



**Lemeiguran v Building Bridges Initiative Taskforce & 4 others; Odinga
(Interested Party) (Judicial Review Application E1157 of 2020)
[2020] KEHC 510 (KLR) (Judicial Review) (22 December 2020) (Ruling)**

*Republic v Building Bridges Initiative Taskforce, Independent Electoral and Boundaries Commission (IEBC)
& 4 others; Rangal Lemeiguran: Ex-part Applicant; Raila Amolo Odinga (Interested Party) [2020] eKLR*

Neutral citation: [2020] KEHC 510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E1157 OF 2020
P NYAMWEYA, J
DECEMBER 22, 2020
IN THE MATTER OF AN APPLICATION FOR LEAVE
FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

BETWEEN

RANGAL LEMEIGURAN APPLICANT

AND

BUILDING BRIDGES INITIATIVE TASKFORCE 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT

NATIONAL ASSEMBLY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

AND

HON RAILA AMOLO ODINGA INTERESTED PARTY

Whether leave from the court to apply for Judicial Review orders could operate as stay.

The applicant filed an application seeking leave in order to apply for the judicial review orders of mandamus to compel the 1st respondent and the 2nd respondent to allocate the Ilchamus Community a Constituency in the ongoing political process of amending the Constitution. Further, the applicant sought orders of prohibition preventing the respondents from considering, debating, or approving the draft Constitution of Kenya



(Amendment) Bill 2020 until an amendment was made in accordance with the law and order issued by the court in a prior case. The court granted leave to the applicant as sought.

Reported by Flora Weru

Judicial Review – *judicial review orders – leave sought to file a substantive application for judicial review orders – threshold to be met at the stage of seeking leave - where the applicant sought leave to apply for judicial review orders of mandamus and prohibition - whether the applicant had made out an arguable case and was entitled to leave from the court to commence judicial review proceedings and whether such leave, if granted, could operate as a stay – Civil Procedure Rules (cap 21) order 53 rule 1.*

Brief facts

The applicant filed an application seeking leave to apply for judicial review orders of *mandamus* to compel the 1st respondent and the 2nd respondent to implement the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004, particularly under Order No. 5 and allocate the *Ilchamus* Community a constituency in the ongoing political process of amending the Constitution of Kenya 2010.

Furthermore the applicant sought leave to apply for a judicial review order of prohibition to prevent the 2nd Respondent, 3rd Respondent, and 4th Respondents from in any way considering, debating, or otherwise approving the draft Constitution of Kenya (Amendment) Bill 2020 until an amendment was made to section 74 and the 2nd Schedule of the Bill to add a constituency for the Ilchamus Community in compliance with the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004.

Issues

- i. What was the threshold to be met at the stage of seeking leave in order to apply for judicial review orders of *mandamus* and prohibition?
- ii. Whether leave from court could operate as stay.

Held

1. The applicable law on leave to commence judicial review proceedings was Order 53 rule 1 of the Civil Procedure Rules, which provided that no application for judicial review orders should be made unless leave of the court was sought and granted. It was also trite that in an application for leave, such as the instant application, the court ought not to delve deeply into the arguments of the parties but should make a cursory perusal of the evidence before the court and make the decision as to whether an applicant's case was sufficiently meritorious to justify leave.
2. The applicant had met the threshold of an arguable case and was therefore entitled to the leave sought to commence judicial review proceedings against the respondent.
3. In the question of whether the leave of the court could operate as a stay, the applicable principle was that the grant of such leave was discretionary, but the court should exercise such discretion judiciously. The main factor was whether or not the decision or action sought to be stayed had been fully implemented
4. Where the action or decision was yet to be implemented, a stay order could normally be granted in such circumstances. Where the action or decision was implemented, then the court needed to consider the completeness or continuing nature of such implementation. If it was of a continuing nature, then it was still possible to suspend the implementation.
5. In that regard, while the consideration of section 74 and the 2nd Schedule of the Constitution of Kenya (Amendment) Bill 2020 required certain actions of a continuing nature to be taken by some of the respondents, the said Bill was also the subject of various other prior judicial proceedings, and there was thus the risk of the instant court granting conflicting orders. For that reason, the said provisions were not amenable to a stay.

Application allowed



Orders

- i. *The applicant's Chamber Summons application dated December 15, 2020 was certified as urgent, was admitted for hearing ex parte.*
- ii. *The applicant was granted leave to apply for an order of mandamus to compel the 1st respondent to implement the order issued by the High Court in Nairobi High Court Miscellaneous Application No. 305 of 2004, particularly under Order No, 5 and allocated the Ilchamus Community a constituency in the ongoing political process of amending the Constitution of Kenya, 2010.*
- iii. *The applicant was granted leave to apply for an order of mandamus to compel 2nd respondent to implement the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004, especially Order No. 5 and allocated the Ilchamus Community a constituency in the exercise of boundaries reviewed that would be undertaken under its mandate.*
- iv. *The applicant was granted leave to apply for an order of prohibition to prevent the 2nd respondent, 3rd respondent and 4th respondent from in any way considering, debating or otherwise approving the draft Constitution of Kenya (Amendment) Bill 2020 until an amendment was made to section 74 and the 2nd Schedule of the Bill to add a constituency for the Ilchamus Community in compliance with the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004.*
- v. *The prayer that the leave granted did operate as stay of section 74 and the 2nd Schedule of the Constitution of Kenya (Amendment) Bill 2020 until the substantive judicial review was heard and determined was declined.*
- vi. *The costs of the applicant's Chamber Summons application dated December 15, 2020 shall be in the cause.*
- vii. *The applicant shall file and serve the respondents and interested party with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated December 15, 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.*
- viii. *Upon being served with the said pleadings and documents, the respondents and interested party shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.*
- ix. *The hearing of the substantive Notice of Motion shall be held on January 28, 2021.*
- 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, the Court shall hear and determine the applicant's 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 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.*
- 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 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 with copies to asunachristine51@gmail.com.*
- xiv. *The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on January 28, 2021.*
- 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, December 24, 2020.*
- xvi. *Parties shall be at liberty to apply.*

Citations

Cases



Kenya

1. *Kagwana, Jared Benson v Kenya Agricultural Research Institute* Environment & Land Case 215 of 2013; [2020] KEELC 2732 (KLR) - (Mentioned)
2. *Republic v County Council of Kwale & another; Kondo & 57 others (Ex parte)* Miscellaneous Civil Application 384 of 1996; [1998] KEHC 2 (KLR) - (Mentioned)
3. *Taib A Taib v Minister for Local Government & 3 others* Miscellaneous Civil Application 158 of 2006; [2006] KEHC 3166 (KLR) - (Mentioned)

United Kingdom

R (H) v Ashworth Special Hospital Authority [2003] 1 WLR 127 - (Mentioned)

Statutes

Kenya

1. Civil Procedure Rules (cap 21 Sub Leg) order 53 rule 1(4) - (Interpreted)
2. Constitution of Kenya article 89(5)- (Interpreted)

Advocates

None mentioned

RULING

1. Rangal Lemeiguran, the applicant herein, has filed a chamber summons application dated December 15, 2020, in which he is seeking the following orders:
 1. That this application be certified urgent and heard ex-parte:
 2. That leave be granted to the applicant to apply for judicial review for an order of mandamus to compel the 1st respondent to implement the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004, particularly under order No, 5 and allocate the Ilchamus Community a Constituency in the ongoing political process of amending the [Constitution of Kenya 2010](#).
 3. That leave be granted to the applicant to apply for judicial review for an order of mandamus to compel 2nd respondent to implement the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004, especially order No, 5 and allocate the Ilchamus Community a Constituency in the exercise of boundaries review that will be undertaken under its mandate.
 4. That leave be granted to the Applicant to apply for judicial review for an order of prohibition to prevent the 2nd respondent, 3rd respondent and 4th respondents from in any way considering, debating or otherwise approving the draft Constitution of Kenya (Amendment) Bill 2020 until an amendment is made to section 74 and the 2nd Schedule of the Bill to add a constituency for the Ilchamus Community in compliance with the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004.
 5. That leave granted herein does operate as stay of section 74 and the Second Schedule of the Constitution of Kenya (Amendment) Bill 2020 until this substantive Judicial Review is heard and determined.
 6. That the honourable court be pleased to give further orders and directions as it may deem fit and just to grant.



7. That the costs of this application be provided for.
2. The said application is supported by a statement dated December 15, 2020 and an affidavit sworn by the applicant on the same date. The grounds for the application in summary are that the High Court issued an order in Nairobi High Court Misc. Application No. 305 of 2004, requiring that the interests of the Ilchamus Community be considered in the next exercise on boundaries review by the IEBC or any other process and directed that the then Electoral Commission of Kenya (now the Independent Electoral and Boundaries Commission(IEBC)) at its next exercise of Boundary Review to take into account all the requirements set out in section 42 (now article 89 of the [Constitution of Kenya 2010](#)), and in particular the need to ensure adequate representation of sparsely populated rural areas, population trends and community of interest including those of minorities especially the Ilchamus of Baringo Central Constituency.
3. However, that the Building Bridges Initiative Taskforce has released a draft bill, Constitution of Kenya (Amendment) Bill 2020 which makes several constitutional amendments including the creation of extra 70 constituencies in a manner that is not in keeping with article 89 (5) of the [Constitution of Kenya 2010](#) as read together with a court order issued in Nairobi High Court Misc. Application No. 305 of 2004 regarding the creation of new constituencies.
4. The applicant annexed copies of the judgment delivered in Nairobi High Court Misc. Application No. 305 of 2004 on December 18, 2006, and order issued therein on July 17, 2007.
5. The applicable law on leave to commence judicial review proceedings 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.
6. 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.
7. In the present application, the applicant has provided evidence of the judgment and orders issued in Nairobi High Court Misc. Application No. 305 of 2004, and averred to the grounds why it considers the respondent's actions and omissions to be unlawful. To this extent I find that the 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.
8. 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.”
9. 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.

10. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in *Jared Benson Kangwana vs. Attorney General*, Nairobi HCCC No. 446 of 1995 that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in *Taib A. Taib vs. The Minister for Local Government & Others Mombasa* HCMISCA. No. 158 of 2006 .
11. This factor was also discussed in *R (H). vs Ashworth Special Hospital Authority (supra)* 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.”
12. It therefore follows 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.
13. In this regard, while the consideration of section 74 and the Second Schedule of the Constitution of Kenya (Amendment) Bill 2020 requires certain actions of a continuing nature to be taken by some of the Respondents, the said Bill is also the subject of various other prior judicial proceedings, and there is thus the risk of this court granting conflicting orders. For this reason, the said provisions are not amenable to stay.

The Orders

14. In light of the foregoing observations and findings, the ex parte applicants’ chamber summons dated December 15, 2020 is found to be merited to the extent of the following orders:
 - i. The applicant’s chamber summons application dated December 15, 2020 be and is hereby certified as urgent, and is hereby admitted for hearing ex parte.
 - ii. The applicant is granted leave to apply for an order of mandamus to compel the 1st respondent to implement the order issued by the High Court in Nairobi High Court Miscellaneous Application No. 305 of 2004, particularly under Order No, 5 and allocate the Ilchamus Community a Constituency in the ongoing political process of amending the *Constitution of Kenya 2010*.
 - iii. The applicant is granted leave to apply for an order of mandamus to compel 2nd respondent to implement the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004, especially Order No, 5 and allocate the Ilchamus Community a Constituency in the exercise of boundaries review that will be undertaken under its mandate.



- iv. The applicant is granted leave to apply for an order of prohibition to prevent the 2nd respondent, 3rd respondent and 4th respondents from in any way considering, debating or otherwise approving the draft Constitution of Kenya (Amendment) Bill 2020 until an amendment is made to section 74 and the 2nd Schedule of the Bill to add a constituency for the Ilchamus Community in compliance with the order issued by the High Court in Nairobi Miscellaneous Application No. 305 of 2004.
- v. The prayer that the leave granted herein does operate as stay of section 74 and the Second Schedule of the Constitution of Kenya (Amendment) Bill 2020 until the substantive Judicial Review is heard and determined is declined.
- vi. The costs of the applicant's chamber summons application dated December 15, 2020 shall be in the cause.
- vii. The applicant shall file and serve the respondents and interested party with (i) the substantive notice of motion, (ii) the chamber summons dated December 15, 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within fourteen (14) days from today's date.
- viii. Upon being served with the said pleadings and documents, the respondents and interested party shall be required to file their responses to the substantive notice of motion within fourteen (14) days from the date of service.
- ix. The hearing of the substantive notice of motion shall be held on January 28, 2021.
- 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 applicant's 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 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.
- 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 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 with copies to asunachristine51@gmail.com.
- xiv. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on January 28, 2021.
- 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, December 24, 2020.
- xvi. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF DECEMBER 2020



P. NYAMWEYA
JUDGE

