REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPL. NO. 533 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF BREACH OF ARTICLES 6, 10, 186, 187 & 189 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 5 PART 2 OF THE 4TH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENT ACT CAP 265A OF THE LAWS OF KENYA

BETWEEN

NAIROBI CITY COUNTY GOVERNMENT…….……APPLICANT

VERSUS

THE CHIEF OF DEFENCE FORCES,

KENYA DEFENCE FORCES.....1ST RESPONDENT

THE CABINET SECRETARY

MINISTRY OF DEFENCE.....2ND RESPONDENT

THE ATTORNEY GENERAL……3RD RESPONDENT

RULING

Introduction

1. The ex parte applicants herein, **Nairobi City County Government**, filed an application dated 27th October, 2016 seeking the following orders:

> **1) That the Application be certified urgent and be heard *ex parte* at the first instance and expeditiously owing to its extreme urgency.**
>
> **2) That the Applicant be granted leave to apply for judicial review order of PROHIBITION to remove into this Honourable Court and prohibit the Respondents from to continuing with the digging of a trench across the Mihango Road Link and thereby rendering the same impassable and inaccessible.**
>
> **3) That the Applicant be granted leave to apply for judicial review order of PROHIBITION to remove into this Honourable Court and prohibit the Respondents from continuing to deploy its officers along the Mihango Road Link to stop the Applicant from further carrying out construction along the *Mihango Road Link.***
>
> **4) That the Applicant be granted leave to apply for judicial review order of MANDAMUS to remove into this court and compel and/or direct the 1st and 2nd Respondents to forthwith fill up the trench dug along the *Mihango Road Link.***
>
> **5) That the Applicant be granted leave to apply for judicial review order of MANDAMUS to remove into this court and compel and/or direct the 1st and 2nd Respondents to forthwith pull out their armed soldiers deployed along the *Mihango Road Link* to stop the Applicant's officers from further constructing the *Mihango Road Link.***
>
> **6) That the Leave so granted do operate as a stay of the purported illegal, irrational and unprocedural continued digging of the trench across the *Mihango Road Link* and any further interference of the Applicant in the construction of the tarmac along the *Mihango Road Link*.**
>
> **7) That costs of and incidental to the Application be provided for.**
>
> **8) That such further and other reliefs that this Honourable Court may deem just and expedient to grant.**

2. According to the Applicant, the function of maintenance of roads is a shared function as between the national and county governments though they have distinct roles as regard the same. While under section 18(a) (b) & (c) of the Constitution (sic) the national government is in charge of road traffic, the construction and operation of national trunk roads and standards for the construction and maintenance of other roads by the counties, the Applicant has a constitutional and statutory mandate to manage and/or maintain county / access roads within the Nairobi City County.

3. It was contended that section 5 Part 2 of the Fourth Schedule of the Constitution, ***The Transition to Devolved Government Act*** CAP 265A of the Laws of Kenya have devolved the function of maintenance and/or management of county and/or access roads to the county governments.

4. It was therefore contended that being a shared function, it must be carried out in accordance with Article 6(2) of the Constitution which though takes cognizance of the fact that the governments at the national and county levels are distinct and interdependent and enjoins them to conduct their mutual relations on the basis of consultation and cooperation.

5. The Applicant averred that the **Embakasi-Mihango Road** (herein after referred to as "the Road") is a county and/or access road and is therefore under the management of the county government of the

Applicant and has been in existence for over 30 years and is in fact part of the **1982 Master Plan** which seeks to have the same connected to the Eastern By-Pass. To the Applicant the said Road is a county and/or access road and a public road within the meaning of the ***Public Roads and Roads of Access Act*** **CAP 399** of the Laws of Kenya and plays a fundamental role for the residents of Mihango and Kayole Estates and indeed all the residents within the Embakasi area as it is the only access road that the residents of Mihango can use to access the Nairobi CBD. In its absence, the only alternative route is the Eastern By-Pass which culminates to a further 20km.

6. It was averred that there are several schools, healthcare centers and business premises to mention but a few which the residents of Mihango Estate access at Kayole Estate and its environs and that it is only through this access road that the residents of Mihango are able to access the same. This is notwithstanding the fact that several residents of Mihango Estate are employees within the Nairobi CBD and consequently find this road very instrumental in their ability to access their places of work. To the applicant, noting the instrumentality of this public access road, it commenced and continues to undertake several maintenance and improvement actions with respect to county roads and that more specifically, on the 12th day of April 2016 it executed a contract worth a whooping sum of Kshs. 230,231,979.42 to oversee the construction of the same road and that the construction has been going on smoothly without any kind of interference whatsoever.

7. However, on or about 24th October 2016, the 1st and 2nd Respondents through their officers stationed at the Embakasi Garren Station unilaterally and without any form of consultation or public participation involving the Applicant whatsoever purported to illegally and unprocedurally commence the digging of a deep trench across the Road which action the Applicant contends was illegal, irrational and unprocedural as they were purporting to carry out the function of management of county roads which is an exclusive function of the County Government as set out under section 5 part 2 of the Fourth Schedule of the Constitution of Kenya. To the Applicant, in unilaterally digging the trench without consultation with the Applicant the Respondents acted illegally as they violated the principles of devolution which calls out for consultations and cooperation in mutual relations as set out under Articles 6, 10, 186, 187, 189 of the Constitution of Kenya and the ***Intergovernmental Relations Act*** CAP 5G. Further, the illegal, irrational and unprocedural digging up of the trench across the only access road between Kayole and Mihango Estate is in utter violation of the public interest as the residents of Mihango and Kayole Estates are unable to access basic social amenities.

8. It was contended that following the illegal, irrational and unprocedural actions that exhibit nothing but bad faith and abuse of power by the 1st and 2nd Respondents the residents of Mihango Estate have been exposed to untold suffering as:

a They are unable to access the Nairobi CBD without undue expensive difficulties

b School going children are unable to access their respective schools thereby violating their right to Education under Article 53 of the Constitution

c The residents of Mihango Estate are unable to access healthcare facilities thereby violating their Right to Health under Article 43(1)(a) of the Constitution.

d The residents of the Kayole and Mihango Estate have been exposed to immense insecurity as thieves and robbers have taken advantage of the trench and are using it as a hideout at night.

e The construction operations of the Applicant along the Mihango Road Link have been immensely interfered with causing loss of public funds;

9. The applicant further averred that the 1st and 2nd Respondents have unilaterally, illegally and in an utter display of abuse of power deployed their armed officers at the trench to purportedly guard against the filling up of the trench by the residents and the Applicant and that the armed soldiers have further restrained the Applicant's constructor from further constructing the tarmac road along the Mihango Road Link which to the applicant is not only abuse their powers but is contrary to Article 186, 187 and 189 of

the Constitution. It was disclosed that this situation has created intense tension among the residents of Mihango and Kayole Estates leading to eruptions of spouts of violence occasioned by the protests that are taking place therein.

10. The applicant was therefore apprehensive that the continued interference with the public access road is going to continue to expose the residents of Mihango and Kayole estates to untold suffering and violations of human rights.

11. The applicant however appreciated that **Articles 159 and 189 of the Constitution** provides for the use of ADR in the settlement of disputes. And further that the ***Intergovernmental Relations Act*** **CAP 5G** calls for the use of ADR in the settlement of disputes that arise as between the two levels of the national and county governments. It was however its case that it had attempted severally to have the Respondents agree to settle this matter amicably to no avail hence the Court was urged not to sit back and watch actions that go against public interest go on without intervening because of an ADR process that is not forthcoming due to lack of goodwill by the Respondents.

12. The Applicant therefore urged this Court to grant the orders sought.

Respondents' Case

13. In response to the application, the respondents filed the following grounds of opposition:

> **1) That the Chamber summon application is defective has no merit and is based on a misconception of the law.**
>
> **2) That the application offends the statutory provisions of section 9(2)(3) of The Fair Administrative Action Act on exhaustion of alternative dispute resolution mechanisms.**
>
> **3) That the application has been filed in total disregard of the provisions of section 31, 32, 33 & 34 of Intergovernmental Relations Act Cap 5G which provides for dispute resolution between National & County governments.**
>
> **4) That other than writing to the respondent, the applicant has not satisfactorily demonstrated having engaged the intergovernmental relations secretariat.**
>
> **5) That it is a well settled principle of law that where statute has provided for an alternative method of dispute resolution the same should be exhausted. See *Speaker of the National Assembly v The Hon James Njenga Karume,Civil application No 92 of 1992 KLR 22{1992}, Peter Oduour Ngoge v Hon. Francis Ole Kaparo, SC Petition 2 of 2012*,[para. 29-30], *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others [2014] eKLR.***
>
> **6) That to the foregoing, the matter is not yet ripe for judicial proceedings.**
>
> **7) That the respondent prays that the application be dismissed with costs to the respondent.**

Determinations

14. On 3rd November, 2016, after hearing the application for leave, I was satisfied that the applicant had disclosed a *prima facie* case for the purposes of leave which I granted. Taking into account the nature of the orders sought, I however deferred the hearing of the limb for directions that the leave so granted do operate as a stay for hearing *inter partes* pursuant to the proviso to provisions of Order 53 rule 1(4) of the ***Civil Procedure Rules.*** It is that limb that is the subject of this ruling.

15. 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.**

16. 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.

17. 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.

18. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

19. In this case, it is contended that the digging of the offending trench is continuing. In other words the act complained of is not complete and has not come to an end. Accordingly, this Court is still seized of the jurisdiction to arrest the same from being completed. 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."** [Underlining mine].

20. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding. In **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** it was held that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

21. In this case the Respondents did not swear any affidavit in response to the factual averments made by the Applicants which remain wholly uncontroverted. The Respondents have instead contended that the dispute herein belongs to the Summit pursuant to the provisions of the ***Intergovernmental Relations Act.*** The Respondents have however not sought to have the leave granted herein set aside. The grant of leave presupposes the existence of a *prima facie* case and it is my view that where a party contends that the

proceedings are improperly before the Court the prudent way to raise the issue is by way of an application seeking to set aside the leave as opposed to raising the same in opposition to the stay while leaving the leave intact. In **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 KLR 475; [2006] 1 EA 321, Nyamu, J** (as he then was) held that:

> **"It cannot be denied 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. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the Judge who granted leave to set aside such leave… Although leave is provisional until set aside for good reasons upon an application, it cannot be re-litigated when the application for judicial Review comes up for hearing or after the filing of the application. It cannot be attacked by way of a preliminary point instead of arguing the judicial review application itself on merit because after its grant and the filing of the application it is spent and the parties have to contest the subsequent application for judicial review on the basis of the grounds and reliefs set out in the statement filed with the application for leave. However where leave is granted with an order that such leave does operate as a stay a party can apply in cases of material nondisclosure or misrepresentation… The other reason why the Court cannot reopen it is because the purposes of leave are firstly to protect the targeted officials and the public bodies against frivolous and vexatious challenges which might hamper public administration of those bodies, and secondly, at the advent of judicial review it was feared that it would open floodgates of endless applications but by hindsight this has not happened in many jurisdictions… The Judge has no basis on which to undo the grant of leave, which prayer she had granted to the applicants without an application made to that effect and upon which she could review or vary her order granting leave to apply for the order of prohibition… Where an applicant wants his day in court to be heard on merit in an application where leave has been granted his right should not be lightly deprived and there must be compelling reasons to warrant the taking away of that right e.g. on a point of law which is not contentious or where the subject matter is not amenable to judicial review and therefore plainly non-justiciable. The court should always lean towards sustaining a hearing on merit instead of taking away it at a preliminary hearing. It must not be forgotten that some of the matters raised as preliminary objections e.g. *locus standi* or standing, and justifiability in Judicial Review can highly be contentious and should not be necessarily taken to be suitable topics for determination as preliminary points. They should ideally be determined at the second stage on merit… A careful look at the analysis of the points raised and covered in the ruling including its length, is the plainest or clearest demonstration that the points raised are not suitable for determination as preliminary points and that full arguments on merits should be entertained in the interest of justice. Issues such as standing, whether or not there is a public law element, availability of alternative remedy, the scope of the grounds for intervention are not always straightforward and plain matters for determination at the threshold stage."**

22. In my view the above holding aptly deals with the legal points of objection raised by the Respondents herein in respect of the stay.

23. It was however contended by **Mr Odhiambo** learned State Counsel that the grant of the orders herein will prejudice the Respondent and further expose the residents to the risk of getting injured implements used by the armed forces. Suffice it to say that these were mere submissions from the bar unsupported by an affidavit hence of little evidential value. I agree with **Miss Awuor** learned counsel for the Applicants that this argument cannot hold in light of the uncontroverted evidence that the road has been in use for several years.

24. It was further contended by **Mr Odhiambo** that the effect of the grant of stay would be to grant the final orders. In my view in exceptional circumstances the Court may well craft stay orders in such a way as to temporarily reverse the decision or action under challenge and such exceptional circumstances may exist where the public interests is endangered. In this case, it is contended that the residents who make use of the road have been cut off from accessing institutions which offer such essential services as

educational and health facilities. This contention is not controverted.

25. In my understanding stay of proceedings may include stay of the decision itself where the circumstances permit. However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of **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** where he said 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."**

26. Considering the allegations made with respect to the risk to which the public is exposed by the actions of the Respondents under challenge in these proceedings, it is my view that the appropriate orders of stay ought to take into account such interests. In other words I am satisfied that exceptional circumstances do exist to warrant the grant of stay whose effect would be to reverse the actions being challenged. As was appreciated by **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606 that:

> **"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".**

27. As is appreciated in ***Black's Law Dictionary, 9th Edn***. "public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

28. In **Re McBride's Application [1999] NI 299** the Court expressed itself as follows:

> **"…it appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group…..it seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity."**

29. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution while under Article 1(3)(c) sovereign power under the Constitution is delegated *inter* alia to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

30. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in

arriving at a judicial determination.

31. In the premises I direct that the grant of leave herein shall operate as a stay of the decision by the Respondents in digging the trench along Embakasi-Mihango Road and that the *status quo ante* the said action be restored with the consequence that the Applicant be at liberty to fill the trenches in question to the extent that the public are afforded access through the said Road pending the hearing and determination of these proceedings or other orders of his Court.

32. The parties are however at liberty to invoke any alternative remedies available to them in law.

33. The costs will be in the cause.

34. Orders accordingly.

Dated at Nairobi this 14th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Arende for Miss Awuor for the Applicant

Mr Odhiambo for the Respondent

CA Mwangi