



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 133 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY ASSEMBLY.....RESPONDENT

EX PARTE APPLICANT:

WAMUNYORO INVESTMENTS LIMITED

RULING

The Application

1. Wamunyoru Investments Limited, the *ex parte* Applicant herein, is aggrieved by the decision by the Committee on Public Accounts of the Nairobi City County Assembly (the Respondent herein), to commence an inquiry into matters pertaining to the *ex parte* Applicant's ownership of land parcel LR 209/12077, as well as the Applicant's acquisition of the said property.

2. The *ex parte* Applicant has consequently moved this Court in an application made by way of a Chamber Summons dated 18th June 2020, seeking the following orders:

1. That the application be certified urgent and heard ex-parte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.

2. That the Applicant be granted leave to apply for:-

a) An order of Certiorari to remove to the High Court and quash the decision and findings of the Respondent's Select Committee on Public Accounts to initiate and inquiry into LR 209/12077 as contained in the Respondent's letter dated 26th May 2020.

b) An order of Prohibition to issue prohibiting the Respondent, whether by itself, Committees, officers and/ or agents from purporting to make any inquiry into the ownership of LIR 209/12077.

c) Any other and/or further relief that this Court may deem just and expedient to grant in the circumstances.

3. That the grant of leave herein do operate as a stay of all further action, demands, inquiry and/ or proceedings by the Respondent and particularly by its Select Committee on Public Accounts against the Applicant pertaining to LR 209/12077, pending the hearing and final determination of the substantive Application for Judicial Review.

3. The application is supported by the *ex parte* Applicant's Statutory Statement dated 18th June 2020, and a verifying affidavit sworn on the same date by Hon. Gachagua Rigathi, the *ex parte* Applicant's Managing Director.

4. In summary, the grounds of the application are that the Respondent's Committee on Public Accounts, which derives its mandate from

Standing Order 197 (2) of the Nairobi City County Assembly, is only charged with the examination of the accounts showing the appropriations of the sums voted by the County Assembly to meet the public expenditure, and of such other accounts laid before the County Assembly as the Committee may think fit, and in the circumstances lacks any jurisdiction whatsoever to make any inquiry into matters pertaining to the ownership of land.

5. Furthermore, that it is acting *ultra vires*, and this is especially so since such an inquiry has already been made and concluded by the National Lands Commission which has jurisdiction, and which ruled on the legitimacy of the *ex parte* Applicant's ownership of the said property, with there being no challenge whatsoever to that decision.

The Determination

6. I have considered the application dated 18th June 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent in light of the intended inquiry by the Respondent's Committee of on Public Accounts, which is scheduled to commence on 25th June 2020.

7. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law on leave is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

8. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. In the present application, the *ex parte* Applicants have provided evidence of a letter dated 26th May 2020 written by the Acting Clerk of the Respondent notifying the Applicant that the Respondent's Select Committee on Public Accounts had commenced an inquiry into possible irregular subdivision/ allocation of the parcel of land LR 209/12077 owned by the Applicant. Also annexed was a copy of a decision dated 24th March 2016 by the National Lands Commission, as to the legitimacy of the *ex parte* Applicant's ownership of LR 209/12077. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the Respondent's action to be illegal and *ultra vires*.

9. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

10. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. *Order 53 Rule 1(4)* of the Civil Procedure Rules provides as follows in this respect:

“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.”

11. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, 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. 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.

12. 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. See in this regard 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**.

13. In the present application the acting Clerk of the Respondent in its letter dated 26th May 2020 indicates that the *ex parte* Applicant was invited to a virtual meeting of the Select Committee on Public Accounts that was to be held on Wednesday, 3rd June, 2020, for the Applicant to shed light on various issues on the subject property. The Applicant states that this meeting was rescheduled to 25th June 2020, and is therefore yet to be held. The stay orders sought by the *ex parte* Applicants are therefore merited to this extent.

The Orders

14. In light of the foregoing observations and findings, the *ex parte* Applicant's Chamber Summons dated 18th June 2020 is found to be merited. I accordingly grant the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 18th June 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.

II. The *ex parte* Applicant is granted leave to apply for an order of Certiorari to remove to the High Court and quash the decision and findings of the Respondent's Select Committee on Public Accounts to initiate and inquiry into LR 209/12077 as contained in the Respondent's letter dated 26th May 2020.

III. The *ex parte* Applicant is granted leave to apply for an order of order of Prohibition to issue prohibiting the Respondent, whether by itself, Committees, officers and/ or agents from purporting to make any inquiry into the ownership of LIR 209/12077.

IV. The leave so granted herein to institute these judicial review proceedings shall operate as a stay y of all further action, demands, inquiry and/ or proceedings by the Respondent and particularly by its Select Committee on Public Accounts against the *ex parte* Applicant pertaining to LR 209/12077, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion or further orders by this Court.

V. The costs of the Chamber Summons dated 18th June 2020 shall be in the cause.

VI. The *ex parte* Applicant shall file and serve the Respondent with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 18th June 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VII. Upon being served with the said pleadings and documents, the Respondent shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

VIII. This matter shall be mentioned on 27th July 2020 for further directions.

IX. 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 substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. All the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in word format.

XI. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the description of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XII. 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.

XIII. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Monday, 22nd June 2020.

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 27th July 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVI. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2020

P. NYAMWEYA

JUDGE