions; 2<sup>nd</sup> Respondent's submissions; and, 3<sup>rd</sup> Respondent's submissions - all dated 21<sup>st</sup> November, 2023.
22. I have considered the Application, responses thereto, annexures, respective party's submissions, and cited authorities therein. I find the following issues that call for determination:
- i. Whether the Application is fatally defective
  - ii. Whether the Application has met the threshold to granting of leave to commence Judicial review proceedings; and if so,



- iii. Whether the leave so granted should operate as a stay.

### **Analysis and Determination**

23. On the first issue, the contention is that the application for leave is brought by way of a Notice of Motion, as opposed to an ex-parte Chamber Summons. The Application was brought under the Constitution, the Civil Procedure Rules, and Fair Administrative Action Act.
24. Order 53 rule 1 of the Civil Procedure Rules provides that, “Applications for mandamus, prohibition and certiorari to be made only with leave. 1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”
25. Nevertheless, Article 159(d) of the Constitution, is to the effect that justice shall be administered without undue regard to procedural technicalities; and Section 10(1) of the Fair Administrative Action Act provides that an application for judicial review shall be heard and determined without undue regard to procedural technicalities.
26. I have painstakingly examined the application dated 2<sup>nd</sup> November, 2023 which is titled Notice of Motion. The contents therein and reading the application is inter alia seeking leave to institute judicial review proceedings. No substantive reliefs have been sought in this application.
27. To my mind, the form of the Application for leave on record can be said to be wanting - at least in title; but the substance of the Application (the laws brought under) is proper as before this court. To that end, I find that the Application is NOT fatally defective to warrant dismissal or to strike out the same.
28. On the second issue, on leave; leave 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.
29. 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.
30. 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.
31. 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.



32. Further, 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.
33. In the instant matter, the crux of the Application before this court is that the Applicants are seeking leave to commence judicial review proceedings for orders of certiorari, prohibition, and mandamus.
34. 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.
35. 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 representation of the applicant, the nature of the Application, the proper forum to determine this matter, functus officio, and res judicata would require more than a cursory perusal of the case - but a deeper ventilation and consideration of the case - Which to my mind, are best fit for substantive stage of the case. In particular, the Grounds of Oppositions are filed prematurely. To that end, I find that the Application for leave before this court is merited.
36. On the third 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.”
37. In the case of *Taib A. Taib vs. 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.”

38. Further, Odunga J. (as he then was) in *Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others* (2014) eKLR; and in *James Opiyo Wandayi vs Kenya National Assembly & 2 Others*, (2016) eKLR, 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.
39. In the instant matter, there is no evidence that the Respondents' decisions have been 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.

**Disposition:**

40. The Application is meritorious.

**Order:**

41. The Application (Notice of Motion) dated 2<sup>nd</sup> November, 2023 succeeds to the extent that:
  1. The Applicants are granted leave to apply for: an order of certiorari in terms of prayer 2(a); and order of prohibition in terms of prayer 2(b); and, an order of mandamus in terms of prayer 2(c).
  2. The leave so granted to operate as a stay pending the hearing and determination of the substantive suit.
  3. The Applicant shall file and serve the substantive motion within 7 days of today's date.
  4. The Application shall be canvassed by way of written submissions.
  5. The Respondent shall file and serve their responses to the substantive Application within 7 days of service.
  6. The Applicant shall thereafter file and serve its submissions within 7 days.



7. The Respondent shall thereafter file and serve their submissions within 7days of service.
8. The Submissions shall be limited to 10 pages each.
9. The matter shall be mentioned on 13<sup>th</sup> March, 2024 with a view to securing a judgment date.
10. The cost shall be in the cause.

It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**J. CHIGITI (SC)**

**JUDGE**

