



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 76 OF 2014

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND MANDAMUS**

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNCIL.....RESPONDENT

AND

TIARA PROPERTIES LIMITED.....INTERESTED PARTY

RULING

1. On 26th February, 2014 I granted the applicant herein leave to institute judicial review proceedings as sought in its Chamber Summons dated 24th February, 2014. I further directed that the grant of the said leave operates as a stay in terms of prayer 3 of the said application pending the hearing and determination of the substantive motion or until further orders of the court.
2. By a Notice of Motion dated 3rd March, 2014, the interested party herein now seeks in the main that the said orders be set aside and the said application be dismissed with costs to the interested party.
3. The application is supported by an affidavit sworn by **Peter Njenga**, an alternate director of the **interested** party herein.
4. In opposition to the application the Respondent filed a replying affidavit sworn by **Dickson Mukaburu Matu**, the applicant's director.
5. I have considered the contents of the said affidavits and the submissions by the parties herein.
6. That a party affected by the grant of leave and/or stay has the right to move the Court at any stage of the proceedings for setting aside those orders is not in doubt. In **Geosurvey International LLC and Another vs. The Town Clerk, Malindi Municipal Council Malindi HCCC No. 106 of 2007 [2008] 2 EA 144** the Court expressed itself as follows:

“It is the law that any party aggrieved by the grant of leave in a judicial review application may apply to the judge who granted it or any other judge if the former is not available to set

it aside. The issue is at what stage can the aggrieved party make the application for setting aside the leave. In the instant matter it will be noted that apart from the granting leave it was ordered that the said leave to operate as a stay of the respondent's decision which was being challenged. That in effect, meant that the respondent would be served with the order. If the order aggrieved the respondent there is absolutely nothing wrong with the application to set aside the order in question being brought at the time it was brought. If leave has been granted on *ex parte* basis the respondent can make an application to set aside the leave. If such application is to be made, it must be made timeously if it is to have any point at all. What is discouraged is the delay in instituting an application to challenge leave."

7. Similarly, in Republic vs. Commissioner of Co-Operative Development & Another Ex Parte Gusii Farmers Rural Sacco Ltd. Kisii HCMA No. 32 of 2004 [2004] 1 KLR 483, the Court held:

"Judicial review proceedings under Order 53 CPR starts when the substantive motion has been filed.... In this case the substantive motion had not been filed. However though the parties would not be heard on the issue of judicial review *per se* they still can be heard on the issue of stay if it is granted simultaneously with the leave to institute judicial review. Granting leave to institute judicial review is one thing and granting stay is another thing altogether. Whereas issues relating to the former should be dealt with after the substantive motion has been filed parties interested in the matter can canvass the issue of stay even before the substantive motion has been filed. This is only logical since if a party feels that he will be affected by the order of stay he may not have to wait for 21 days if he feels that by doing so his rights will be infringed. Therefore there was nothing wrong for the Judge to rule that the 3 interested parties could be heard."

8. It is therefore my view and I so hold that an application seeking to set aside leave and stay may be made at any time. In fact it ought to be made as soon as it is discovered that grounds justifying such an application exist.
9. Order 53 Rule 1(4) of the Civil Procedure Rules provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.

10. It is therefore clear that an order that the leave granted do operate as a stay may only be granted in cases where leave granted is with respect to application for prohibition and certiorari. There is, therefore, no discretion to grant stay under Order 53 where what is sought and granted is only leave to apply for *mandamus*. Accordingly, in Re: Justus Nyangaya and Social Democratic Party Nairobi HCMA 1132 of 2002 Nyamu, J (as he then was) held that at leave stage it cannot be ordered that leave to apply for a *mandamus* order do operate as stay because logically there can be nothing to stay in respect of the leave for *mandamus* unlike orders of certiorari and prohibition where such leave can if ordered by a Judge operate as stay. In this case, the stay sought is pursuant to the application for leave to apply for an order of certiorari, *mandamus* and prohibition hence it follows that the prayer for stay was competently before the Court. Where, however, the decision sought to be quashed has been implemented leave ought not to operate as a stay. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.
11. This position arises from the fact that once a decision has been implemented stay is no longer 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 that stay may be granted. Where, therefore the stay is in respect of the grant of leave to apply for prohibition, it must be emphasized that prohibition by its very nature looks to the future hence where the impugned decision has already been implemented prohibition is not the best remedy to seek. See Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR.

12. However even where the leave is granted to apply for certiorari and prohibition it was held in **Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995** that in an application for leave to apply for judicial review and 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. Therefore where the outcome of the judicial review might be in a manner contrary to the conclusion reached by the inferior tribunal, stay of proceedings should be granted as it might lead to an awkward situation.

13. **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... In judicial review applications 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 and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... 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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process 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. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

14. Those then are the principles under which the Courts do exercise their discretion in granting an order for stay. However, it is not in doubt that such an order, if granted *ex parte*, may be set aside at a later stage if the Court finds that the stay ought not to have been issued in the first place or that the change in circumstances no longer warrant the continued existence of the orders of stay. Parties and their counsel are, however, cautioned that the grant of an order of stay ought not to be followed by an application seeking to vacate the same. It is only in cases where the Court is convinced that the conduct of the applicant at the *ex parte* stage when the stay was granted does not justify the grant either by non-disclosure of material facts or misrepresentation of the same or due to subsequent events that the Court will set aside the stay granted. This is due to the fact that Courts do not grant orders of stay as a matter of course and where the Court is in doubt, the Court is now at liberty to direct that the prayer seeking the stay be heard inter partes even in cases where the leave has been granted.

15. Dealing with an application seeking to set aside leave, the Court of Appeal in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** expressed itself as follows:

“Although leave granted *ex parte* can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases unless it be contended that judges of the Superior Court grant leave as a matter of course which is not correct. Unless the case is an obvious one, such as where an order of *certiorari* is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the application coming to court and there is, therefore, no prospects at all of success, the court would discourage practitioners from routinely following the grant of leave with application to set aside. Fortunately such applications are rare and like the Judges in the United Kingdom, the court would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.”

28. In this case, it was contended by **Mr Luseno** learned counsel for the interested party that the effect of the stay granted herein was to injunct the interested party from proceeding with its

- constructions yet judicial review orders may only be made against public bodies as opposed to private bodies such as the interested party.
29. It was further contended that under section 41(3) of the **Physical Planning Act**, the Respondent has a discretion to issue change of user subject to it being satisfied and that discretion ought not to be interfered with by this Court. Learned counsel further submitted that the decision whether or not to grant judicial review orders being discretionary the court ought to consider all the circumstances of the case including the conduct of the applicant who in this case was a beneficiary of a change of user decision and followed the same procedure as that of the interested party.
30. On the part of the applicant, it was submitted that the issues raised by the interested party are issues which ought to form the subject of the substantive motion rather than an application for setting aside leave and stay. It was further submitted that this court can grant orders staying the implementation of the decision being challenged.
31. I have considered the foregoing. It is my considered view that in an application seeking to set aside leave and stay, parties ought not to turn the said proceedings into a hearing of the substantive motion. With due respect, this is what the interested party seemed to have intended this court to do.
32. Section 41(3), (4) and (5) of the said Act provides:

(3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit.

(4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the applicant of such objections or representations and shall before the application is determined by it afford the applicant an opportunity to make representations in response to such objections or representations.

(5) A local authority may approve with or without such modifications and subject to such conditions as it may deem fit, or refuse to approve, an application made under subsection (1).

(6) Any person aggrieved by a decision of the local authority under subsection (5) may appeal against such decision to the respective liaison committee:

Provided that if such person is aggrieved by a decision of the liaison committee he may appeal against such decision to the National Liaison Committee in writing stating the grounds of his appeal: Provided further that the appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

33. It is clear that there is a statutory obligation placed on the local authority not only to publish a notice for change of user in the Gazette but also to notify owners or occupiers of adjacent land of the intention to change the user. Although the wording of the said provision is in prima facie mandatory terms, it is contended by the interested party that the said requirement is merely directory.
34. The requirement for leave was explained 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.**

35. **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”.

36. 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.

37. 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:

“The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power...the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter... It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person’s legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant’s legal rights or interests were affected. The applicant’s complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the matter of his complaint. If he 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... In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under

section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought.”

38. In R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199, the Court of Appeal was of the view 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.

39. 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.... Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century. 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.”

40. In this case, a *prima facie* reading of section 41(3) aforesaid clearly indicates that there is a need for notification of the owners or occupiers of adjacent lands to the land for which the change of user is sought. This requirement is important because change of user may adversely affect the residents of a particular area as well as the environment hence it is important that the said residents or owners be notified.

41. The preamble to our Constitution emphasises that in enacting the same the people of Kenya were “respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations”. The right to a clean and healthy environment is underpinned under Article 42 of the Constitution.

42. Article 47(1) of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

43. That the Respondent’s decision in considering an application for change of user is an administrative action cannot be doubted. Therefore in exercising its powers under the *Physical*

- Planning Act**, a local authority is obliged to comply with the provisions of Article 47 and if it does not so comply, its actions can be challenged in a court of law.
44. Having taken into account the foregoing and as the court's jurisdiction at the stage of the application for leave is limited to determining whether or not there is a prima facie case, I am not satisfied that the applicant's case did not disclose a prima facie arguable case for the purposes of the grant of leave. Accordingly, I decline to set aside the leave granted herein.
 45. With respect to stay, in my view "proceedings in question" under Order 53 rule 1(1)(4) of the **Civil Procedure Rules** refers to the proceedings in respect of leave is sought. In this case the proceedings in question must of necessity refer to the proceedings which led to the issuance of the change of user. Whereas it is true that a stay may be granted to prohibit the implementation of the said decision, where the decision has been implemented in the sense, as in this case, that the change of user has already been granted, it cannot be said that the decision by the owner of the plot on which the construction is being undertaken is implementing the decision of the local authority. Where a decision is made and the same has not been transmitted then an order of change of user may still be stayed since the act of transmission of the decision is an implementation thereof.
 46. Accordingly, strictly speaking an order that the leave operates as a stay pursuant to Order 53 rule (1)(4) aforesaid ought only to be granted in respect of the proceedings which are being challenged since those are the "proceedings in question."
 47. This however, does not mean that the Court is powerless in appropriate circumstances to invoke its inherent jurisdiction to prevent the abuse of its process or to ensure that the ends of justice are met. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice. Inherent power, it must be stressed is not donated by Section 3A of the **Civil Procedure Act**. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the **Civil Procedure Act** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
 48. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
 49. Accordingly, I find that in appropriate and deserving cases the Court when properly moved may perfectly grant orders whose effect is to ensure that the subject matter of the dispute is preserved. However, that is a jurisdiction which ought to be invoked only in exceptional circumstances.
 50. In the present case, the construction is not directly the subject of the judicial review orders sought herein as rightly admitted by **Mr Mburugu** for the applicant. No exceptional circumstances have been disclosed before me. If the interested party is not complying with the conditions stipulated for the grant of the change of user, there are in my view appropriate legal mechanisms for dealing with the same rather than judicial review.
 51. In the premises, I vary the orders made herein on 26th February, 2014 and set aside the order that the leave granted herein operates as a stay of the proceedings in question.
 52. With respect to the alternative prayer that these proceedings be stayed, under Order 53 rule 2 the stay may only be granted where there is pending another course where similarly efficacious remedies may be granted or there is a time limit stipulated for seeking the alternative remedy which time has not lapsed. In this case, I have not been told that the circumstances exist in which stay may be granted. Accordingly I decline to stay these proceedings.
 53. The costs of this application will be in the cause.

Dated at Nairobi this 20th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mburugu for the Applicant

Mr Luseno for the Interested Party