



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 123 OF 2020

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY TRANSPORT

AND INFRASTRUCTURE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE APPLICANT:

OKIYA OMTATAH OKOITI

RULING

The Application

1. The *ex parte* Applicant herein, Okiya Omtatah Okoiti, is aggrieved by a **Notice on Transport of Cargo** which he alleges that the Cabinet Secretary for Transport and Infrastructure, who is sued as the 1st Respondent herein, issued *ultra vires* on 22nd May 2020. According to the *ex parte* Applicant, the said notice which came into effect on 1st June 2020 was published at 14:00 hours on 22nd May 2020 on the official Facebook Page of the Ministry of Transport and Infrastructure at <https://www.facebook.com/Ministry-of-Transport-and-Infrastructure-GoK493194307419924/>.

2. The *ex parte* Applicant has consequently filed an application by way of a Chamber Summons dated 2nd June 2020, seeking the following orders:

1. **THAT** the Court be pleased to certify the application as extremely urgent and hear it *ex-parte* at the earliest opportunity.
2. **THAT** leave be granted to the *Ex Parte* Applicant to seek by way of Judicial Review, that an order of certiorari do issue, to bring to this Court for purposes of being quashed, and to be quashed the **Notice on Transport of Cargo**.
3. **THAT** leave be granted to the *ex-parte* applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the Respondents herein, and any other person howsoever acting, from implementing, giving effect to, or enforcing the **Notice on Transport of Cargo**.
4. **THAT** leave be granted to the *Ex Parte* Applicant to seek by way of Judicial Review, that an order of mandamus do issue, to compel the 1st Respondent to adhere strictly to the Constitution, national legislation and best international practice in managing the movement of all transit cargo/containers imported through the Port of Mombasa and destined for Uganda, Rwanda and South Sudan.
5. **THAT** pending the filing, hearing, and the final determination of the substantive Judicial Review Notice of Motion herein, or until further Court Orders, leave so granted do operate as a stay or suspension of the **Notice on Transport of Cargo**.

3. The grounds for the application are stated in the *ex parte* Applicant's Statutory Statement dated 2nd June 2020, and a verifying affidavit he swore on 5th June 2020. In summary, the *ex parte* Applicant contends that the impugned notice has no basis in law, and breaches express provisions of the Constitution and of national legislation. In particular, that the impugned notice has not been gazetted contrary to section 22 of the Statutory Instruments Act, No. 23 of 2013.

4. The *ex parte* Applicants annexed copies of the said *Notice on Transit Cargo* issued by the 1st Respondent, and various newspaper reports on the same in support of his case.

The Orders

5. Upon careful consideration of the Chamber Summons application dated 2nd June 2020, I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent, and that the same ought to be heard on a priority basis. This is for the reason that the impugned notice on transit cargo was to take effect from 1st June 2020, and is therefore amenable to enforcement with respect to stakeholders and other persons affected by it.

6. 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.

7. 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. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success. In the present application, the *ex parte* Applicant has provided evidence of the impugned notice made by 1st Respondent, and also averred as to the reasons why it considers the 1st Respondent's decision to be illegal, and cited the legal provisions relied upon.

8. 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.

9. 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.”

10. 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.

11. It has in this regard been held that where 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.**

12. In the present application the notice on transit cargo issued by the 1st Respondent notifies that the transportation modalities that will apply for cross border cargo with effect from 1st June 2020 will *inter alia* be as follows:

- (a) all transit cargo destined for Uganda, Rwanda and South Sudan will be transported by railway for clearance at the Inland Container Depot (ICD) at Naivasha or to Tororo/Kampala,
- (b) transit cargo or containers transported on the standard gauge railway will be armed only at the ICD at Naivasha. And
- (c) all exports not railed on metre gauge railway will be delivered to ICD at Naivasha for railage to the port of Mombasa.

13. The directives therein are therefore of a continuing nature, and amenable to stay. In addition, there is need to stay the operation of the said notice until its legality is established. 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* Applicants' Chamber Summons dated 2nd June 2020 is found to be merited. I accordingly grant the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 2nd 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 seek by way of judicial review, that an order of certiorari do issue to bring to this Court for purposes of being quashed, and to be quashed the *Notice on Transit Cargo* published by the 1st Respondent on 22nd May 2020 on the official Facebook Page of the Ministry of Transport and Infrastructure at <https://www.facebook.com/Ministry-of-Transport-and-Infrastructure-GoK-493194307419924/>.

III. The *ex parte* Applicant is granted leave to seek by way of judicial review, that an order of prohibition do issue prohibiting the Respondents herein, and any other person howsoever acting on, implementing, giving effect to, or enforcing the *Notice on Transit Cargo* published by the 1st Respondent on 22nd May 2020 on the official Facebook Page of the Ministry of Transport and Infrastructure at <https://www.facebook.com/Ministry-of-Transport-and-Infrastructure-GoK-493194307419924/>.

IV. The *ex parte* Applicant is granted leave to seek by way of judicial review, that an order of mandamus do issue to compel the 1st Respondent to adhere strictly to the Constitution, national legislation and best international practice in managing the movement of all transit cargo/containers imported through the Port of Mombasa and destined for Uganda, Rwanda and South Sudan.

V. The leave so granted herein to institute these judicial review proceedings shall operate as a stay do operate as a stay and/or suspension of the *Notice on Transit Cargo* published by the 1st Respondent on 22nd May 2020 on the official Facebook Page of the Ministry of Transport and Infrastructure at <https://www.facebook.com/Ministry-of-Transport-and-Infrastructure-GoK-493194307419924/>, pending the hearing and determination of the *ex parte* Applicants' substantive Notice of Motion or further orders by this Court.

VI. The costs of the Chamber Summons dated 2nd June 2020 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 2nd June 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

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

IX. This matter shall be mentioned on 22nd July 2020 for further directions.

X. 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* Applicants' substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XI. 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.

XII. 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.

XIII. 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.

XIV. 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.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 18th June 2020.

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 22nd July 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVII. Parties shall be at liberty to apply.

6. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF JUNE 2020

P. NYAMWEYA

JUDGE