



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 358 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
CERTIORARI**

AND

**IN THE MATTER OF THE GAZETTE NOTICE NO. 13214 OF 27TH SEPTEMBER, 2013
APPOINTING NEW MOTOR VEHICLE INSPECTORS AND DEGAZETTING PREVIOUS
INSPECTORS**

AND

IN THE MATTER OF CONSTITUTION OF KENYA, 2010, ARTICLES 10, 165 AND 232

AND

IN THE MATTER OF TRAFFIC ACT, CAP 403 LAWS OF KENYA, SECTION 3(3)(A)

BETWEEN

EDWARD GITONGA

WAMBUGU NYAMU

**YAKKUB AWAN (in their capacity as the officials of SPEED
GOVERNORS & ROAD SAFETY
ASOCIATION.....APPLICANTS**

AND

AND

**CABINET SECRETARY FOR TRANSPORT
INFRASTRUCTURE.....RESPONDENT**

AND

THE NATIONAL TRANSPORT

AND SAFETY AUTHORITY.....INTERESTED PARTY

RULING

1. By a Chamber Summons dated 9th October 2013, the applicants herein sought the following orders:
 1. **That the applicant herein be granted leave to apply for an order of certiorari to bring to the High Court for the purposes of quashing and to quash the respondent's decision contained in the Gazette Notice No. 13214 in the Kenya Gazette Vol. Cxv-No. 139, Nairobi of 27th September, 2013 appointing motor vehicle inspectors and degazetting the previous ones.**
 2. **That the said leave do operate as a stay of the aforesaid Gazette Notice No. 13214; that is to say that the previous inspectors remain in office until the motion is filed, heard and determined.**
 3. **That the costs of this application be provided for.**
2. When the application came before me on 9th October 2013, I granted the leave sought in prayer 1 of the said summons and pursuant to the proviso to provisions of Order 53 rule 1(4) of the Civil Procedure Rules, I directed that the limb dealing with the stay be heard inter partes.
3. It is that limb of the application which is the subject of the present ruling.
4. The application is supported by a verifying affidavit sworn by **Edward Gitonga Kieru** on 9th October 2013.
5. According to the said affidavit, the Speed Governors and Road Safety Association, the applicant herein (hereinafter referred to as the Association) is an association registered as such under the Societies Act, Cap 108 Laws of Kenya. And among its objects are to ensure road safety and it is made up of members who are also the owners of various types of approved and gazetted speed governors models that exist in the country. According to the deponent, road safety and road carnage has always been a matter of immense public interest and concern but lately it has attracted unprecedented public attention. The association, according to him, works with various stakeholders to ensure road safety such as: i) Ministry of Transport and Infrastructure ii) The Motor vehicle Inspection Unit iii) National Transport Safety Authority (NTSA) iv) Kenya Bureau of Standards v) Traffic Police Department and vi) Kenya National Highway Authority (KENHA) and in discharging its mandate to achieve the road safety goals, the Association compiled a detailed report detailing the causes of the road accidents among the PSVs on our roads, which report was supplied free of charge to all stake holders including the respondent. In the said report the Association identified how speed governors are tampered with leading to road accidents and it is because of the immense knowledge and expertise of the association on speed governors that they have always worked and trained motor vehicle inspectors who inspect the effectiveness of speed governors in terms of the Traffic Act.
6. It is deposed that before the cabinet secretary in charge of Transport and Infrastructure degazetted the previous inspectors on 27th September, 2013, the association had carried out training and sensitization of the inspectors on speed governors who also gained mastery and skills in detecting fake speed governors. However, on 27th September 2013, vide Gazette Notice No.13214, the respondent gazetted new inspectors and degazetted the previous ones. Annexed hereto marked EGK5 is true copy of the gazette notice. While aware that under section 3(3)(a) of the **Traffic Act**, Cap.403 Laws of Kenya, the respondent is empowered to appoint motor vehicle inspectors which is an office in public service, he deponent avers the process of appointing new motor vehicle inspectors was done in contravention of the constitutional principle of public participation in that unlike before, no advertisement of the new vacancies was advertised inviting qualified and interested applicants to apply and further that no consultation was done to relevant players and stakeholders such the applicant herein, the motor vehicle owners who are consumers of the services of the motor vehicle inspectors, the police and the Ministry of Internal Security. He further states that the process and the outcome of the appointment process offends constitutional principles of governance; to wit; plurality, competition and diversity, both gender and ethnic; the process of appointing new motor vehicle inspectors offends the principle of legitimate expectation in that it creates and has indeed created a vacuum in that no motor vehicle inspection has taken place during the transition period, by removing the entire lot of the previous inspectors, the

- process has killed the institutional memory of the motor vehicle Inspectorate Unit and the applicant herein has invested heavily in training and sensitizing the previous inspectors on road safety and especially on operation and effectiveness of speed governors hence their abrupt and whole sale departure is thus a big dent on road safety which is a matter of public interest.
7. According to the deponent, before the aforesaid unilateral appointment, the procedure was that the PSC through Ministry of Internal Security used to advertise for the positions and at no time in recent past has the Minister revoked appointment of all the previous inspectors as he did this time. To him, the gazette notice has caused confusion in the motor vehicle inspection department in that the new officers have not taken over their positions and the old ones though still in office cannot work and consequently, no inspection is currently going on leading to a crisis.
 8. In response to the application the interested party filed an affidavit sworn by **Engineer Paul T Mukiri**, the Chief Mechanical & Transport Engineer for the Government of Kenya on 4th November 2013.
 9. According to him, the government of Kenya like any other government in the world has established particular mechanical requirements which every motor vehicle must possess in order to be allowed by the government to operate in our roads which requirements are designed to ensure that the motor vehicles plying the roads are mechanically sound and are not a threat to other road users and/or their operators. The same are designed to further improve road safety and reduce accidents resulting from mechanically defective motor vehicles. To ensure that the above requirements are met by all motor vehicles, the government has established the motor vehicle inspection unit throughout the country and regularly trains motor vehicle inspectors which inspectors are then armed with the necessary mechanical and technical knowhow to enable them carryout effective inspection of motor vehicles. The deponent avers that he is the government officer in charge of the training of the Motor Vehicle Inspectors which responsibility he has carried out for over ten years now and in that capacity he is equally responsible for the scheme of services and training rendered to and by the Motor Vehicle Inspectors. He further states that as a result of the increasing number of road accidents in the County, the Government has been keen to carry out necessary measures to ensure the reduction of the road carnage which has so far claimed a large number of Kenyan lives and in effecting the said measures the Government established the Interested Party, the Authority herein to be in charge of transport and road safety which is a public body established as a parastatal under Section 3 of the **National Transport and Safety Authority Act NO. 33 of 2012** with the statutory functions of inter alia to;- advise and make recommendations to the Cabinet Secretary n matters relating to road transport and safety, implement polices relating to road transport and safety; plan, manage and regulate the road transport system, ensure the provision of safe, reliable and efficient road transport services and to administer the **Traffic Act** Chapter 403 of the Laws of Kenya. in the performance of its above functions, the Interested Party is mandated to inter alia conduct motor vehicle inspections and certification, regulate public service vehicles, develop and implement road safety strategies etc. and in so doing the Authority established that it was necessary to overhaul the motor vehicle inspection process and to change the motor vehicle inspectors since some of the accidents occurring on our roads were mainly as a result of the defective mechanical condition of the public service vehicles. To the deponent, it became apparent that there was wide spread inefficiency in the motor vehicle inspection process and the then gazetted inspectors were unable to effectively carry out their duties as such contributing to the road accidents. According to the deponent, since the said degazetted motor vehicle inspectors are employees of the government, they were redeployed to the Mechanical and Transport department that does not deal with inspection of privately owned motor vehicles and the government through the Authority and the Ministry of Transport and Infrastructure then revamped the motor vehicle inspection process by gazetting highly trained members of the ministry with competent mechanical and technical knowhow to carry out the motor vehicle inspection and duly gazette them as required by law vide the Gazette Notice No.13214 in the Kenya Gazette Vol.Cxv-No. 139, of 27th September 2013, which Gazette notice is the subject of these proceedings.
 10. It is his position that the gazetted Motor Vehicle Inspectors are not fresh recruits since they are employees of the government who have merely been picked form the department the Department of Mechanical and Transport and gazette as motor vehicle inspectors pursuant to the requirements of the **Traffic Act** and a cursory consideration of the said Gazette Notice No.13214 in the Kenya

Gazette Vol. Cxv-No.139, of 27th September 2013, confirms that the newly gazetted motor vehicle inspectors are qualified and for the first time in the history of our country, the motor vehicle inspectors will be headed by a professional and duly qualified and trained registered engineer in the rank of Chief Superintendent Engineer and deputized by a fully trained Mechanical Engineer. According to him, as is the normal practice his department participated in the identification and recommendation of the gazetted motor vehicle inspectors and to him, they are all qualified and competent individuals who will properly carry out the task.

11. It is further deposed that all the gazetted Motor Vehicle Inspectors were and remain government officers serving in his department and he is fully aware that they have the necessary qualification to carry out proper and regular inspection of motor vehicles and that their gazettelement will assist the Ministry in reducing road accidents. According to information received from **Eng. Gerald Kaguri Wangai**, the Director of Motor Vehicle Inspection, the newly gazetted Motor Vehicle Inspectors took up their duties on 30th September 2013 and the process of motor vehicle inspection is currently going on smoothly while all the previous motor vehicle inspectors have handed over their activities to the newly gazetted motor vehicle inspectors and that most of the degazetted former motor vehicle inspectors have since reported back to him for redeployment to their new departments. The deponent however avers that none of the applicants herein is a former and/or degazetted Motor Vehicle Inspector and they are total strangers to him. With respect to the allegations made in the verifying affidavit, the deponent avers that the government of Kenya through his department trains motor vehicle inspectors and administers their scheme of service hence it is misleading for the Applicants to allege that they train motor vehicle inspectors on the use of speed governors as speed governors are a major component of road transport and there is no reason whatsoever why the government would allow training of its officials on such an important aspect of road transport to be carried out by private individuals; that the Motor Vehicle Inspectors are serving employees/officers of the government and they don't stop being such officers merely because they have been gazetted and/or degazetted as motor vehicle inspectors; that his my department in conjunction with the Kenya Bureau of Standards (KEBS) is responsible for the approval of any speed governor prior to it being allowed to be used in Kenya the same cannot be left to the Applicants herein who claim at paragraph 6 of the Verifying affidavit to be owners of Speed Governors; that the Applicants being owners of speed governors seem to have a hidden agenda in their misconceived fight to ensure that the previous Motor Vehicle Inspectors continue to carry on motor vehicle inspection; that paragraphs 15 – 17 of the Verifying Affidavit are all misleading and untrue; and that there is no public office known as the office of the motor vehicle inspector as alleged by the applicants and/or at all since motor vehicle inspectors are employees of the government, employed in different ranks and merely gazetted to act as motor vehicle inspectors.
12. According to the interested party, the Application as filed herein by the Applicants is wholly misconceived and lacks in merit and the same is substantially premised on none existent facts designed by the Applicants to mislead this Honourable Court into granting unmerited stay orders and based on legal advice received from his advocates he believes that the entire proceedings herein are anchored on a misconceived believe that there exists in public service an independent office known as the office of the inspector of motor vehicle which office the applicants believes should be occupied by people appointed in accordance to the constitution while in truth there is no such office and the gazettelement of already existing employees of the government as motor vehicle inspectors does not create such an office since the same is only carried out pursuant to the Traffic Act, which requires that government officials designated as motor vehicle inspectors be gazetted.
13. The interest party contends that the judicial review orders sought herein are against the public interest and the same should not issue for being grossly prejudicial and unfair to the Kenyan citizenry particularly the users of public service vehicles who rely on the government to inspect the motor vehicles and only allow them to operate if they are mechanically sound and the import of the judicial review orders applied for herein if the same were to issue is that the Applicant will through the Court process control the inspection of motor vehicle by ensuring that status quo is maintained to the detriment of the government and the public. To him, it is inconceivable that the Applicants herein wants this Honourable Court to issue orders to stop the gazettelement of the motor vehicle inspectors and in effect stop the government from taking appropriate steps to reduce road accidents simply because the Applicants are owners of speed governors which they wish to

continue to sell without inhibitions and that an order of stay as sought herein cannot regularly issue to stay an act which have already occurred as the gazette motor vehicle inspectors have already taken up their duties and the previous ones have already handed over and returned to the ministry for redeployment some have even taken up their new duties. It is finally contended that an order of certiorari as sought herein is not available to the Applicants since there is no decision that has been made as against them, which decision can lawfully be quashed. The Applicants have not demonstrated any rights and/or legitimate expectation and/or any breach of the rules of natural justice to avail them to the orders sought herein and/or to warrant the issuance of an order of certiorari.

14. In support of the application **Mr Gacheru**, learned counsel for the applicants submitted that when the Court granted leave, it noted that there was a prima facie case which still subsists. According to him, the purpose of the stay is that in event that the Motion succeeds the same will not be rendered nugatory. According to him the applicants have a strong case based on the principle of legitimate expectation. If the stay sought is not granted the effect would be that we would have inspectors who are not qualified and secondly there would be a crisis in the transport industry since the new inspectors have no knowledge in the field of motor vehicle inspection. He further submitted that the other crisis would be with respect to channels of reporting since the new inspectors have been moved from Internal Security Ministry to the Ministry of Transport. Since the old inspectors have not been deployed anywhere, it is submitted that they are available and if the stay is granted no prejudice will be caused.
15. On his part **Mr Agwara** learned counsel for the interested party reiterated the contents of the replying affidavit and submitted that all the inspectors and employees of the government and the only requirement for one to be an inspector is the gazettement. It was further submitted that the degazetted inspectors and not the applicants in this application and are not before the Court and that the applicant's reason for bringing this application is simply to protect its own interests. Since the degazetted inspectors are not the applicants herein to grant the stay sought will be in vain since there is no evidence that the old inspectors are interested in resuming their duties. To him judicial review being a public matter, public interest dictates that the inspectors be allowed to continue with their duties. Since at the time of coming to court handover had already taken place, it is submitted that the prayer for stay has been overtaken by the events.
16. On the part of the respondent, **Ms Mbilo** while associating herself with the submissions made on behalf of the interested party submitted that the order of stay sought is not efficacious because of the great public interest since it would cripple the operations of the government and the public. She similarly was of the view that since the aggrieved parties are not parties to this application, the applicant has not demonstrated prejudice that it is likely to suffer and since the same is not demonstrated any loss or injury that it is likely to suffer may be compensated by an award of damages. Since the new inspectors have already taken office there is no merit in the stay sought as to grant the same would be tantamount to reversing the decision. However if the court after the hearing finds that the Gazette Notice was improper it can declare the said notice to be illegal. On the other hand if the stay is granted there would be nothing pending to be heard and the respondent and the interested party would be prejudiced.
17. In his rejoinder **Mr Gacheru** submitted that this is a matter of public interest hence the interest of justice favours the grant of the stay in order to maintain the status quo ante the notice.
18. I have considered the forgoing and this is the view I form of the matter.
19. The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The first issue for consideration by the Court is the circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise. 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.

20. 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.**

21. 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 Njoroje & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR.**
22. 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.
23. **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.”

24. In this case, it is clear that the old inspectors had been degazetted as such inspectors vide a gazette notice dated 27th September 2013. The application for leave was filed on 9th October 2013. In order to merit the grant of stay orders sought it ought to be demonstrated that unless the stay sought is granted the success of the applicant’s motion may well be rendered an academic exercise.
25. In the present case, new inspectors have been appointed. The old inspectors are not parties to these proceedings. Instead the applicants contend if I hear **Mr Gacheru** correctly that since the new inspectors are not possessed of the sufficient knowhow the public is exposed to a risk. According to the applicants the new inspectors have never undergone training with respect to speed governors which the old inspectors did. Can it therefore be said that unless the stay sought is granted, the outcome of the application will be negated? I don’t think so. If the applicants were to succeed in their application the impugned gazette notice would be quashed and the respondents would be left to follow the correct procedure.
26. What however is the meaning of stay? According to **Black’s Law Dictionary**, 9th Edition by Bryan Garner at page 1548, “stay” is defined as “the postponement or halting of a proceeding, judgement, or the like”, “an order to suspend all or part of a judicial proceeding or a judgement resulting from that proceedings”. In this case the proceedings in question have reached a stage where the old inspectors have been degazetted and the new ones gazetted. For all intents and purposes the proceedings are complete and there is nothing pending to be stayed.

27. What the applicants intend to achieve by the grant of the stay sought is an order reinstating the old inspectors back to their offices. That in my view is not the intention of granting a stay since by doing so the applicants shall have obtained the orders they seek in their Motion before the Motion is heard and determined. I associate myself with the decision in **Taib A. Taib vs. The Minister for Local Government & Others** (supra) that a stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.
28. It is therefore my view that to grant the stay at this stage would be an exercise in futility and it is trite that Courts do not grant orders in vain. This is more so as the degazetted inspectors are not parties to these proceedings and it has not been shown that by granting the order for stay they would resume their duties in the absence of an order compelling them to do so. To grant a stay without compelling the old inspectors to resume their duties may lead to a vacuum in the motor vehicle inspection unit which is likely to lead to a much bigger crisis than the one envisaged by the applicants.
29. In deciding whether or not to grant an order the court must take into account the principle of proportionality in order to see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**
30. In the premises I decline to direct that the grant of leave herein do operate as a stay.

Dated at Nairobi this day 13th of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gacheru for then applicant

Mrs Sirai for the Respondent

Mr Agwara for interested party