



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISCELLANEOUS CIVIL APPL. NO. 312 OF 2015**

**IN THE MATTER OF JUDICIAL REVIEW APPLICATION**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE JUDICATURE ACT CHAPTER 8 OF THE LAWS OF KENYA**

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 23 OF THE LAWS OF KENYA**

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF  
JUDICIAL REVIEW OF CERTIORARI AGAINST THE HONOURABLE RESIDENT  
MAGISTRATE P. MUHOLI**

**IN THE MATTER OF THE ARTICLES 165 (6) & (7) AND 159 OF THE CONSTITUTION**

**MUIGAI INTERNATIONAL (K) LTD.....APPLICANT**

**VERSUS**

**RESIDENT MAGISTRATE**

**MILIMANI COMMERCIAL COURTS.....RESPONDENT**

**IRENE AJWANG.....INTERESTED PARTY**

**RULING**

**Introduction**

1. By a Chamber Summons dated 21<sup>st</sup> September, 2015, the applicant herein, **Muigai International (K) Limited**, seeks the following orders:

1. That this application be certified urgent and heard Ex parte at the first instance.
2. That this honourable court be pleased to grant leave to the Applicant to apply for an order of certiorari to remove to this honourable court and quash the orders of honourable P. Muholi issued on the 17<sup>th</sup> September, 2015 in CMCC 5447 of 2015 Muigai International (K) Limited vs Irene Ajwang inter alia vacating previous orders issued on the 14<sup>th</sup> September, 2015 and extended the validity of orders issued on the 17<sup>th</sup> of July 2015 in CMCC 4118 of 2015.

4. That in the alternative be pleased to invoke the provisions of Article 165 (5) and (7) to enable a speedy determination of the matter subject of application herein.

5. That the costs of this application be paid by the Respondents.

### Applicant's Case

2. According to the applicant, it filed CMCC No. 5447 of 2015 against the Interested Party herein and obtained ex parte interim restraining orders against the said interested party.

3. However the Interested Party also filed an application in the same matter seeking the vacation of the said interim orders on the basis that there existed previous orders in CMCC No. 4118 of 2015 between the Interested Party and Mageeta Investments Limited & Another. The said interim orders were duly vacated on the ground that there were contradictory to the orders granted in the said CMCC 4118 of 2015.

4. It was contended that the Respondent admitted that he had not had the opportunity of perusing the alleged orders in MCC No. 4118 of 2015 and was unaware of their status though the applicant herein informed the Court that he same had lapsed.

5. It was the applicants case that the decision vacating the interim orders was based on non-existent orders and was hence detrimental to the applicant hence the Respondent's exercise of discretion was not judicious. To the applicant the said decision was made without the applicant being afforded a hearing and without evidence of service of the orders in CMCCC No. 4118 of 2015.

6. It was on the basis of the foregoing that the applicant sought the instant orders.

### Determinations

7. I have considered the instant application, the Statement and verifying affidavit filed herein as well as the submissions of counsel.

8. 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**.

9. **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”.

10. 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.

11. 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...”

12. 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.”

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.

14. In this case, if I understand the applicant correctly, the Respondent erred in misconstruing the position of CMCC No. 4118 of 2015 and thereby arrived at a wrong decision by vacating the interim orders in favour of the applicant. That the Respondent had jurisdiction to vacate the said orders is however not in doubt since interim *ex parte* orders are by their very nature provisional and the Court retains the discretion to discharge them. One of the grounds for doing so is the material non-disclosure. From the applicant's own averments it would seem that the Respondent was of the view that in light of the existence of orders which were contrary to the interim orders granted, the same ought to be set aside. That

decision could have been either wrong or right based on the material before him. However, that alone could not deprive the Respondent of the jurisdiction to vacate the interim orders. It is also clear from the applicant's own averments that the applicant informed the Court that the orders in CMCC No. 4118 had lapsed. That the Court did not believe this cannot be said to amount to violation of the rules of natural justice. If the decision was arrived at on insufficiency of the evidence, that cannot be a ground for the grant of judicial review orders. As long as there was evidence on the basis of which the Respondent could base its decision, its decision cannot be termed irrational.

15. In this case, after hearing the parties *inter partes*, the Court would still have been entitled to grant the temporary restraining orders pending the hearing of the suit since by then the Court would be better informed to make appropriate orders.

16. In my view the applicant ought to have expedited the hearing of its yet to be determined application instead of seeking to intercept the same through judicial review application. After hearing the application *inter partes* the Respondent would make an informed decision on the merits of the application. The mere fact that the Court vacates interim orders without dismissing the application itself ought not in my view to justify the commencement of judicial review proceedings with view to reinstating the vacated orders as the applicant seeks herein.

17. The decision whether or not to grant leave is no doubt an exercise of discretion and the Court in determining such an application is obliged to take into account sound legal principles. One of such principles is that where the applicant's remedies may well be achieved in the proceedings sought to be quashed, the Court ought not to permit the applicant to jump the gun as it were but should direct the applicant to prosecute its pending application so that the matter can be determined on merits. 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.

18. In the premises as the applicant's application is yet to be determined, I decline to exercise my discretion in favour of the applicant as sought herein and direct the applicant to instead fix its pending application for hearing and determination expeditiously.

19. It follows that without leave being granted these proceedings are rendered still-born and are hereby struck out but with no order as to costs.

**Dated at Nairobi this 24<sup>th</sup> day of September, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Macharia for the Applicant**

**Cc Patricia**