REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISII

MISC. CIVIL.APPL. NO. 3 OF 2013

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY DR. J.A.S. KUMENDA AND DR. FLORENCE W. GATUNE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE PUBLIC HEALTH ACT

AND

IN THE MATTER OF ENVIRONMENT MANAGEMENT & COORDINATION ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

DR.J.A.S. KUMENDA……1ST APPLICANT

FLORENCE W. GATUNE……..……..……2ND APPLICANT

AND

THE CLERK, MUNICIPAL COUNCIL OF KISII…..……1ST RESPONDENT

THE MUNICIPAL COUNCIL OF KISII……..……..2ND RESPODNENT

THE COUNTY COMMISSIONER, KISII COUNTY……3RD RESPONDENT

THE COUNTY DIRECTOR OF ENVIRONMENT……..……4TH RESPONDENT

DISTRICT PUBLIC HEALTH OFFICER, KISII……..……..5TH RESPONDENT

DISTRICT COMMISSIONER,KISII CENTRAL DISTRICT……6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL…….7TH RESPONDENT

RULING

1. On 26th February, 2013, the applicants herein, Dr. J.A.S. Kumenda and Florence W. Gatune, (hereinafter referred to only as **"the applicants"**) brought an application for leave to apply for an order of certiorari to bring before court and quash the decision of the respondents that was conveyed to the applicants through a letter dated 19th February, 2013 that purported to stop the applicants from developing their parcel of land known as LR.No. Kisii Municipality/ Block III/301 (hereinafter referred to as "**the suit property**") and authorized the 1st and 2nd respondents to utilize the suit property as a garbage dumping site. The application also sought leave to apply for an order of prohibition to prohibit the respondents from interfering, encroaching, and/or intermeddling with the suit property and from contaminating and/or polluting the environment by converting the suit property into a dumping site. The applicants also prayed that the leave sought if granted should operate as a stay against the enforcement of the decision of the respondents aforesaid. When the application came up for hearing before me *ex parte* under certificate of urgency on 26th February, 2013, I directed the applicants for reasons that I set out in the order made on that day, to serve the application upon the respondents for hearing *inter partes* on 5th March, 2013 pursuant to the provisions of Order 53 rule 1(4) of the Civil Procedure Rules. When the matter came up for hearing *inter partes* on 5th March, 2013, Mr. Nyanchoga, advocate appeared for the 1st and 2nd respondents, Mr. Maroro, Chief Litigation Counsel appeared for the 3rd to 7th respondents while Mr. Otieno appeared for the applicants. On that day, Mr. Nyanchoga and Mr. Maroro asked for more time to consider the application and take instructions from their respective clients. They indicated to the court however that the respondents had no objection to leave being granted to the applicants to apply for orders of certiorari and prohibition. In the circumstances, the court granted leave to the applicants as prayed for in the chamber summons application dated 25th February, 2013 and listed the application for hearing *inter partes* on 12th March, 2013 on the issue of whether or not the leave that had been granted to the applicants to apply for orders of certiorari and prohibition should operate as a stay.

2. On 12th March, 2013, the advocates for the parties made submissions on whether or not the leave that was granted to the applicants on 5th March, 2013 should operate as a stay of the decision and proceedings complained of herein by the applicants. Mr. Otieno, advocate for the applicants relied on the contents of the 1st applicant's verifying affidavit sworn on 25th February, 2013 and submitted that the applicants are the registered proprietors of the suit property on which they have commenced development activities. Counsel submitted that, the applicants' interest in the suit property is protected under Article 40 of the constitution of Kenya and as such the same cannot be interfered with by the respondents without lawful or reasonable cause. Counsel submitted that the respondents sought through the decision complained of to curtail the applicant's rights over the suit property without following the due process and in breach of the rules of natural justice as the applicants were never given a hearing before the decision complained of was made by the respondents. Counsel termed the respondent's decision complained of herein as capricious and oppressive in that; the applicants own the suit property and had sought and obtained development permission from the relevant authorities including the 1st and 2nd respondents to develop the said property before sourcing for and obtaining development funds. The applicants thereafter engaged contractors to commence development on the suit property.The said contractors had commenced construction works on the suit property and the applicants had in fact inspected the first stage of the said works when the respondents without any notice to the applicants purported to stop the said works and give direction that the suit property should be used by the 2nd respondent as a garbage dumping site. Counsel submitted that, it would only be fair and just in the circumstances if the respondents are stopped by way of a stay from executing the said decision the execution of which will violate the applicants' constitutional rights. The respondents did not file any replying affidavit in response to the applicants' application for as a stay. The factual averments in the 1st applicant's verifying affidavit relied on by the applicants in support of their application for a stay is therefore not controverted. The respondents' advocates chose to oppose the application only on one technical point of law. Leading the onslaught, Mr.Nyanchoga, advocate for the 1st and 2nd

respondents, submitted that, the order of stay sought cannot issue against the 1st and 2nd respondents. Counsel submitted that the 1st and 2nd respondents ceased to exist soon after the announcement of the results of the just concluded general elections that brought in County Governments. Counsel submitted that, under section 134 of the County Governments Act, 2012, the Local Government Act, Cap.265 Laws of Kenya under which the office of the 1st respondent and the 2nd respondent as a legal entity were constituted stood repealed upon the announcement of the said results. The 1st and 2nd respondents therefore ceased to exist as legal entities. Counsel submitted further that, section 59 of Urban Areas and Cities Act, No. 13 of 2011 provides that any cause of action commenced in law by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of that Act against a body established by law. Counsel submitted that the "body" referred to in the said Act is not defined and has not been set up and no doubt is not the 1st or the 2nd respondents sued herein. Counsel submitted that the court would be acting in vain in issuing orders against the 1st and 2nd respondents who have ceased to exist as legal entities. On his part Mr. Maroro, the Chief Litigation Counsel who appeared for the 3rd to 7th respondents associated himself with the submission of Mr. Nyanchoga and added that the 3rd to 7th respondents were acting at the behest of the 1st and 2nd respondents and as such would be happy to abide by whatever ruling the court makes on the matter. In response to the respondents' submissions, Mr. Otieno advocate for the applicants submitted that the repeal of the Local Governments Act, Cap. 265 Laws of Kenya has not affected these proceedings in any way. Counsel argued that section 59 of the Urban Areas and Cities Act, No.13 of 2011 is very clear that any pending suits by or against local authorities would be sustained in the same manner in which they were prior to the commencement of the said Act. Counsel submitted therefore that this suit which was commenced prior to the repeal of the Local Government Act, Cap. 265 Laws of Kenya must continue and must be sustained as it is and the orders sought if found merited should issue accordingly without any hesitation. Counsel summed up his response by submitting that the issues raised by the respondents are mere technicalities which should be overlooked by the court having regard to the provisions of the section 159 (2) (d) of the Constitution of Kenya. Counsel submitted that the orders sought if issued would not be in vain as it would bind which ever body is set up to continue with actions that had been commenced by or against local authorities prior to coming into effect of the County Governments Act, 2012. Counsel prayed for the stay order sought to be granted.

3. I have considered the applicants' application, the verifying affidavit relied on in support thereof together with the applicants' advocate's submissions. I have also considered the respondents' advocates' submissions in opposition to the order sought. The respondents have not challenged the merit of the application for stay. The respondents seem to agree and rightly so that, on the material put before the court by the applicants, this is an appropriate case in which leave granted to the applicants to apply for orders of certiorari and prohibition should operate as a stay of the decision complained of pending the hearing and determination of the judicial review application. The decision of the respondents complained of herein is in my view prima facie unreasonable and irrational and is likely to cause serious prejudice and loss to the applicants if not stayed. I am a live to the fact that the power to grant a stay is discretionary which discretion must be exercised judicially based on well-established legal principles. The respondents have not advanced any argument on the merit of the application which militates against the exercise of this court's discretion in favour of the applicants. I am satisfied that the application has met the threshold for granting the stay order sought. The application is therefore for granting unless I uphold the technical objection raised by the respondents which I will deal with herein below in the second part of this ruling.

4. The technical objection raised by the respondents against granting of the order of stay sought by the applicants is that, the 1st and 2nd respondents have ceased to exist by operation of law and as such any order issued against them would be in vain. The application herein was instituted when the 1st and 2nd respondent were legally in existence and were capable of suing and being sued. The respondents' argument is that the repeal of the Local Governments Act, Cap. 265 under which the

two respondents were constituted took away their legal personality thereby rendering any action against them unsustainable and any order issued against them worthless.

5. The issue that arises for determination from the foregoing is whether legal proceedings that were instituted against local authorities prior to the repeal of the Local Government Act, Cap. 265 Laws of Kenya (hereinafter referred to only as "**Local Government Act**"), like the present application, which are pending before courts are sustainable and if so, against whom. The Applicants' took the position that such proceedings are sustainable as they are. The Applicants' advocate did not however come out clearly as to against whom such proceedings should be sustained. On the other hand, the respondents' position on the matter was that such proceedings are not sustainable against the 1st and 2ndrespondents and must wait until the "body" referred to in section 59 of the Urban Areas and Cities Act is established. The respondents' advocates also failed to address the issue as to the legal status of such proceedings which are at different stages of disposal by the courts pending the establishment of the said body having regard to the fact that accrued rights and interests cannot reside in vacuum. These are some of the issues that this court will have to grapple with in this second part of the ruling. The Local Government Act was repealed by section 134 (1) of the County Governments Act, No.17 of 2012 (hereinafter referred to only as "**the County Governments Act**"). The County Governments Act has no transitional provisions dealing with pending actions and legal proceedings. I find this to be a lacuna in this Act. As a repealing statute, the County Governments Act ought to have provided for how to deal with the accrued rights and interests under the repealed Act including pending actions and legal proceedings. What this Act has provided for in this regard is set out in section 134 (2) thereof which states as follows; "**All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition**." The body dealing with transition referred to in this section is the Transition Authority established under the Transition to Devolved Governments Act, No. 1 of 2012. I don't think that it was the intention of parliament having regard to the temporary nature of the life of the Transition Authority as an institution to give it power to continue with or defend suits pending by or against local authorities that were constituted under the repealed Local Government Act. If that was the intention of the legislature, it would have been stated expressly in the said section of the County Governments Act.

6. Due to the foregoing, it is clear that there are no transitional provisions in the County Governments Act dealing with actions and legal proceedings that were pending as at the date of the repeal of the Local Government Act. The reason for this obvious omission in drafting is not clear but I am of the opinion that it may be due to the fact that, an Act that was enacted earlier before the County Governments Act, namely, the Urban Areas and Cities Act, No. 13 of 2011("**Urban Areas and Cities Act**") had transitional provisions dealing with rights and interests that had accrued prior to the repeal of the Local Government Act including pending actions and legal proceedings. Section 59 of the Urban Areas and Cities Act to which both parties herein referred to in their submissions although to support conflicting positions provides as follows; "**Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law".** This section vests the power to proceed with and to defend actions and legal proceedings pending against the defunct local authorities upon **"a body established by law"**. This "**body**" is neither defined nor constituted under this Act. This section therefore attempts to provide a solution to the transitional question under consideration but one which is vague and not totally helpful.

7. Section 59 of the Urban Areas and Cities Act aforesaid only provides an answer to the first segment of the initial question that I had set out to answer in this part of the ruling, namely, whether suits pending against the defunct local authorities are sustainable and if so against which body or entity. This section is clear that suits commenced in a court of law against any local authority prior to the repeal of the Local Governments Act shall continue to be sustained. This section is in accord with the provisions of section 23 (3) (e) the Interpretation and General

Provisions Act, Cap. 2 Laws of Kenya which provides as follows; "**Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not-(e) affect investigations, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceedings or remedy may be instituted, continued or enforced……..**" Section 59 of the Urban Areas and Cities Act, as I have observed above is however vague as to against whom such suits shall be sustained or continued. The applicants' advocate had submitted that such suits are sustainable as they are, meaning, against all the respondents, the 1st and 2nd respondents inclusive. The respondents' advocates thought otherwise. According to them, such suits are not sustainable against the 1st and 2nd respondents or against any other body or entity save for them body referred to in section 59 of the Urban Areas and Cities Act aforesaid which is yet to be established; which means that, until the said body is established, rights and interests in such suits remain inchoate or suspended. I am not fully in agreement with the submissions of both advocates on this issue. The Applicants cannot be correct in their submission that despite the repeal of the Local Government Act that did away with local authorities, legal proceedings that were pending by and against such local authorities can be proceeded with by and against such authorities. The Applicant's advocate did not cite any case law or statute in support of this submission which is contrary to the express provisions of section 59 of the Urban Areas and Cities Act, aforesaid. I agree with the submission by the advocates for the respondents that after the repeal of the Local Government Act, local authorities and institutions that were constituted thereunder like the 1st and 2nd respondents herein ceased to exist as legal entities and as such cannot sue and be sued and can neither proceed with nor be proceeded against with respect to any pending suit. I don't agree however that the suits that had been instituted by and against the defunct local authorities some which are pending rulings and judgments must remain in limbo until such a time that the body referred to in section 59 aforesaid of the Urban Areas and Cities Act is set up. From my reading of the Urban Areas and Cities Act and the transitional provisions of the Constitution of Kenya, 2010, I have formed the opinion that such suits can be proceeded with by and against the County Governments. The objects of Urban Areas and Cities Act, as set out in section 3 thereof is to establish legislative framework for classification of areas as urban areas or cities and for the governance and management thereof under the County Governments. Urban area is defined under the Act to mean, a municipality or a town. The Act provides a legal frame work under which County Governments can classify areas under their jurisdiction as towns, municipalities or cities. Under section 12(1), 20(2) and 31 of the said Act, the management of cities, municipalities and towns are vested in County Governments and the same are to be administered on behalf of the County Governments in case of a city or a municipality by a board and in case of a town by a committee. The said Act provides that a board of a city or a municipality shall be a body corporate with perpetual succession capable of suing or being sued in its own name. The committee of a town however has no corporate status. The said Act provides a period of 3 years under section 54 thereof from the date of first general elections under the new constitution within which an assessment needs to be undertaken on the existing towns, municipalities and cities to ascertain whether they meet the criteria under the said Act for classification under the Act as a town, a municipality or a city and for appropriate classification to be done. Urban Areas and Cities Act came into operation after the first general elections under the new constitution save for sections 54 to 60 thereof that came into force after the repeal of the Local Government Act, that took place upon the announcement of results of the first general elections under the new constitution pursuant to the provisions of section 134(1) of the County Governments Act aforesaid. Section 59 of the Urban Areas and Cities Act aforesaid, which came effect after the repeal of the Local Government Act was therefore intended to preserve the rights to sue and to defend by and against local authorities existing as of the date of the repeal of the Local Government Act as the process of setting up new units of devolved governments got underway. As stated above, under the new system of devolved governments, the management of towns, municipalities and cities fall upon County Governments to be administered by boards and committees on their behalf. It follows therefore that until new towns, municipalities and cities are set up under the Urban Areas and Cities Act in the manner stated above the former towns, municipalities and cities would be under the direct management of County Governments. Due to the foregoing, the County Governments are in my view the successors of the local authorities that

were constituted under the repealed Local Government Act and should be the ones to proceed with pending legal actions by the defunct local authorities and against whom the pending legal proceedings against the said local authorities should be sustained. I find support in this proposition in the Sixth Schedule to the Constitution of Kenya.

8. Section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 provides that, an office or institution established under the Constitution of Kenya, 2010 is a legal successor of the corresponding office or institution under the former constitution or under a former Act of parliament in force immediately before the effective date of the Constitution of Kenya, 2010 whether known by the same name or a new name. County Governments under the new constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act. Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010, County Governments are therefore the natural and presumptive legal successors of the defunct local authorities. It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them.

9. In conclusion, it is my finding that this application is sustainable and until the body referred to in section 59 of Urban Areas and Cities Act is set up or established, it shall be sustained against Kisii County Government which will also be bound by any orders that may be issued herein in place of the 1st and 2nd respondents in the application. Due to the foregoing, I allow the applicants' application and order that leave granted herein to apply for an order of certiorari a prohibition shall operate as a stay of the decision complained of in terms of prayer No. 5 in the chambers summons application dated 25th February, 2013. The costs of this application shall abide the outcome of the substantive notice of motion application for judicial review.

Dated, signed and delivered at Kisii this 14TH day of June, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Applicants

No appearance for the 1st and 2nd Respondents

No appearance for the 3rd to 7th Respondents

Mobisa Court Clerk

S. OKONG'O,

JUDGE.

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