REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 27 OF 2016

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS BY EX PARTE MARTIN WASIKE OROMAT KCG 806A, KCD 593Q, ISAAC BURGEI OROMATS KCA 407Y, KBW 462B, KCF 802Q, CHRIS LETTING OROMATS KCE 600H, KCF 126A, IRENE OTIENO ONGATA LINE KCE 238B, MICHAEL WEGESA UMOINNER KCD 342J, AGNES WANGOI GICHUI ONGATA LINE KCB 038P, ERIC BOBBY MAINA ONGATALINE KC 303T, JOSEPG KAMANDE DAKIKA SACCO KCC 865S.

AND

IN THE MATTER OF THE NATIONAL TRANSPORT AND SAFETY AUTHORITY

AND

IN THE MATTER OF THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY

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

BETWEEN

REPUBLIC …….....….APPLICANT

VERSUS

THE NATIONAL TRANSPORT

AND SAFETY AUTHORITY…….1ST RESPONDENT

NATIONAL ENVIRONMENT AUTHORITY.....……2ND RESPONDENT

RULING

Introduction

1. By an Amended Chamber Summons dated 25th January, 2016, the applicant (sic) leave to apply for an order of certiorari to quash the purported implementation and/or enforcement of the directive issued by the 1st Respondent stopping the ex parte applicants and several other public service vehicles from conducting their transport services. Also sought is leave to apply for prohibition prohibiting the Respondents from stopping the operation of public service vehicles from conducting their business. Together with leave the applicants also sought that the grant of

leave do operate as stay of any directive by the 1st Respondent stopping the applicants from operating Public Service Vehicles.

2. According to the Statutory Statement filed herein, the applicant is described as a female adult of sound mind and the supporting affidavit was sworn by Irene Otieno who also described herself as the ex parte applicant herein. Nowhere in the said affidavit was it contended that the deponent was swearing the said affidavit on behalf of anyone else. Accordingly, there is no affidavit sworn by the other persons mentioned in the title of the application who are not even named as the applicants in the Statement. It follows that there is no basis upon which this Court can grant leave to persons who have not sworn affidavit disclosing the grounds upon which they would be entitled to the orders they seek.
3. It follows that this application will be restricted to the orders as they apply to **Irene Otieno** only (hereinafter referred to as "the Applicant").
4. According to the applicant, the 1st Respondent through a print and other media on 22nd January, 2016 warned that all public service vehicles with graffiti, horns, running lights and multi-coloured paintings would not be allowed to conduct business unless the same were removed. And the said warning was to take effect on 25th January, 2016. That waring according to the applicant was duly implemented by arresting any non-compliant vehicles.
5. To the applicant the said decision was irrational and unreasonable and led to immense losses by the Applicant. As a result the same decision led to chaos in the transport sector. To the applicant the said graffiti, horns, exhaust pipes and running lights do not cause chaos and no complaints had been raised thereon. It was contended that that there are other measures which can be taken to bring sanity to the industry without necessarily taking such measures.
6. It was therefore contended that the Respondents overstretched their mandate and abused their power and also violated he applicant's legitimate expectations.
7. It was submitted by **Mr Omwansa**, learned counsel for the applicant that it was the 1st Respondent who licensed the applicant's vehicles to be on the road hence it was absurd to contend that the same ought not to be on the road. To the applicant, she was suffering immense losses as a result of the grounding of her vehicles and that the measures that the 1st Respondent wanted to be taken would subject her to sustain huge losses.
8. On behalf of the Respondents, it was contended by **Mr Agwara** that no prima facie case was disclosed by the applicant since there is no evidence that the applicant operates PSV Vehicles, is licensed and is a member of any SACCO. Further there is no evidence that the applicant owns any vehicle. To grant the orders sought, it was contended would amount to speculation.
9. According o leaned counsel, the Court should not grant the orders sought since the Respondents are carrying out their statutory mandate as provided under the law.

Determination

10. I have considered the issues raised in this application as well as the submissions made.
11. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed 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. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321, Nyamu,J** (as he then was) held 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 and 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.**
12. **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… 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".

13. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.
14. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated 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 not 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."

15. 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.

16.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….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."

17.It is therefore clear that the grant of leave to commence judicial review proceedings is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he/she has a *prima facie* arguable case for grant of leave. Whereas he or she is not required at that stage to go into the depth of the application, he/she has to show that he/she has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. As was held in **Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128** based on ***Judicial Review Handbook* (3 Ed) By Michael Fordham:**

"A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a "confess and avoid"). The duty of "full and frank" disclosure harks back to the time when permission for judicial review was *ex parte.*"

13.In this case, there is no evidence at all on the basis of which this Court can find that the applicant has any motor vehicles on the road whose operation the have been adversely affected. When asked about this issue, **Mr Omwansa** informed the Court that such evidence would be availed at a later stage. I wish to state at this stage that there is no place for a supporting affidavit in an application for leave to apply for judicial review and the only affidavit provided for is the affidavit verifying the facts which ought to be detailed and contain all the facts relied upon by the Applicant. This position was clarified 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) was of the view which view I associate myself with that:

"There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the

affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."

18. An application for leave therefore ought to be self-contained. It ought to be supported by an affidavit disclosing all the facts to be relied upon in the main motion and ought to exhibit all the relevant documents except those which the applicant satisfies the Court he was not in a position to exhibit. To appear before the Court with scanty material with the aim of filing further documents would not do. Judicial review applications are serious applicants since they have the result of interfering with decisions of public bodies and ought not to be treated casually. The Court must be satisfied that it is not granting orders to assist persons with frivolous applications or busy-bodies.
19. In this case without evidence showing that the applicant has any interest in the transport industry, this Court is not satisfied that by granting the orders sought it would not be assisting busy-bodies especially when the applicant not only seeks orders favourable to her but also seeks orders favourable to "other public service vehicles".
20. The applicant seeks leave orders to quash implementation and/or enforcement of directives. It is in fact conceded that there actually exist Regulations. Those Regulations are ***The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014*** (the Regulations) and as amended by ***The National Transport and Safety Authority (Operation of Public Service Vehicles) (Amendment No. 2) Regulations, 2014*** they provide that every operator of a public service vehicle must ensure that all innovative decorations are not offensive and they are not painted sprayed, drawn on or affixed to any window, the front and back windscreens, lights, indicators or chevrons of the vehicle and that the said innovative decorations do not have reflective properties. Further they are required to ensure that no additional exterior and interior lighting is affixed other than those affixed by the manufacturer of the vehicle. In his decision **Lenaola, J** in **Modern Coach Express Limited vs. Attorney General & 3 Others [2012] eKLR**, pronounced himself as follows:

"Safety is a prime consideration for any public vehicle owner and both the Minister and other organs of State have a general obligation to ensure the safety of passengers and if tinting of windows compromises that security, then promulgation of Law to restrict it cannot either be ultra vires Section 119 of the Act or any other Law. It is a matter of common notoriety that with terrorist threats abounding, public service vehicles are an attractive target and Rule 3 aforesaid was enacted to ensure that Law enforcers can see through public service vehicle windows and the minor inconvenience complained by the Petitioner cannot override the Law and the wider interests of public safety and security. Further, it is my understanding that the Traffic Act was enacted to ensure the general safety of the populace and that is why for example, regarding how windows should be designed and constructed, Rule 30 of the Traffic Rules provide that the design of windows should be such that the driver has a full view of the road and traffic ahead; that his view is not impeded and material with reflective properties should be avoided – see *David Gichuki Kariuki vs Commissioner of Police (2008) eKLR*. The reason for the enactment is obvious as is the reason for denying public service motor-vehicle owners the comfort of tinted windows on their motor-vehicles."

21. In my view there is a policy issue involved in the said Regulations and that policy issue can only be challenged by the challenge to the Regulations themselves. In this application, however, there is no leave sought to apply for the orders quashing the Regulations themselves. As has been held time and again, where what is ought to be quashed is simply the implementation of a decision,

which decision itself is not sought to be quashed judicial review order of certiorari ought not to be granted. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law."

22. Without quashing the Regulations in issue there would be no basis or granting the order of prohibition sought. See **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR**.
23. Apart from that Regulation 14 of the Regulations provides that a person aggrieved by the decision of the National Transport Authority taken under the said Regulations my within fourteen days of the receipt of the decision appeal to the Appeals Board. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

24. Subsection (3) thereof provides:

The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

25.. Subsection (4) of the said section however provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

26. With respect alternative procedures this Court is aware of the decision in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** where it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

27. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. There is no reason why the applicant is unable to resort to the provisions of Regulation 14 of the said Regulations since what is sought to be challenged are not the Regulations but the manner of their implementation.
28. With respect to stay, Order 53 Rule 1(4) of the ***Civil Procedure Rules*** 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. [Emphasis mine].

29. In my view "proceedings in question" refer to the proceedings in respect of which leave is sought.
30. In this case, the applicant is challenging the implementation and/or enforcement of the directive issued by the 1st Respondent stopping the applicant and several other public service vehicles from conducting their transport services. The prohibition is also sought along similar lines. However the stay sought is directed towards the directive stopping the applicant from operating Public Service Vehicles. That is clearly different from the terms of the leave. To grant the orders along those terms would grant the applicant a bank cheque to operate her vehicles notwithstanding any contravention of the law and those are orders which this Court cannot grant.
31. Further, it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. 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. In this case apart from the evidence from the bar there is no evidence in support of the allegation of the great difficulties the applicant faces in implementing the said Regulations.
32. Having considered the application herein I am not satisfied based on the scant evidence presented that the applicant/s have established a *prima facie* case warranting the grant of leave.
33. Accordingly, I decline to grant the leave and without leave the application is stillborn.
34. In the premises these proceedings are struck out and as the Motion proper is yet to be filed and considering the fact that the Respondents seem to have not immediately implemented the impugned Regulations, there will be no order as to costs.
35. Orders accordingly.

Dated at Nairobi this 29th day of January, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omwansa for the applicant

Mr Obok for Prof. Muma for the 1st Respondent

Cc Patricia