**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**JUDICIAL REVIEW APPLICATION NO 3 OF 2020 (JR)**

**IN THE MATTER OF ARTICLES 1 (1), (2) & (3) (a), 10, 20, 21(1), 22, 23, 27, 47, 48, 50, 185, 232(1), 232(2) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 5, 15, 16, 17, 19, 20, 27, OF THE COUNTY ASSEMBLIES POWERS & PRIVILLAGES ACT NO. 6 OF 2017**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF STANDING ORDERS NO. 44, 47, 49 & 50 OF THE STANDING ORDERS OF COUNTY ASSEMBLY OF KISII**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY ASSEMBLY OF KISII**

**COMMITTEE OF POWERS & PRIVILEDGES.....1ST RESPONDENT**

**THE COUNTY ASSEMBLY SERVICE**

**BOARD KISII COUNTY ASSEMBLY.....2ND RESPONDENT**

**THE COUNTY ASSEMBLY OF KISII.....3RD RESPONDENT**

**THE HON. SPEAKER KISII COUNTY ASSEMBLY.....4TH RESPONDENT**

**THE CLERK OF COUNTY ASSEMBLY KISII.....5TH RESPONDENT**

**EXPARTE**

**KAREN NYAMOITA MAGARA.....EXPARTE APPLICANT**

**RULING**

**INTRODUCTION**

**1.** On 18th August 2020, I heard the application dated 15th August 2020 ex parte and granted the applicant leave to commence judicial review proceedings.

**2.** Subsequent to the orders, by a Notice of Motion dated 20th August 2020, filed on 21st August 2020, the applicants herein now seeks the following orders:

> *"2. The Honourable Court be pleased to review the Exparte Orders of 18th of August, 2020 and in particular No 4 and set aside the same and in place thereof leave granted in terms of prayer 2 of the Exparte Chamber Summons dated 15th August, 2020 pursuant to Order 53 Rules 1 and 2 of the Civil Procedure Rules, do not operate as s stay of the implementation of the resolution and decision made on 28th July 2020 and the communication thereof by the 5th Respondents later (sic) dated 4th August, 2020 in terms of prayer no 4 of the said Exparte Chamber Summons."*

**THE APPLICANT'S CASE**

**3.** The applicant's application is based on the grounds on the face of the application and the affidavit sworn by the applicant, Karen Nyamoita Magara. The applicant avers that she was given a mortgage and car loan by the 2nd respondent amounting to Kshs 5,000,000/- recoverable from her pay slip for a period of 5 years from 2017 and that the mortgage and car loan are yet to be recovered fully. It was her case that because of the suspension she will only be entitled to her gross pay of Kshs 144,375/- less statutory deductions and as a result she will not be able to repay the outstanding balance in respect of the mortgage and car loan. She explained that there is likelihood that her house will be repossessed by the 2nd respondent and sold to recover the outstanding loan. It was advanced that should the house and car be sold then the applicant shall be subjected to indignity. She urged the court to exercise its unfettered discretion to review the orders granted on 18th August 2020 on the ground, '*for any other sufficient reason*'.

**4.** The applicant submitted that it seeks to review the orders on grounds of '*any other sufficient reasons*'. She relied on the case of **Sader Mohamed v Choran Singh and Another**, where it was held that '*any other sufficient reasons for the purpose of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter'*. It was submitted that in the case of the **Registered Trustees of the Archdiocese of Dar es salaam v Chairman of Bunju Village Government & Others, Civil Appeal No. 47 of 2006**, C.A observed that;

> *"It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant."*

**5.** The applicant advanced that if stay of the implementation of the resolution and decision made on the 28th July 2020 by the 3rd respondent based on the impugned report of the 1st respondent dated 22nd July 2020 and the communication thereof by the 5th respondent's letter dated 4th August is not granted, the applicant will remain suspended for a period of 3 assembly calendar sitting months which is about 14 calendar months.

**6.** The applicant contend that pursuant to **Order 53 Rule (4) the of the Civil Procedure Rules**, the decision to grant stay pursuant to the leave to commence judicial review proceedings is an exercise of judicial discretion which must be exercised judiciously. It cited the cases of **R (H) v Ashworth Special Hospital Authority (2003) IWLR 127** where Dyson L.J. held as follows**;**

> **"As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.**
>
> **I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. ..It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented …"**

**7.** They also cited the case of **Taib A. Taib v The Minister of Local Government & Others Mombasa,** HCMISCA 158 OF 2006 where the court held that:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…In judicial review applications 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 and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited…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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process 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. It is however not appropriate to compel a public body to act…A stay order framed in such a way as to compel the Respondents to reinstate the applicant before**

**hearing the Respondent cannot be granted."**

**8.** The applicant advanced that it had made a good case for review and was entitled to the orders sought.

**THE RESPONDENT'S CASE**

**9.** The respondent opposed the applicant's application dated 20th August 2020. The respondent argued that the applicant's assertions that the respondent might repossess the car and house are innuendos and presumptuous in nature and are not the subject of the application. They submitted that even if the said actions were to occur, the issues will be adjudicated by a court of proper jurisdiction as the matters cannot be handled in a judicial review application. It was their case that the applicant was not prejudiced by the decision complained of as she still enjoys her full salary and other allowances save for sitting allowances. It was submitted that the review jurisdiction should not be open to a party who could have otherwise appealed or to a party who simply wants to persuade the court to change its mind. They relied in the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers Civil Appeal No 142 of 2012** where the court considered "sufficient reason" at great length and observed as follows;

> **"Mulla** *in the Code of Civil Procedure[11] (writing on Order* **47** *Rule* **1** *of the Civil Procedure Code of India), (the equivalent of our Order* **45** *Rule* **1***), states that 'the expression sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate." This definition only covers misconception of facts of law but not negligence or conduct of an advocate.*
>
> **Mulla[12]** *also states that* **'the expression***' any other sufficient reason' used in Order* **47** *Rule* **1** *means a reason sufficiently analogous to those specified in the rule."*

**10.** The respondent submitted that the word "analogous" is defined in the oxford dictionary as (to/with something) similar in some way to another thing or situation and therefore able to be compared with it. The respondent argued that 'sufficient reason' should bear a form of semblance of the other grounds for grant of review. The respondent contends that in **R (H) v Ashworth Special Hospital Authority (supra)** it was held that stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of stay is to preserve the *status quo* pending the final determination of the claim for judicial review.

**11.** They also cited the case of **R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) eKLR** where the court held that judicial review proceedings are public law proceedings for vindication of private rights and for this reason public interest is a relevant consideration in granting of stay orders. The respondent urged that courts should be cautious in granting leave to operate as stay where such an order is likely to interfere with internal business and competence of an arm of government in the delivery of service in the public good.

**DETERMINATION**

**12.** Having considered the parties' pleadings and their rival submissions the only issue for consideration is whether the applicant has demonstrated that she is entitled to the review of the court order of 18th August 2020 and whether this court's decision declining to grant the applicant leave to operate as stay should be varied or set aside.

**13.** The starting point for this application is **Order 53 Rule 1(4)** of the **Civil Procedure Rules**, which gives this court the power to **grant leave to operate as stay. Order 53 Rule 1(4)** of the Civil Procedure Rules, provide as follows;

> **"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."**

**14.** The granting of leave to operate as an order **for stay is discretionary and should be exercised judiciously.** ***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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process 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*** **(see** T**aib A. Taib vs. The Minister for Local Government (supra)).**

**15. In judicial review proceedings the standard** for the grant of an order of stay is much higher than that of obtaining leave. This was discussed i**n Republic v National Transport & Safety Authority & 10 others [2014] eKLR** where the court held as follow;

> *"In judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case. The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise the Court will be reluctant to suspend the operation of a law."*

**16.** The principles that guide courts before the granting of a stay order were discussed by Odunga J in James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR where he held as follows;

> *"42. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been*

*crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay may be granted. See* **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

*43. In this case, the period of suspension of the applicant is still running. In other words the act complained of is not complete and has not come to an end. …….*

*……..……...However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist*.**"**

**17.** It is on the basis of the principles enunciated in the above cases that this court declined to make orders on stay.

**18.** I now turn to whether the appellant have established that he is entitled to an order for review. The guiding law for review is provided under **section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules**. Order **45** Rule **1** of the Civil Procedure Rules, lists the grounds for review by providing as follows;

*"**45** Rule* **1 (1)** *Any person considering himself aggrieved-*

*(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."*

**19.** This court has jurisdiction to review its earlier issued orders in light of Order 45 Rule 1. In **Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR** the court held as follows;

*19. The wording of this sub-rule clearly indicates that the court has jurisdiction to review, vary, set aside or discharge stay and that the powers of court are discretionary. Referring to the review, varying or setting aside ex-parte orders by the court the matter was discussed in* ***Civil Appeal No.77/2003 in Court of Appeal Judicial Commission of Inquiry to the Goldenberg Affair & Others vs. Job Kilach.*** *The Court of Appeal referring to the case of Ex-parte* **Harbage** *and the words of* **MAY L. J.** *quoted a passage on page 14 thus:-*

*"The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court……nevertheless in his judgment in that case* **Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said:**

***"****I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision."*

**20.** The applicant's application for review is that it has satisfied the ground of '*any other sufficient reason*'. Having looked at the applicant's application and the grounds in support thereof and I am constrained to find that the reasons offered by the applicant does not amount to '*sufficient reason'* within the meaning of **Order 45 Rule 1 of the Civil Procedure Rules**.

**21.** I agree with the finding of Mativo J in **Republic v Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR** where he consideration of the ground *'any other sufficient reason'* and observed as follows;

*30. A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Signh and Another*[19] *it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.* **Mulla** *in the Code of Civil Procedure*[20] *(writing on Order* **47** *Rule* **1** *of the Civil Procedure Code of India), (the equivalent of our Order* **45** *Rule* **1***), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.*[21]

*31. I also find useful guidance in Tokesi Mambili and others vs Simion Litsanga*[22] *where they held as follows:-*

*i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and*

*important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)*

*ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

*32. I am not persuaded that the reasons offered by the applicant amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order* **45** *Rule* **1.** *My finding is fortified by the holding in the case of Evan Bwire vs Andrew Nginda*[23] *where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh."*

**22.** In the chamber summons dated 15th August 2020 contemporaneously filed with the supporting affidavit made no mention of the applicant's mortgage or car loans. The appellant merely stated that she would lose her allowances. Although the applicant's application is on the ground '*any other sufficient reason*', she has introduced new evidence being a copy of her pay slip. The new evidence thus is analogous to the ground: discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made.

**23.** The pay slip produced by the applicant and the fact the applicant has a mortgage and car loan qualifies as new evidence. The new evidence was not tendered before the court *at the time the order of 18th August 2020 was made. The applicant has not given any reason why the new evidence was not tendered before the court. T*he Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that;

*"25. In* **Francis Origo & another v. Jacob Kumali Mungala** *(C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review.……..*

*29. …….. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limps nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order."*

**24.** Having considered the application in its entirety, I find that the applicant has failed to prove any ground or establish any reason which falls within the limited jurisdiction of this court to entertain an application for review. The application is dismissed. Costs to abide the outcome of the substantive motion.

**25.** In the interest of justice I hereby direct that the substantive motion be heard expeditiously on a priority basis.

**Dated, Signed** and **Delivered** at **KISII** this **30th** day of **September, 2020**

**A. K. NDUNG'U**

**JUDGE**