REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 449 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE ARBITRATION ACT, NO. 11 OF 2009

BETWEEN

SYLVANA MPABWANAYO NTARYAMIRA......................APPLICANT

VERSUS

ALLEN WAIYAKI GICHUHI, ARBITRATOR..........1ST RESPONDENT

AND

RICHARD WAWERU NJOROGE......................INTERESTED PARTY

RULING

1. By a Chamber Summons dated 14th December, 2015, the applicant herein, **Sylvana Mpabwanayo Ntaryamira**, seeks leave to apply for orders of judicial review prohibiting the Respondent herein, **Allen Waiyaki Gichuhi**, an advocate from proceedings with arbitral proceedings between the applicant and the interested party; an order of certiorari to quash the said arbitral proceedings; and for the grant of leave to operate as a stay of the said proceedings. The applicant also seeks that the costs of the summons be in the Motion.

2. According to the applicant, she entered into an agreement for sale of her properly being LR No. 27/158 to the interested party and executed an agreement for the purpose. The terms of the said agreement included clauses that in event of a dispute arising therefrom, the same would be referred to arbitration by an arbitrator agreed upon by the parties failing which the said Arbitrator was to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators of Kenya on application by either party.

3. In this case however, it was contended by the applicant that he appointment of the Respondent by the

said Chairman was done without involving the applicant. Accordingly, the applicant objected to the appointment of the respondent. However, despite the said objection, the Respondent decided to proceed with the said arbitral proceedings.

4. According to the applicant, the respondent intimated that he was not opposing the application.

Interested Party's Case

5. The application was however opposed by the interested party herein who relied on the following grounds of objection:

1. **That the Respondent is not a public body hence judicial review proceedings are not applicable.**
2. **That the court lacks jurisdiction to hear the application on the grounds that there exist statutory dispute resolution mechanisms under the Arbitration Act to which the applicant and the interested party mutually subjected themselves.**
3. **The applicant reveals a dispute more appropriately to be handled under Arbitration law and not administrative law.**
4. **The applicant therefore relies on frivolous, vexatious and hopeless grounds to seek prerogative order against the Arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya Branch.**
5. **The application seeks to waste precious judicial time on a long inquiry on a private matter for no or little return.**
6. **The application is a delaying tactic such that if leave is granted on this misguided attempt to institute judicial review there would be a serious monetary loss which the applicant will not be easily able to remedy by paying awarded damages and costs.**
7. **On the material available to the Court, without going into the matter in depth, the Applicant has failed to show that there is an arguable case for granting leave to seek the reliefs claimed.**
8. **The Applicant does not reveal any grounds to move this Honourable Court to certify that this matter is fit for further substantive hearing under Judicial Review.**

6. I have considered the issues raised in this application.

7. 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.**

8. **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".

9. 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.

10. 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…"

11. 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."

12. 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."

13. 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. The grant of leave being an exercise of discretion the conduct of the applicant must also be considered.

14. In this case, the respondent contends that this Court has no jurisdiction to deal with this matter as the dispute is a private law matter as opposed to public or administrative matter. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. *It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it*. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

15. The applicant has however contended that in the current Constitutional dispensation, there is no longer any distinction between private and public law or administrative law disputes hence it matters not that the respondent is a private individual as opposed to a public authority.

16. The parameters of judicial review were restated by the Court of Appeal in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194** where it was held that:

> **"The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of *certiorari* might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation."**

17. Ordinarily matters relating to contractual issues are not elevated to found a cause of action in judicial review jurisprudence. As was held by **Visram, JA** in **Maseno University & 2 Others vs. Prof.Ochong' Okello [2012] eKLR** in which the learned Judge held:

"…orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose

from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties. The trial Judge appears to have been moved by the fact that the respondent is "a *senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children*". This may well be so. Nonetheless, that fact does not make the contractual relationship between the respondent and the applicant which is governed by terms and conditions agreed by the parties a matter of public duty or matter governed by public law. Moreover, if one were to accept the reasoning of the trial Judge that the treatment of the respondent becomes a matter of public law because of the public expectation that the University would act lawfully and fairly towards the respondent, then it is not the respondent but the public who would have a right of action for orders of judicial review based on breach of their expectation. …[T]he breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court."

18. The same position was adopted in **Republic vs. City Council of Nairobi ex parte Meshack Mbuthia Macharia & 2 Others [2012] eKLR** where it was held that judicial review cannot provide a remedy for an alleged breach of contract.

19. The applicant however contends that Article 165(6) of the Constitution the comprehensively catalogues the jurisdiction of the High Court hence entrenching judicial review jurisdiction in the Constitution. The said provisions provides that:

> ***The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.***

20. However the Article that specifically deals with judicial review of administrative action is, as the applicant rightly appreciated, Article 47 of the Constitution. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015***. Section 2 thereof defines "administrative action" to include:

> ***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

21. The same section defines 'administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

> ***(1) This Act applies to all state and non-state agencies, including any person***
>
> ***(a) exercising administrative authority;***
>
> ***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***
>
> ***(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates***

22. That an arbitrator is a non-state agency whose action**,** omission or decision affects the legal rights or interests of the parties before him to whom the arbitral proceedings relate cannot be doubted. It is

therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the ***Fair Administrative Action Act, 2015***, judicial review orders may where appropriate issue against the decisions of an arbitrator.

23. The next issue however is whether the Court, despite the existence of alternative remedies can still invoke its judicial review jurisdiction.

24. However, section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

> ***(2) 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.***
>
> ***(3) 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).***
>
> ***(4) 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.***

25. 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. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

26. It was similarly held in **Republic vs. National Environmental Management Authority [2011] eKLR** where the court held that:

> **"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it….The learned trial Judge, in our respectful view, considered these structures**

and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge."

27. In **Re Preston [1985] AC 835 at 825D** **Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

28. Section 14 of the ***Arbitration Act 1995*** states as follows:

(1) Subject to subsection (3), the parties are free to agree on

a procedure for challenging an arbitrator.

(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13 (3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

(4) On an application under subsection (3), the arbitrator who was challenged shall be entitled to appear and be heard before the High Court determines the application.

(5) The High Court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.

(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal.

(7) Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

29. In this case, there is no dispute that the agreement had an arbitration clause. The only issue raised by the applicant is the manner in which the Respondent was appointed an arbitrator. That is a matter which falls squarely within section 14 above. It follows that the applicant herein, if he felt aggrieved by the decision to appoint the Respondent as an arbitrator by whatever reason ought to have moved the Court within 30 days after being notified of the decision to reject the challenge. In this respect I agree with the decision of **Nyamu, J** (as he then was) in **Anne Mumbi Hinga vs. Victoria Njoki Gathara Civil Appeal No. 8 of 2009 [2009] KLR 698** where the learned Judge expressed himself as follows:

"The concept of the finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modelled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of this Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation. Where the parties attempt to heighten the level of judicial scrutiny of arbitration awards the policy of allowing flexibility to the parties, clashes with the equally important policies of finality and efficiency in arbitration. Permitting enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render the informal arbitration merely a prelude to a more cumbersome and

time-consuming judicial review process which is an unacceptable process. The goal of flexibility must yield to a national policy favouring arbitration with just limited review needed to maintain arbitrations essential virtue of resolving disputes straightaway… By entering into an arbitration agreement a party necessarily gives up most rights of appeal and challenge to the award in exchange for the virtue of finality of the award."

30. In my view a person who has willingly entered into an agreement with an arbitration clause ought not to be permitted to fall back on the Constitution in order to avoid his obligation to refer the disputes which properly fall within the arbitration clause to the agreed alternative dispute resolution mechanism. Where a party challenges the manner in which the arbitral proceedings are being conducted the same ought to be in accordance with the terms of the arbitration or the legislation guiding the arbitration process and he ought not to resort to judicial review proceedings as the first port of call. I associate myself with **Nyamu, J**'s position in **Kanzika vs. Governor, Central Bank of Kenya & 2 Others Nairobi HCMCA No. 1759 of 2004 [2006] 2 KLR 545** where the learned judge held:

"While a liberal and not an overly legalistic approach should be taken to constitutional interpretation the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter as of all constitutional documents is constrained by the language, structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of our society…Textually there is no reason for constitutional vindication of Commercial or contractual matters unless there is compulsory acquisition or "a taking away" as the American would call it. The parties and the courts have a responsibility not to trivialize constitutional jurisdiction. This is a claim that was well provided for under the general law of the land and in particular contract law but the applicant now wants to go behind that law ostensibly to escape from the applicable or available defences on limitation. This Court will not allow it. Thus, while the Court agrees that the claim in respect of the Chapter 5 fundamental rights and freedoms are not actions as such capable of being time barred, except where expressed in the Constitution this principle is not available to the applicant…Even if there was no specific provision in the Constitution our Constitution does recognize the existence of the general principles of law…Failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods...Our Constitution has not and was not intended to create commercial or contractual rights, instead it secures and guarantees existing constitutional rights. Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of state interest…Under the Constitution an individual's fundamental right may have to yield to the common weal of society. Personal freedoms and rights must necessarily have limits, for…a society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few…Under s 70 the individual right is subject to public interest. Public interest includes observation of laws including the Limitation of Actions Act and the Public Authorities Limitation Act and the general principles of law except where they are inconsistent with a particular provision in the Constitution… When a period of limitation has expired a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers, if they exist and discard any proofs of witnesses which have been taken, discharge his solicitors for if he has been retained and order his affairs on the basis that his potential liability has gone."

31. Although the Judge was dealing with limitation, in my view the principle is that disputes which ought to be dealt with under ordinary civil law ought not to be elevated to Constitutional matters otherwise such mundane issues as the grant or refusal of adjournments may soon find themselves being litigated as constitutional petitions.

32. Judicial review, it ought to be remembered, is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.

33. In the premises, I decline to exercise my discretion in favour of the applicant as sought herein and disallow the application for leave. It follows that without leave being granted these proceedings are misconceived and are hereby struck out with costs to the interested party.

Dated at Nairobi this 20th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr J M Kariuki for Mr Munge for the exp interested party

Miss Musimba for the applicant

Cc Mwangi