



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC E054 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI METROPOLITAN SERVICES..... RESPONDENT

AND

KENYA RAILWAYS STAFF RETIREMENT

BENEFITS SCHEMEINTERESTED PARTY

EX PARTE APPLICANTS:

SNOWBALL SACCO LIMITED

ASTRABELL LIMITED

AVERTECH LIMITED

RULING NO. 2

1. On 29th October 2020, this Court delivered a ruling granting the *ex parte* Applicants herein leave to commence judicial review proceedings against the Respondent, and directed that prayer 3 of their Chamber Summons dated 27th October 2020 seeking orders that the leave granted operates as a stay of implementation of the decision by the Respondent intending to ban Public Service Vehicles (PSV) from the Central Business District (CBD) be canvassed *inter partes*. The parties were further directed to file and serve their respective submissions on the said prayer for stay.

2. The *ex parte* Applicants have since filed a substantive Notice of Motion dated 10th November 2020, and a supplementary affidavit dated 2nd February 2021. In response to the *ex parte* Applicant's application, the Respondent filed a replying affidavit sated 8th January 2021 deponed to by Kang'ethe Thuku, its Deputy Director General, while the Interested Party also filed a replying affidavit sworn on the same date by Reenah Kurumi Esendi, its Legal Officer. The *ex parte* Applicants in addition filed submissions dated 10th November 2020 on the prayer for stay. The Respondent and Interested Party did not file any submissions. This ruling is accordingly on the prayer for stay, and the parties' respective cases in this regard are summarised in the following sections.

The Arguments

3. The *ex-parte* Applicants averred that the Respondent's decision to effect the blanket ban without involving the *ex-parte* Applicants was a matter of great public concern. Further, that if the blanket ban was effected without excluding the *ex-parte* Applicants it would mean eviction from the private terminus and the decision would be unreasonable, illegal and *ultra vires* in the circumstance. The *ex-parte* Applicants submitted that the Respondent's decision to exempt others operating alongside the *ex-parte* Applicants at the private terminus was unreasonable, illegal and amounts to unfair discrimination under the Constitution.

4. The *ex-parte* Applicants cited the cases of **Republic vs National Hospital Insurance Fund Management Board ex parte Patanisho Maternity and Nursing Home [2019] eKLR**, and **R (H) vs Ashworth Special Hospital Authority (2003) 1WLR 127** for the submission that the purpose of stay in judicial review proceedings is to suspend the proceedings being challenged, and in so doing maintain the *status quo* in order to aid the judicial process and make it more effective. Further, that in the event that the party is successful in the suit then stay

ensures that the full benefit of the success is enjoyed.

5. The case of **Taib. A. Taiba vs The Minister for Local Governments & Others [2006] eKLR** was also cited for the position that stay is important in judicial review proceedings to ensure that the ex-parte applicant's application is not rendered nugatory by the Respondent before it can be determined. The *ex parte* Applicants submitted that their suit is likely to be rendered nugatory should they be banned or prevented from accessing their private bus terminus on L.R. No.209/12401, and cited the case of **James Opiyo Wandayi vs Kenya National Assembly & 2 Others (2016) eKLR** for the holding that a suit is rendered nugatory where the subject matter will be destroyed, the Court is rendered hopeless, court order is rendered irrelevant, litigants constitutional right is taken away or where if suit is successful there would be no possibility of returning to the *status quo*.

6. It was further submitted that the *ex parte* Applicants would suffer great prejudice if the blanket ban was implemented fully without being heard on the suit, as they would be exposed to great financial losses as they have signed leases, paid rent and devoted themselves to long term commitments. In addition, that the private terminus where the 1st and 2nd *ex parte* Applicants are situated is already well known to their customers, and relocating to the new bus terminus would lead to unfair competition, chaos and rowdiness and it would deprive them of orderliness, safety and security. In conclusion, the *ex parte* Applicants submitted that the Respondent's decision was not within its jurisdiction, as they operate from a private bus terminus and not a public one that is under the Respondent's management.

7. The Respondent, in response to the *ex parte* Applicants' averments of leasing a private space, averred that section 10 of the Matatu Termini By-Laws, 2007 prevents any person from establishing a private terminus without written authority, and that that the *ex parte* Applicants had not provided any proof of authority to establish the said terminus. Further, that the establishment of a private terminus did not extinguish the legal requirement for it to be legally established. The Respondent averred that it was agreed with the PSV operators that the changes would be applied to all operators in order to ensure fairness, and that if the *ex parte* Applicants were allowed to operate at their current illegal terminus, it would be discriminatory against all other operators and defeat the purpose of the decongestion activities.

8. It was averred that the Respondent, with the support of the Matatu operators began designing and constructing various Matatu terminus, and committed to have an organized and systematic relocation of all public service vehicles from the CBD. In addition, that the *ex parte* Applicants have not demonstrated what prejudice they are likely to suffer from the relocation, and that a perceived disadvantage is not sufficient to prevent the implementation of a policy. The Respondent contended that in an effort to mitigate any disadvantage suffered by the PSV operators, it has provided suitable amenities and support facilities such as supermarkets, lactation rooms, ablution areas and dispensaries at the public designated terminus.

9. In addition, that the Respondent has invested a substantial amount of public funds to remedy and reorganize public transport in the City and that to allow matatu operators fail to utilize these facilities would amount to wasting public funds which is against the principles of prudent financial management. Lastly, that the re-organization greatly impacted public interest as it is meant to benefit the public at large, and that the *ex parte* Applicants' intention was to pursue private interests at the expense of the general public.

10. The Interested Party on its part averred that in an effort to ensure that the *ex parte* Applicants do not suffer any losses, it agreed with the Respondent that the rent already paid to it would be utilized at the Green Park terminus upon relocation. Further, that after the paid rent had been fully utilized, the payments that followed would be made to the Respondent or Kenya Revenue Authority. In addition, that this position was communicated to the *ex parte* Applicants vide a letter dated 27th November 2020.

11. According to the Interested Party, the *ex parte* Applicants had not made any developments on the private termini to warrant any loss or to suffer any form of prejudice. It was averred that the relocation would begin with PSVs that operate within the city before those that ply long distances. Therefore, that long distance operators are under a different category and there is no intention to discriminate against the *ex parte* Applicants.

The Determination

12. I have considered the arguments by the parties, and I am guided by the exposition on the purpose of a stay in **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

13. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

14. These positions were also explained in the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others. (2014) e KLR** and **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR**.

15. the present application, the status of implementation is not contested, and the Respondent and Interested Party do not dispute that there is an intended ban of PSV motor vehicles accessing the Nairobi CDB. This is therefore a decision that is amenable to stay. However, in addition to the status of implementation of a decision, a number of other principles have also been held to affect the exercise of a Court's discretion to grant a stay, particularly in cases where the stay will affect third parties and the general public. These principles include balancing the interests of an applicant with the wider public interest, and requiring undertakings as to damages where the stay will prevent a third party from benefitting from a decision (see **R v Inspectorate of Pollution, ex parte Greenpeace Ltd [1994] 1 WLR 570**).

16. In addition, it was held in **R (H). vs Ashworth Special Hospital Authority (supra)** that where granting a stay has the effect of depriving an individual of his or her liberty, the Court has to be satisfied that the public body has acted unlawfully, and that there is cogent evidence of the risks that would result if the individual were to be released as held. Lastly, it is also well established that permission to apply for judicial review and for stay may be refused if there is an adequate alternative remedy that is available, as exemplified by section 9 of the Fair Administrative Action Act.

17. This Court considered the element of public interest in an application for stay in the case of **Republic vs Kenya Airports Authority & another Ex parte Irene Elizabeth Wanjiku Kisangi; Abel Gogo & another (Interested Parties) [2019] eKLR** and cited the case of **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another.** where Majanja J held as follows:

“...judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders. There is thus need to preserve the current *status quo* until the legality or otherwise of the 1st Respondent’s proceedings and decision is established.”

18. This element of public interest was also the subject of the decision in **R (H) vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held;

“Where there is a public interest element involved, the Court strikes a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal’s decision was unlawful.”

19. This was also the position in the case of **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42**, wherein Justice Nyamu (as he then was) cited the decision in **R VS Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763** (as he then was) in that the Court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration.

20. In the instant application, the *ex parte* Applicant has emphasized the prejudice it will suffer if the ban is effected before its suit is heard and determined. The Respondent and Interested Party have on the other hand urged that the *ex parte* Applicants are not likely to suffer any prejudice, and that the public interest precludes a stay in light of the expenditure that has been expended in reorganizing the public transport and the benefits to the public.

21. A stay of the implementation of the decision by the Respondent intending to ban Public Service Vehicles (PSV) from the Central Business District (CBD) is likely to affect third party PSV operators and members of the public who are not party to these proceedings, and who may stand to benefit from the Respondent’s initiatives. In addition, the Respondent has averred to the public interest considerations in reorganizing the public transport in Nairobi CBD. Given the possible effects a stay would have on the public, and given that at this stage the illegality of the Respondent’s intended action is yet to be established, I am of the view that a stay will not be merited in the circumstances.

22. In addition, both the Respondent and Interested Party have averred to mitigation measures that have been taken to ameliorate any prejudice that may be suffered by the *ex parte* Applicant’s as a result of the impugned decision. All these factors in my view militate against a stay being granted in the instant application.

The Disposition

23. In the premises, I hereby make the following orders:

I. Prayer 3 of the *ex parte* Applicant’s Chamber Summons dated 27th October 2020 seeking orders that the leave granted herein operates as a stay of implementation of the decision by the Respondent intending to ban Public Service Vehicles (PSV) from the Central Business District (CBD) is hereby declined.

II. The *ex parte* Applicants shall file and serve the Respondent and Interested Party with submissions on the substantive Notice of Motion dated 10th November 2020 within fourteen (14) days of today’s date.

III. The Respondent and Interested Party are granted leave to file and serve their reply submissions to the *ex parte* Applicant’s substantive Notice of Motion dated 10th November 2020 within fourteen (14) days of service by the *ex parte* Applicants.

IV. The *ex parte* Applicants’ Notice of Motion dated 10th November 2020 shall be heard virtually on 26th May 2021.

V. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant’s Notice of Motion dated 10th November 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VI. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

VII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail,

and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

VIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

IX. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 26th May 2021 and shall send the parties an electronic link for the hearing.

X. Parties shall be at liberty to apply.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicants', Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE