REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 617 OF 2017

REPUBLIC….....……APPLICANT

VERSUS

FAZUL MAHAMED.....……....1ST RESPONDENT

NGOS COORDINATION BOARD.……2ND RESPONDENT

MS. IRENE KHAN….....1ST INTERESTED PARTY

PROF. MAKAU MUTUA.....……2ND INTERESTED PARTY

OKIYA OMTATAH OKOITI.....…EXPARTE APPLICANT

RULING ON LEAVE AND STAY

1. The applicant Mr Okiya Omtatah Okoiti seeks from this court by his notice of motion dated 9th October, 2017, **leave of court to** commence judicial review proceedings against the respondents Fazul Mohamed and the NGOs Coordination Board for:

> *a. Prohibition to issue prohibiting the respondents or any other person acting through them or at their behest or direction, in purported enforcement of the 1st respondent's decision as contained in its letter RE: NGOB/5/30A/8/Vol. XV dated 5th October, 2017 from acting upon, or enforcing or complying with the said letter;*
>
> *b. Certiorari to issue to bring into this court for purposes of quashing and to be quashed, the 1st respondent's letter RE: NGOB/5/30A/8/Vol. XV dated 5th October, 2017, vesting powers in the 1st respondent outside the scope of the Constitutional and statutory mandate of the 2nd respondent;*
>
> *c. Pending the filing and the final determination of the substantive motion or until further court orders, leave so granted do operate as a stay of the enforcement, and any further enforcement of the 1st respondent's decision as contained in its letter RE: NGOB/5/30A/8/Vol. XV dated 5th October, 2017, vesting powers in the 1st respondent outside the scope of the Constitutional and statutory mandate of the 2nd respondent;*

d. Such other or further orders as the court may deem necessary to grant to give effect to the foregoing orders and or favour the cause of justice

e. Costs be in the cause.

2. The Notice of motion which is expressly brought under the provisions of Order 53 Rules 1, 2, 3&4 of the Civil procedure Rules, sections 8&9 of the Laws Reform Act and all other enabling provisions of the law is premised on the grounds as contained in the statutory statement and verifying affidavit of the applicant Mr Okiya Omtatah Okoiti sworn on 9th October, 2017 and on the annexed documents which include the impugned letter communicating the respondents' decision.

3.. The exparte applicant's case is that the 1st and 2nd interested parties herein are who are Mrs Irene Khan and International Law Organization (IDLO) being an official of the 2nd interested party and an international inter-Governmental organization respectively to whom the impugned letter was addressed.

4. That the 2nd interested party IDLO has been active in Kenya for close to 10 years covering areas of climate change, and that Kenya became a member in 2009 upon which the organization started providing technical assistance to the then Committee of Experts on Constitutional Review.

5. That on 5th October 2017 the respondents wrote the impugned letter which is annexed to the applicant's affidavit claiming that the government of Kenya had waived the privileges and immunities of the 2nd interested party IDLO.

6. The application was argued in open court by Mr Omtatah briefly in the absence of the respondents who despite being served with the application and hearing notice, neither appeared nor filed any response.

7. Mr Omtatah submitted that because the respondents have no mandate to supervise international organizations, and as the IDLO operates under a treaty executed by government, the letter of 5th October, 2017 is a nullity and amounts to arbitrary abuse of power. It was submitted that the interested parties have not been given a hearing before the decision was made, which decision is said to be highly prejudicial to the public interest to ban the IDLO as the organization assists the country and more so the mainstream government and judiciary functions.

8. It was submitted that the 1st respondent had ran amok throwing around directives without jurisdiction and without giving parties affected by his decisions an opportunity to be heard.

9. Further, that the the NGO Coordination Board shall not suffer any prejudice if the orders sought are granted

10. On the prayer that leave if granted do operate as stay of implementation of the decision contained in the impugned letter, it was submitted that unless stay is granted, the motion shall be rendered nugatory.

11. I have considered the foregoing.

12. The rationale for the requirement that leave be sought and obtained is to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. However, 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. Leave stage is therefore 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 paralyzed for months because of pending court action which might turn out to be unmeritorious. See **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993, Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**

13. As was held 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**:

> ***"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… 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 inter partes 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."***

14. A similar holding can be found in the case of **Meixner & Another vs. Attorney General [2005] 2 KLR 189.**

15. The yardstick for the grant of leave was however set by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> ***"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 is justiciable, that is to say if it is a matter on which the Court can adjudicate, the 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 power is subject to judicial review is not its source but its subject matter… It is neither the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the 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 no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise 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 the 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 show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. 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… 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 prima facie 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 section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."***

16. 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**, the Court of Appeal was of the view that 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.

17. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

"Application for leave to apply for orders of judicial review are normally ex parte 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 the 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 "I's") and has become the most powerful enforcer 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 the celebrated case of Donoghue 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 Megarry, J in the case of John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

18. What emerges clearly from the foregoing is that the grant of leave to commence judicial review proceeding is neither a mere formality nor a practice of magic. It is not to be granted as a matter of course. Delay is one of the factors which a Court often considers in deciding whether or not to grant leave. The applicant for leave is under an obligation to show to the court that he or she has a prima facie arguable case for grant of leave.

19. Therefore whereas an applicant 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.

20. Applying the above principles espoused in law to this case, the exparte applicant claims that the impugned letter is illegal and unconstitutional for the respondents to purport to ground the operations of the interested parties without giving them an opportunity to be heard on the allegations. Further, that the respondents have no power to demand to register an intergovernmental organization which is governed by treaties signed with the government of Kenya.

21. Without delving into the depths of the dispute, it is my humble view that the above allegations raise very weighty issues legal and constitutional issues for consideration on merit during the substantive hearing, if leave is granted. Accordingly, I find that the application as filed is not frivolous or vexatious. It was also filed expeditiously within four days of the impugned decision. An allegation of illegality or unconstitutionality is *prima facie* an arguable allegation or issue which a court of law should investigate into in the exercise of its supervisory powers vested by Article 165 (6) of the Constitution.

22. Accordingly, I grant the orders of leave as sought in the notice of motion dated 9th October, 2017 and order that the substantive motion shall be filed and served on all the affected parties within 7 days of this ruling.

23. On the prayer that the leave granted do operate as stay of implementation of the directives contained in the impugned letter, the applicant claims that in this case unless stay is granted, the motion if successful will be rendered nugatory and that in any event no prejudice will be suffered by the

respondents if stay is granted.

24. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant a direction that the grant of leave do operate as a stay of the proceedings or implementation of the impugned decision until the determination of the substantive application, or until the judge orders otherwise" is stipulated in Order 53 Rule 1(4) of the ***Civil Procedure Rules*** which provides:

> " ***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.***

25. In **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005** it was held that where, however, the decision sought to be quashed has been fully implemented leave ought not to operate as a stay. This position arises from the fact that once 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.

26. However it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in an application for leave to apply for judicial review and 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. Therefore where the outcome of the judicial review might be contrary to the conclusion reached by the body or person whose decision is challenged, stay of proceedings should be granted as it might lead to an awkward situation where a decision which ought not to have been made has been concluded.

27. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view 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."***

28. In the instant case, the exparte applicant asserts that the directive by the respondents has crippled the operations of the interested parties in that all their bank accounts have been frozen on account that the funds received for charitable objectives have been deployed to nefarious operations neither within its objectives nor towards charitable interventions. Further, that following the termination of the host agreement, the organization now fell within charitable organizations and therefore within the jurisdiction of or under the supervision of the second respondent Board.

29. The respondents then went ahead to demand for immediate application by the 2nd interested party for a registration certificate to be issued by the 2nd respondent and in the meantime, suspended all the operations of the IDLO in Kenya. It also asked Central Bank of Kenya to preserve any funds held under IDLO Bank accounts until further communication from the 1st respondent.

30. Effectively, the above decision taken by the 1st respondent would ground all the operations of the 2nd interested party functionally and financially. There are employees of such organizations who enjoy employment rights guaranteed under the Constitution and therefore I have no doubt that unless the implementation of the decision is stayed and or temporarily prohibited, the exparte applicant if successful will be rendered a pious explorer in the justice system,

31. For that reason, I am satisfied that a stay is necessary. I grant the prayer for stay of implementation of the decision of 5th October, 2017 made by the respondents against the interested parties until further orders of this court.

32. Costs shall be in the cause.

33. This matter shall be mentioned on 6th November, 2017 to confirm the filing of the main motion and for further directions.

34. Dated, signed and delivered in open court at Nairobi this 18th day of October, 2017

R. E.ABURILI

JUDGE