REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 335 OF 2016

IN THE MATTER OF ARTICLE 10, 96 AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OFSECTION 8 & 9 OF THE LAW REFORM ACT

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

REPUBLIC……………………………..………...……..APPLICANT

-VERSUS-

THE SENATE……………………..……….......1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.......2ND RESPONDENT

INSPECTOR GENERAL OF POLICE..……..….3RD RESPONDENT

THE ATTORNEY GENERAL..………….......….4TH RESPONDENT

EX-PARTE APPLICANTS WYCLIFEE AMBETSA OPARANYA, GOVERNOR OF THE COUNTY GOVERNMENT OF KAKAMEGA AND COUNCIL OF COUNTY GOVERNORS

RULING

Introduction

1. The ex parte applicants herein, **Wyclifee Ambetsa Oparanya, The County Government of Kakamega** and **Council of County Governors**, filed an application dated 28th July, 2016 seeking the following orders:

> **1. That leave be granted to the Applicants to apply for an Order of Prohibition directed against the 1st Respondent prohibiting it from summoning Wycliffe Oparanya the Governor,**

Kakamega County in respect of matters pending determination in Constitutional Petition 561 of 2015: Wycliffe Oparanya & Council of Governors Vs. The Office of the Director of Public Prosecutions & the Senate.

2. That leave be granted to the Applicants to apply for an Order of Prohibition directed against the 1st Respondent prohibiting it from summoning Wycliffe Oparanya the Governor, Kakamega County in respect of matters under consideration by the County Assembly of Kakamega.

3. That leave be granted to the Applicants to apply for an Order of Prohibition directed against the 2nd and 3rd Respondents prohibiting them, their agents and assigns from arresting and preferring fresh charges against Wycliffe Oparanya, the Governor, Kakamega County.

4. That leave be granted to the Applicants to apply for an order of Certiorari to remove and bring to this Honourable Court for purpose of quashing the Summons of the Senate to Wycliffe Oparanya, the Governor, Kakamega County dated 19th July, 2016.

5. That the leave so granted to the Applicants operate as a stay of the Summons of the Senate to Wycliffe Oparanya, the Governor, Kakamega County dated 19th July , 2016 and the Senate's directions to the 2nd and 3rd Respondent to arrest and charge the Governor for failure to honour those Summons.

6. That Costs of this application be provided.

2. According to the Applicants, the Senate through a letter dated 30th June, 2016 invited the Governor of Kakamega County, **Wycliffe Ambetsa Oparanya**, (hereinafter referred to as "the Governor") to appear before it on 19th July, 2016 to purportedly answer questions on the Report of the Auditor General on the Financial Operations of the Kakamega County Executive for the financial year 2013/2014. To that invitation, the Governor responded reminding the Senate that it was acting *sub judice* as there are two cases pending in the Courts touching on the very subject matter of the invitation and as such the Governor could not attend.

3. According to the Applicants, the first case, **Chief Magistrate's Court at Nairobi Criminal Case No. 2051 of 2015** in which the Senate is the Complainant involves criminal prosecution of the Governor for alleged failure to honour Senate summons in 2015 similar to the ones issued by the Senate on 19th July, 2016 while the second case, **Constitutional Petition 561 of 2015: Wycliffe Oparanya & Council of Governors vs. The Office of the Director of Public Prosecutions & the Senate** challenges the constitutionality of summoning Governors on matters pertaining Auditor General's Reports whereas a Governor is not an accounting officer and of criminal prosecution of the Governor for failure of a party to honour summons issued under Article 125 of the Constitution, which matter is pending before this Court for the hearing of the Senate's Article 165(4) Application on 17th August, 2016.

4. It was deposed that owing to the weighty constitutional issues raised in the above Petition, the Court saw it fit on 9th February, 2016 to stay proceedings in the Criminal Court pending the hearing and determination of the Petition.

5. However, the Senate through a Letter dated 19th July, 2016 responded that because the cases in Court dealt with a previous summon, despite the glaring similarity, the *sub judice* rule did not apply and the same day the Senate issued summons requiring the Governor to attend before it on 28th July, 2016 to which a similar response as the first one was made by the Governor. Further, he reminded the Senate the question of whether a Governor is an accounting officer who can be summoned by the Senate to answer questions on Auditor General Reports was pending determination in Petition 561 of 2015 to which it is a party. In the above letter, the Governor informed the Senate that the respective accounting officers of the

various County departments designated under section 148 of the ***Public Finance Management Act, 2012*** were available and were willing to attend the Senate Committee on 28th July, 2016 to respond to audit queries for financial year 2013/2014 touching on their individual departments. The Senate however did not respond to this.

6. It was disclosed that on 28th July, 2016, the various accounting officers from the County attended the Senate Committee to answer queries raised in the Auditor General's Report but were not allowed to answer the queries raised and informed that the Senate Committee would instruct the Inspector General of Police to arrest and have the Governor charged with failure to honour Summons. It was this threat, according to the Applicants that provoked these proceedings.

7. According to the Applicants, it is apparent that the Senate, and especially the Senator from Kakamega who publicly instigated the previous prosecution, is highly desirous of a fresh prosecution of the Governor now that the previous instance was stayed by the Court. They disclosed that on 18th July, 2016, Petition 561 of 2016 was to come up for highlighting of submissions only for the Senate to surprise the other parties therein, including the DPP, with a last minute Application for constitution of a three judge bench despite the vacancy in the Chief Justice position. They averred that while it was unclear at the time why the Senate was trying to delay the hearing and determination of that Petition, it is now apparent that they were planning to instigate fresh prosecution. In their view, the Senate as such is trying to compromise the pending cases by maliciously instigating prosecution of the Governor. If indeed the Senate was confident that it would prevail in Petition 561 of 2015 thereby allowing the existing prosecution to continue to finality, there would be no need to delay that Petition and at the same time pursue similar charges against the Governor. They asserted that the earlier summons of 2015 that led to the pending cases was issued by the same Committee to discuss the contents of the report of Auditor General submitted under Article 229 of the Constitution and that the current Summons are the subject of the same report.

8. It was contended that just like last time, the Auditor General Report that the Senate wants to examine is before the County Assembly of Kakamega for consideration and as such the Senate should not exercise its powers in manner to usurp the oversight authority of a County Assembly. To them, the question of whether the Senate can exercise its oversight powers over matters already placed before a County Assembly, as is the case herein, is also pending determination in Petition 561 of 2016. The Applicants' position is that the Senate's oversight powers under Article 96 of the Constitution do not grant it appellate or concurrent jurisdiction over matters properly before a County Assembly and that Article 6(2) of the Constitution provides that the governments at the national and county levels are distinct and inter-dependent. Further, Article 189(1) (a) of the Constitution provides that Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level.

9. The Applicants averred that in considering and making a determination on the queries raised in the Auditor General's Report tabled before it the County Assembly of Kakamega was properly exercising its oversight function under Article 185(3) of the Constitution and that the County Assembly of Kakamega and the Senate are distinct bodies with full legislative and oversight powers and cannot purport to sit in appeal of each other's decisions since none is inferior to the other. The Applicants contended that Article 10 of the Constitution enjoins the Respondents to ensure that the national principle of sharing and devolution of power, is discharged when exercising their powers and performing their duties and in their view, a cursory glance at Petition 561 of 2016 as filed will reveal that the current Summons and the desired prosecution is an attempted usurpation or bypassing of the High Court's mandate to determine the issues raised therein.

10. To the Applicants, lack of jurisdiction, bad faith, unreasonableness, in violation of legitimate expectation, unfair or which result from or in abuse of power are strong grounds for judicial review..

1st Respondent's Case

11. In response to the application, the 1st respondent, the Senate filed the following grounds of opposition:

> **1. That pursuant to Article 125 of the Constitution, this Honourable High Court has no jurisdiction to deal with a challenge to the powers of the Senate to summon any person by virtue of Constitution as the High Court and the Senate share a concurrent jurisdiction on the matter. Further, the prayers sought in the chamber summons dated 28th July 2016 are for the High Court to grant leave to the applicants to apply for Judicial Review to prohibit the Senate from summoning the Governor of Kakemaga County. As the High Court and the Senate share a concurrent jurisdiction on this matter, the issue can only be dealt with by the Court of Appeal. This concurrent jurisdiction is similar to that of other courts established under Article 162(2) of the Constitution to deal with employment and labour relation matters and environmental and land matters.**
>
> **2. That Article 96 of the Constitution of Kenya sets out the role of the Senate.**
>
> **3. That Article 96(3) specifically provides that the Senate determines the allocation of national review among the counties and thereafter exercises oversight over this national revenue allocated to the county governments.**
>
> **4. That this oversight mandate is not limited to national revenue alone as the Senate needs to protect the interests of the counties and their governments by ensuring that Governors are carrying out their duties well.**
>
> **5. That in exercising its oversight mandate the Senate may call for any report from any independent office of constitutional commission as provided by Article 254 of the Constitution which states as follows:**
>
> **6. That Article 248(3)(a) of the Constitution of Kenya designates the office of the auditor general as an independent office and therefore one of the offices required to submit to the Senate it annual report and at any time any report required by the Senate.**
>
> **7. That the powers of a Governor are set out at Section 30 of the County Governments Act and the Senate at Section 33 of the County Governments Act tries a Governor during an impeachment process. This is part of the oversight of State Officers.**
>
> **8. That this Judicial Review application is based on totally different facts and grounds as High Court Constitutional Petition No. 561 of 2015 *Wycliffe Oparanya & Council of Governors Vs The Office of the Director of Public Prosecutions & the Senate:***
>
> > **a. High Court Petition No. 561 of 2015 seeks to stay the prosecution of Wycliffe Oparanya, the Governor of Kakamega County, in Criminal Case No. 20151 of 2015.**
> >
> > **b. This Judicial Review application seeks blanket orders to restrain the Senate from summoning the Governor in respect of matters under consideration by the County Assembly of Kakamega, a prayer which has no basis in law. The applicant is in effect asking the High Court to suspend the provisions of Article 125 of the Constitution.**
> >
> > **c. The applicant has not even produced any evidence to show that the matters alleged of are under consideration by the County Assembly of Kakamega.**
>
> **9. That the applicant has not shown what prejudice shall befall him if he appears before the Senate and answers questions relating the report of the Auditor General and indeed on any other matters affecting the County Government.**

12. The foregoing issues were submitted on by **Mr. Ashitiva** and **Mr. Wanyama** who appeared on behalf

of the Applicants, **Mr. Njoroge** who appeared on behalf of the Senate and **Mr. Okello** who appeared with **Mr. Murang'a** for the 2nd and 3rd Respondents.

13. On 1st August, 2016, **Lenaola, J** granted leave to the applicants to commence judicial review proceedings. None of the parties hereto have sought to have the said leave varied or set aside. The Senate contends that its decision in summoning the Governor cannot be questioned by this Court since in so acting it is exercising concurrent jurisdiction as that of the High Court. This issue was dealt with by this Court in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** in which the Court expressed itself as follows:

> **"…a Departmental Committee of the National Assembly when exercising quasi-judicial powers as opposed to legislative powers is subject to the supervisory jurisdiction of the High Court since under Article 165(6) of the Constitution, "The High Court has supervisory jurisdiction over the subordinate courts and over *any person, body or authority* exercising a judicial or quasi-judicial function, but not over a superior court". [Emphasis mine]. Whereas under Article 125 of the Constitution "Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information" and for that purpose and that purpose alone, "a House of Parliament and any of its committees has the same powers as the High Court—(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; (b) to compel the production of documents; and (c) to issue a commission or request to examine witnesses abroad, that power cannot be interpreted to equate a House to the High Court in the exercise of judicial authority. Under Article 159(1) of the Constitution "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution." A Departmental Committee of the National Assembly, in my view is not a Court or Tribunal established under the Constitution. It cannot purport to grant orders which the Courts and tribunals set up under the Constitution are empowered to grant. If the position was different the doctrine of separation of powers would be rendered illusory."**

14. The Jurisdiction of the Court of Appeal is provided for under Article 164(3) of the Constitution as follows:

> ***(3) The Court of Appeal has jurisdiction to hear appeals from—***
>
> > ***(a) the High Court; and***
> >
> > ***(b) any other court or tribunal as prescribed by an Act of Parliament.***

15. It is therefore clear that the Court of Appeal's jurisdiction is purely appellate. It does not have any original jurisdiction and it can only exercise the said appellate jurisdiction in appeals emanating from the High Court or in instances where an Act of Parliament expressly confers such appellate jurisdiction on the Court of Appeal. The Senate has not cited any provision which confers on the Court of Appeal the jurisdiction to entertain a matter arising from the Parliament's jurisdiction to summon a person. In my view what Article 125 of the Constitution does is to enable the Parliament to summon witnesses just like the High Court does. However where it is alleged that the said power is being improperly or unconstitutionally exercised nothing prevents this Court from investigating such allegations of impropriety or unconstitutionality. This Court accordingly expressed itself on the issue in **Judicial Service Commission Case** (supra) as hereunder:

> **"That the Court has the power to inquire into the Constitutionality of the actions of the Speaker and other officers of the National Assembly was answered in the affirmative by Lenaola, J in Njenga Mwangi & Another vs. The Truth, Justice and Reconciliation Commission & 4 Others Nairobi High Court Petition No. 286 of 2013 where the learned Judge expressed himself *inter alia* as follows:**
>
> **"I am also in agreement, that under section 29 of the National Assembly (Powers and**

Privileges Act) (Cap 6), Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly but I am certain that under Article 165(3)(d) of the Constitution, this Court can enquire into any unconstitutional actions on their part".

16. As to whether the Senate exercises administrative authority is to be determined from the provisions of section 2 of the ***Fair Administrative Action Act, 2015*** which is an Act of Parliament enacted pursuant to Article 47 of the Constitution. The said section 2 defines the term "administrator" as meaning "*a person who takes an or who makes an administrative decision*". It also defines "administrative action" as including:

> ***(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;***

17. In this case it cannot be doubted that the purported threatened decision by the Senate directing that criminal proceedings be commenced against the Governor is likely to affect the legal rights and interests of the Governor. Accordingly, the Senate's alleged decision is an administrative action pursuant to the provisions of the ***Fair Administrative Action Act, 2015*** as read with Article 47 of the Constitution and hence amenable to the supervisory jurisdiction of this Court since the Senate cannot under any stretch of imagination be construed as a Superior Court for the purposes of Article 162 of the Constitution which defines Superior Courts as the Supreme Court, the Court of Appeal, the High Court and the courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

18. To hold that this Court cannot entertain questions revolving around the impropriety, illegality or constitutionality of the decisions of the Senate when it is clear that the Court of Appeal has no jurisdiction to entertain a matter arising from the exercise of such powers would leave the Applicants with no remedy. In my view where there is no legal redress provided for or where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the High Court, as the Constitutional Court, will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to investigate the allegations and provide or even fashion an appropriate relief under Article 23(3) of the Constitution. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

19. The law being a living thing, a court and in particular the Constitutional Court, would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

20. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

21. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

22. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement.

23. It is therefore my view that the view held by the Senate that its decision under challenge can only be challenged by an appeal to the Court of Appeal is misconceived and has no merit. That takes care of that jurisdictional issue.

24. As I have mentioned hereinabove, **Lenaola, J's** decision granting leave has not been challenged. Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a *prima facie* case has been made out and ought not to be granted as a matter of course. See **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR.**

25. Therefore as leave had been granted in these proceedings and as no application has been made to set aside the said leave, it is my view that it would be an exercise in futility for this Court to embark on an investigation at this stage whether or not the applicants' case is arguable since to arrive at a decision in the negative would impact negatively on the leave already granted. Consequently I do not intend to embark on that futile, absurd and potentially embarrassing exercise. I will therefore ignore the issues raised herein which go to the merits of the orders intended to be sought in the substantive Motion.

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

27. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is nolonger 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 and its implementation has not come to an end that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

28. In this case, it is alleged that there is a threat to commence criminal proceedings against the Governor. Accordingly, the application for conservatory orders are proper since what is sought to be stayed has not been undertake. This was the position adopted by **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the Lord Justice held that:

"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This

will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review…Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect."

29. Gladwell LJ in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** on his part held that:

"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."

30. 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…I also want to state that in judicial review applications like this one the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

"THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and

severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined."

31. In this case, it is contended that since these proceedings are challenging the decision which is the subject of Petition 561 of 2015, to decline to grant the stay would remove the substratum of the said Petition where conservatory orders were granted and render the same superfluous. In effect the Senate is being accused of attempting to steal a march on both the Applicants and the Court. It is trite that a Court cannot allow a party to steal a march on the Court and obtain undeserved forensic advantage as to do so would amount to the Court permitting itself to be used as a conduit for the violation of a party's rights to a fair hearing. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** the decision to grant a stay involves:

> **"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."**

32. I therefore agree that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

> **"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."**

33. The Senate has also been accused of acting in bad faith in instituting fresh investigations against the Governor. It is true that Petition No. 561 of 2015 was on 26th April, 2016 fixed for hearing on 18th July, 2016. On the hearing date, learned counsel for the Senate, **Miss Thanji**, informed the Court that the Senate had instructed her to make an application under Article 165(4) of the Constitution to have the matter certified as raising substantial questions of law and to refer the same to the Chief Justice for empanelment of a bench consisting of not less than three judges to hear the petition. Learned Counsel therefore applied for the adjournment of the hearing scheduled for that day. Although the petitioners did not oppose the application, **Ms Obwo**, learned Counsel for the 1st Respondent vehemently opposed the application. After considering the application, the Court granted the adjournment albeit reluctantly. It has since come to pass that the application has been filed.

34. The Applicants however contend that the adjournment was meant to forestall and scuttle the hearing of the petition while the Senate knew very well that the office of the Chief Justice was vacant while at the same time proceeding with fresh proceedings. Based on the material placed before me I cannot, at this stage, state that this was the position. It is however trite that every party must act in good faith and exercise a sense of reasonableness in matters pending before the Court for adjudication. If the applicants' contentions are true it would in my view amount to a serious indictment on the part of the Senate. I however wish to say no more on the issue.

35. Having considered the issues raised herein, it is my view that the leave granted by **Lenaola, J** herein on 1st August, 2016 ought to operate as a stay of the summons of the Senate to **Wycliffe Oparanya**, the Governor, Kakamega County dated 19th July, 2016 and the Senate's directions to the 2nd and 3rd Respondent to arrest and charge the Governor for failure to honour those Summons. It is so ordered.

36. The costs of the application will be in the cause.

Dated at Nairobi this 17th day of August, 2016

G V ODUNGA

JUDGE

Mr Ashitiva and Mr Clapton for the applicants

Mr Njoroge for the 1st Respondent

Miss Kihara for Mr Okello for the 2nd and 3rd Respondents

Cc Mwangi