



Henrie & 2 others (Suing in their capacity as the registered officials of Wilson Tenants Association) v Kenya Airports Authority; Cabinet Secretary, Roads and Transport (Interested Party) (Miscellaneous Application E072 of 2023) [2023] KEHC 26974 (KLR) (Judicial Review) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26974 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E072 OF 2023
JM CHIGITI, J
DECEMBER 19, 2023

BETWEEN

EDISION BARRY HENRIE, WILLIAM WANGOMBE KAMAU, AND LILIAN WAIGWE MWANGI (SUING IN THEIR CAPACITY AS THE REGISTERED OFFICIALS OF WILSON TENANTS ASSOCIATION) APPLICANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

AND

CABINET SECRETARY, ROADS AND TRANSPORT INTERESTED PARTY

RULING

1. By a Chamber Summon application dated 5th July, 2023 the Applicants moved this court for orders that:
 1. Spent.
 2. Leave be granted for the Applicant to apply for orders of:
 - a. *certiorari* to remove into this Honourable Court for the purposes of quashing the Respondent's decision dated 15th March, 2023 and 22nd March, 2023.
 - b. Prohibition restraining the Respondent by itself, its agents or persons acting on its behalf from arbitrarily imposing and collecting high license fees for use of the premises,



concessions, and other facilities provided by the Respondent to the Members of the Applicant.

- c. *Mandamus* compelling and directing the Respondent to comply with the mandatory statutory requirements of Sections 8(3) and 12(3)(e) of the [Kenya Airports Authority Act](#), Cap 295 of the Laws of Kenya and Regulation 25(2)(b)(xx) of the [Civil Aviation \(Security\) Regulations](#), 2020,
 - d. Declaration to the effect that the Notices issued on the 15th March 2023 and 22nd March 2023 to the Applicants Members, were not done in conformity with the [Kenya Airports Authority Act](#) as well as the laid down Procedures and are a breach of the Rights of the Applicant's Members to fair administrative action.
3. Leave granted do operate as a stay of implementation of the Respondent's decisions dated 15th March, 2023 and 22nd March, 2023 arbitrarily increasing the charges relating to the license for use of the premises, concessions, and other facilities provided by the Respondent to the Members of the Applicant and arbitrarily and without due regard to the legal stipulations, imposed a requirement for issuance of Land side Access Permits at a fee to persons doing legitimate business on the landside, an action that affected the legal rights and/or interests of the Members of the Applicant's Association.
 4. The costs of this Application be provided for.
2. The Application is based on the grounds on its face, on the Statutory Statement and on the Verifying Affidavit deponed by Edison Barry Henrie, all evenly dated.
 3. In sum, the Applicant's case is that the Respondent's decision was marred with procedural improprieties, unreasonable, illegal, and ultra vires. Also that the decision was arbitrarily, unfair, and unconstitutional. The decision is said to have the effect of increasing the charges paid for license for the use of the premises, concessions, and other facilities provided by the Respondent - to the members of the Applicant association.
 4. The Application is opposed by the Respondent through a Replying Affidavit dated 22nd June, 2023 and sworn by Joseph Okumu, Regional Airport Manager, Wilson Airport & Northern Region.
 5. He averred that the relationship between the members of the Applicant and the Respondent is that of Licensor/Licensee and therefore, the same is a land/contractual relationship and in the event of a dispute, the proper forum is the Environment and Land Court (ELC) or the Business Premises Rent Tribunal (BPRT) subject to the issue of jurisdiction of the BPRT being established.
 6. Also, that even for the Licensees who are yet to return the executed licenses, their remedies and rights are still contractual and therefore not the subject of Judicial Review proceedings considering that they entered the licensed premises by virtue of Licenses which have since expired.
 7. It is further deponed that the Kenya is a signatory to International Civil Aviation Organization (ICAO) treaty and whose standards are implemented in Kenya by the Kenya Civil Aviation Authority (KCAA). That under the Treaty, there is harmonization of operations and management of all airport in the world and access to the public of all amenities and facilities.
 8. Thus, that grant of the orders sought herein would cause Kenya and in particular, KCAA and the Respondent, to renege on Kenya's international obligations which Kenya is a party to pursuant to Article 2(6) of the [Constitution](#).



9. As per the Respondent, the Landside Security Access Permits are already in universal use in all Airports in Kenya and therefore, the Applicant here is seeking to exclude and or shield Licensees of Wilson Airport from undergoing the same safety and security procedures as all other Airports in Kenya.
10. That the Orders sought for leave to seek reliefs of *certiorari* and Prohibition are already overtaken by events, have been implemented and third parties have contracted to the same and the Digital Cards, (Landside Security Access Permits) are already in use. Also, has been overtaken by events in so far as it seeks to stay, quash and or prohibit contractual obligations of many unidentified parties who have not formally served with the proceedings herein.
11. The Respondent maintained that having followed the legal process and procedures, the allegations by the Applicant to the effect that the Applicant acted arbitrarily, illegally, unlawfully, un-procedurally, and improperly are completely false, misleading and only meant to deceive this court.
12. Further, the Respondent opposed the Application by a filed Notice of Preliminary Objection dated 25th July, 2023 on the grounds:
 - a. That the Honourable Court has no jurisdiction to hear and determine the present Ex-parte chamber summons application dated 5th July 2023 by virtue of provisions of Section 4 of the [Environment and Land Court Act](#), 2011, with jurisdiction conferred by Section 13(1) thereof;
 - b. That the predominant dispute between the members of the Applicant and the Respondent is a contractual License for occupation of businesses at Wilson Airport. Consequently, the dispute ought to be determined before the Environment and Land Court (ELC); and
 - c. That consequently, the *Ex-parte* Chamber Summons application dated 5th July, 2023 and the entire proceedings herein amount to a sheer abuse of court process for want of jurisdiction.
 It is proposed to ask the court for the following orders:
 - a. That the Ex-parte chamber summons application dated 5th July, 2023 herein be struck out;
 - b. That costs of the Ex-parte chamber summons dated 5th July, 2023 and the proceedings herein be awarded to the Respondent.
13. In response to, and opposing the Respondent's Notice of Preliminary Objection, the Applicant filed their Grounds of Opposition dated 31st August, 2023 on the grounds:
 1. That the present dispute does not relate to the environment and the use and occupation of, and title to land.
 2. That the present dispute does not relate to any of the disputes listed and/or enumerated under section 13(2)(a) - (e) of the [Environment and Land Court Act](#) No. 19 of 2011.
 3. That the present dispute relates to;
 - i. Imposition and levying of charges relating to license for use of the premises, concessions, and other facilities provided by the Respondent to members of the Applicant in violation of the express provision of the law, more specifically Sections 8(3), 11(b) and 12(3) of the [Kenya Airports Authority Act](#), Cap 395.
 - ii. Imposition and levying of Landside Pass Charges payable by staff and visitors as well as members of the Applicant for access and use of the premises concessions and other facilities provided by the Respondent to Members of the Applicant is in violation of Regulation 25 of the [Civil Aviation \(Security\) Regulations](#) 2020.



- iii. Failure of the Respondent to furnish reasons upon request, for the administrative action taken is a flagrant breach of Section 6 of the *Fair Administrative Actions Act* 2015.
- 4. That the gist of the Applicant's dispute is that the Respondent's decision stated above is vitiated or tainted with Illegality, Irrationality, Procedural Impropriety and has been taken Without Or In Excess Of Jurisdiction.
- 5. That the Judicial Review Court is the right court to look into the lawfulness of the process by which a decision is made by a public body such as by the Respondent.
- 6. That under Order 53 Rule 1 of the *Civil Procedure Rules* 2010, it is mandatory that an Applicant, in such an Application, seek leave before they can file the substantive motion.
- 7. That Section 7 of the *Fair Administrative Actions Act* 2015, requires persons aggrieved by an administrative decision to apply through Judicial Review.
- 8. That the Application was brought in good faith and in the interests of justice.

Reasons Wherefore the Applicant prays that the Preliminary Objection dated 25th July 2023 be dismissed with costs to the Applicant.

- 14. In buttressing their cases, the parties filed their respective written submissions. The Applicants' submissions are dated 13th September, 2023; While the Respondent's submissions are dated 7th September, 2023.

Analysis and Determination:

- 15. After a careful consideration of the Applications, Responses, annexures thereto, and the submissions; the main issues for determination are:
 - i. Whether the Application for leave to commence judicial review proceedings is merited; and if so,
 - ii. Whether the leave so granted merit to operate as a stay.
- 16. 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.
- 17. 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.
- 18. 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.



19. 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.
20. 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.
21. 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*, prohibition, and *Mandamus*.
22. 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.
23. 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 nature of the dispute, the proper forum to determine this matter, 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 Preliminary Objection and the Grounds of Opposition are filed prematurely. To that end, I find that the Application for leave before this court is merited.
24. 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.”
25. 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.”

26. 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.
27. In the instant matter, there is no evidence that the Respondent's decision 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.

Disposition:

28. The Application is meritorious.

Order:

The Chamber Summon dated 5th July, 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); an order of *Mandamus* in terms of prayer 2(c).
2. The leave so granted shall operate as a stay pending the hearing and determination of the substantive suit.
3. The Applicants shall file and serve the substantive motion within 7 days of today's date.
4. The Respondent and the Interested Party shall file and serve their responses to the substantive Application within 7 days of service.
5. The Applicant shall thereafter file and serve its submissions within 7 days.



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

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER, 2023.

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JOHN CHIGITI (SC)

JUDGE

