



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAKURU**  
**JUDICIAL REVIEW 81 OF 2009**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MUNICIPAL COUNCIL OF NAKURU.....SUBJECT**

**RULING**

The applicants initially brought Nakuru HCCC No.175 of 2009 which has now been withdrawn upon the filing of this application. It is Chamber Summons dated 2<sup>nd</sup> July, 2009 for leave to bring judicial review proceedings and for orders that leave if granted, to operate as a stay of execution of the respondent's resolution to evict the applicants.

The application was placed before Mugo, J. on 2<sup>nd</sup> July, 2009, who after considering it made the following order:

***“Upon perusal of the chamber summons dated 2<sup>nd</sup> July, 2009 and noting the grounds for urgency, the same is hereby certified urgent. Upon hearing counsel and considering the grounds advanced in support, leave prayed herein is granted. Let the application be served forthwith for hearing on 7<sup>th</sup> July, 2009.....”***

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The effect of that order was that the applicants were granted leave to file a substantive motion, but the prayer for stay was deferred for *inter partes* hearing. That, I believe is what was placed before me on 7<sup>th</sup> July, 2009. That is clear from the submissions by learned counsel for the respondent.

Order LIII of the Civil Procedure Rules stipulates as follows in the part relevant to this issue:

**“(1) No application for an order of mandamus prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule**

**(2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavit verifying the facts relied on.**

.....

**(3) .....**

**(4) The grant of leave under this rule to apply for an order of mandamus 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.”***

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In interpreting this provision of Order LIII, the Court of Appeal has held that the High Court has no power to grant one Portion of the application *ex parte* and defer the other portion for consideration *inter partes*. In **Republic V. Commissioner of Co-operatives and Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd.** (1999) 1 EA 245 in which the court stated that-

***“If the application must be made *ex parte*, then it follows that it must be hard and granted or refused *ex parte*. If the application is granted, then rule 4 of Order LIII must also be dealt with because it is at the granting stage that the judge is required to deal with the issue of whether the leave granted shall act as a stay. From the provisions we have set out, it is clear to us that a judge has no power to separate the granting of leave *ex parte* from the issue of whether or not such leave shall act as a stay. The judge must decide at the stage of granting leave whether or not such a grant shall act as a stay.”***

To emphasis this point, I quote Ole Keiwua, JA in the case of **Shah V. Resident Magistrate, Nairobi** (2000) 1 EA 208 where he said:

***“In my respectful view, it is within the discretion of a judge to adjourn the whole application for leave, and for that leave to operate as a stay of***

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***proceedings for hearing *inter partes*, but I do not think that that discretion extends to enable such a judge to hear that application both *ex parte* and *inter partes* as was about to happen in this case.....”***

There is no point to elaborate on these very clear sentiments, save to note that counsel in their submissions failed completely to address me on this. See also **Republic V. Kenya Wildlife Services & 2 Others**, Civil Application No. NAI.12/2007.

This court cannot at this stage exercise a jurisdiction that ought to have been exercised at the stage of granting leave. I decline to grant order of stay.

Dated, Signed and Delivered at Nakuru this 25<sup>th</sup> day of September, 2009.

W. OUKO

JUDGE