



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous 338 of 2011

IN THE MATTER OF AN APPLICATION BY SPRING VALLEY RESIDENTS COMPANY LIMITED

AND

IN THE MATTER OF A DECISION BY THE CITY COUNCIL OF NAIROBI

RULING

The Applicant, Spring Valley Residents Company Ltd, has made an application under Order 53 Rule 1(2) of the Civil Procedure Rules for leave to apply for an order of certiorari to remove into this court to be quashed the decision made by **the Respondent, the City Council of Nairobi**, approving the proposed development plan registered as No.FB505 in respect of proposed development of an **Office Park** and **Hotel** to be erected on L.R.7158/76, Nairobi. **Dazzler Properties Limited, an interested party**, seeks to participate in the ex parte application for leave which the applicant prays should operate as a stay of the proposed development.

Mr. John Mbaluto, the learned counsel for the Applicant submitted to the court that he had great difficulty in accepting that the interested party should participate in the ex parte application for leave. He opposed the application by the interested party seeking to be heard on the issue as to whether leave should be granted and if so, if it should operate as a stay.

Mr. Kithinji Marete, the learned counsel for the interested party urged the court to allow the interested party to participate in the application on the ground that the court had discretionary power to make such orders.

I have perused the application and the accompanying documents and I have duly considered the submissions made by both counsel. Rule 1(i) of Order 53 provides that no application for mandamus, prohibition or certiorari shall be made unless leave therefor has been granted. Rule 1(2) of the Order provides that an application for such leave shall be made ex parte. Under sub rule (4) of Rule 1 of the Order, the grant of leave operates as a stay of the proceedings in question if the court so directs until the determination of the application or until the court orders otherwise.

The court has discretionary power to allow in appropriate circumstances the participation of a respondent or interested party during the ex parte hearing of an application for leave by dint of Article 165(3) of the Constitution. At any rate, under Article 159 (2) (d), justice shall be administered without undue regard to procedural technicalities and the focus should always be to ensure fairness in decision making. After all, one of the national values and principles of governance that bind every public officer

including judicial officers is (securing) rule of law and equity. Moreover, the powers conferred by an enabling statute include not only such powers as are expressly granted but also all such powers as are reasonably necessary for the accomplishment of the object intended to be secured, in this case justice.

In Rosafric Ltd and Others v. The Minister for Finance (Nbi, H.C. Misc Civil Application No. 1392 of 2001, this court in dealing with a similar application stated:

“So then, should this court allow an interested party who claims to be directly affected to be heard at this so called “ex parte” stage? It is not in dispute that the Interested Party herein is, and will be, directly affected by the outcome of this application. So, if they have a right to challenge the leave after it has been granted, what is wrong in having them challenge the same before it is granted? It is not logical that what can be done after cannot also be done before in certain circumstances where the court considers it appropriate to do so. Or will the court be stifled in its attempts to do justice merely by the use of the mandatory word “shall” in the Rule? (ie Rule 1(2) of Order 53).”

In Nairobi H.C. Misc Civil Application No.359 of 2003, Wilfred Karuga Koinange & 2 others versus the Judicial Commission of Inquiry into the Goldenberg Affair (unreported) this court stated with regard to an application by an interested party to participate in an ex parte application for leave for committal to civil jail;

In our view, this court has power to make, and will, in appropriate cases, make orders permitting any party who may be affected by an intended application for contempt to participate in the hearing of the ex parte application for leave. In deciding whether to permit such party to participate in the ex parte application for leave, the court will be guided by considerations as to whether any prejudice will be caused or occasioned by such participation, and whether ends of justice will be better served by an inter partes hearing of the ex parte application.

Where the party applying to be allowed to participate in the ex parte application intends to place before the court relevant material or facts without which the court would not have a full or complete picture of the matter before it, the court will readily allow such party to participate in the ex parte application. This is more so where it becomes plain that the party seeking leave to institute contempt proceedings has omitted material facts or has distorted facts or where, on the basis of the material placed before the court by the party seeking to participate in the ex parte application, it appears to the court that the intended contempt proceedings are not properly founded in law or are futile.

Where, as here, leave is sought in an ongoing litigation, the court will more readily allow a party to participate in the ex parte application if it is shown that no prejudice is caused and that such party intends to place before the court material which will assist the court to fairly reach its decision. But where a party has patently and beyond peradventure been in flagrant breach of the court order, the dictates of justice demand that such party be shut out.”

I have duly considered the circumstances relating to the instant case. The interested party and the Respondent have not furnished any reasons or material to show why their participation is being sought at the leave stage. Counsel appearing did not through any light in this regard. Accordingly, I decline to allow participation of the interested party and the respondent in the application for leave. The application shall proceed to hearing in their absence.

Dated at Milimani Law Courts, Nairobi, on this 11th day of January 2012.

G.B.M. KARIUKI, SC
JUDGE