REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 447 OF 2014

REPUBLIC .....APPLICANT

VERSUS

NATIONAL TRANSPORT & SAFETY AUTHORITY .....ST RESPONDENT

CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE ...2ND RESPONDENT

PRINCIPAL SECRETARY STATE DEPARTMENT OF TRANSPORT....3RD RESPONDENT

TRAFFIC COMMANDANT.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

AND

EQUITY BANK LTD.....1ST INTERESTED PARTY

KENYA COMMERCIAL BANK LTD.....2ND INTERESTED PARTY

CO-OPERATIVE BANK LTD.....3RD INTERESTED PARTY

FAMILY BANK LTD.....4TH INTERESTED PARTY

FIBRE SPACE LTD (1963) .....5TH INTERESTED PARTY

SAFARICOM LTD .....6TH INTERESTED PARTY

RULING

On 2nd December, 2014 I granted leave to the Applicant, James Maina Mugo to seek certain judicial review orders. He had in his chamber summons application for leave dated 25th November, 2014 also prayed that the grant of leave **"do operate as stay of the intended implementation, and any implementation by the Respondents or any person acting under their behest, or direction, the payment of Public Service Vehicle fares via the "cash light" system specified in the 2nd Respondent's Legal Notice No. 75 of 2014, (THE NATIONAL TRANSPORT AND SAFETY**

AUTHORITY OPERATION OF PUBLIC SERVICE VEHICLES) (AMENDMENT) REGULATIONS, 2014 published in the Kenya Gazette on 11th June 2014, until the hearing and determination of the Notice of Motion herein filed, or until further Court orders."

This ruling therefore addresses the question as to whether the implementation of Legal Notice No. 75 of 2014 should be stayed pending the hearing and determination of the substantive notice of motion.

The Applicant's plea for an order of stay is grounded on the reasons for his application for leave. It is not wise to do a detailed consideration of those issues at this stage since those issues will be determined during the hearing of the substantive notice of motion.

The respondents and the interested parties opposed the application for stay. Their first ground of opposition is that this matter was brought to court too late in the day. They argued that although Legal Notice No. 75 of 2014 was published in June, 2014, the Applicant approached this Court on 27th November, 2014 a few days to 1st December, 2014 when the regulations were to come into force. For this reason, they argue that the application has not been brought in good faith and the leave granted should not operate as stay.

The second ground on which the application is opposed is that the Applicant has not shown what prejudice he will suffer if the implementation of the Legal Notice is not stayed. They point out that the interested parties have invested their money expecting that the regulations will be effected and it would be prejudicial to their interests to suspend the Legal Notice.

Thirdly, they submit that the grant of an order of stay will affect the wider public interest behind the decision in question. They submitted that the regulations in question were the outcome of extensive consultations with the actors in the public transport sector and issuance of stay would scuttle the public interest that the rules were meant to achieve.

In response to the arguments of the respondents and the interested parties Mr. Harrison Kinyanjui for the Applicant contended that application has been brought without undue delay. He submitted that it is the 2nd Respondent who has kept postponing the commencement date of the regulations and the Applicant cannot be blamed for filing the matter at this time. He urged the Court to note that this matter is grounded on the enforcement of Article 47 of the Constitution which provides the right to fair administrative action. He asserted that the regulations will hamper the Applicant's enjoyment of his constitutional rights and the operation of the regulations should be arrested through the issuance of an order of stay.

The purpose of a stay order was well articulated by D. K. Maraga, J (as he then was) in **TAIB A TAIB v MINISTER FOR LOCAL GOVERNMENT & 3 OTHERS (2006) eKLR** when he stated that:

> **That this court has jurisdiction to grant orders of stay has never been in issue given the provisions of Order 53 Rule 1(4). What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious.**
>
> **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 of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited."**

In issuing an order of stay, the Court must always balance the interests of the parties before the Court. The Court must also consider the impact of the stay orders on the wider public. In the case before me, failure to issue an order of stay will not render nugatory the Applicant's case. If at the end of the day the application succeeds, matters will revert back to the position that prevailed prior to the implementation of the Legal Notice. The allegation by the Applicant that the regulations are illegal and unconstitutional will

be determined after the hearing of the substantive application.

Whether the grant of leave should operate as stay is determined by the circumstances of each particular case. In Nairobi High Court, **JR No. 25 of 2011 REPUBLIC v CITY COUNCIL OF NAIROBI & ANOTHER EX-PARTE OUTDOOR ADVERTISING ASSOCIATION OF KENYA** (unreported), Musinga, J (as he then was) opined that a delay in filing proceedings can lead to denial of an order of stay even where such an order is deserved. In the case before me, the Legal Notice in question was gazetted on 11th June, 2014. The Kenya Gazette is the mouthpiece of the Government of Kenya and it is deemed that every Kenyan became aware of the regulations on 11th June, 2014. The Applicant has not given any reason why he did not take any action immediately after the gazettement of the regulations. He waited up to the eleventh hour before approaching the Court. This can be interpreted to mean lack of good faith on his part.

In judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he has an arguable case. The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise the Court will be reluctant to suspend the operation of a law. In this regard, I am persuaded by the words of Lord Goff **IN R V SECRETARY OF STATE FOR TRANSPORT EX P. FACTORAME (NO.2) [1991] A.C 603 H L** where he stated that **"the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless, it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based to justify an exceptional cause being taken."**

In the instant case, the Applicant can only establish the illegality or unconstitutionality of the regulations in question during the hearing of the substantive notice of motion. It would be unfair to the respondents and the interested parties to suspend the regulations without the benefit of the hearing of the arguments on merit.

Considering the circumstances of the case before me, I find that an order of stay is not viable. The application that the leave granted to commence judicial review proceedings should operate as stay is therefore rejected and dismissed. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 9th day of December, 2014

W. KORIR,

JUDGE OF THE HIGH COURT