



Owiti v Kisumu Water and Sanitation Company Limited & another; County Government of Kisumu (Interested Party) (Environment and Land Judicial Review Case E013 of 2022) [2022] KEELC 13366 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E013 OF 2022
A OMBWAYO, J
SEPTEMBER 30, 2022**

**IN THE MATTER OF CONTRAVENTION OF
2,3,10,19,20,21,22,23,43,46,47,48,50,56,159,162 (2) (B),186,258 AND 259 OF THE
CONSTITUTION OF KENYA AND IN THE MATTER OF SECTION 11 OF PART 2 OF
THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA AND IN THE MATTER
OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 AND IN THE MATTER OF
SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND IN
THE MATTER OF SECTIONS 7, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION
ACT, NO. 4 OF 2015 AND IN THE MATTER OF SECTIONS 63, 70, 72, 121, 124 AND 139 OF
THE WATER ACT, NO. 43 OF 2016 AND IN THE MATTER OF SECTIONS 13 (2) (B) AND
15 OF THE CONSUMER PROTECTION ACT, NO. 46 OF 2012 AND IN THE MATTER
OF KENYA GAZETTE NOTICE NO. 13561 IN GAZETTE ISSUE VOL. CXXIII-NO. 253
DATED 10TH DECEMBER 2021 AND IN THE MATTER OF AN APPLICATION FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

BETWEEN

VICTOR JUMA OWITI APPLICANT

AND

**KISUMU WATER AND SANITATION COMPANY LIMITED 1ST
RESPONDENT**

WATER SERVICES REGULATORY BOARD 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF KISUMU INTERESTED PARTY



RULING

Introduction

1. The applicant herein filed a chamber summons application dated February 25, 2022 and filed on February 28, 2022 under articles 2,3,10,19,20,21,22,23,43,46,47,48,50,56,159,162 (2) (b),186,258 and 259,section 11 of the fourth schedule of the Constitution of Kenya, Order 53 of the Civil Procedure Rules,2010, section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya, sections 7,9 and 11 of the Fair Administrative Act, No 4 of 2015, sections 63 , 70,,72,121,124 and 139 of the Water Act , No 43 of 2016 , sections 13(2) and 15 of the Consumer Protection Act, No 46 of 2012 seeking orders that the honourable court be pleased to grant the applicants Leave to apply for the judicial review of prohibition to prevent or stop the 1st and or the 2nd respondents, in person or through their agents, from demanding and/or collecting any water bills on the basis of the impugned tariff structure for the period 2021/2022 to 2024/2025 as published by the 1st respondent vide public notice dated and issued on December 14, 2021 and by the 2nd respondent vided Kenya Gazette Notice No 13561 in Gazette Issue Vol CXXIII-No 252 dated December 10, 2021. *Certiorari* to remove and bring before this honourable court, the Kenya Gazette Notice No 13561 in Gazette Issue Vol CXXIII – No 253 dated December 10, 2021 vide which the 2nd respondent published the illegal Tariff Structure for the period 2021/2022 to 2024/2025.*Certiorari* to remove and bring before this honourable court, the public notice dated and issued on December 14, 2021 issued and published by the 1st respondent and referenced “regular review of tariff” and notifying “all esteemed customers and the general public “of the implementation of the illegal Tariff Structure for the period 2021/2022 to 2024/2025 as published by the 2nd respondent in the Kenya Gazette Notice No 13561 in Gazette Issue Vol CXXIII-No 253 dated December 10, 2021.
2. That the court be pleased to order that the leave in 2 (a), (b) and (c) operates as stay of the continued implementation and /or enforcement of the impugned tariff structure for the period 2021/2022 to 2024/2025 as published by the 2nd respondent vide Kenya Gazette Notice No 13561 in Gazette Issue Vol CXXIII- No 253 dated December 10, 2021.
3. The application was based on grounds that despite water and sanitation services being expressly delineated as a county function under section 11 (b) of part II of the fourth schedule of the Constitution, the 2nd respondent , being a National Government agency , has without authority , and *ultra vires* arrogated to itself the power to receive the purported application by the 1st respondent to review the tariffs on the basis of the said application and approved the upward review of the tariffs in clear abuse and infringement of the rights of the applicant and other residents of Kisumu.
4. That despite the 2nd respondent’s allegation in the impugned Gazette Notice that public consultation was carried out on the application by the 1st respondent for the review of the tariffs, including oral and written submissions by all stakeholders, there was never adequate public participation, or any at all, as none of the applicant and other residents of Kisumu, who are key stakeholders in the services offered by the 1st respondent, were consulted either directly nor indirectly.
5. It is averred that the 2nd respondent issued and published the impugned Gazette Notice without the applicant and other residents of Kisumu having been afforded the right to be heard and without following due process contrary to the rules of natural justice. That the 2nd respondent issued the impugned Gazette Notice and the 1st respondent started the implementation of the impugned new water tariff structure for the period 2021/2022 to 2024/2025 without considering all the relevant



factors including that an up to 87% increase in water bills is economically and financially oppressive to the residents of Kisumu amidst the ravaging effects of the Covid-19 pandemic.

6. It is the applicant's case that up to 87% increase in water bills resulting from the implementation of the impugned new water tariff structure for the period 2021/2022 to 2024/2025 published vide the impugned Gazette Notice has made water unaffordable and thus out of the reach of the many residents of Kisumu thus infringing their right to clean, safe, cost-effective and affordable quality water in adequate quantities.
7. The application is supported by the statutory statement and the verifying affidavit of Victor Juma Owiti both of even dates. It is the Applicant's case that he is the holder of Water Meter Number 16039494 with the 1st respondent's water supply services in the Obunga Slums area delegated by the 1st respondent to and run on behalf of the 1st respondent by the Obunga Water and Sanitation Project referred to as Obunga WATSAN, who collects and remits water bills from Obunga Slums to the 1st respondent.
8. That the delegation of the water supply and /or management services to the said Obunga WATSAN is based on the 1st respondent's Delegated Management Model which is a performance -based model, in which the Obunga WATSAN and other private operators in Kisumu manage the distribution and other aspects of water services to customers on behalf of the 1st respondent as an agent of the latter in terms of connecting customers ,operating the sub-network , collecting revenue and fixing leaks and which model was intended to among other things increase access to safe and affordable water to the poor in Kisumu in accordance with clause 4.3 of the 1st respondent's Pro-Poor Policy , 2021.
9. It is also the applicant's case that a large proportion of the 1st respondent's customers are low-income earners struggling to afford a living and as such the impugned new water tariff structure for the period 2021/2022 to 2024/2025 is an extra unbearable burden to the already economically and financially over-burdened. That the increase in water bills resulting from the implementation of the impugned new water tariff structure has made water unaffordable and out of reach of most residents of Kisumu thus infringing their right to clean, safe, cost-effective and affordable quality water in adequate quantities contrary to the law and the 1st respondent's own commitment to accessibility and affordability.
10. It was stated that the implementation of the impugned new tariff structure grossly exceeds the cost of water for domestic/ residential use in neighboring counties including Homa Bay, Vihiga and Kericho. That no consultations nor public participation was carried out for the approval of the new tariffs. It was further stated that water and sanitation services including review of water tariffs are expressly delineated as a County function under the Constitution of Kenya and has no authority to review such water tariffs.
11. That the 2nd respondent had no powers to approve the impugned new water tariff structure for the said period without proof of consent or authority of the County Government. It is the applicant's case that the continued implementation of the impugned new water tariff structure will expose him and other residents of Kisumu to continued suffering of irreparable harm if the leave to apply for judicial review orders is not granted.
12. The 1st respondent in response to the application filed a replying affidavit dated March 16, 2022 where Thomas Odongo the CEO of the 1st respondent stated that the applicant is an advocate working under the Director of Public Prosecution and that the applicant is a contracted customer/client of the 1st respondent and is barred from filing this suit as per section 121 of the Water Act against the 1st respondent .



13. It is the 1st respondent's case that it took into account the pro-poor policy 2021 in the increase of the water tariffs hence the tariffs are divided to different categories to advocate the pro-poor objective and the new water tariff structure was approved after a well published constitution by all the stake holders and the slight increase in the water tariffs was necessary to meet the production and all attendant costs. That the effects of Covid 19 are not unique to the applicant alone and if the applicant was vigilant, he ought to have taken part in the public participation organized by the 1st respondent in full consultations with the 2nd respondent held on October 1, 2021.
14. It was stated that the applicant is an advocate of the High Court of Kenya and cannot genuinely claim to be a low-income earner and struggling as the water tariff is equally comprised of different categories to take care of all the interests' sectors of the society. That the water tariffs do not infringe the right of clean, safe, cost effective and affordable quality water as the tariffs were arrived after a wide consultation involving stakeholders and the water costs is still affordable to all customers.
15. That the respondents have equally had equal share of Covid 19 as the 1st respondent had to set up its production and supply of water to all its customers owing to the fact that water is the most effective way of fighting Covid 19 through hand washing. The 1st respondent stated in its case that it carried out extensive public consultation before adjusting the water tariff and in its first consultative meeting held on 1/10/2021, it proposed a report from which report it is clear that the 1st respondent complied with the requirements of articles 10,43, and 47 of the Constitution of Kenya 2010 and section 139 of the Water Act.
16. It was further sated that the powers to grant order of stay to operate amounts from Orders 53 rule 1 (4) which is a discretionary power and should be exercised sparingly and in cases where the decision complained of have been implemented such as the present suit, the court should b slow to order stay and the court should also strike a balance between the interests of the public who need good quality water in adequate supply as opposed to the individual interests of the applicant.
17. It was the 1st respondent's case that in judicial review proceedings, the court is concerned with the process but not the substance merit of the decision and the applicant herein is not challenging the process but the substance and that the increased tariff which is the issue in this application is the merit and as such the court should not allow stay pending the hearing and determination of the subordinate motion.
18. The 2nd respondent herein filed a replying affidavit dated March 16, 2022 and filed on March 23, 2022 where Engineer Peter Njaggah deposed and stated that he is the Director in Charge of Licensing, Standards and Advocacy at the Water Services Regulatory Board. He stated that the 2nd respondent is the Regulator for Water and Sanitation Services, having been established under section 70 and 72 of the Water Act (No. 43 of 2016) with the principle objective of protecting the interests and rights of consumers in the provision of water services.
19. That under section 72(1) (b) of the Water Act, 2016 , the 2nd respondent is mandated to evaluate water and sewerage tariffs to the county water service providers and approve the imposition of such tariffs in line with consumer protection standards. It also determines standards for provision of water services ,sets rules, approves water tariffs and enforces standards that guide the sector towards ensuring that consumers are protected and have access to efficient ,adequate ,affordable and sustainable water and sanitation services.
20. It was stated that pursuant to section 72 of the Water Act,2016 , the 2nd respondent has statutory obligation to establish regulations and guidelines to further guide licensed utilities on compliance with the provisions of the Water Act and to ensure sustainable provision of water services throughout the



Republic of Kenya. It was averred that among the regulations developed by the 2nd respondent is the tariff guidelines whose objective is to establish tariffs that balance commercial, social and ecological interests by ensuring access to all while allowing water service providers to recover justified costs.

21. The 2nd respondent applies the guidelines when approving the customer tariffs charged by all water service providers across the Republic of Kenya and the service providers must adhere to these guidelines when making any tariff adjustment proposal for consideration by the 2nd respondent. That public participation in the context of the Constitution entails facilitation of people involvement, conducting business in an open and transparent manner and getting the views of the people concerned and/or affected to the largest extent possible.
22. It is the 2nd respondent's case that the respondents duly complied with the provisions of article 10 (2), 232 (1) of the Constitution of Kenya 2010 and section 139 of the Water Act, 2016 by publicizing the proposed tariff adjustment application and inviting views and/ or objections from affected customers. That a hybrid public consultation forum was jointly organized and held by the 1st and 2nd respondents prior to finalization of approval processes by the 2nd respondent in line with the law and notices were duly published in line with the provisions of the Constitution and the Water Act, 2016.
23. It was stated that the said notices set out a summary of the application, the premises at which the public consultation would take place, invited written comments on or objections to the application, specified the person or body to which any such comments were to be submitted and specified a closing date of such comments. The 2nd respondent did not receive any comments, complaints or questions from the residents of Obunga Slums during the period for public consultation. That over and above the views and comments by the consumers, the 2nd respondent interrogates all tariff applications extensively to safeguard consumers interests hence the regulatory requirement for a Social Economic Study to inform the tariff adjustment process.
24. It was further stated that after the lapse of the timelines for sending complaints and comments on the proposed tariff structure, the 2nd respondent received a complaint from the Kenya Water and Sanitation Civil Society Network (KEWSNET) concerning the 1st respondent's proposed tariff review and the 2nd respondent forwarded the same to the 1st respondent for consideration. That the objectives underpinning water services tariff include raising enough revenue to guarantee sustainable water services, promoting economic efficiency of water service providers, ensuring equity and fairness and contributing to resource conservations while at the same time ensuring that tariffs are socially acceptable and politically feasible.
25. It was also the 2nd respondent's case that the water tariff structure entails consumption fees payable in various categories of consumers according to consumption trends and aims at addressing social objectives to safeguard the poor and is also a premium to guard public health. That the 2nd respondent determined an upward review of the 1st respondent's tariff in line with the best practice after considering the application and the supporting socio economic study, the written and oral submissions by all stakeholders during the public consultation period.
26. It was stated that the applicant's low-income area is served through the Delegated Management Model (DMM) who are private operators contracted by the 1st respondent to manage water supply in the delegated areas including billing and collection of revenue from all consumers within the low-income areas. That the original goal of the DMM was amongst others to improve access to water in the low-income areas with the end goal of achieving the progressive realization of the right to water and the said model has over the time proven to be commercially unviable for the operations of the 1st respondent.



27. That the approved tariff for the 1st respondent is intended to safeguard the interests of consumers in the low-income areas as it would enable the 1st respondent to gradually phase out the DMM and provide services directly thus eventually ensuring fairness, uniformity and consistency in the application of the tariff across all domestic users. The 2nd respondent set the phasing out of the DMM as a condition to the tariff approval. That pursuant to section 120 of the [County Government Act, 2012](#), which was amended by section 159 (b) of the [Water Act 2016](#), it stipulates that a county government or any agency delivering services in the county shall adopt and implement tariffs and pricing policy subject to the existing National Government Laws and policies.
28. It is the 2nd respondent's case that based on the above provisions of the law, it proceeded within the powers donated by the law in approving the water services tariff structure for the 1st respondent. That provision of water and sanitation services is a shared function between the National and County Governments in terms of regulation and management of water services. The national regulation in the water service sector including the approval of water tariffs is inevitable in light of article 21 of the [Constitution](#) since such regulations is imperative as tool to set national uniform standards in resource management and service provision standards and is necessary for national monitoring of obligations of both levels of government and to protect, put value and articulate on the economics, pricing and sustainability of water for present and future generations.
29. It was averred that granting orders sought by the applicant in the application at hand would defeat the state's fundamental duty in the progressive realization of the right to water as espoused under article 43 of the [Constitution](#) of Kenya 2010 and section 63 of the [Water Act, 2016](#). That the applicant's application is devoid in merit and should be dismissed with costs.

The application was canvassed by way of written submissions as directed by this court.

Applicant's Submissions

30. The applicant filed his submissions on March 22, 2022 and he raised a number of issues or determination which include ; whether this court has jurisdiction to hear and determine this suit, whether the circumstances of the instant application call for the court to exercise discretion to by-pass the requirement of exhaustion and whether the circumstances of the instant application call for this court to exercise discretion to order that leave having been granted operates as stay of execution pending the hearing and determination of the application.
31. On the issue of jurisdiction, it was submitted that this court is more appropriate to hear matters and / or appeals and disputes relating to and or arising from water services such as the review of water tariffs which is the basis of this application. Reliance was place in the case of [Republic v Nairobi City Water and Sewerage Company Limited ex parte Osman Batur Dedeoglu](#) Nairobi High Court Judicial Review Miscellaneous Application E11 OF 2020 (2021) eKLR.
32. On the issue of whether the circumstances in the instant application call for this court to exercise discretion to by-pass the requirement of exhaustion, it was stated that the application challenges the 2nd respondent's power of reviewing tariffs as it lacked the authority to do so as the County Government is the one mandate to review water tariffs. He relied in the case of [Murang'a County Government v Murang'a South Water & Sanitation Co Lt & Another](#) (2019) eKLR. It was submitted that the application to the extent that it challenges the power of the 2nd respondent to review tariffs, does not fall within the ambit of the requirement of exhaustion as there would not be any decision of the 2nd



respondent to appeal to the tribunal should this honourable court agree that indeed the 2nd respondent acted *ultra vires*.

33. It was further stated that the alternative remedy of an appeal to the Water Tribunal was in this case unavailable as was in the case of [Dawda K Jawra v Gambia](#) in which the court held that non-exhaustion may be excused in cases where the alternative remedy is not available. In the case of [Republic v Nairobi City Water and Sewerage Company Limited ex parte Osman Batur Dedeoglu](#) Nairobi High Court Judicial Review Miscellaneous Application E11 OF 2020 (2021) eKLR it was stated that the remedy of the Water Tribunal was found not only to be unavailable but also ineffective for the reason that the tribunal was not properly constituted.
34. It was submitted that the court may exercise discretion in exceptional circumstances as in the instant case to exempt the applicant from the obligation to exhaust any such remedies as the appeal to the tribunal in the interest of justice.

On the issue of whether this court can exercise discretion to order that leave having been granted operates as stay of execution pending the hearing and determination of the application; It was stated that the court has discretionary powers to direct that the grant of leave to apply for an order of the judicial review orders of *Certiorari* and /or prohibition do operate as stay of execution of the impugned notice until the hearing and determination of the application or until this court orders otherwise. The applicant relied in the case of [Muma & Kanjama Advocates v National Industrial Training Authority & Another](#) Nairobi High Court Judicial Review Application No Misc E006 of 2021 (2021) eKLR.

35. It was further stated that the matter affects the applicant and all the residents of the affected areas who have suffered substantial loss unless an order of stay is granted and he relied in the case of [R \(H\) v Ashworthy Special Hospital Authority](#) (2003) 1 WLR 127.

The applicant submitted that he has established that this court has jurisdiction to determine this application and has also demonstrated exceptional circumstances on the basis of which this court should exercise its discretion in his favour to direct that leave granted on March 9, 2022 operates as stay of the implementation of the new tariffs pending the hearing and determination of the substantive application or until further orders of the court.

1st Respondent's Submissions**

36. The 1st respondent herein filed his submissions on May 4, 2022 and stated that the gist of the decision of [R \(H\) v Ashworthy Special Hospital Authority](#) (2003) 1 WLR 127 is that the effect of stay is to halt proceedings that are challenged by way of judicial review and the purpose of stay is to preserve the *status quo* pending the hearing and determination of the judicial review proceedings. It was stated that it is easy to stay a decision which has not been implemented and in cases where the decision has been implemented then the court should that jurisdiction sparingly. Reliance was placed in the case of [George Philip M Wekalo v Law Society & Another](#) (2005) e KLR and [Taib A Taib v The Minister for Local Government & Others](#) Mombasa HCM MISCA No 158 of 2006.
37. It was stated that the court in exercise of discretionary powers to grant stay in judicial review proceedings considers public interests as was the case in [R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another](#) where Majanja J held that judicial review proceedings are public law proceedings for vindication of private rights and for this reason public interest is a relevant consideration in the granting of stay orders. It was submitted that in the instant case, leave should not operate as stay for the reason that it involves the protection of selfish individual rights and not for the interest of the general public. The 1st respondent also relied in the case of [Suleiman v Amboseli Resort Limited](#) (2004) 2 KLR 589.



38. On the issue of nugatory test, the court of appeal in the case of *George Otieno Gache v Judith Akinyi Bonyo & 5 Others* (2017) eKLR, the judges relied in the case of *Hashamukhal Virchand Shah & 2 Others v Investment & Mortgages Bank Limited* (2014) eKLR where it was held that:

“As for the second requirement, we have to ensure that the word “nugatory” has been given its full meaning, namely that the appeal will not be rendered worthless, futile, invalid or even trifling (*Reliance Bank Ltd v Nor Lake Investment Ltd* (2002) IEA 227). Secondly, we have to consider whether what has been sought to be stayed is reversible or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

39. It was also submitted that the public interest element in grant of a stay, the court strikes a balance between the rights of an individual and the public interest and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong and not merely arguable case that a tribunal’s decision was unlawful.

It was the 1st respondent’s submission that the decision to review the water tariff upwards has been implemented and stay is not available for the applicant.

Analysis and Determination

40. Pursuant to the affidavit sworn by Engineer Peter Njaggah, it was stated that the Respondents duly complied with the provisions of article 10 (2), 232 (1) of the *Constitution* of Kenya 2010 and section 139 of the *Water Act, 2016* by publicizing the proposed tariff adjustment application and inviting views and/ or objections from affected customers. That a hybrid public consultation forum was jointly organized and held by the 1st and 2nd respondents prior to finalization of approval processes by the 2nd respondent in line with the law and notices were duly published in line with the provisions of the *Constitution* and the *Water Act, 2016*.

Section 139 of the *Water Act, 2016* provides as follows:

1. A requirement imposed by or under this Act for a person in this section referred to as the designated person to undertake public consultation in relation to any application made, or action proposed to be taken under this Act shall be construed as a requirement to ensure that this section is complied with in relation to that application or action.
2. The designated person shall publish a notice, in relation to the application or proposed action —
 - (a) in at least one national newspaper of daily circulation; and
 - (b) in at least one Kenyan radio station broadcasting in that locality.
- (3) The notice shall—
 - (a) set out a summary of the application or proposed action;
 - (b) state the premises at which the details of the application or proposed action may be inspected;
 - (c) invite written comments on or objections to the application or proposed action;
 - (d) specify the person or body to which any such comments are to be submitted; and



- (e) specify a date not earlier than thirty days after publication of the notice by which any such comments are required be received.
- (4) The designated person shall make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the application or proposed action which are in the possession of the designated person.
- (5) The designated person shall consider— (a) any written comments received on or before the date specified under subsection (3) (e); and (b) any comments whether in writing or not received at any public meeting held in relation to the application or the proposed action at which the designated person was represented or pursuant to any other invitation to comment.
- (5) The designated person shall publish in accordance with subsection (2), notice of the fact that a copy of the decision and the reasons for the decision in relation to the application or proposed action is available for public inspection at the same premises as were notified under subsection (3)(b).
- (6) Regulations made under this Act may require, the designated person to hold a public meeting in relation to the application or proposed action.

41. It is clear that exhibit PN-2 indicates that the 1st respondent invited the 2nd respondent for public consultation and the notices were duly published in line with the law as per Gazette Notice No 9378. From the evidence on record, it is clear that the 2nd respondent did not receive any comments, complaints or questions from the residents of Obunga Slums during the period for public consultations. This court has established that although the applicant has alleged that no tangible public participation was carried out among the residents of Kisumu prior to the approval of the new tariffs by the 2nd respondent, the evidence on record shows that the residents were invited for public participation but failed to do so.

42. Pursuant to the consultative meeting held on October 1, 2021, the 1st respondent proposed a report in which report the 1st respondent had complied with the provisions of articles 10,43 and 47 of the Constitution of Kenya 2010 and section 139 of the Water Act before increasing the Water Tariffs. That as per section 120 of the which was amended by section 159 (b) of the Water Act, 2016 which states that a county Government or any agency delivery in the county government shall adopt and implement tariffs and pricing policy subject to the existing National Government laws and policies and the 2nd respondent proceeded within is powers in approving the water services tariff structure for the 1st respondent.

Since the new water tariff structure has already been implemented, the main issue for determination is whether leave should be granted to operate as a stay. The applicable law on whether leave so granted should operate as a stay is Order 53 rule 1(4) of the Civil Procedure Rules, which provides as follows;

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.”

43. In Taib A Taib v The Minister for Local Government & Others Mombasa HCMISCA No 158 of 2006 the court held that: -

... 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....”

44. In the case of *Republic v County Government of Embu Ex parte Peterson Kamau Muto t/a Embu Medical and Dental Clinic & 6 others* [2022] eKLR, it was stated as follows:

It is therefore clear that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

45. In *Jared Benson Kangwana v Attorney General*, Nairobi HCCC No 446 of 1995 it was stated that “stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded.”

Odunga J in *Republic v Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others* (2014) e KLR and in *James Opiyo Wandayi v Kenya National Assembly & 2 Others*, (2016) eKLR, where the learned judge held that it is only where the decision in question is complete that the court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

46. This court needs to exercise discretion on whether or not to grant stay and based on the above case law and evidence on record, this court has established that the decision being challenged by the applicant has already been implemented and therefore this application lacks merit and is hereby dismissed and each party should bear its own costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30th DAY OF SEPTEMBER, 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020

