REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 305 OF 2016

IN THE MATTER OF AN APPLICATION BY TAJ MALL LIMITED FOR LEAVE TO APPLY FOR ORDER OF PROHIBITION

AND

IN THE MATTER OF THE FIRST CLASS MAGISTRATE'S COURT AT CITY HALL NAIROBI IN CASE NO. 109 OF 2015

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT CHAPTER 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 48 & 50 OF THE CONSTITUTION OF KENYA

REPUBLIc……..……..……..APPLICANT

AND

NAIROBI CITY COUNTY.....1ST RESPONDENT

THE FIRST CLASS MAGISTRATE'S COURT

AT CITY HALL NAIROBI.....2ND RESPONDENT

EX PARTE: TAJ MALL LIMITED

RULING

Introduction

1. By a Chamber Summons dated 15th July, 2015, the applicant herein, **Taj Mall Limited**, seeks the

following orders:

1. **That leave be granted to institute judicial review proceedings seeking;-**

   a. An order of Prohibition prohibiting the respondents from prosecuting and from proceeding any further or taking any further steps in any whatsoever in Case No. 109 of 2015 filed before the 2nd respondent by the 1st Respondent against one Hema Patel Kashyap.

   b. That the costs of this application be provided for.

2. **That the grant of leave herein do operate as a stay of any proceedings or the taking of any further step whatsoever in Case No. 109 of 2015 filed before the 2nd respondent by the 1st respondent against one Hema Patel Kashyap pending the hearing and determination of the judicial review application.**

Applicant's Case

2. The application was supported by an affidavit sworn by **Douglas Aswani**, who described himself as the General Manager of the Applicant herein.
3. According to the deponent, on 26th March, 2015, one **Hema Patel Kashyap** was charged by the 1st respondent before the 2nd respondent with the offence of advertising TAJ MALL on LR No. 209/13938 using a sky sign without lawful authority which case is still pending hearing and determination in the First Class Magistrate's Court at City Court, Nairobi, the 2nd Respondent herein.
4. It was deposed that the said accused, **Hema Patel Kashyap**, has allegedly been sued either as a Director, Shareholder or Employee of Taj Mall Limited which is a limited liability company having its own legal existence with the right to sue and be sued in its own capacity. Despite that the said accused in the said Case No. 109 of 2015 has been sued in her own capacity as an individual for the alleged wrongs done by the company hence the said proceedings are malicious and an abuse of due process.

Determination

5. I have considered the issues raised in this application.
6. 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.**
7. **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".

8. 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.
9. 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:

"If he [the Applicant] 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…"

10. 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."

11. *This position was appreciated by **Majanja, J** in Judicial Review Misc. Civil Appl. No. 139 of 2014 between **Vania Investments Pool Limited and Capital Markets Authority & Others** in which the learned Judge expressed himself as follows:*

"I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR, "In my view, the reference to an "arguable case" in W'Njuguna's Case is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view." The duty of the court to consider the facts is not lessened by the mere conclusion that the case if frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose."

12. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding 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 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.
13. Section 7(1) of the ***Fair Administrative Action Act, 2015*** provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Therefore a person ought to *prima facie* show his grievance with the question sought to be challenged. In this case what the applicant seeks to challenge are proceedings in Case No. 109 of 2015 filed before the 2nd respondent by the 1st respondent against one **Hema Patel Kashyap**. There is no indication that the accused in those proceedings is aggrieved by the decision to charge him as he is not the applicant in these proceedings. **My Mungai**, learned counsel for the applicant submitted from the bar that the said accused person went to complain to the applicant herein who decided to challenge the said proceedings. In my view the applicant before me has no business "holding brief' for the said accused person as it were in these judicial review proceedings. The applicant before me, **Taj Mall Limited**, simply has no interest in a matter in which it is not the accused.
14. I however wish to disabuse the applicant of the notion that its directors cannot be charged in matters affecting the corporation. This position is clearly recognised under our ***Penal Code*** in section 23 which provides as follows:

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

15. It is therefore clear that in conducting the investigations it is upon the Director of Public Prosecution and the police based on the evidence and material presented before them to decide whether the material justifies the charging of all the Directors of a Company or only some of them. As to whether such evidence exist is another matter altogether.
16. Apart from the foregoing, it is clear that the proceedings sought to be quashed were commenced in the year 2015. More than six months have lapsed since they were commenced. In ***Vania Investments Pool Limited and Capital Markets Authority & Others*** (supra) the learned Judge addressed the issue of delay in the following terms:

"The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and

Fulham (Respondents) and Other Exparte Burkett &

Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,

"[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O'Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision…But decisions as to whether a petition should be

dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

17. In this case there is no explanation at all in the affidavit as to why these proceedings were not commenced as soon as the criminal proceedings were commenced instead of waiting for the 11th hour, just a day to the commencement of the trial, to bring these proceedings. Whereas, **Mr Mungai** attempted to proffer an explanation in his address from the bar, such an explanation not being on affidavit, has very little weight. Such an action or inaction on the part of an applicant does not augur well for the favourable exercise of the Court's discretion to the applicant as it may well be construed to have been calculated to stall the trial.
18. Having considered the material placed before me in this matter it is my view and I hereby find that this application is frivolous, misconceived and incompetent and is incapable of being cured by the mere filing of an affidavit by the accused as **Mr Mungai** belatedly sought.
19. In the premises the Chamber Summons dated 15th July, 2016 is struck out with no order as to costs.

Dated at Nairobi this 20th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mungai for the applicant

Cc Mwangi