REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

JR 495 OF 2008

ISAAC NGOTHO KUNGU…….....……PLAINTIFF

VERSUS

THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS …DEFENDANTS

RULING

The applicant herein moved to this court under certificate of urgency and filed two applications by way of chamber summons. One was dated 14th August 2008 and filed on 15th August 2008. The other on was dated 18th August 2008, and filed the same date of 18th August 2008. The one dated 18th August 2008 sought leave to b e granted to the applicants to be heard during the court vacation where, as the one dated 14th August 2008 and filed on 15th August 2008 sought 4 prayers.

(a) "That the application is certified urgent.

(b) leave is granted to the applicant Mr. Isaac Ngotho Kungu to apply for judicial Review and for orders of prohibition and Mandamus a as more particularly set out in the applicants statement of grounds and facts filed under order 53 rule 1 (3) of the civil procedure rules namely.

(1) *Prohibition to prohibit the respondent being the national commission on Human Rights organization, established by section 3 of the Kenya national Human Rights commission Act 9 of 2002 from:- releasing, publishing and issuing copy of the report known as " on the Brink of the precipice A Human Rights Account of the Kenya Post 2007 election violence preliminary edition August 2008" to the press and or the public through media house, and its website or any other on line communication or to any other persons or authority other than person or authorities mentioned in section 2(1) of the Kenya national commission on human rights Act, Act no 9 of 2002.*

(2) *Mandamus directing the respondent a statutory national body established by the Kenya national human rights commission Act, Act no 9 of 2002 to submit to the president and to the national assembly an un edited true and correct specified report dated July 2008 and all the annextures and schedule of the investigation it carried out in respect of the violation of Human Rights that took place in Kenya following the December 2007 presidential election in accordance with the Kenya national commission on Human Rights Act, Act no 9 of 2002.*

(3) *The leave so granted for orders of prohibition and mandamus shall operate as a stay of the issue and publication or any further or other issuance, release or publication of the report entitled "on the Brink of the precipice. A human Rights account of the Kenya's Post 2007 election violence preliminary edition August 2008" to among others;-*

(i). *The press, local and foreign.*

(ii). *The prime minister.*

(iii). *The minister for justice, national cohesion and constitution a ffairs*

(iv). *The Attorney General.*

(v). *The state agencies.*

(vi). *The civil society.*

(vii). *The international community.*

(viii). *The international criminal court (ICC)*

(ix). *The office of the high commission for Human Rights.*

(x). *And or other un authorized persons and/or institutions.*

(4) *the cost of this application are costs in the application for judicial review"*

The application dated 18th August 2008 and filed on 18th August 2008 seeking leave of court for the applicant to be heard during the vacation was heard and granted the same 18/8/08. The application dated 14/8/08 was also heard on the same date and this court, made the following orders:-

"*Order heard counsel exparte. There is basis laid. Leave sought to be granted*

(2) Substantive application to be filed and served forth with, alternatively the same to be filed and served not later than 21 days from today.

(3) In view of the parties named and who are likely to be affected by leave operating as stay, the court defers the issue of leave granted to operate as stay to be argued inter partes after the other parties are brought on board.

(4) Hearing on 28/8/08 on the issue of leave granted operating as stay.

(5) Cost in the cause"

When parties appeared before this court, on 19/9/08 for argument on the issue of leave granted operating as stay application to be heard inter partes counsel for the applicant intimated to the court, that they intend to raise a preliminary objection as regards the courts' intention of hearing that issues inter partes.

The said P.O is dated 19/9/08 and filed the same date. It is titled **Notice of preliminary objection to hearing** inter partes the application **for leave to operate as stay"** Two grounds were put forward namely:-

1. "That under order 53 rule 2 and 4 both the application for grant of leave and for the grant of leave to operate as a stay is to be heard exparte.

2. The court, has no power to separate the granting of leave ex-parte, from the issue of whether or not such leave shall acts as a stay. There is no power in court, to make one part of the chamber exparte and the other part to be heard inter parties"

The preliminary objection was heard inter partes on 16/10/08 and this ruling is in respect of the same. The points put forward by the objector are as follows:-

- Issue of leave has to be heard exparte.

- There is no power to separate the two.

- The position is that the facts which were before the court, and upon which the court, exercised its discretion to grant leave should be the same on which to grant leave to operate as stay.

- Since the court, found that the applicant has a justiciable interest and there was ground to grant leave, the same ground should have operated for the grant of stay.

On case law counsel relied on the case of **SHAH VERSUS RESIDENT MAGISTARATE NAIROBI (2000) IEA (CAK) 208** where Aluoch J as she then was (now JA) granted leave to apply for judicial review but deferred the issue of leave granted operating as stay to be argued inter parties when the matter came up for hearing inter parties, objection was raised to the mode of procedure and when the matter went to the court of appeal the CA ruled that:-

(i). That the court, has power to grant leave to operate as a stay

(ii). That the issue of leave being granted and the issue of leave granted operating as stay cannot be separated, they have to be considered together.

(iii). That there is no way the respondent can be heard on the issue of leave granted operating as stay as the court, cannot look at the application filed in reply or response to the substantive application on the basis of the foregoing submissions the court was urged to uphold the preliminary objection.

In response counsel for the respondent simply submitted that he has filed a comprehensive response to the substantive application. As for leave granted operating as a stay, the court, has discretion a to grant the same or not to grant the same. The court was also given the discretion to decide, the merits and the demerits of the preliminary objection.

In response to that submission, counsel for the applicant objector submitted that if the respondent has chosen to leave it to court, then he has not taken any substantive opposition to the preliminary objection and so the same should be allowed.

On the courts' assessment of the facts herein, the court, is of the opinion that the fact that the respondent to the P.O has not submitted substantively on it does not preclude the court, from looking at the merits and demerits of the P.O. In this courts' opinion the mere fact of the respondent leaving it to the court, to decide the merits and the demerits of the P.O is sufficient invitation for the court, to look into the objection. Further even if the same would not have been defended formally or orally in court is no justification for the objector getting a walk over. The court, is entitled to examine the objection and arrive at a determination as to whether the objection is merited or nor.

The basis of the objection appears to be an assertion that this court has miss construed, miss applied or failed to apply correctly the provision of order 53 rules 2 and 4. Further that the courts, discretion failing to deal with the issue of leave granted operating as stay, at the same time as the time when leave to apply for judicial review was granted is contrary to the decision of the court of appeal cited. This being the case, it is necessary to set out both the said provisions and the reasoning of the court of appeal. The court, has noted an error to the effect that the correct citation of the rules should read order 53 rules 1 (2) and 4 which deal with application for leave and stay and not order 53 rules 2 and 4. Order 53 rule 2 deals with provision relating to application for certiorari in certain cases, where as order 53 rules 4 on the other hand deals with statements and affidavits. Failure to so cite the said sub rule correctly does not disentitle the objector a ruling on its merits. Justice demands so.

The correct provision which should have been cited namely order 53 rule 1 (2) and 4 reads thus:-

"Order 53 rule 1 (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 a foresaid shall be made exparte to a judge in chambers and shall be accompanied by a statement, setting out the name and description of the applicant, the reliefs sought and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may in granting leave impose such orders as to costs and as to giving security as he thinks fit.

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall if the judge so direct operates as a stay of the proceedings in question untill the determination of the application or justified the judge orders otherwise"

The case law relied upon is the case of **SHAH VERSUS RESIDENT MAGISTRATE NAIROBI (2000) IEA 208.**

The brief fact of the case are contained in the editors summarized notes and are as follows. After criminal proceedings had been instituted against them, in the chief magistrates court, at Nairobi the applicant appealed to the high court, for leave to commence judicial review proceedings for orders of a prohibition and for such leave if granted to operate as a stay of proceedings in connection to one of the changes they faced. Aluoch J as she then was (now JA) granted leave but directed that the issue of whether leave should operate as a stay should be heard and determined at the inter partes hearing ,after the Attorney general and the prosecutor had been served. On the inter partes hearing, an objection was raised as to the jurisdiction, propriety of the bifurcation of the granting of leave and the adjournment of the prayer of leave to operate as stay for inter parties.Aluoch J as she then was (now JA) then suomoto set aside all the initial orders, she had granted and directed that the entire application be heard denovo before another judge. The application came for hearing exparte before Githinji J as he then was (now JA) who declined to grant leave. On the applicants application before the court, of appeal, for stay of the criminal proceedings before the chief magistrate, pending the hearing and determination of an intended appeal, against the said orders of Githinji J as he then was (Now JA) .

Ole Keiwa JA upon review of the law, on judicial review as it obtained in England at page 210 paragraph e-I went on to observe thus at page 211 paragraph a-C line 4 from the top:- " *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 proceedings for hearing inter partes but I do not think that the discretion extends to enable such a judge to hear that application both exparte and inter partes as was about to happen before Aluoch J"*

Owuor JA as she then was on the other hand at page 213 paragraph f-g line 20 from the bottom observed thus: - "*the issue alluded to in civil appeal number 39 of 1997 (supra) is substantial and at this interlocutory stage all I can say is that it may be the subject of submission in the intended appeal whether or not the proceedings before Githinji J were proper and valid….."*

The foregoing reasoning gave rise to the following holdings:

(i). The application would be granted because the applicant had satisfied the condition for the grant of stay they had an arguable appeal.

(ii). Aluoch J as she then was (now JA) had no jurisdiction to split the hearing of the prayers for leave and a leave to operate as stay in the manner she did. Either the entire application was heard exparte in its entirety adjourned to be heard inter partes.

(iii). Aluoch J as she then was (now JA) had no jurisdiction to set a side the earlier orders for leave, that she had already granted and as per Keiwa JA had no basis on which to do so as there was no application before her on which she would set aside or vary the earlier orders. It followed, that Githinji J as he then was (now JA) could not re-hear the application for leave as her orders were still extant"

In this courts' determination of the preliminary objection raised, it whises to note on the record, that it has

in the recent past in the discharge of its judicial function been confronted with a similar objection when handling a judicial review matter in **NAIROBI HCC MISC APPLICATION NO. 993 OF 2007. IN THE MATTER OF DR. PAUL NYONGESA OTUOMA AND 2 OTHERS VERSUS ATTORNEY GENERAL AND 2 OTHERS.** The court delivered two rulings in this matter. One delivered on 20th September 2007 and another delivered on 20th November 2007. The ruling delivered on 20th September 2007 centered on the preliminary objection similar to the one raised herein. Where as the one delivered on 20th November 2007, entered in the merits of the leave granted to apply for judicial review being ordered to operate as stay.

In this two rulings this court, went to great length examining and reviewing case law cited to it on the subject both emanating from the superior courts and the court, of appeal inclusive of the court of appeal authority that objector cited and is relying on. In addition to reviewing the case law, the court went further to construct the relevant provision namely order 53 rules 1 (2) and 4 CPR in so far as they went to affect issues raised as to whether the superior court, has jurisdiction, power, and authority do grant case to apply for judicial review exparte, and then defer the issue of that leave operating as stay to be heard inter parties.

Since the current objection is similar to the one handled earlier on **in Misc application 993/07** and since the said **Misc application 993/2007** had been handled by this court, in the same capacity, this court will re trace its foot steps in the reasoning in these two rulings', apply the said reasoning to the arguments herein in order to determine whether the objection is to be upheld or not.

This brief background information on the facts of the objection in **misc application 993/07** is that by coincidence with the case law cited by objector herein, Aluoch J as she then was (now JA) had been seized of that application for judicial review and had granted leave to apply for judicial review, and deferred the issue of the issue of the leave granted operating as stay. This court, became seized of the application what the issue of leave operating as stay had already been deferred to be argued interparties. On the day of hearing inter partes is when the preliminary objection was raised.

The courts, assessment starts at page 9 of the ruling delivered on 20/9/07. (Case law on the subject emanating from the court, of appeal inclusive of the one cited herein start at page 12 where as those emanating from the high court, start at page 35 of the ruling.

Analysis of the law by this court, started at page 45 line 3 from the top. The relevant portion runs thus:-"*the kind of objection being inquired into in these proceedings relates to a scenario where by the judge before whom the chamber summons for leave to apply for judicial review decides to grant leave to apply for judicial review and then defers the issue of whether the leave granted is to operate as a stay to another day to have it heard inter partes, either on the same date or on another date and either before the same judge or another judge for hearing and determination. Case law set out herein in has shown that whenever this occurs, it has attracted objections to the effect that the court has no power to split the consideration of the two reliefs and has to deal with them at the same time. This is the kind of situation and objection that this court, is dealing with the chamber summons went before Aluoch J who granted the first limb of the relief and then deferred the second limb to be considered to another date before this court*"

At page 46 of the said ruling this court made observations that each time the scenario occurred, the matter went up to the court of appeal. One of these was the case of **REPUBLIC VERSUS COMMISSIONER OF CO-ORPORATIVES (SUPRA)** in which the CA construed the provisions of order 53 rule 1 (2) and 1(4) and it was noted by this court to have been categorical that since the application must be heard and granted exparte, it is at the granting stage that the judge is required to deal with the issue of whether leave granted shall act as stay. Further that a judge has no power to separate the granting of the leave exparte from the issue of whether or not such leave shall act as stay"

At the same page 46, between line 10 from the bottom and line 1 from the bottom, this court set out both provision of order 53 rule 1 (2) and rule 1 (4) this courts construction of sub rule 1 (4) is found at page 47 line 4 from the top and states thus;- " *a reading of these two provision do not explicitly say especially*

sub rule 4 that the said leave " shall be granted exparte neither do they explicitly state that leave cannot be granted separately" the court went on to state that despite the said own construction of the said provision, the court, of appeal had gone a head in its own wisdom and stated that the two reliefs must be considered exparte by the same judge.

At page 47 this courts went on to consider the decision of **SHAH VERSUS RESIDENT MAGISTRATE NAIROBI (SUPRA**) *it is observed by this court that in the body of the ruling by Keiwa JA the authority to offer the whole application and have the same heard inter partes as stated a page 211 of the decision paragraphs (a-b) as " the authority to do so is within the discretion of the judge"* at line 2 from the top of page 48 it is observed that Owuor JA (as she then was) and Gicheru JA (now C.J) had agreed with that stand.

At line 3 from the top of page 48, this court, went on to observe thus:- " *this reasoning formed the centrol theme in the decision at page 209 paragraph (b) which is that the judge had no jurisdiction to split the hearing of the prayers for leave and leave to operate as stay in the manner she did . Either the entire application was heard exparte or court, in its entirety adjourned to be heard inter partes. What is lacking in that decision is guidance as to what criteria a judge would use to exercise his/her discretion to defer the whole matter to be heard inter partes, and not to exercise her discretion to grant leave in the first instance and then differ the issue of leave operating as stay to be canvaged inter parties. More so when the underlying reasons in the instances is the same. Namely to alert the other side of the impending proceedings to avoid surprise, get the respondents opinion and then give a fair ruling for ends of justice to be met to both parties. This little observation is not meant to criticise the court, of appeal decision but just to point out possible lacunces as to be filled by the court, of appeal at an appropriate time in order to sharpen the tools of trade for the superior courts in this area of laws.*

At page 49 of the said ruling the court went on to consider the CA decision of Zakhem construction **KENYA LIMITED VERSUS PERMANENT SECRETARY MINISTRY OF ROADS AND PUBLIC WORKS AND CHIEF ENGINEER WORKS (SUPRA)**. The augment presented to the court of appeal is found at line 3 from the bottoms and it runs thus;- counsel objecting at page 4 of the judgement was that *"since order LIII rule 1 (2) requires that the application be made exparte in chamber it must follow that the same must also be heard exparte in chamber"*

The response of the learned judges of the court of appeal is found at page 50 line 3 from the top and it runs thus:- " generally speaking and particularly in Kenya, unlike in the united kingdom, where this rules have been amended Mr. Mutua would appear to be right in the prima facie reading of the provision"

Consideration of the said case by the CA continues on the rest of the said page 50. then this court went on to observe at line 3 from the bottom thus: - "*at page 5 of the judgement, the court, of appeal acknowledges the fact that in the **republic versus commissioner** (**supra)** they had taken a strict stand that it was not permissible to grant leave exparte and then postpone the issue of whether the leave so granted ought to act as a stay for hearing inter partes. The court acknowledged that in the shah case (supra) they suffered on that stand when they held that a judge has discretion to adjourn the whole application for hearing inter partes. This was based on the realization that even in the United Kingdom, and even before the amendment of the rule, there was a power to adjourn an application for leave for hearing inter partes"*

At page 51 line 10 from the bottom this court went on to observe thus:- " *in the Zakhem case (supra) the court of appeal was now faced with a situation where a judge had deferred the whole exparte application for it to be served and heard inter partes. At line 11 from the bottom the court of appeal acknowledged that it had accepted that position in the **shah case** that a judge had a discretion to adjourn the exparte application and then have it served and heard inter partes. At line 9 from the bottom the court observed "we add as a matter of interest that Mr Mutua really conceded that the hearing of the application inter partes occasioned no prejudice at all to the applicant." This court notes that in the Zakhem case, the issue of "prejudice" to the applicant arose. The court of appeal was satisfied when counsel for the applicant conceded that no prejudice was suffered by them. No guidance was given as to why the issue of whether or not prejudice would be suffered or what prejudice a litigant would suffer if the two reliefs*

were split and granted separately"

At page 52 of the said ruling this court, had occassion to take note of the court of appeal decisions in this case of **ABU CHIABA MOHAMED VERUS MOHAMED MWANA BAKARI AHMED H.S MRAJA AND ELECTORAL COMMISSION OF KENYA NAIROBI CA 238 OF 2003** delivered by a Bench of (7) seven court of appeal judges. It is observed that at page 6 of the judgement line (5) five from the top there is found a stern warning to errant superior court judges who wittingly or unwittingly or otherwise attempt to trespass into the court of appeal territory without being properly invited to step on to that territory . it reads;- " *of course the learned judge of the high court, would have no jurisdiction to over rule the decision of this court, even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well known doctrine of precedent would respectively point out to the learned judge like all other judges in her position, under the doctrine of precedent, she is bound by the decision of this court, even if she may not approve of a particular decision and any attempts to over rule or side step the courts decision can only result in in necessary costs to the partes involved in litigation"*

At page 53 to 60 this court acknowledge the superior courts judges' decisions on the subject and in a summary form noted the following.

1. in the case of **TOURISM PROMOTION SERVICES LIMITED HCC MISC APPLICATION NO 7721 OF 2006 WENDOH J AND IBRAHIM JULIUS ODLNOBERTS AND 11 OTHERS VERSUS PUBLIC SERVICE COMMISSION AND 2 OTHERS HCCC MISC APPLICATION NO. 1305 OF 2004** upheld the strict stand of the CA in the case of **REPUBLC VERSUS COMMISSIONER OF CO-OPERATIVES** that the two reliefs namely leave for judicial review, and leave granted operating as a stay have to be granted at the same time and the two cannot be spilit where as Rawal J in the case of **REPUBLIC VERSUS CHIEF MAGISTRATE COURT AND ANOTHER EXPARTE HINESH K. CHUDASAMANAI MISC APPLICATION NO. 473 OF 2006.** When dealing with an objection raised before her namely, the splitting of consideration of the two reliefs namely leave to apply for judicial review being heard exparte where as consideration of the second limb of leave to operate as stay to be heard inter partes, went a head to disallow the objection. A reading of her ladyships reasoning tends to show that a major factor weighing in her up holding her ladyships stand was based on the fact that the centrol issue in the two decision namely **shahs and Kirinyaga Tea growers corporative** society limited cases were other issues other than the issue of splitting the relief. In her ladyships opinion this was a side issue of each case and therefore the court of appeal decision on the same points was or biter of dicta.

The foregoing not withstanding this court went a head and drew some inspiration from lady justice Rewals' decision along the following lines:-

(1) on her ladyship finding that the high court, has unlimited jurisdiction and by virtue of which the high court, can enlarge old remedies and invent new ones, only if that is what it takes as necessary or appropriate to secure and vindicate the rights breached. This court, agreed with the said pronouncement because it was in line with the court, of appeal taking a softened stand from the first one in the **Kirinyaga case** of a strict application of the rule 1 to softer stand in the **shahs case** that the court, could invoke its discretion and adjourn the exparte application for consideration interpartes, in this way the court of appeal was simply enlarging an old remedy and creating a new one namely using the courts' discretion to break the chain of strict application of the rules,.

(2) On her ladyships prouncement that the court, is always faced with a variety of facts and new circumstances and to place it into a straight jacket of procedure especially in the field of very important sensitive and special jurisdiction, touching on the liabilities and rights of the subjects shall be a blot on the independence and discretionary review of the high court. In this courts opinion it was correct because it was in line with the legal position in law that a court of law, has a discretion in the discharge of its functions whose only fetter is that it has to be exercised judicially and with reason. This court found that this too was in line with the court, of appeals stand by changing an old remedy of requirements that the issue of leave to apply for judicial review and that leave granted operating as stay was an old remedy

expanded by the court of appeal creating a new one to the effect that the superior court has a discretion to defer the entire exparte application for leave to apply for judicial review and consider it inter partes was not only an enlargement of an old remedy, but an effective weapon against the strict application of rules at the expense of substantive justice to the parties as circumstances permit.

(3) Aprouncement that the sole purpose of inviting the opposite party to participate in the proceedings is for him/ her to assist in filling in gaps in the information which may be available and thereby enable the matter to be dealt with properly at a first hearing, and dispense with the necessity of having a second hearing, in this courts' opinion this is in line with the court, of appeal, recognition that the court, has a discretion to adjourn the whole application to be heard interpartes, where there is no prejudice to the applicant. Which is also in line with a cardinal principle of law honoured by the court of appeal itself that in as much possible courts, of law should lean towards disposing off matters on merits (by hearing both parties as opposed to leaning towards technicality giving drastic relief on the testimony of one party)

(4) Her ladyships pronouncement that jurisdiction under order LIII was an invitation to interpret rules, and that it is settled law that the rules of procedure cannot become allowed to become mistress of justice but hand maids of mainly justice. In this courts' opinion is borne out by the reasoning in the court of appeal decision as the construction and or interpretation was on the effect and purport of rules 1 (2) and 1(4) of order LIII. In the first decision in the commissioner of co-operatives case, the court, of appeal, elevated rules of procedures to be masters of justice. But in the softened stand in the **shah case** the rule of procedure were made to be hand malds of justice.

(5) Her Ladyship pronouncement that a judge must not alter the material of which the Act is known, but he can and should iron out the creases, in this courts' opinion the sole purpose for the existence of the interpretative role of a court of law..

(6) A pronouncement that there should be no legal basis to stop or obstruct the court, to get representation from the other side before it can grant a drastic remedy of stay, in this courts opinion is in line with the court, of appeals softened stand as being proper for the judge exercising his or her discretion, in adjourning the exparte application to another date with notice to the other party for purpose of hearing both sides, in order to enable the court arrive at a more balanced decision which has taken into account the interests of both sides as opposed to a decision which is based only on representations from one party.

(7) A pronouncement that a reading of sub rule 1(4) of order 53 civil procedure rules does not reveal any prohibition for the court, not to grant leave and then defer the issue of leave operating as stay to another date, for interparties hearing. In this courts' opinion is correct because a plain reading of the said provision does not prohibit the splitting of the two limbs, which appears to be confirmed by the decision in the Shah and Zakhem cases which have explained it away on the basis of the courts' discretion and lack of prejudice to the complaining party.

(8) A pronouncement that any restriction on the inherent power of the court, must specifically be provided for by the constitution or a statute, in this courts opinion is correct and as such, the construction of sub rule 1 (4) should not be done in such a way so as to appear as if this provision exists to stifle the courts un limited original and inherent jurisdiction. The construction should be such as one that portrays the court, as an institution or organ that both adheres to and protects the rule of law in institution that protects and safe guards the rights of litigants who come before it in search of justice on equal footings.

At page 65 line 3 from the bottom, this court, went on to observe after hearing arguments from both sides thus: " *both sides are in agreement that sub rule 4 is silent on the issue as to whether an order for leave granted to apply for judicial review must be made at the same time as the order for granting leave to apply for judicial review. Like wise there is no express provision that the other side can challenge the stay or the leave at what stage this can be done, and the mode of moving the court.*

At page 66 of the said ruling line 7 from the bottom this court quoted with approval the case **NJUGUNA VS MINISTER FOR AGRICULTRE** (**2000) IEA 184**, in which decision at page 186 paragraph G-H

the court of appeal had made observations as follows:

"*It cannot be denied that leave should be granted if on the material available, the court, considers without going into the matter in depth that there is an arguable case for leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court to the judge who granted leave to set aside such leave".*

At page 67 line 3 from the top this court, made observations that on the basis of the above quoted observation, made by the court of appeal, the said court of appeal, had held per incuriam that the appropriate procedure for the challenging of leave which has already been granted is to apply under the inherent jurisdiction of the court, to the judge who granted leave to set it aside.

At line 6 from the bottom this court, went on to observe that the Njugunas case was quoted simply because it introduces a most powerful tool in the judicial process namely the invocation of the inherent power of the court. At page 70 line 10 from the bottom, the court, went on to observe further thus " nowhere in the authorities decided by *the court of appeal, cited does the court of appeal say that these two powerful tools are the preserves of the court of appeal. They are available to all courts with the only fetter attached to them being that they have to be exercised judicially and with a reason."* At page 73 thereof while commenting on the court of appeal decision in the case of **NJUGUNA AND OTHER VS MINISTER FOR AGRICULTER (SUPRA)** *went on to observe thus " though the rules do not say that an aggrieved party can apply to have those orders set aside, the court of appeal went ahead to provide one, it recognized the fact that where a litigant wishes to avail himself or herself of a remedy, or relief provide by statute, the court should enable him to access it. Where there is no provision for challenging the orders provided to the opposite party the doctrine of the inherent power of the court, can be resorted to by the opposite party to apply to have that leave set aside if need be.*

Applying that to the facts herein it is this court, view that the relief of leave granted operating as stay is available to a litigant under the rules. The judge who granted leave deferred it to be heard on merit. This court has ruled that the defence orders are spent, but that not withstanding since no decision has been made on it, it can still be revisited on the basis of an oral applications allowed on the basis of judicial discretion and inherent powers of the court which do not rule out oral application where circumstance permit".

Following the above reasoning this court went on to justify its stand at page 74 of the ruling line 1 (one) from the top thus: "this court has also ruled that no prejudice would be suffered as both parties will be heard on merit. In taking this step, this court will not be ignoring the court of appeal decisions but will be justified, following its footsteps for the following reasons.

(1) *The court of appeal recognized the doctrine of judicial discretion in the* ***shah case*** *and used it to enable the superior court ignore the mandatory command in sub rule 1 (2) that the chamber summons which is mandatorily required to be heard exparte can be deferred and heard interpartes.*

(2) *In the Zakhem case the court of appeal went a head and approved the action in the* ***shah case*** *and then added the issue of lack of prejudice being suffered by the opposite party.*

(3) *Then in the Njuguna case, the court of appeal went a head and stated explicitly that the doctrine of the inherent powers of the court, was available for invocation by the opposite party who apparently has no right to challenge the leave once granted as the rules do not provide the same"*

At page 74 line 2 from the bottom this court, went on to state that in taking the step it had taken, it was simply following the stand of other courts of concurrent jurisdiction that "*though judicial review is a special jurisdiction and there is a requirement that its provision be interpreted or construed strictly such interpretation or construction should not loose sight of the fact that it needs to keep pace with the new challenges that are emerging in the exercise of this jurisdiction "*

At page74 of the said ruling, this court, drew support from decision of courts of concurrent. On the need

to relax the interpretation and or construction of the judicial review provisions. In the case of **JARED BENSON KANGWANA VERSUS ATTORNEY GENERAL NAIROBI MISC APPLICATION 446 OF 1995 (UR).** The applicant had sought leave to apply for judicial review and leave was granted. The issue of that leave operating as a stay was not gone into at the granting of leave stage. substantive proceedings commenced and in the cause of trial of the same, events unfolding. Therein necessitated the applicant to move the court by way of notice of motion to seek stay pending determining of the judicial review proceedings. Such a procedure is not provided for under the judicial review provision, but Okubasu J as he then was (now JA) is noted to have agreed in principle with counsels from both sides that the procedure was in order, though no specific provision is provided for such a procedure in the judicial review rules. The parties were heard merit and a stay order granted. In the case of **KURIA AND OTHERS VS THE ATTORNEY GENERAL** (**2002) 2KLR 69** Mulwa J as he then was ruled that " *application for judicial review should not be stifled by aid decisions and concepts but must be expansive, innovative and appropriate to new areas where in they suit".*

In the case **of REPULIC VS COMMISSIONER OF COOPERATIVE DEVELOPMENT AND ANOTHER EXPARTE GUSII FARMERS RURAL SACCO LTD (2004) I KLR 483** Bauni J. as he then was ruled that " it is a fundamental principle of justice that before an order or a decision is made parties should be heard". In the case of **(NGUMBA MUIRURI VERSUS LAND DISPUTES TRIBUNAL AND ANOTHER NAIROBI MISC APPLICATION 1645 OF 2005**. Emukule J. ruled that "*where illegalities and irregularities are involved, the court, cannot give a blind eye to them and allow them to pass un rebuked just because the rules of judicial review have to be strictly adhered to"*. In the case of **REPUBLIC VS CHIEF MAGISTRATE COURT NAIROBI AND ANOTHER EXPARTE HUNESH K. CHUDA SAMA AND OTHERS MISC APPLICATION 473 OF 2006** Rawal J. has ruled that "provisions on judicial review should not be construed so as to appear as if they can operate to stifle and interfere with the courts' discretion and inherent power to do justice to both parties"

At page 77 -79 this court drew out jurisprudential guide lines extracted from all the decisions cited as here under in a summary form.

(1) In the case of **REPUBIC VS COMMISSIONER OF CORPORATVE KIRINYAGA TEA GROWERS SACCO** (**SUPRA)** there is still an option to the superior court to exercise its jurisdiction strictly as its provided for in order 53 rule 1 (2) CPR i.e grant leave to apply for judicial review and order that the leave granted should operate as stay at the exparte stage before hearing the opposite party on the issue of stay.

(2) Vide the **shah case** (supra) the superior court has an election to defer the entire exparte proceedings and have them heard inter parties.

(3) Vide the Zakhem case the splitting of the twp reliefs, that is granting of leave to apply for judicial review, and then deferring the issue of the leave granted operating as stay to be heard inter parties is permissible where there is no prejudice to be suffered by the opposite party.

(4) Vide the case of **KURIA AND 3 OTHERS VERSUS THE ATTORNEY GENERAL (2002) 2 KLR 69** the guiding principle is that limits of judicial review should not be curtailed but natured to meet new challenges but it should be used as an avenue for accessing relief like any other in the judicial process.

(5) Vide the case of **REPUBLIC VERSUS COMMISSIONER OF CO-OPERATIVES GUSII FARMERS RURAL SACCO (2004) KLR 483** the principle is that the relief of leave to apply for judicial review and that of leave granted to operate as a stay are not inter twined. They are severable and they can be deliberated upon separately unless circumstances dictate otherwise. Issues of stay should be determined after the opposite party has been given an opportunity to be heard so that his/her rights are not infringed.

(6) In the case of **JARED BENSON KANGWANA VERSUS ATTORNEY GENERAL NAIROBI**

HCC MISC APPLICATION 446 OF 1995 (CR) The principle is that a litigant has a right to exercise his right of having leave granted operating as stay at any stage of the proceedings, should circumstances arise which are likely to render the judicial proceedings concerned in his favour nugatory if stay Is not granted.

(7) Vide the case of **NJUGUNA AND OTHERS VERSUS MINISTER FOR AGRICULTURE (SUPRA)** the inherent jurisdiction of the court, is also available in judicial review.

(8) In the **Tourism promotion services limited High court** Misc **Application No.772/2006** where a court has truncated the two relief there is an option to declare one functus officio on the issue of leave granted operating as a stay, and then require the parties to proceed with the hearing of the substantive motion

(9) In the case of **REPUBLIC VERSUS CHIEF MAGISTARATE COURT NAIROBI AND ANOTHER EXPARTE HINESH C. CHUDASAMA AND OTHERS NAIOBI MISC APPLICATION NUMBER 473 OF 2006**, The principle is that at no time should the order 53 provisions be construed in such a manner so as to stifle the courts' unlimited and inherent jurisdiction as well as the exercise of the judicial discretion.

(10) Vide Misc application 1645 of 2005 in the matter of land disputes tribunal Gatenga versus Elias Ngumba Muiruri the principle is that where a illegalities and irregularities are likely to flourish, strict construction and or adherence to the order 53 provisions may not be resorted to.

By reason of the foregoing reasons the preliminary objection was disallowed and the parties were heard on merit on the issues of leave granted to apply for judicial review operating as stay .

In the decision on merit on the issues of leave granted operating as a stay, delivered on the 20th day of November 2007, in the same **NAIROBI MISC APPLICATION NO. 993 OF 2007 DR PAUL NYONGESA OTUOMA AND 2 OTHERS VERSUS ATTORNEY GENERAL AND 2** others, the court, had occasion to revisits that issue between pages 2-18 there of. To avoid lengthening this ruling unnecessarily, the points raised will be set out herein in a point form.

- At page 3 this court, made obseavtions that the court of appeal had invoked the doctrine of the inherent powers of the court both in the **Njuguna case** and the **Shah case** to fill up gaps left by silent rules.

- That order 53 sub rule 1(4) is a silent rule as it does not say that the issue of leave granted to apply for judicial review can only be considered at the exparte stage and not at any other stage of the proceedings.

- At page 5 of the said ruling, this court, drawing inspiration from the court, of appeal decision of **COMMISSIONER OF LANDS VERSUS HOTEL KUNSTE LIMITED 1995-1998 IE.A.C(C.A.K)** at line 6 from the top made observation that the CA had made observations in the said case to the effect that "*judicial review is concerned not with the private rights or the merits of the decision being challenged, but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he is subjected."* This court, extended that at line 7 from the bottom that "the requirements for a fair treatment extends to the courts, to which he moves to seek relief and it is expected to last the entire process until the matter is finally determine between them. It is this courts view that denying a litigant accessibility to a relief available to him provided by statute, will be an unfair treatment. Granting a litigant a hearing is not perse a clean bill that he will *get what he is asking for. He will have exercised his right of seeking the relief granted to him by statute of which this court is sure that it was not put there fore cosmetic value. It is meant to be accessed and enjoyed by litigants subject of course to the court, determining that it should be enjoyed by such a litigant"*

- At page 7-9 the court set out the provision of section 9 of the law reform Act cap 26 laws of Kenya. At page 9 line 8 from the top this court made the following observations:-" it is instructive to note that section 9 of the law reform Act, does not donate power to the rules committee to make rules concerning

stay or more particularly leave granted operating as a stay. It is therefore the finding of this court, that order 53 rule 1 (4) does not have its base in the parent Act to order 53 which is the law reforms Act. The only reasonable inference or construction that can be drawn by this court, is that it was sloted in by the rules committee. This adds further credit to the argument advanced by this court, in its ruling of 24/9/2007 that the two are distinct from each other and the court, through its inherent powers consider that the same be dealt with at different stages of the proceedings"

At page 9-11 this court, quoted with approval a decision by Aluoch J as she then was (now JA) in the case of **ANNE RAMA AND 60 OTHERS VERSUS KENYATTA UNIVERSITY AND REGIONAL INSTITUTE OF BUSINESS MANAGEMENT NAIROBI MISC** APPLICATION 926 OF 2007 decided by her ladyship on 12th day of October 2007. This court, made the following observation of that ruling in a point from:- that the learned judge stated at page 8 of the said ruling line 5 from the top that she had granted leave to file an application for judicial review but had declined to order the leave to operate as a stay and directed that the application for stay be served and heard inter partes on 11/8/2007.

At paragraph 2 the said learned judge maintained that she had brought herself within the ambit of order LIII rule (1) sub rule (2) and (4).

- That under sub rule 2 she has not imposed any terms as to costs and under sub rule 4 she had not directed that the grant of leave do operate as a stay but she had ordered otherwise" by directed that the application for stay be served and heard inter parte on a date given in court.

- That she had exercised her inherent jurisdiction under rule 4 of order LIII because according to her she did not find that this rule prohibits a court from dealing with the matter of leave and stay in the manner she dealt with.

- At page 9 of the ruling 2nd paragraph, noted that the law reform Act is the substantive law and it provides for rules on the matter of leave and not stay at section 9.

- At page 12 of the said ruling paragraph 2 approved the reasoning of justice Rawal in the Hinesh Chudasama case (supra) that section 9 of the law reform Act particularly 9 (b) does not make any provision or does not make any mention as regards the procedure which include the procedure concerning the said leave to operate as stay. That this sub rule 1 (4) of order LIII can be said to have been made without any support from an Act of parliament.

This court has considered the lengthy excusion into the reasoning of this court in the said own cited ruling and applied the reasoning therein to the present preliminary objection in the light of the arguments presented in its support by the objector as well as the no contest observation made by the respondent to the same. In addition the court, has revisited the case law on the subject emanating both from the superior courts, as well as the court of appeal on the subject as set out herein above . The court, has also revisited the relevant provisions of the subject law relied upon by the objector and recon reconstructed the same and applied to the preliminary objection and makes a finding that the said preliminary objection has been ousted because of the following reason:-

1. Order 53 rules 1(2) and (4) are silent as regards whether leave granted to apply for judicial review, and the granting of that leave to operate as stay must be heard and granted and or refused at the same time. A reading of sub rule 2 to a judge dealing with the issue of grant of leave to apply for judicial review, is that such a judge has authority to "*impose such terms as to costs and as to giving security as he thinks fit"* there is no command that he must consider issue of that leave granted operating as a stay at the same time.

2. where as the command in order 53 sub rule 4 is that if the said judge so directs the leave granted to apply for judicial review will operate as a stay. The use of the word " so directs" denotes recognition of the judges discretion to evaluate the facts before her /him and then arrive at a conclusion as to whether the facts presented are deserving of the leave granted operating as stay or not. There is no command that the stay order under for leave granted operating as stay must have been granted at the time the said leave

was granted in order for it to be effective . Further there is nothing in that provision to show that the only discretion that the judge seized of the matter can exercise under that provision is to direct that the leave so granted do operate or not to operate as a stay. There is therefore room left for the court, to go further and exercise other discretions such as the making of an order that leave to apply for judicial review be granted and the issue of leave so granted operating as stay be deferred and the same be heard inter partes.

3. This court, is live to the decisions of courts of concurrent jurisdiction, namely one by Onyancha J in the case of **REPUBLIC VERSUS MINSITER FOR LOCAL GOVERNMENT AND ANOTHER EXPARTE MWAHIMA NO 2 (2002) 2 KLR 574,** Ringera J as he then was in the case of **WELAMONDI VERSUS THE ELECTORAL COMMISSION OF KENYA (2002) 1 KLR 486** to the effect that where proceedings are governed by an Act of parliament they have to be construed strictly in accordance with the parent Act. The parent Act to order 53 CPR is the law Reform Act cap 26 laws of Kenya. This court has stated that section 9 thereof is relevant to these proceedings. Nowhere in a reading of the same does it say that power is donated to make rules concerning leave granted to apply for judicial review operating as a stay. This court therefore justified in making a finding that the two provision namely order 53 rule 1 (2) and (4) are distinct from each other. Sub rule 2 is a child of the law Reforms Act where as sub rule 4 was slotted in by the rules committee. (By virtue of this reason, there is no harm in splitting the reliefs and have them dealth with separately.

4. It is evidently clear that indeed the court, of appeal in its decision cited in this ruling inclusive of the one cited and relied upon by the objector, recognized the existence of silent rules under the order 53 procedures. The court of appeal in the exercise of its jurisdiction has not sent litigants away from its seat of justice on account of lack of a remedy by virtue of the said rules being silent as regards the relief sought. In the case law set out herein, the court, of appeal has gone ahead in its judicial wisdom to apply the courts discretion to do certain acts, given advice that where the order 53 procedures do not provides a remedy the litigant can invoke the inherent jurisdiction of the court, to access a relief. Further that where a superior court has taken a procedural step complained of which is not provided for under the order 53 procedures, none the less if it has not caused any prejudice to the opposite party, the complaint about the procedure will not be upheld. In the **shah case** relied upon by the objector, the CA provided the guidelines that instead of splitting the relief, the entire exparte application should be adjourned and be ordered to be heard inter partes a procedure not provided for under the rule. If the CA can read such a procedure into the silent provision of the order 53 procedures, and uphold the exercise of the superior courts excise of the discretion in the manner it did why should

the C.A not recognize the superior courts' discretion to override the silent rules and then provide reliefs to litigants within the law, in the manner it, the CA itself does so as Shawn by the case law cited, more so when it is undisputed that the tools it the (C.A) uses namely.

-The court discretion;

- the lack of prejudice; and

- The courts' inherent jurisdiction, are not a preserve of the court of appeal.

- They are also tools of trade of the superior court`

(5) By reason of what has been stated in no. 1,2,3, bove this court was perfectly in order and acted within its discretion, properly exercised and within the relevant rule, when it granted the applicant leave to apply for judicial review and then deferred the issue of the said leave so granted operating as stay to be argued inter partes after the respondent has come on board.

(6) In view of the ruling in number 5 above the parties are at liberty to have the inter partes hearing on the issue of leave granted operating as stay disposed off first, or to opt for the hearing of the substantive motion in view of the fact that the respondent has already filed a response to the applicants application.

(7) The respondent to the preliminary objection will have costs of the preliminary objection.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2008

R.N. NAMBUYE

JUDGE