REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 318 OF 2012

IN THE MATTER OF: AN APPLICATION BY ABDO MOHAMED BAHAJJ, ANTHONY GETAMBU, AL-HAJ YUSSUF M K MURIGU, TEJPAL BEDI AND FLORA NKADUA GODO FOR LEAVE TO APPLY FOR ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE STATE CORPORATIONS ACT CHAPTER 446 LAWS OF KENYA.

IN THE MATTER OF: THE KENYA TOURIST DEVELOPMENT CORPORATION ACT CAP 382 LAWS OF KENYA.

IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: GAZETTE NOTICE NO. 10233 SPECIAL ISSUE VOL. CXIV – 69 OF 20TH JULY 2012

BETWEEN

ABDO MOHAMED BAHAJJ.....1ST APPLICANT

ANTHONY GETAMBU.....2ND RESPONDENT

AL-HAJ YUSSUF M K MURIGU.....3RD RESPONDENT

FLORA NKADUA GODO.....4TH RESPONDENT

VERSUS

MINISTER FOR TOURISM.....1ST RESPONDENT

THE KENYA TOURIST

DEVELOPMENT CORPORATION.....2ND RESPONDENT

RULING

1. By a Chamber Summons dated 6th August 2012, the applicants herein seek the following orders:

1. **THAT this application be certified agent.**
2. **THAT the Honourable Court do admit and hear this application during the High Court Vacation.**
3. **THAT leave be granted to the applicants Abdo Mohamed Bahajj, Anthony Getambu, Al-Hajj Youssuf M. K. Murigu, Tejpal Bedi And Flora Nkadua Godo herein to apply for an order of Certiorari to remove int the High court and quash the decision of the first Respondent contained in the Kenya Gazette Notice number 10233 of 20th July 2012 in special issue vol. CXIV - No 69 revoking the Applicants appointment as the Board Members of Kenya Tourist Development Corporation to remove into the High Court and quash Gazette Notice Number 10233 of 20th July 2012 special issue Vol CXIV - No 69 to extent that it appoints Shellina Popat, Bramwell Simiyu, John Mwazemba Mwaduwi, Maria Kagai Ligaga, Fatma Mohamed Achoki, Andrew Agak, Mary Mugure Mutungi and Junet Sheikh Nuh Mohamed to replace the applicants as Directors of Board Members of Kenya Tourist Development Corporation.**
4. **THAT leave be granted to the applicants to apply for an order of prohibition to prohibit the Respondents, their officers, the purported appointed Directors, agents or employees or otherwise howsoever from relying on the Gazette notice Number 10233 of 2012 in special issue vol. CXIV - No.69.**
5. **THAT leave be granted to the applicants for an order of Mandamus compelling the first Respondent to revoke Kenya Gazette Notice Number 10233 of 20th July 2012 special issue Vol. CXIV - No.69 to the extent that it revoked the appointments of the applicants and to forthwith reinstate and gazette the applicants as Directors of the second Respondent in place of Shellina Popat, Bramwel Simiyu, John Mwazemba Mwaduwi, Maria Kagai Ligaga, Fatma Mohamed Achoki, Andrew Agak, Mary Mugure Mutundi and Junet Sheikh Nuh Mohamed.**
6. **THAT the grant of leave for application for orders of Certiorari, prohibition and mandamus do operate as stay of further proceedings, the enforcement and/or implementation or any further action consequent upon the order/decision contained in the Kenya Gazette Notice Number 10233 of 20th July 2012 special issue Vol. CXVI - No. 69 until the hearing of this application or until this honourable court otherwise orders.**
7. **THAT cost of this application be in the cause.**

2. The application is based on the fact that the 1st respondent revoked the appointments of the applicants herein as directors of the 2nd respondent without giving the applicants reasons for doing so an action which the applicants contend is in breach of the rules of natural justice, arbitrary, mala fides and actuated with malice and political ill-will. According to the applicant the 1st respondent even if exercising discretion conferred on him by the law was obliged to give reasons for such exercise where the said action affects the rights and obligations of individuals.
3. When the application came up for hearing **Miss Ouma** learned counsel for the 2nd respondent informed the Court that since the dispute was between the applicants and the 1st respondent, the

2nd respondent would comply with whatever decision the Court made.

4. I have considered the foregoing. 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.**
5. **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".

6. 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.
7. 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."

8. 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.
9. 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."

10. 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. The Court is under a duty to filter the application at that stage of leave 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. Public bodies ought to proceed with their statutory duties without being uncertain as to whether their actions will be overturned in the future and the public ought to be assured that the actions taken by the public bodies will not be overturned. Unless this assurance is given, public affairs are unlikely to be conducted in a manner that guarantees to the public confidence in the administration of its affairs. Therefore leave may only be granted 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.

11. In this case the applicants contend that the 1st respondent's action is in breach of the rules of natural justice, arbitrary, *mala fides* and actuated with malice and political ill-will. These contentions have not been denied by the 1st respondent.
12. 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.

13. In the absence of any controverting material I find that the applicants have established a *prima facie* case for the grant of the leave sought.
14. Accordingly I grant leave as sought in prayers 3, 4, and 5 of the Chamber Summons dated 6th August 2012. The Notice of Motion shall be filed and served within 21 days.
15. With respect to the prayer for stay sought in prayer 6 of the said Summons taking into account the period that has lapsed since the impugned decision was made it would not be proper to grant the stay sought.
16. The costs of this application shall be in the main Motion.

Dated at Nairobi this 16th day of August 2013

G V ODUNGA

JUDGE

Delivered in the presence of Miss Olando for Mr Lakicha for the applicant