



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Civil Appli 325 of 2005

IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

IN THE MATTER OF: THE PHYSICAL PLANNING ACT CAP 286 LAWS OF KENYA

IN THE MATTER OF: THE GOVERNMENT LANDS ACT CAP 280 LAWS OF KENYA

**IN THE MATTER OF: A DECISION MADE BY THE COMMISSIONER OF
LANDS ON 4TH MARCH 2005 EFFECTING CHANGE OF USER OF PLOT NUMBER
MN/1/3229**

**FROM ONE PRIVATE DWELLING HOUSE TO MOSQUE/MADRASSA AND
ACCOMMODATION**

FOR THE IMAM IN CHARGE.

**IN THE MATTER OF: A DECISION MADE BY THE MUNICIPAL COUNCIL OF MOMBASA
APPROVING DEVELOPMENT**

**APPLICATION FOR CHANGE OF USER OF PLOT NUMBER MN/1/3229 FROM ONE
PRIVATE**

**DWELLING HOUSE TO MOSQUE/MADRASSA AND ACCOMMODATION FOR THE IMAM
IN CHARGE.**

BETWEEN

REPUBLICAPPLICANT

VERSUS

COMMISSIONER OF LANDS.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA2ND RESPONDENT

NEW NYALI COMMUNITY GROUPEXPARTE APPLICANT

RULING

The history behind this matter is short and straightforward. By a motion dated 9th June 2005, New Nyali Community Group,

hereinafter referred to as the 'applicant' sought for the following judicial review orders against the Commissioner of Lands and the Municipal Council of Mombasa, hereinafter referred to as the 1st and 2nd Respondents:'

- (a) *An order of certiorari to quash the decision of the 1st Respondent of 4th March 2005 of effecting a change of user of Plot No. MN/1/3229 from that of a residential to a mosque.*
- (b) *An order of certiorari to quash the decision of the 2nd Respondent of 4th March 2005 approving the building plans, change of user and developments on plot no. MN/1/3229.*
- (c) *An order of Prohibition to prohibit the 1st Respondent from implementing and enforcing the aforesaid decision (in (a) above)*
- (d) *An order of prohibition to prohibit the 2nd Respondent from implementing and enforcing the aforesaid decision (in (b) above)*
- (e) *Costs.*

When served with the motion, the 2nd Respondent took out a preliminary objection against the entire motion. As practice demands, the preliminary objection was first taken. The preliminary point also was supported by Salim Ali Taib, Ahmed Ali Taib and Faizal Ali Taib being the interested parties herein. After considering the arguments for and against the preliminary point. In the end this court upheld the preliminary objection and proceeded to strike out the entire motion on 26th day of February 2007. Being aggrieved, the applicant filed a notice of appeal to intimate its intention to appeal against the aforesaid decision. The applicant then took out the motion dated 13th

March 2007 in which it sought for the following orders interalia:

- (i) *To order for the maintenance of the status quo in terms of the order that leave granted do operate as a stay granted on 20.5.2005 and or the court to stay the order of striking out of the Applicant's application given on 26/2/2007 pending appeal.*
- (ii) *Costs of the application.*

The motion is the subject matter of this decision. When served with the motion, the 2nd Respondent resisted the motion by filing grounds of opposition. The motion is said to be brought under order XLI rule 4 of the Civil Procedure rules and under the inherent powers of the court.

At the hearing interpartes of the motion, two preliminary issues were raised against it. The first issue is whether or not this court has jurisdiction to hear and determine the motion. Secondly is whether or not this court is *functus officio* in the matter

On the first issue, it is the argument of Mr. Khatib, learned advocate for the 2nd Respondent that this court has no jurisdiction to grant an order for stay pending appeal. The learned advocate cited the provisions of Section 8(3) of the Judicature Act.

Mr. Nowrojee, learned advocate for the interested parties agreed with the arguments of Mr. Khatib. Mr. Asige learned applicant's advocate was of the contrary view. It is his submission that Section 8(3) did not take a way this court's inherent power to issue the order of stay pending appeal in a situation where a judicial review application has been dismissed or struck out. The learned advocate preferred to call the orders he is seeking for via this motion as orders of maintenance of the status quo as opposed to

an order for stay of execution pending appeal. My take on the issue is that whatever angle one takes to look at it, in essence it is an order for stay pending appeal. I have considered the divergent arguments over this issue. I have also taken into account the grounds set out in the motion and the facts deponed in the affidavit in support of the motion. Of course I have considered the grounds of opposition filed by the 2nd Respondent. In order to appreciate the import of Section 8(3) of the Law Reform Act, it is important to reproduce its contents here as follows:

“8(3) No return shall be made to any such order, and no pleading in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.”

A critical perusal of the prayers made in the motion will reveal that the applicant intends to stall the effect of the order striking out the motion dated 9th June 2007. In my view, this court’s discretion to grant such orders has been taken away by Section 8(3) of the Judicature Act. Parliament clearly expressed itself and this court cannot go behind it. One of the roles of this court is to interpret the intention of parliament in a statute. The interaction here is clear that this court is barred from returning to a judicial review order issued. It does not matter whether the application failed or succeeded. The applicant has an automatic right to appeal to the court of Appeal under Section 8(5) of the Law Reform Act. An application such as this can only be agitated before the court of appeal pursuant to rule 5(2)(b) of the Court of Appeal Rules.

The second preliminary issue argued before this court is whether or not this court has the jurisdiction to issue an order in terms of the order for stay granted at the leave stage. It is the argument of Mr. Asige, learned advocate for the applicant that this court has the inherent power to direct that the status quo be maintained in terms of the stay orders issued at the leave stage. It is the argument of Messrs Nowrojee and Khatib learned advocates for the interested parties and the 2nd Respondent respectively that the orders issued at leave lapsed upon the delivery of this court’s decision in respect of the substantive application hence the court is functus officio in the matter.

Having considered the rival submissions and the material placed before this court over this issue, I am of the same view as Miss Nowrojee and Khatib under Order LIII rule 1(4) of the Civil Procedure rules that this court may direct the order for leave to operate as a stay of proceedings in question until the determination of the application or until the judge orders otherwise. In this matter, the applicant was granted leave to institute judicial review proceedings on 20th May 2005. This court then directed the order for leave to operate as a stay of any development, building and or construction of a mosque/madrassa or other structure for the Imam on Plot No. MN/1/3229 following the implementation of the decision by the 2nd Respondent of approving the application for change of user and a further stay of implementation of the decision by the 1st Respondent effecting the change of user from its original lawful and official use for one private dwelling house to its use for development of a Mosque/Madassa and accommodation for the Imam in charge until the hearing and determination of these proceedings or further orders from the court. It is obvious that the substantive judicial review proceedings lapsed when this court pronounced its order of 26th

February 2007 striking out the motion dated 9th June 2005. That order for stay therefore died with the end of the motion hence there is no pending proceedings to justify the reissuance of such an order. This court cannot go back to the issue. I agree that this court has an inherent power to deal with any circumstances to see to it that justice is done before it but that does not allow this court to exercise it to create a jurisdiction which has been expressly limited by a statute.

For the foregoing reasons hereby strike out and dismiss the motion dated 13th March 2007 with costs to the 2nd Respondent and the interested parties herein.

Dated and delivered at Mombasa this 29th day of June 2007.

J.K. SERGON

JUDGE

In open court in the presence of Mrs. Kayatta h/b Asige for the exparte Applicant

Khatib for Respondent

Khatib h/b Omar Amin for Interested party.