



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI(NAIROBI LAW COURTS)**

**JR ELECTION CASE 111 OF 2008**

**OL KEJU RONKAI LIMITED**

**EMUNY MARA CAMP LIMITED.....APPLICANTS**

**VERSUS**

**THE NATIONAL ENVIRONMENTAL TRIBUNAL.....RESPONDENT**

**KENYA TOURISM FEDERATION.....1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY (NEMA).....2<sup>ND</sup> INTERESTED PARTY**

**R U L I N G**

In this matter an order for leave to file a judicial review application was made on 16<sup>th</sup> December 2008 by this court. In addition the court ordered that the leave operates as a stay.

On 22<sup>nd</sup> January 2009 the 1<sup>st</sup> Interested Party filed an application by way of Notice of Motion under Order LIII Rule 1 (4) of the Civil Procedure Rules seeking orders:

1. That the order made on 16<sup>th</sup> December 2008 granting the ex parte Applicants leave to apply for orders of Certiorari, Prohibition and Mandamus be set aside.
2. That the order made on 16<sup>th</sup> December 2008 to the effect that such leave does operate as a stay of the proceedings recognition, hearing conduct and/or determination or any other action by the respondent in Tribunal Appeal No NET 30/2008; **KENYA TOURISM FEDERATION VERSUS NATIONAL ENVIRONMENTAL TRIBUNAL (NEMA) OLKEJURONKAI LIMITED & EMUNY MARA CAMP LIMITED** be set aside.

The parties could not agree as to how the two applications could proceed and the court allowed them to address it on the issue. Mr. Gitonga learned Counsel appearing for the 1<sup>st</sup> Interested Party submitted that his Notice of Motion dated 22<sup>nd</sup> January 2009 should be heard first because it challenges the very substance and existence of the entire judicial proceedings while Prof Mumma learned Counsel appearing for the Applicant submitted that this is an application to set aside leave granted by this court on 16<sup>th</sup> December 2008. To hear the application to set aside the leave is an exercise in futility because once a substantive Notice of Motion Application has been filed then an application to set aside leave cannot be entertained.

At leave stage all the Applicant has to do is place before the court materials to demonstrate that he has a prima facie and arguable case.

The test as to whether leave should be granted to an Applicant for judicial review is whether, without examining the matter in any depth there is an arguable case that the reliefs might be granted on the hearing of the substantive application.

Once the court is satisfied that the Applicant has demonstrated that it has an arguable case and has exercised its discretion in favour of the Applicant and has granted leave to file the substantive motion that order for leave is spent and any substantive application to challenge the order made at the leave stage can be canvassed in the substantive motion.

Having come to that conclusion I order that the 1<sup>st</sup> Interested Party do file a replying affidavit to the Applicant's substantive motion in which it will be at liberty to challenge any issues raised by the Applicant including the orders made by the court on 16<sup>th</sup> December 2008 granting leave and that the leave so granted do operate as a stay. Those are the orders of this court.

Dated and delivered at Nairobi this 11th day of June 2009.

**J. L. A. OSIEMO**

**JUDGE**