



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. MISC E041 OF 2020**

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

**BETWEEN**

ZHANG AIXIAN.....APPLICANT

**VERSUS**

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA.....4<sup>TH</sup> RESPONDENT

**AND**

JIANG BAOQUI.....1<sup>ST</sup> INTERESTED PARTY

SILZHA LIMITED.....2<sup>ND</sup> INTERESTED PARTY

REGISTRAR OF COMPANIES.....3<sup>RD</sup> INTERESTED PARTY

EDWARD ATE NANOK.....4<sup>TH</sup> INTERESTED PARTY

**RULING**

1. The Applicant herein has filed an application by way of a Chamber Summons dated 17<sup>th</sup> September 2020, seeking the following orders:

1. This application be certified as urgent and service thereof be dispensed with in the first instance.
2. Leave be granted to the Applicant to apply for an order of Certiorari to remove into the Court and quash the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to charge and prosecute the Applicant in Kibera Chief Magistrate's Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian)
3. Leave be granted to the Applicant to apply for an order of Prohibition to prohibit further proceedings in Kibera Chief Magistrates Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian) and further prohibiting the 1<sup>st</sup> and 3<sup>rd</sup> Respondents from instituting any future charges against the Applicant in respect to the subject.
4. The leave so granted do operate as a stay of further proceedings in Kibera Chief Magistrates Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian).

2. The application is supported by an undated statement and a verifying affidavit sworn on 17<sup>th</sup> September 2020 by the Applicant. The main ground raised by the Applicant is that the subject matter in Kibera Chief Magistrates Court Police Case No 145/93/200 and **Criminal No. 896 of 2020 (Republic vs Zhang Aixian)** is a purely civil and commercial dispute between the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested

Party, in which the Applicant and 1<sup>st</sup> Interested Party are directors.

3. I have considered the application dated 17<sup>th</sup> September 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. This for reason that criminal proceedings have been commenced against the Applicant.

4. On the orders sought by the Applicants for leave to commence judicial review proceedings, the applicable law 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.

5. 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.

6. In the present application, the Applicant has provided evidence of the incorporation and business dealings of the 2<sup>nd</sup> Interested Party, and a copy of the documents lodged in Kibera Chief Magistrates Court Police Case No 145/93/200 and **Criminal No. 896 of 2020 (Republic vs Zhang Aixian)**. The *ex parte* Applicant has also averred to the grounds and reasons why it considers the impugned criminal proceedings to be unlawful, *ultra vires*, unreasonable and unfounded. 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.

7. 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.”**

8. 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 including **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**.

9. In summary, the applicable principles are that 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.

10. In the present application, the Applicant has stated that he was arrested on 4<sup>th</sup> September 2020 and arraigned before the 4<sup>th</sup> Respondent on 7<sup>th</sup> September 2020 where he was charged with the four offences. The criminal proceedings are commenced and are of a continuing nature as no hearings are yet to take. Place. In the circumstances the said proceedings are amenable to stay.

### **The Orders**

11. In light of the foregoing observations and findings, the Applicant's Chamber Summons dated 17<sup>th</sup> September 2020 is found to be merited only to the extent of the following orders:

**i. The Applicant's Chamber Summons application dated 17<sup>th</sup> September 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* and on a priority basis.**

**ii. The Applicant is granted leave to apply for an order of Certiorari to remove into this Court and quash the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to charge and prosecute the Applicant in Kibera Chief Magistrate's Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian)**

**iii. The *ex parte* Applicant is granted leave to apply to apply for an order of Prohibition to prohibit further proceedings in Kibera Chief Magistrates Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian).**

**iv. The leave so granted herein shall operate as a stay of further proceedings in Kibera Chief Magistrates Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian) pending the hearing and determination of the substantive application or until further orders.**

**v. The costs of the Chamber Summons dated 17<sup>th</sup> September 2020 shall be in the cause.**

vi. The Applicant shall file and serve the Respondents and Interested Parties with the substantive Notice of Motion, and shall also serve the Respondents and Interested Parties with the Chamber Summons dated 17<sup>th</sup> September 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 Respondents and Interested Parties 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 16<sup>th</sup> November 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 Applicants' 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 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

xiii. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

xiv. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 16<sup>th</sup> November 2020.

xv. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicant by electronic mail by close of business on Monday, 21<sup>st</sup> September 2020.

xvi. Parties shall be at liberty to apply.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18<sup>th</sup> DAY OF SEPTEMBER 2020

P. NYAMWEYA

JUDGE