**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NUMBER 4 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**BETWEEN**

**SIMON MWANGI.....EX PARTE APPLICANT**

**VERSUS**

**THE CHIEF OFFICER FINANCE**

**ENOCH K. NGUTHU.....1ST RESPONDENT**

**THE CHIEF OFFICER HEALTH AND SANITATION**

**RICHARD MUTHOKA.....2ND RESPONDENT**

**COUNTY GOVERNMENT OF KITUI.. .....3RD RESPONDENT**

**RULING**

1. By a Chamber Summons dated 6th August, 2018, the ex parte applicant herein move this Court seeking the following orders:

> **1 That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.**
>
> **2 That this application be heard during this period of the Court's Vacation.**
>
> **3 That this Honourable Court be pleased to grant leave to the the Ex parte Applicant to institute judicial review proceedings in the nature of an Order of *Certiorari* directed to the 1st, 2nd and 3rd Respondents to bring to this Honourable Court for the purpose of quashing the decision by them made on or about 3rd August 2018 of close down and cancel the applicants business permit/licences.**
>
> **4 That this Honourable Court be pleased to grant leave to the Ex parte applicant to institute judicial review proceedings in the nature of an Order of *mandamus* be issued to the Respondent to immediately unlock and remove all seals, padlocks and any other gadgets placed at the applicants premises for purposes of impounding the applicants property or in the ALTERNATIVE.**
>
> **5 That this Honourable court be pleased to grant leave to the Ex parte applicant to institute judicial review proceedings in the nature of a conservatory order be issued authorizing the applicant to remove forthwith all seals, padlocks and any other gadgets placed in the applicant's premises by the Respondents for purposes of seizing and or impounding the applicant's products.**
>
> **6 That the grant of leave does operate as a sty on the Respondents decision to close down the applicant's premises and cancellation of the business permit/licence issued on the 3rd August, 2018 pending the full hearing and determination of this**

**application or the further Orders of the court.**

2. It was the ex parte applicant's case that he trades in the names and style of Mount Kenya Wholesalers Limited. He however averred that he on 8th January, 2018 applied for and was issued with a licence by the 1st Respondent herein after satisfying all the requirements under the ***Kitui County Finance Act***.

3. The applicant's case was however that on 2nd August, 2018, the 2nd Respondent while purporting to carry out an inspection of his premises concluded that the same did not meet the minimum health requirements stipulated in section 131(2) of the ***Public Health Act*** and the applicant was informed that the said premises had been closed down.

4. It was the ex parte applicant's case that the said decision was *inter alia* arrived at in contravention of his right to fair administrative action pursuant to Article 47 of the Constitution.

5. After considering the application ex parte, this Court granted leave to the ex parte applicant to commence judicial review proceedings proper but directed that the issue whether the grant of such leave would operate as a stay of the decision in question be canvassed *inter partes*.

6. When the matter came up for *inter partes* hearing the Respondents through their learned counsel, **Mr Makau** and **Mr Malonza** raised a preliminary objection whose gist was that the ex parte applicant herein had no locus to commence these proceedings since it is clear that the licence in question was issued to **Mount Kenya Wholesalers Limited**, a separate company. It was further contended that the proceedings were commenced without evidence that a resolution of the said company had been made authorising the commencing of these proceedings. This limb was hinged on the provisions of Order 4 rule 1(4) of the ***Civil Procedure Rules***.

7. In response, **Mr M N Ndegwa** who appeared with **Mr C M Ndegwa** submitted that under the current constitutional regime a person aggrieved by a decision affecting the rights of another person can institute proceedings where the person whose rights are affected is unable to do so. In this case it was contended that the company was unable to institute these proceedings as its premises had been locked by the Respondents hence it could not make a resolution to commence legal proceedings.

8. I have considered the submissions made on behalf of the parties herein. This being a ruling on preliminary objection, the starting point are the guidelines set out in **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**. In that case **Law, JA** was of the following view:

> **"A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

9. As for **Newbold, P**:

> **"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".**

10. In **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it was held that:

> **"In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."** [Emphasis added].

11. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

> **"The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."**

12. In this case one of the grounds relied upon by the Respondents is that the proceedings do not comply with Order 4 rule 1(4) of the ***Civil Procedure Rules***. That rules provides as follows:

> ***Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.***

13. It is clear that the rule does not require that the authorisation which is to be under seal be filed with the pleadings. What is required is that the officer swearing the verifying affidavit should be authorised to do so by the company and that the said authority be under seal. As to whether there in actual fact exist such authorisation is a factual matter which unless admitted cannot be a proper ground for raising a valid preliminary objection. In any case, these proceedings are not brought by a corporation but by an individual. Further, it is now clear that the provisions of the ***Civil Procedure Act*** as well as the Rules made thereunder do not ordinarily apply to judicial review proceedings since the ***Civil Procedure Act*** is expressed to be "*An Act of Parliament to make provision for procedure in civil courts*". In **Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995** and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply since it is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the ***Civil Procedure Rules*** being the procedural law. See also **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003.**

14. In the premises the preliminary objection based on Order 4 rule 1(4) of the ***Civil Procedure Rules*** cannot be sustained.

15. As regards locus, in **Omondi vs. National Bank of Kenya Ltd & Others** (supra) it was held that:

> **"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections."**

16. Therefore the issue of locus can be properly taken as a preliminary objection.

17. In this case leave having been granted the first question for determination is whether this Court may enter into an investigation whose effect would be to set aside the said leave. That this Court has jurisdiction to set aside leave and/or stay granted in judicial review proceedings is not in doubt. The Court of Appeal made this clear in **R vs. Communications Commission of Kenya & 2 Others ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199** where it held:

> **"Leave should be granted if, on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside."**

See also **Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184.**

18. However as was expressed in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR**:

> **"Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

19. Similar sentiments were expressed by the same Court in **Aga Khan Education Service Kenya vs. Republic & Others Civil Appeal Number 257 of 2003** where the court pointed out that:

> **"We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."**

20. Therefore the power to set aside the leave ought only to be exercised sparingly and in exceptional cases for example where there was non-disclosure of material facts or where the circumstances are such that the leave ought not to have been granted in the first place. However, that jurisdiction is always open to the Court and may be exercised either on the Court's own motion after affording an opportunity to the parties to be heard or on an application by a party to the proceedings.

21. Where, therefore it is shown that the applicant did not disclose relevant material at the ex parte stage as a result of which the Court granted undeserved orders, the Court in the exercise of its inherent powers may well be entitled to set aside the leave granted as the conduct of the applicant may well amount to an abuse of the Court process. The position where there is an abuse of the court process was restated in **Mitchell and Others vs- Director of Public Prosecutions and Another (1987) LRC (const) 128** where it was held that:

> **" ….in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties .It can be used properly ,it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes BY extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties"**

22. It is trite that the grant of leave to commence judicial review proceeding is not a mere formality and leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. Whereas in determining the limb for stay the Court ordinarily does not revisit the leave already granted, where it comes out clearly that leave ought not to have been granted, it would be irresponsible for the Court to allow proceedings which are clearly frivolous to continue. The rationale for this was appreciated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321,** where **Nyamu, J** (as he then was) held that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

23. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived".**

24. Similarly in in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** the Court of Appeal expressed itself as follows:

> **"The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"**

25. In **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, the Court of Appeal had this about time as a judicial resource:

> **"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice. We have no doubt that what is before us is a matter that could have been determined summarily and the matter finalized... We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:**
>
> **"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**
>
> **At page 493 of the same case *Lord Templeman* delivered himself thus:**
>
> **"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate**

**expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**

**...In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-**

**"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."**

**.....In our view he, knowingly and dishonestly, used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not...To re-inforce the point, abuse of process has been defined in *WIKIPEDIA*, the free encyclopedia:**

**"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."**

**In *BEINOSI v WIYLEY 1973 SA 721 [SCA]* at page 734F-G a South African case heard by the Appeal Court of South Africa, *Mohomad CJ*, set out the applicable legal principle as follows:-**

**"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."**

**Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656*, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.**

**In the Nigerian Case of *KARIBU-WHYTIE J Sc* in *SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)* the concept of abuse of judicial process was defined:-**

***"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice…"***

26. Therefore where it is shown that the person coming to Court is a busybody the Court would not permit such a person to hold a public authority to ransom. It is however true that the issue of locus has been expanded under our current constitutional dispensation. Article 22(1) and (2) of the Constitution provides that:

***(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its***

***members.***

27. Article 258 of the Constitution which provides as follows:

***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

28. Therefore where there is an allegation that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or that the Constitution has been contravened, or is threatened with contravention a person may institute legal proceedings for redress in his own name, on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members. From the proceedings in this matter it is clear that the entity aggrieved in Mount Kenya Wholesalers Limited, a separate legal entity from the ex parte applicant herein. Article 260 of the Constitution defines the word "person" as including:

***a company, association or other body of persons whether incorporated or unincorporated.***

29. Therefore since Mount Kenya Wholesalers Limited is, as evidenced by the certificate of incorporation exhibited a person, it has the *locus standi* to institute proceedings of the nature brought in these proceedings. Where the person aggrieved can bring proceedings on its behalf, it is not permissible for another person to bring the same in its behalf. In this case it is contended that the said company cannot act in its own name because its premises have been locked by the Respondents. With due respect, the mere fact that a corporation's premises are inaccessible by its directors does not bar the directors from instituting legal proceedings in the name of the corporation.

30. In this case it is clear that the ex parte applicant herein does not qualify as a person aggrieved by the decision of the Respondents in order to entitle him to bring these proceedings. **James, LJ** in **Re Sidebotham [1880] 14 Ch. 448** held:

**[A person aggrieved means someone who has] "suffered grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something."**

31. **Lord Esher, MR** in **Re Read Bowen & Co. exp Official Receiver [1887] 19 QBD 174** held:

**"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not of course include a mere busybody who is interfering in things which do not concern him, but they do include a person who an order has been made which prejudicially affect his interests."**

32. Whereas I appreciate that in certain instances where it is shown that a corporate entity is unable to commence proceedings contemplated under Articles 22(1) and (2) and 258 of the Constitution any person including a Director thereof may well institute such proceedings, the Constitution itself sets the threshold for the same and that is that the Director is acting on behalf of the Company, which Company cannot act in its own name. In my view there is no requirement that the Company premises be opened before a Company can institute legal proceedings. Actions of a corporation even where initially not sanctioned by Company resolution can always be ratified. In the circumstances of this case it is my view the correct entity which should have brought these proceedings should have been Mount Kenya Wholesalers Limited and not the ex parte applicant herein, its Director since there was neither a factual nor legal barrier that hindered the said company from coming to Court to agitate its rights.

33. In the pleadings filed in Court, the ex parte applicant herein presented himself as the aggrieved person. There was no averment at all that the Company could not act in its own name. The ex parte applicant for example stated that it was in fact him who applied for the licence and it was him who was issued with the licence. It is now clear that the licence holder was in fact the company. I therefore find that the ex parte applicant herein obtained leave by distorting the material facts which if disclosed this Court might have determined whether or not leave ought to have been granted.

34. In the premises the leave granted herein is hereby set aside and without leave these proceedings are incompetent and are hereby struck out with half the costs to the Respondents.

35. It is so ordered.

**Dated at Machakos this 9th day of August, 2018.**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Ndegwa M N and Mr Ndegwa C M for the applicant***

***Mr Malonza and Mr Makau for the Respondents***

***CA Geoffrey***