



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 543 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

**FREEDOMS UNDER ARTICLES 27,32,35,36,42,43,47,48,50 & 165 OF THE CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION TO RIGHT TO FAIR ADMINISTRATIVE
ACTION, EQUALITY AND FREEDOM,**

**HUMAN DIGNITY AND ECONOMIC AND SOCIAL RIGHTS & IN THE MATTER OF
RIGHT TO EQUALITY**

AND

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

AND

IN THE MATTER OF ACCESS TO JUSTICE

AND

**IN THE MATTER IF ULTRAVIRES, PREJUDICIAL, UNWARRANTED, ILLEGAL DENIAL
OF AN ECONOMIC ACTIVITY**

AND

**IN THE MATTER OF NAIROBI COUNTY EXHIBITIONS AND BUSINESS COMMUNITY
EMPOWERMENT ORGANIZATION**

LUSSIA MAGGY (SUING ON BEHALF OF AND AS THE CHAIRPERSON

OF NAIROBI COUNTY EXHIBITIONS & BUSINESS COMMUNITY

EMPOWERMENT ORGANIZATION.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

CHIEF OFFICER TRADE, INDUSTRIALIZATION &

TOURISM NAIROBI COUNTY.....2ND RESPONDENT

R U L I N G

1. By a chamber summons dated 8th November 2016 and filed in court on the same day under certificate of urgency, pursuant to the provisions of Order 53 Rule 1 of the Civil Procedure Rules, the Law Reform Act Cap 26 Laws of Kenya and all other enabling provisions of the law, the ex parte applicants Lussia Maggy (on behalf of and as the chairperson of Nairobi County Exhibition and Business Community Empowerment Organization (NCEBCEO) seeks from the court orders that:

1. Spent

2. That owing to the urgency of this matter service to the Registrar be dispensed with in the first instance.

3. That this Honourable court be pleased to grant leave to the applicant for an order of prohibition –directed towards the respondents prohibiting them, their servants, agents, anyone claiming under or through them from revoking the permit, ejecting, interfering with the applicant’s quiet possession or any act of compelling the applicants from occupying the suit premises known as (zone 7 along Moi Avenue known as Gill House for the purpose of conducting trade fair) herein;

4. That the said order to operate as stay towards further actions or inactions of the respondent, their servants, agents or anyone claiming through or under them from interfering with the applicants right to carry out the business at Zone 7 along Moi Avenue known as Gill House.

5. That costs of this application be provided for.

2. The chamber summons was premised on the statutory statement which gives 15 grounds upon which the relief is sought, the ex parte applicant’s supporting affidavit and annexures thereto.

3. The respondents who are the Nairobi City County and the Chief Officer Trade, Industrialization & Tourism Nairobi County filed a replying affidavit sworn by Joshua Otieno the Assistant Director Markets in opposing the chamber summons seeking for leave and the prayer that leave is granted do operate as stay.

4. The application was heard on 15th November 2016 by way of oral submissions with Mr Odhiambo urging the application on behalf of the ex parte applicants whereas Mr Abwao represented the respondents.

5. The ex parte applicants case is that they are a registered community based organization duly registered on 25th August 2015. That on 7th May 2015 they applied to the respondents for consideration and the be permitted to occupy zone 7 of Moi Avenue at Gill House for the purpose of carrying out Trade Fair Exhibition.

6. That the respondents agreed to grant the permission sought, vide letter dated 12th January 2016 provided certain conditions were met by the applicants. That upon fulfillment of the aforesaid

conditions, the applicants paid kshs 32,000 as fee for the reserved parking for the said space for the said Trade fair exhibition. That the applicants then took possession of the said space **until recently** when a different faction, through their agents, servants of the respondents threatened to evict them and the applicants had to flee for their lives in fear of physical confrontation.

7. That the respondents, their servants, agents, persons claiming through or under them soon after issuing the applicant with the permit to commence the said business have continued with prejudice, malice and without providing any reasons to threaten to evict, harass the applicant, her servants or agents.

8. That no explanation was given for the respondents' actions and that recently in the month of October 2016(sic) the said applicants came across an internal memo by the respondents of withdrawing or cancelling of Trade Fairs Permits.

9. That the respondents are acting maliciously, infringing the applicant's right to equality by purporting to have cancelled the said Trade Fair permits in general but prejudicially authorizing other factions to continue with the same trade within the CBD.

10. That the above action was done hurriedly, with prejudice and malice and that the said information was negligently withheld from the applicants.

11. That there is no just cause in granting permits to other factions and yet decline to issue permits to the applicants, which is discriminatory.

12. That the above action enables an unlawful illegal faction to threaten the safety and fundamental rights of the applicants' group whenever they tried to occupy the said space to carry out their business activities.

13. That an unknown faction has been authorized by the respondents to carry out business on the said premises yet they collected a free from the applicants, and that it is in the interest of justice that this application is allowed to avoid the respondents trampling on the applicants' rights to economic activities, freedom of association, right to fair administrative action, and access to information which are fundamental rights under the Constitution.

14. The supporting affidavit of Lussia Maggy reiterates the above grounds and annexes the exhibits referred to in the grounds upon which he relief is sought.

15. In the respondents' replying affidavit of Joshua Otieno, the respondents' case is that the applicants applied for a permit to conduct a Trade Fair on the suit premises on specific dates of 5th-7th February 2016. That the 2nd respondents' Department had no objection to the permit subject to the applicants fulfilling the following conditions.

i. Clearance from the Chief Officer, security compliance and disaster management in writing.

ii. Getting clearance from the Chief Revenue Officer, indicating availability of space in writing, among others.

16. That the applicants herein were granted the permit to hold the trade fair on the named dates 5th-7th February 2016 along Gill House as applied for and therefore their goods could not have been confiscated between 5th and 7th February 2016 but on the subsequent weeks when the applicants tried to remain in the premises/space without obtaining the prerequisite permit.

17. That in any event the amount paid covered the period of the Trade Fair 5th-7th February 2016 but not perpetual and or on subsequent weekends.

18. That upon advise from the National Government, the respondents stopped issuing permits for trade fairs due to the security concerns.

19. That the space in question is used by matatus plying Ngong Road and Jogoo Road and that it is risky to allow business of trade fairs and matatus at the same place as space is unavailable for all including pedestrians and private vehicles.

20. That the applicants may have operated outside the permitted areas leading to confiscation of their wares in accordance with the City by Laws.

21. That the respondents would only allow usage of the said space for trade fairs during weekends because it is used as parking zone, loading zone and matatu terminal during week days and no clearance from the Chief Revenue Officer has been obtained to allow the applicants into the spaces in issue.

22. That this application is an abuse of the court process in that the applicants are guilty of a multiplicity of suits seeking the same orders namely CMCC 5776/2016 between the same parties hereto over the same subject matter.

23. The respondents annexed exhibits and urged the court to dismiss the applicant's chamber summons dated 8th November 2016.

24. In their oral submissions to support their respective rival positions, counsels for the parties reiterated what is contained in the chamber summons and replying affidavit.

25. Mr Odhiambo on behalf of the applicants emphasized that the respondents' actions are prejudicial to the rights and freedoms and interests of the exparte applicants herein who are citizens of small means and that some of them had taken loans to finance the Trade Fairs in different areas of the Central Business District (CBD) of Nairobi City County. Further, that the respondents' malice and impartiality is evident as there are other Trade Exhibitors along Moi Avenue hence it is unfair to interfere with the applicants' businesses.

26. In opposition, Mr Abwao relying on the respondent's replying affidavit emphasized that the applicants were granted the permit for the days 5th-7th February 2016 and that the said Trade fairs went on as scheduled.

27. That thereafter, the National Government advised the County Government that it was a security risk to allow trade fairs in the CBD and as a result, the County Government stopped issuing any permits for exhibitions in the CBD after 12th March 2016.

28. Further, that there are several other cases as cited above pending in the lower court over the same subject matter between these same parties hence the applicants have not come to this court with clean hands. Mr Abwao urged this court to decline to grant any leave to the applicants.

29. In a brief rejoinder, Mr Odhiambo submitted that the applicants seek the right to equality to be applied to them since there are other exhibitions going on. He stated that his clients had vacated the space and that they are not privy to the letter from the Minister of Sports on security matters. Counsel also stated that he was not aware of the multiple suits cited by the respondents and contended that he had only seen the allegations in the replying affidavit filed by the respondents.

Determination

30. I have carefully considered this chamber summons dated 8th November 2016, the statutory statement, the supporting affidavit, the respondent's replying affidavit and the respective parties' advocates oral submissions made on 15th November 2016. None of the parties relied on any authority.

31. I observe that the application for leave to apply and for judicial review orders and for leave to operate as stay was argued as if it is a substantive motion on merits.

32. None of the parties relied on the established principles applicable for grant of leave to apply for Judicial Review remedies/orders) and or for stay of the implementation of the decision or for grant of conservatory orders pending hearing and determination of the substantive motion once filed.

33. Leave to apply for Judicial Review orders is discretionary and not automatic and in considering such application for leave, the court must be careful in what it states lest it touch on the merits of the main application for Judicial Review. Therefore, where the outcome of the Judicial Review might be contrary to the conclusion reached by the body or person whose decision is challenged, stay of proceedings should be granted as it might lead to an awkward situation where a decision which ought not to have been made has been concluded, as was held in **Jared Benson Kangwana Vs Attorney General Nairobi HCC 446/1995**.

34. The requirement for leave, however, was explained by the three judge bench of the High Court composed of Bosire, Mbogholi Msagha and Oguk JJ in **Matiba V Attorney General Nairobi HCC Miscellaneous Application 790/1993** wherein the court held that the requirement for leave it is supposed to exclude frivolous or vexatious applications which prima facie, appear to be abuse of the process of the court or those applications which are statute barred. In **Republic Vs Land Disputes Tribunal Court Central Division & Another exparte 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 expenses for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months, because of pending court action which might turn out to be unmeritorious. A similar decision was reached in **Republic Vs The Permanent Secretary, Ministry of Planning and National Development Exparte Kaimenyi [2006] 1 EA 353**.

35. In **Republic Vs County Council of Kwale & Another Exparte Kondo & 57 Others Mombasa HCC Miscellaneous Application No. 384 of 1996**, Waki J (as he then was) held:

“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 of 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 parties 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.”

36. The above position was confirmed by the Court of Appeal in the case of **Meixner & Another Vs Attorney General [2005] 2 KLR 189** where the court held that leave of the court is a pre-requisite to making a substantive Judicial Review application 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.

37. In **Mirugi Kariuki V Attorney General CA 70/91 [1992] KLR 8** the Court of Appeal laid down

the grounds that should guide the court in granting leave to apply for Judicial Review and stated:

“ 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 busy bodies, cranks and other mischief-makers...”

38. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43**. The High Court of Kenya 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 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 losing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by losing 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 Megary J in the case of John V 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.”

39. From the decisions and principles espoused hereinabove, it is clear to this court that the grant of leave to institute Judicial Review proceedings is not a mere formality and that leave is not granted as a matter of course. The applicant seeking leave is under an obligation to show to the court that he has a prima facie arguable case for grant of leave. And whereas at this stage he is not required to delve into the depths of the merits of the application, he has to show that he has not come to court after inordinate delay and that the application is not frivolous, vexatious, malicious, futile and or abuse of the court process.

40. Applying the above principles to this case, the ex parte applicant by their chamber summons dated 8th November 2016 claim that although they applied for permission to hold exhibitions at the reserved parking at Gill House and paid shs 34,000, the respondents and some faction of the applicants threatened the applicants with eviction and thereby caused fear among the applicants who had to leave the said premises and that the respondents now purport to have stopped to issue any Trade Fair permits to any prospective exhibitors because of security reasons as advised by the Ministry of Sports, yet there are other factions carrying out Trade Fairs in the same space. The annexures LM7 annexed to the affidavit in support of the chamber summons show payment for shs 32,200 on 21st January 2015 for reserved parking along Moi Avenue Gill House & Development House for 5th February-7th February 2016.

41. According to the respondents, the applicants were granted a permit and they did hold the trade fair for the named dates of 5th -7th February, 2016 after which they were expected to vacate as the permit was not permanent but for those two days. Further, that trade fairs are only permitted during weekends in those reserved parking spaces and not on a daily basis. And that the exhibitions were

approved vide letter of 12th January 2016 after which the respondents received a letter from the National Government Ministry of Sports, Culture and Arts, advising against future events in the CBD which they considered a security risk hence from March 2016, the respondents stopped issuing such permits.

42. The substantive prayer for the applicants is leave to apply for Judicial Review orders of prohibition to prohibit the respondents, their servants agents or anyone claiming under or through them from revoking the permit, ejecting, interfering with the applicants' quiet possession or any act of compelling the applicants from occupying the suit premises known as zone 7 along Moi Avenue known as Gill House for the purpose of conducting trade fair herein.

43. However, from the affidavit evidence, there is nothing to show that the applicants were granted or that they hold a valid permit to conduct the trade fairs, for the respondent to be said to be threatening to revoke, and or for the respondents to be prohibited from evicting the applicants from the stated space. The permit granted as per the letter of 12th January 2016 and payment of 21st July 2015(sic) lasted for the events of 5th-7th February 2016. There is no other permit or payment made thereafter.

44. In addition, this court will be issuing orders of leave in vain in that what is sought to be prohibited does not exist. The applicants are not on site and neither are they complaining in their application that they were denied a permit, which is not the case here. And if they were denied a permit, only mandamus would issue to compel issuance thereof. That being the case, an order of prohibition would be futile.

45. Furthermore, this application was filed after nearly 9 months from February 2016 when the applicants first got the permit to exhibit their wares. Although an order of prohibition is not limited by statute, but the delay in applying for leave to apply and in referring in the supporting affidavit as “*until recently,*” without demonstrating that the applicants were if at all on the premises after 7th February 2016 and or that they were evicted there from or denied entry thereto on a specific date, in my humble view, the applicants are simply throwing the dice at this court.

46. Further, the respondent have sworn an affidavit detailing that this application is an abuse of the court process because there are pending before the subordinate court two civil suits instituted by the same applicants and over the same subject matter between the same parties. The response by the applicant's counsel was that he is not aware of those cases. That deposition by the respondents was accordingly not rebutted.

47. There was also no evidence of bias as alleged that other factions are operating from the same space and even if that were to be the case, there is no evidence that there was discrimination in issuing permits since there is no subsequent application for a permit by the applicants which has been rejected by the respondents. Furthermore rejection of permit cannot be challenged by way of a prohibition.

48. In the end, I find that the applicants herein have not demonstrated to the satisfaction of this court that they have a prima facie arguable case against the respondents capable of further consideration in depth at a substantive stage and therefore to grant them the leave sought herein is to clog this court with frivolous, vexatious claims like the one before me.

49. Accordingly, I must decline to exercise the judicial discretion conferred on this court in this matter by dismissing the Chamber Summons dated 8th November, 2016 which I hereby dismiss and order that each party bear their own costs of the application dated 8th November 2016.

Dated, signed and delivered in open court at Nairobi this 18th day of November, 2016.

R.E. ABURILI

JUDGE

In the presence of

N/A for Applicants

N/A for Respondents

CA: Adline