REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 146 OF 2017

IN THE MATTER OF ARTICLE 23(3) (F), 40 AND 43(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF ILLEGAL EVICTION AND DEMOLITION OF RESIDENTIAL HOUSES, INSTITUTIONS AND BUSINESS PREMISES IN MUKURU KWA NJENGA NAIROBI

ALI GOLLE……1ST APPLICANT

ELIJAH MAINA……2ND APPLICANT

(*Suing on their own behalf and on behalf of and representing All persons interested in and being residents in the affected Mukuru Kwa Njenga area)*

VERSUS

CABINET SECRETARY MINISTRY OF TRANSPORT

& INFRASTRUCTURE….....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS,

HOUSING &URBAN DEVELOPMENT…….....2ND RESPONDENT

THE DIRECTOR GENERAL KENYA URBAN

ROADS AUTHORITY……3RD RESPONDENT

COUNTY GOVERNMENT OF NAIROBI……...4TH RESPONDENT

THE HON. ATTORNEY GENERAL……5th RESPONDENT

RULING ON LEAVE AND STAY

1. This matter was heard this afternoon interpartes. The exparte applicants in this case are **Ali Golle** and **Elijah Maina** suing on behalf of themselves and on behalf of and representing all persons interested in and being residents of and affected **Mukuru Kwa Njenga Area.**

2. They seek for leave to institute Judicial Review proceedings seeking for orders of certiorari to remove into this court and quash the decision of the 1st, 3rd and 4th respondents to construct a road passing through the applicant's premises and consequently to evict and or displaced the applicants from part of all that area known as Mukuru Kwa Njenga Nairobi to pave way for the construction of the said road;

3. They also seek for leave to apply for Prohibition directed at the 1st 3rd and 4th respondents to prohibit the respondents from demolishing the applicant's residential houses, business premises and/or institutions situate within Mukuru Kwa Njenga Nairobi to pave way for the intended construction;

4. They further seek that the grant of leave do operate as stay of the said decision; and costs to be in the cause.

5. The application is supported by the verifying affidavit of the applicant Ali Golle and statutory statement and annextures.

6. The exparte applicant's case is as contained in the depositions of 27th March 2017 by Ali Golle, to the effect that they are residents of Mukuru Kwa Njenga and that they have lived there and carried out their business for over 30 years. Some of them were born there and they pay for licences to the City County of Nairobi. That the area is inhabited by schools, mosques, colleges, police post and all other social amenities and that they were surprised when the respondents without any consultations, in April 2016, the 3rd respondent Kenya Urban Roads Authority (KURA) engaged a consultant who is Ilovi Consulting Engineers Ltd and who has erected beacons with a view to extending the road passing through Mukuru Kwa Njenga. That no meeting of residents was convened to seek consensus from residents and no notice was given to the residents when the decision to expand the road was made.

7. Further, that on 23rd January 2017 a Baraza was held at the area wherein a resolution was passed authorizing respondents to survey the road yet no posters were send to residents to invite them for the meeting. That if the road is constructed without their involvement yet an expansion was done in 2015 thereby allowing residents to occupy the spaces, then they will be evicted from the area which will occasion them irreparable loss.

8. That there is an alternative road available which can be used in place of the proposed expansion of Catherine Ndereba Road.

9. The 1st, 2nd, 3rd and 5th respondents who are the Cabinet Secretary Ministry of Transport and Infrastructure, Ministry of Lands Housing and Urban Development, and Director General Kenya Urban Roads Authority and Attorney General respectively oppose the application through a replying affidavit sworn and filed on 12th April 2017 by Engineer Doreen Kirima deposing that the application is premature because no decision to expand the road has been annexed and that there is only a feasibility study. There is admission nonetheless that the 3rd respondent has embarked on decongesting urban trunk arterial roads by reinstating roads which have hitherto existed only on paper or the cadastral map but missing on the ground through land grabbing, encroachment, and uncontrolled growth and spread of informal settlements in urban areas, and are now denoted as missing links; and that this is in accordance with the statutory mandate of Kenya Urban Roads Authority

10. That Kenya Urban Roads Authority procured the consultancy of Ms Ilovi Consulting Engineers Ltd to undertake the feasibility study, preliminary and detailed Engineering Design, Environmental and Social Impact Study and preparation of associated tender documentation hence there is no irregularity.

11. That barazas have been organized to get stakeholder views on the intended work hence no law or rights of residents have been infringed to warrant court intervention since appropriate Resettlement Plan of Action will be laid out for implementation hence these proceedings are misconceived and they misapprehend the mandate of Kenya Urban Roads Authority.

12. The 4th respondent Nairobi City County did not file any replying affidavit but nonetheless never opposed the application for leave. Mr Mutahi held brief for Mr Macharia for the Nairobi City County Government, and intimated that he had instructions not to oppose the application for leave.

13. Mr Esuchi counsel for the exparte applicants submitted on behalf of his clients while reiterating the grounds, statutory statement and the verifying affidavit whereas Miss Maina counsel for the 1st, 2nd, 3rd, and 5th respondents submitted, relying on her clients' replying affidavit in opposition to the chamber summons.

14. Mr Esuchi relied on the case of **NGM V PPARB & Others [2010]** on the principles for grant of leave and emphasized that his clients have a prima facie case for consideration whereas Miss Maina contended that no prima facie case had been established as the application is premature since only 3 days' notice was given prior to filing of the application; that there is no decision and that as no construction had begun so no stay is necessary since the respondents are only carrying out feasibility study hence no prejudice can be suffered by a feasibility study.

15. In a rejoinder, Mr Esuchi pointed out that the minutes annexed to the respondents' replying affidavit shows that a decision has been made and beacons erected in the houses hence the apprehension is real and that seven days' notice was given prior to filing of the application as shown by the annextures.

DETERMINATION

16. I have considered the exparte applicant's application, the accompanying documents; the replying affidavits and the submissions by both parties' advocates on record.

17. The only issue for determination is whether the application for leave is merited and if so, whether stay should issue.

18. In considering whether or not to grant leave, the court warns itself not to delve into merits of the intended application. However, the applicant must satisfy the court that he has an arguable prima facie case as was set out in **NGM V PPARB & Others**(supra) wherein the court citing many other decisions held inter alia that leave should generally be given where the case has realistic prospects of success and that the application is not made later than 6 months from the date of the impugned decision; or is not made with undue delay.

19. In this case, the respondents contend that there is no annexed decision. However, they concede in their affidavit that feasibility study is being carried out to expand the road in line with the mandate of Kenya Urban Roads Authority.

20. On the other hand, the exparte applicants are apprehensive that since beacons have been installed, eviction is imminent which will cause their suffering which cannot be compensated. The respondents have not stated at this stage that there is an alternative remedy for the applicants.

21. It is therefore the view of this court that the court that can intervene in matters where the applicant claims that their rights are threatened to be infringed to prevent such infringement.

22. The applicants contest the list of attendees of the Barazas and maintain that they should be consulted and a decision reached on the expansion of the road. Public participation is a constitutional principle espoused in Article 10 of the Constitution. Where it is alleged that the applicants' rights are threatened to be violated, then the court need not at this stage delve into the merits as that would prejudice the outcome of the main motion.

23. In **Matiba V Attorney General Nairobi HCC Miscellaneous Application 790/1993**. **Republic V the Permanent Secretary Ministry of Planning and National Development Exparte Kaimenyi [2006] 1 EA 353.**

24. Waki J in **Republic V County Council of Kwale & Another Exparte Kondo & 57 Others Mombasa HCC Miscellaneous Application 384/95** stated and I agree that:

> ***" The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any application for Judicial Review which are either frivolous or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing is 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. Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full interpartes hearing of the substantive application for Judicial Review. It is an exercise of the court's discretion but as always it has to be exercised judicially."***

25. In **Mirugi Kariuki V Attorney General Civil Appeal No. 70/91** [**1990- 1994] EA 156** the court stated:

> ***" The law relating to Judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised in justiciable, thatis to say if it is a matter on which the court can adjudicate, he exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…….the controlling factor in determining whether the exercise of prerogative powers is subject to judicial review is not its source but its subject matter.It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some ofthe person's legal rights or interests have been affected.This makes the exercise of such discretion justiciable and therefore subject to Judicial Review.In the instant appeal it is of consequence that the Attorney General has absolute discretion under Section 11(1) of the Act if in its exercise of the appellant's legal rights or interests were affected.The applicant's complaint in the High Court was that this was so and for that reason he sought leave of court to have it investigated. It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to shoe, when he applies for leave, a primafacie case, on reasonable grounds for believing that there has been a failure of public duty, the court would bein error if itgranted leave.The curb represented by the need for the applicant to show, whenhe seeks leave to apply, that he has a case, is an essential protection against abuse of legal process .It enables the court to prevent abuse by busy bodies, cranks and other mischief makers…….In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a primafacie case for the grant of those orders clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under Section11(1) of the Act was brought into question.Without a rebuttal to those allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders***

sought."

26. Again, in **CA 175/2000 Republic V Communications Commission of Kenya & 2 Others Exparte East African Television Network Ltd (2000) KLR 82** the Court of Appeal held that leave to apply for Judicial Review Orders 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.

27. Further in **Re Bivac International SA (Bureau Vevitas) [2005] 2 EA 43.** The High Court stated that:

> ***"Applications for leave to apply for orders of Judicial Review are normally exparte and such an application does restrict the court to threshold issues namely, whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas Judicial Review remedies are at the end of the day discretionary, that discretion is a judicial discretion and for this reason a court has to explain how the discretion if any was exercised so that all the parties are aware of the factors which led to the exercise of the court's discretion. There should be an arguable case which without delving into details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the Judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of Judicial Review and perhaps give an applicant his day in court instead of denying him……like the biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality , irrationality, impropriety of procedure (the three …….) and has become the most powerful enforce of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of Judicial Review can only be compared to the never ending categories of negligence after celebrated case of Donohue Vs Stephenson in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Meggany J in the case of John Vs Rees [1970] ch 345 Page 402 that in the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."***

28. From the above authoritative decisions, which I find good law, it clearly emerges that it is not a mere formality that leave to apply for judicial review remedies shall be granted. There are several factors which a court has to take into account. On the other hand, the burden of proof lies on the applicant to demonstrate to the satisfaction of the court that he had a prima facie arguable case for leave to be granted.

29. In the instant case, the applicants claim that they are and have been residents of Mukuru kwa Njenga area for over thirty years and their families eke a living, children go to school and churches and mosques re constructed in the area which also has a police post . That they have not been consulted over the intended demolition of their houses and business premises prior to the intended road expansion passing through the area.

30. Without going into the depths of the case, Iam persuaded that on the material placed before me, a prima facie arguable case has been established for in-depth investigation by the court at the substantive stage. Accordingly, I grant leave to the applicants to institute Judicial Review proceedings as sought in the chamber summons. **The main motion to be filed and served together with skeletal submissions within 10 days from to date.**

31. On the prayer for stay, it must be noted that the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and like any other judicial discretion must be exercised judicially and not capriciously or whimsically.

32. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallized 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 that stay may be granted. This is what was espoused in the case of **George Philip M.Wekulo vs. The Law Society of Kenya & another Kakamega HCMISCA No. 29 of 2005.**

33. It therefore follows that even where the leave is granted, as was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995,** in considering whether the said leave ought to operate as a stay of proceedings, the Court has to be careful in what it states lest it touch on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

34. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review proceedings nugatory or an academic exercise that the Court would stay the said proceedings, the strength or otherwise of the applicant's case notwithstanding.

35. In **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 Maraga, J** (as he then was) opined that:

> ***"…as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…I also want to state that in judicial review applications like this one 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. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction" 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. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) 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. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:***
>
> ***"THAT the grant of leave does operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."***
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> ***Can I grant this prayer in view of the scope and purpose of the stay order as stated above" I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having***

considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined." [Emphasis added].

36. **In Re: Meridian Medical Centre,** Miscellaneous Application No. 363 of 2013 it was stated:

> ***"....it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."***

37. As was held in **Taib A. Taib vs. The Minister for Local Government & 3 Others** (supra) 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. In other words, stay is meant to prohibit the continuation of the decision making process where the process is still ongoing. Where however the decision has been made, the implementation thereof can still be stayed where the same is yet to be implemented.

38. In this case, and on the material placed before the court, I am satisfied that if the expansion of the road is undertaken prior to hearing and determination of the motion, the applicants shall be rendered pious explorers in the judicial process since their buildings and habitation have not been declared illegal structures by any court of law and it is further alleged that neither have they been served with notices to vacate the area for purposes of expansion of the Road. However, this stay should not be construed to mean stay of feasibility study which should be undertaken as commenced. What this court has prohibited at this stage is any road construction works that will involve eviction of the applicants or demolition of their structures without engaging the applicants as stakeholders until further orders of this court.

39. Accordingly, leave as granted shall operate as stay of construction of the road passing through Mukuru Kwa Njenga Area and or demolition or eviction of any residents of Mukuru Kwa Njenga Area until further orders of this court. This matter shall be fast tracked for hearing and therefore the same shall be mentioned on 30th May 2017 to confirm compliance and for directions on the hearing. Costs in the cause.

40. Orders accordingly

Dated, signed and delivered in open court at 2.30 pm at Nairobi this 16th day of May, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Eshuchi for the exparte applicants

Miss Maina for the 1st, 2nd, 3rd and 5th Respondents

Mr Mutahi for the 4th Respondent

CA: George