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

Misc. Appli. 993 of 2007

REPUBLIC……..……APPLICANT

AND

ATTORNEY-GENERAL…….…….. FIRST RESPONDENT

COMMISSIONER OF POLICE…….SECOND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS……..……..THIRD DEFENDANT

PRINCIPAL MAGISTRATE, BUSIA LAW COURTS…..…….FOURTH DEFENDANT

R U L I NG

The background information is that on 3rd September 2007 the exparte applicant herein Dr Paul Nyongesa Otuoma and 2 others presented an application by way of chamber summons brought under order LIII RULE 2(2) and 3 of the Civil Procedure Rules and Section 8 of the Law Reform Act Cap. 26 of the Laws of Kenya. Among others the application in its prayer 3 sought leave to be granted to the applicants to apply for an order of prohibition to restrain and stop each and all the Respondents from arresting, instituting criminal charges prosecuting and committing to trial and or conducting the trial against the first, second and third applicants on account of the murder of Odhiambo Ochieng and Mohamed Mibale Wawire or in any respect of the proceedings or facts connected with the proceedings subject matter of Busia Police file case number 139/19/2007. In prayer 4 the applicant sought an order that the grant of leave do operate as a stay of restraining the respondents from arresting, instituting criminal charges, prosecuting and committing to trial and or conducting the trial against the first second and third applicants until the hearing and determination of the application for judicial review and an order of prohibition and that costs be provided for.

The applicant appeared exparte before Aluoch J on 3rd September in accordance within the rules. The learned judge after hearing counsel for the applicant exparte made the following orders:

1. I admit the matter to hearing during the court vacation.

2. I grant leave to institute application for judicial review. This should be filed and served within 7 days from today.

3. I however decline to order that the leave I so granted operate as stay.

4. I direct that application for leave to operate as a stay be heard inter parties tomorrow 4th September 2001 at 9.00 a.m.

When the matter came before Nambuye J on 4th September 2007 Mr. Orengo for the applicant informed the court that leave to apply for judicial review had been granted but leave to operate as stay had not been granted and they were before court on that date to argue the issue of leave operating as stay inter parties. Counsel for the respondent in response informed the court that they had just been served the previous day and had just filed grounds of opposition but not the affidavit. Then Mr. Orengo informed the court that under the rules the respondent is not supposed to file any papers as the rules do not allow. Off the record arguments then ensued and when no agreement was reached the court adjourned the matter to allow counsels discuss the matter outside the court to see if an agreement could be reached amicably on the way forward.

After a short adjournment for counsels to discuss the matter outside the court parties came back to court. The court made observation, that the only way the Respondents could be brought on board to participate in the inter parties proceedings is through the filing of the substantive motion. Counsel for the applicants then informed the court that they had agreed that he files the substantive motion by 1.00 p.m. on that date and then have the inter parties hearing on Thursday the 6th of September 2007.

On 6th, counsel for the Respondent informed the court that he had a preliminary objection to raise and the court proceeded to take representations on the preliminary objection. This ruling is in respect of the representation on the preliminary objection. The notice is dated 5th September 2007 and filed on 6th September 2007. It has three grounds namely:

(1) That leave to apply for judicial review orders having been granted by Hon. Lady Justice Aluoch and the substantive motion having been filed, the chamber summons application dated 31st August 2007, for leave and attendant stay is spent

(2) That this honourable court is bereft of jurisdiction to entertain a part only of the chamber summons application that was substantially dealt with by Hon. Lady Justice Aluoch on 3rd September 2007 as the application is incapable of truncation.

(3) That the application for leave to operate as a stay is res judicata, the same having been categorically declined by Aluoch J and this honourable court is iposo facto, functus officio

Parties were heard on the same on merit.

The Respondents put forward the following points:

(1) That the question of whether leave should operate as stay is Res judicata. The same having been categorically denied by Justice Aluoch which renders this court functus officio.

(2) That the judge having certified the application urgent and having granted leave in ground 1 and 2 categorically declined to grant leave to operate as stay in No, 3 when she stated "**I decline to order that the leave so granted do operate as stay"** It means "**to refuse the leave"**. To him order No. 3 is "**categorical**" and not "**conditional**" and it is complete in itself.

(3) The learned counsel stated that in order No. 4 the order that "**I direct that the application for leave to operate as a stay to be heard inter expartes on 4th September at 9.00 a.m.**" served only to confuse issues and complicates matters for the applicants. According to him the learned judge's order No. 3 speaks for itself and it amounts to a determination as to whether leave is to operate as a stay or not. It is their stand that since this court has made an order for leave not to operate as stay this court cannot reopen it even if prompted by order No. 4

(4) Since the substantive application has been filed, the issue of leave operating as stay is foreclosed and parties should proceed to hear the substantive application inter parties and this court cannot come back to the issues of leave as that will be an exercise in futility .

(5) It is their stand that the spirit of order 53 rule 1 Civil Procedure Rules is that the issue of leave to operate as stay cannot be dealt with in piece meal.

To justify their stand counsel relies on the decision, in the case of Republic versus Commissioner of **CO-OPERATIVES EXPARTE KIRINYAGA TEA GROWERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD [1999] 1 EA 208, SHAH VERSUS RESIDENT MAGISTRATE NAIROBI [2000] 1 EA 245 AND ZAKHEM CONSTRUCTION KENYA LIMITED VERSUS PERMANENT SECRETARY MINISTRY OF ROADS AND PUBLIC WORKS AND ANOTHER [2007] E KLR CI. APP. 244 OF 2006** whose decision the court will revert to at a later stage of the ruling when making assessment on the arguments advanced by both sides.

To counter that argument the applicant's counsel relies on the following points:

(1) That a proper reading and construction of order 53 rule (1) is that it focuses on the manner to apply for judicial review is granted but not how stay is granted more so when rule 4 does not say explicitly that the issue of stay must be dealt with exparte. Just as it is not explicitly stated in rule (1) and 2 that the exparte application for leave to operate as stay can be adjourned and be heard inter parties.

(2) Their stand is that there is no provision that the issue of leave operating as stay cannot be truncated and must be dealt with in the same sitting.

(3) From the authorities relied upon by them courts apply different standards when it comes to granting leave to operate as stay depending on the circumstances of each case. To support this the counsel relied on the case of **JARED BENSON KAGWANA VERSUS ATTORNEY GENERAL NAIROBI HIGH COURT MISC. APP. NO. 446 OF 1995 (UR) AND REPUBLIC VERSUS COMMISSIONER OF CO-OPERATIVE DEVELOPMENT AND ANOTEHR, EXPARTE GUSII FARMERS RURAL SACCO LTD [2004] 1 KLR 483**

(4) A proper construction of justice Slouch's order is that she was not in favour of granting leave to operate as stay before hearing the other side on the issue and since they were not heard on leave operating as stay the matter is not Res judicata.

(5) This court is invited to consider fact that the sole reason for granting leave to operate as stay is for purposes of preventing the proceedings from being rendered nugatory.

(6) Turning to the authorities relied upon by the Respondent/objector counsel for the applicant submitted that instead of using the decisions to defeat their request to be heard on leave to operate as stay the court should use them to interpret the rules widely and find that there is no express provision that leave to operate as stay cannot be considered after leave to apply for judicial review has been granted by the court. More so when the Court of Appeal decisions did not decide whether the provisions of rule 4 are mandatory or not

(7) They maintain that the issues raised herein are new and this court should not hesitate in making a ruling on the same as the issue raised herein is not directly as the issues before the Court of Appeal in the cited cases more so when the said decisions were silent on the operation of rule 4.

In reply counsel for the Respondent objector reiterated the following points:

(i) This court should not loose sight of the fact that the proceedings sought to be stopped by the applicant in vindication of lost lives

(ii) They still urge the court to take the stand that leave to operate as stay is to be considered at the same time as leave to file judicial proceedings and the two cannot be dealt with consecutively by different judges.

(iii) The court is urged to believe and go by order number 3 that the judge meant what she said in

that order but not what she said in order No. 4 which she had no power to make.

(iv) The court is urged to be guided by guidance given in the Court of Appeal decisions which are binding on this court. Ignoring them will destroy the doctrine of precedent the very foundation of the law

On the court's assessment of the issues raised in this preliminary objection a number of questions have arisen for determination. These are:

(1) whether the issue of leave to apply for judicial leave to operate as stay is res judicata.

(2) Whether judicial review orders subject of these proceedings are English orders or Kenyan orders and whether they are to be construed as such.

(3) Whether this court is functus officio as regards matters of leave granted to apply for judicial review operating as stay and cannot revisit it.

(4) What is the effect of the jurisprudence generated by case law cited to court by both counsels as well as that sourced by the court on its own on points of law raised by both sides in this preliminary objection.

(5) What are the final orders of the court on the preliminary objection raised.

On res judicata the law as to what amounts to res judicata and what does not amount to it is very clear both by provision in the statute as well as case law Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by the court. "The operative words in this provision are "and has been heard and finally decided by such court." on case law there are numerous authorities on the subject. In the case of **KIBOGY VERSUS CHEMWENO KLR 35** the Court of Appeal held inter alia that where a matter is directly and substantially an issue between the same parties, it is a condition precedent to the application of the doctrine of Res Judicata that the issue has been finally decided by the court.

Applying these principles to the Respondent's objection number 3 it is clear that in order to succeed the Respondent has to demonstrate that the court has "finally determined" and made a final pronouncement on the issue of leave applied for judicial review operating as stay. The Respondent relies on order No. 3 of Justice J Aluoch's order of 3rd September 2007 which is to the effect that the learned judge declined to order that the leave so granted do operate as stay. Had the learned Judge stopped at that point we would not be here. However the learned judge went ahead to make a 4th order which is to the effect that she "directed that application for leave to operate as a stay be heard inter partes, tomorrow 4th September 2007 at 9.00 a.m" counsel has urged the court to read the orders of the learned Judge and stop at number 3 and ignore order No. 4. No provision of law has been cited to this court to entitle this court to server Order No. 4 from the rest of the orders granted on the same date and at the same time and declare it ineffective in the absence of the court being moved to do so through either a proper application directed to this court to review and set aside the same. Or alternatively on appeal to be lodged to the Court of Appeal to have the same quashed for reasons to be given. In the absence of the above two processes being invoked to disoperatonalize the said order the same still stands. And as long as it stands it is proof that the issue of leave granted to apply for judicial review operating as stay was not finally decided and determined by the said court of competent jurisdiction. This being the finding of this court, the objection of Res Judicata cannot hold. The same has been faulted.

As to whether the orders subject of these proceedings being English orders and or Kenyan orders and are to be construed as such, to resolve this the court has turned to case law for assistance. In the case of **COMMISSIONER OF LANDS VERSUS KUNSTE HOTEL LTD [1995] – 1998] 1 EA 1,** at page 5, paragraphs g – h the Court of Appeal made the following observations

"By virtues of the provisions of Section 7 of the Administration of justice (Miscellaneous Provisions Act of 1938, of the United Kingdom, which is applicable in this country by reason of Section 8(2) of the Law Reform Act prerogative writs were changed to be known as orders" except for the writs of Habeas Corpus. So Section 8(1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising, civil or criminal jurisdiction." In the case of **REPUBLIC VERSUS COMMUNICATIONS COMMISSION OF KENYA [2001] 1 EA 199,** at page 206 paragraphs a – d, the Court of Appeal made the following observations:

"Section 8 (2) of the Law Reform Act gives the High Court the power to issue orders of certiorari prohibition and mandamus. Then Section 9(1) of that Act provides as follows:

9(1) "Any power to make rules of court to provide for any matters relating to the procedures of civil courts shall include power to make rules of court:

(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought.

(b) Requiring except in such cases as may be specified that leave shall be obtained before an application is made for any such order.

(c) Requiring that where leave is obtained no relief shall be granted and no ground relied upon except with the leave of the court other than the relief and grounds specified when the application for leave was made"

Pursuant to these provisions the rules committee promulgated order 53 Civil Procedure Rules." In the case of **REPUBLIC VERSUS MINISTER FOR LOCAL GOVERNMENT AND ANOTHER exparte MWAHIMA NO. 2 [2002] 2 KLR 574,** Onyancha J at page 575 line 37 made the following observations. "The said order 53 draws its authority not from the Civil Procedure Act but from the Law Reform Act, Cap 26 of the Laws of Kenya. The relevant rules of Order 53 are in pari mataria with sections of the Act. It is my view therefore that Order 53 is self-sufficient and where it is silent resort should be had to the said Act and not to any provision of the Civil Procedure Act and rules except of course where there are express provisions to it in both the Law Reform Act and in the Civil Procedure Act and Rules." At page 576 line 20 the learned judge added

" It is now trite law that where any proceedings are governed by a special Act of Parliament, the same shall be interpreted and construed strictly. It is my view also that the mere fact of the order 53 or the Law Reform Act being silent, in certain aspects, cannot itself necessitate the application of any sections of the Civil Procedure Act and Rules even such provision as Section 3A of the said Act."

In the case of **WELAMONDI VERSUS THE CHAIRMAN ELECTRORAL COMMISSION OF KENYA [2002] KLR 486** Ringera J as he then was had this to say at page 494 line 37" I agree that judicial review proceedings under Order 53 of the Civil Procedure Rules are special procedures. The provisions of the order are invoked whenever orders of certiorari, mandamus or prohibition are sought……. So in the exercise of its power under the order the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a Jurisdiction sui generis."

In the case of **KURIA MBAE VERSUS THE LAND ADJUDICATION OFFICER CHUKA AND ANOTHER** Nairobi Misc. Application No 257 of 1983, G. P. Mbito and J.A. Mango JJ as they were then at page 3 of the ruling paragraph 3 observed thus:

"We wish to observe that it is now firmly established by the Court of Appeal that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and that the provision of the Civil Procedure Act and Rules do not apply unless expressly provided by such an Act. As such, the provisions of the Civil Procedure Rules and Act cannot be applied merely because the special Act does not exclude them".

In the case of **KENYA NATIONAL EXAMINATION COUNCIL VERSUS REPUBLIC exparte GEOFFREY GATHENJI NJOROGE AND 9 OTHERS** Nairobi Civil Appeal No. 266 of 1996, at page 2 of the judgment line 9 from the bottom the Court of Appeal observed "In the old days in England mandamus, prohibition and certiorari used to be called "prerogative writs". They were writs issued in the name of the King, or Queen to control inferior tribunals from exceeding their jurisdiction. But as the process of separation of powers continued a pace in England, judicial power became the preserve of the courts and apparently in 1938 the parliament of the United Kingdom passed the Administration of Justice (Miscellaneous Provisions Act, and by Section 7 of that Act the High Court could issue orders as opposed to prerogative writs of mandamus, prohibition and certiorari. Section 8(1) supra absolutely forbade our High Court from issuing any prerogative writs. But Section 8(2) permitted the High Court to issue "orders of mandamus, prohibition and certiorari:, in situations where the High

h Court of justice in England would have a similar power. Until 1992, the heading for order 53 was "orders of mandamus prohibition and certiorari." Legal notice No. 164 of 1992 changed that heading to "*Applications for Judicial Review" and that heading is retained in the current rules vide Legal Notice No. 5 of 1996 which restored the position to the pre – 1992 middle some amendments which were understandably ruled ultra vires the provisions of the Law Reform Act. Why is it necessary for us to go into this historical explanation? One may ask. Our answer to that is that we think the time has now come for this court to set out and explain as far as is within our power, the efficacy and scope of each of the remedies namely mandamus prohibition and certiorari."*

The afore set out excursion into case law reveals that the principles on judicial review in this jurisdiction have their base in the prerogative writs of England employed by the Crown to control or provide checks and balances on inferior tribunals. Vide the provisions of the Administration of justice (Miscellaneous Provision Act of England 1938) jurisdiction was given to the High Court in England to issue those orders. The Kenyan High Court on the other hand derives its jurisdiction to issue these orders from the Law Reform Act Cap 26 Laws of Kenya. The procedure to be invoked to issue these orders are the rules set out in order 53 Civil Procedure Rules promulgated by the Rules Committee. The authority to promulgate the said rules is derived from Section 9 of the said Law Reform Act Cap. 26 Laws of Kenya.

As regards construction of its provisions as called upon to do in this ruling, this court is to be guided by the steps taken by both the superior court and the court of appeal of this jurisdiction. The principles to be applied in the said construction is that the same is to be construed strictly in accordance with its own provisions of law under the Law Reform Act Cap 26 Laws of Kenya and its rules under order 53 Civil Procedure Rules. This court is cautioned not to turn to any other provision of law for assistance as it has to bear in mind that under the Law Reform Cap. 26 Laws of Kenya and rules made thereunder, Order 53 Civil Procedure Rules, the jurisdiction exercised is a special one. In the event of any difficulty where no interpretation exists regard is to be had to case law on similar principles of England and the superior courts of this land as persuasive authorities. Those of the Court of Appeal of this land are binding. It is therefore the finding of this court that judicial review orders subject of these proceedings are not English orders. Their principles have their base in English law but are Kenyan orders governed by Kenyan law in the name and style of the Law Reform Act Cap 26 Laws of Kenya. Accessed by procedure set out in order 53 Civil Procedure Rules promulgated by the Rules Committee of this land. The issuing authority is the High Court of Kenya presided over by Judges appointed by the appointing authority of the land. All these characteristics point to the Judicial Review order issued by this court as Kenyan orders.

As regards issues at the court being functus officio, this court has to go back to the record and make a determination as to whether the orders that came up for hearing inter parties are the issue of "leave to apply for judicial review operating as stay on 6th September 2007 are own orders or orders referred by Aluoch J on 3rd September 2007 in order for the court to be termed functus officio. The orders of Aluoch J of 3rd September 2007 were made on the strength of a chamber summons under order 53 rules 1 and 2 of the Civil Procedure Rules. It is now trite law as settled by the decision of the **COURT OF APPEAL IN THE CASE OF REPUBLIC VERSUS COMMUNICATIONS COMMISSION OF KENYA** supra that such applications are to be presented by way of chamber summons exparte in Chambers before a judge. The operative order in sub rule 2 are "*shall be made exparte to a judge in chambers." In words and phrases legally defined second Edition by John B. Saunders Second Edition Volume 5. S – Z London*

Butterworths 1970 page 62 under "SHALL" . It is stated. The words "shall" in general acts of parliament or in private constitutions are to be construed imperatively." The Court of Appeal of this jurisdiction has had occasion to deal with the issue on occasions when the issue of leave to operate as stay deferred for hearing inter parties on another date either before the same judge who had granted leave to apply for judicial review or before another judge of concurrent jurisdiction.

In the case of **REPUBLIC VERSUS COMMISSIONER OF CO-OPERATIVE EXPARTE KIRINYANGA TEA GROWERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD [1999] 1 EA 245** at page 246 paragraph (a) the Court of Appeal made observations that

"*the application for leave was heard by Aluoch J, who ordered that the application for leave to operate as stay be heard inter partes on a stated date and time. The substantive motion was later heard by Keiwa J who declined to grant the orders sought. At page 247 paragraph (a) the Court of Appeal observed " In view of the provisions of Order LIII we do not think this was a proper order to make."* At paragraph (d) it stated". There are three mandatory requirements:

(a) That the application must be made exparte to a judge in chambers

(b) That the application shall be accompanied by a statement of facts

(c) That the application is also to be accompanied by affidavits verifying the facts relied on" Then at paragraph e the Court of Appeal went on to say "If the application must be made exparte, 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 exparte 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. There is no power to make one portion of the chamber summons exparte and the other portion of it to be heard inter partes." On the basis of that reasoning the learned Law Lords of the Court of Appeal held inter alia that "*no application for the three orders of mandamus, prohibition or certiorari can be made unless leave has been granted and the application for leave must be made exparte. Since the application must be heard and granted exparte, it is at the leave granting stage that the judge is required to deal with the issue of whether leave granted shall act as a stay. A judge has no power to separate the granting of leave exparte from the issue of whether or not such leave shall act as a stay*"

In the case of **SHAH VERSUS RESIDENT MAGISTRATE, NAIROBI [2007] 1 EA 208 also** a Court of Appeal decision. At page 210 paragraph f Keiwua JA observed: *"It is noted that the application for leave and for that leave to operate as a stay of proceedings is required to be made exparte, but to be served on the registrar of the superior court" . At paragraph g – I the learned judge observed "first leave to apply for the order was required. The application for leave which was exparte but could be and in practice often was adjourned in order to enable the proposed Respondent to be represented had to be supported by a statement setting out ……". At page 211 paragraph A – B the learned judge went on to say, "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, that discretion extends to enable such a judge to hear that application both exparte and inter partes as was about to happen in this case before Aluoch J. At paragraph C the learned judge continued "Her decision thereafter to send the file and the very same application for leave by another judge of co-ordinate jurisdiction is much as the order granting leave to the applicants could not be set aside by the learned judge without an application for that purpose." In the same decision Owuor JA, as she then was agreed with the reasoning of Keiwua JA at 211 of the decision and went on to make her own observations at page 213 paragraph b - c as follows "Faced with objection from counsel and this court's authority, the learned judge took a rather strange step; she decided to vacate her previous order at nobody's instigation thereby taking away a right she had already given the applicants and ordered as follows. " have decided to move and set aside the orders granted on 3rd March 2000 granting leave and directing that the request for leave be heard inter partes …….. I direct that the application for leave and stay be granted once more before another judge straight away this morning". At paragraph c – d the learned*

judge of appeal continued "It would appear to me at this interlocutory stage that the learned judge Aluoch, had no jurisdiction or power to vacate her orders and therefore Githinji J' could not have reheard the first limb of the application. Aluoch J's order grating leave was still in existence". On the basis of those reasoning it was held inter alia that the application for stay pending appeal was allowed, in that Aluoch J, had no jurisdiction to split the hearing of the prayers to operate as stay in the manner she did. Either the entire application was heard exparte, or it in its entirety adjourned to be heard inter partes. Further that Aluoch J (as per Owuor JA) had no jurisdiction to set aside the earlier orders for leave that she had already granted and (as per Keiwua JA) had no basis on which to do so as there was no application before her on which she could set aside or vary her earlier orders. It followed that Githinji J could not rehear the application for leave as her orders were still in existence "

In another Court of Appeal decision on the same subject, is the case of **ZAKHEM CONSTRUCTION (KENYA) LIMITED VERSUS PERMANENT SECRETARY, MINISTRY OF ROADS AND PUBLIC WORKS NAIROBI CA 244 OF 2006.** The facts in summary are that the application was for judicial review and was placed before Emukule J who upon perusing the documentation made orders to the effect that:

(1) Application is certified urgent.

(2) Serve the Respondents forthwith.

(3) Hearing inter partes on 23rd October 2006.

A perusal of the judgment in this appeal goes to show that among others an issue arose as regards the correct interpretation of orders 53 rule 1 (2) of the Civil Procedure Rules. The learned law lords of the Court of Appeal after quoting Keiwua JA in the case of **Shah versus Resident Magistrate Nairobi supra at page 211** went on to state thus at page 5 of the judgment paragraph 2, 3 and 4 and I quote "The stress on the whole application being adjourned is in relation to the fact that the judge in the Shah case (supra) had granted leave exparte but postponed the issue of whether or not the leave she had granted ought to act as a stay to be heard inter partes. The court had previously held in **REPUBLIC VERSUS COMMISSIONER OF COOPERATIVES 1997** LLR 227 (CAK) 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. What is before us today is whether a judge has jurisdiction to adjourn the whole application for hearing inter partes. As is obvious from what Ole Keiwua JA said in the Shah case (supra) and the other two members of the court agreed with him, a judge has discretion to adjourn the whole application for hearing inter partes. In **O'REILLY VERSUS MACKMAN AND OTHERS** supra, Lord Diplock with whom all the other law lords stated at page 1130 of the report:

"*First leave to apply for the order was required. The application for leave which was exparte but could be and in practice often was adjourned in order to enable the proposed Respondent to be represented had to be supported by a statement setting out…..*"

So even in the United Kingdom and even before amendments of the rules, there was a power to adjourn an application for leave for hearing inter partes. This court accepted that position in the Shah case and it was not correct for Mr. Mutua to say there was no authority on the matter. We add as a matter of interest that Mr. Mutua readily conceded that the hearing of the application, inter partes occasioned no prejudice at all to the Appellants. Grounds 1 and 3 in the memorandum of appeal must accordingly fail.

To balance the scales of justice it is proper to set out the principles in the cases relied upon by the applicant before analyzing the principles set out in them. In the case of **KURIA 3 OTHERS VERSUS THE ATTORNEY GENERAL [2002] 2 KLR 69** Mulwa J as he then was held inter alia that "The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. It is therefore imperative that the intrusion of judicial review remedies into criminal proceedings would have the effect of requiring a much broader approach." In the case of **REPUBLIC VERSUS REGISTRAR OF COMPANIES EXPARTE GITHUNGO** [2001] KLR 299. The same

Mulwa J as he then was at page 306 paragraph 10 – 20 set out the provision of order 53 rule 1(4), Civil Procedure Rules and then made observations that

"*grant of stay under order 53 rule 4 is therefore discretionary. However in exercising this discretion I must be satisfied that the applicant has locus standi which is not an issue here and secondly That circumstances of the case warrant granting of stay applied for*". On the basis of that reasoning the learned judge held inter alia that the limits of judicial review should not be curtailed but should be nurtured and extended in order to meet the conditions and demands affecting the decision making process in contemporary society.

In the case of **REPUBLIC VERSUS COMMISSIONER OF COOPERATIVE DEVELOPMENT AND ANOTHER EXPARTE GUSII FARMERS RURAL SACCO LTD [2004] 1 KLR 483** Bauni J at page 486 paragraph 20 – 35 made the following observations:

"*In this case the substantive motion had not been filed. However I believe that though the parties would not be heard on the issue of judicial review perse, they still can be heard on the issue of stay if it is to be granted simultaneously with leave to institute judicial review. Granting of leave to institute judicial review is one thing and granting stay is another thing all together. Whereas issues relating to the former should be dealt with after the substantive motion had been filed parties interested in the matter can canvass the issues of stay only before the substantive motion had been filed. This is only logical since if a party feels that he will be affected by the order of stay he may not have to wait for 21 days if he feels that by so doing his rights will be infringed. I therefore find that there was nothing wrong for Hon. Justice Kamau to rule that the 3 interested parties could be heard*". On the basis of that reasoning the learned judge held inter alia that

(i) interested 3rd parties for a judicial review proceedings can be heard on the issue of stay if it is granted simultaneously with leave to institute judicial review even though the substantive motion has not been filed.

(ii) Under order 53 rule 1 of the Civil Procedure Rules an application for leave shall be made exparte before a judge in chambers.

(iii) It is a fundamental principle of justice that before an order or a decision is made parties should be heard.

In the case of **JARED BENSON KANGWANA VERSUS ATTORNEY GENERAL NAIROBI MISCELLANEOUS APPLICATION NUMBER 446 OF 1995**. In this matter the applicant filed an application by way of a notice of motion seeking an order of prohibition to prohibit criminal proceedings in a magistrate's court and secondly sought stay of those proceedings under the application for the order of prohibition was heard and finally determined. From what the court was informed during the submissions and from the readings of the contents of the ruling and representation on it in the submissions to court, application for leave to apply for judicial review was granted but apparently leave to operate as stay was not granted. When need arose the applicant sought leave for stay of proceedings in the criminal case which was supposed to be prohibited by the judicial review order of prohibition. After due consideration stay was granted.

The courts attention has also been drawn to the case of Nai Misc. Application No. 772 of 2006 in the matter of

(1) Tender No. KWS HQS 5/82/2005 – 2006

(2) The Exchequer and Audit Public Procurement Regulator 2001

And

(3) Failure by the Kenya Wildlife Service to consider and evaluate the bid by Tourism Promotion

Services Limited for the said tender

And

(4) Of a decision by the Public Procurement Complaints Review and Appeals Board in Application No. 52 of 2006 to reject the applicant's appeals against them and of the said tender to mara land mark

And

(5) of an application by Tourism Promotion Services Limited for leave to apply, for orders of certiorari prohibition and mandamus.

The brief facts are that the application for leave to apply for judicial review came before Aluoch who granted leave to apply for judicial review. But deferred a decision on the issue as to whether leave granted was to operate as stay or not till after the application had been served on the opposite party and a date set for the same to be heard inter parties on that issue. When the matter came for inter parties before Wendoh J she identified the issue before her at page 5 of the ruling line 3 from the bottom thus

"*Before I can consider whether or not the order whether or not the order of stay is merited the crucial issue is whether this court has the jurisdiction to grant an order of stay after an order granted leave has already been made."*

The learned judge at page 6 – 7 of her ruling was guided by the Court of Appeal decisions in the case of **Hotel Kunste Ltd versus Commissioner of Lands CA 234/1995** and the case of **SHAH VERSUS RESIDENT MAGISTRATE [2000] 1 EA 208.** At page 7 line 4 from the top after due consideration of the principles in the cited cases the learned Judge ruled "From consideration of the above authorities the Court of Appeal has clearly set out what the law is, that the prayer for leave and stay have to be considered simultaneously exparte otherwise the court adjoins to consider both prayers inter partes.

Indeed that is the practice of this court when the court is of the view that the ends of justice will be met by hearing both sides before orders of leave or stay are granted. The court has on some

occasions ordered the applicant to serve the chamber summons application and parties are heard inter partes on the issue of leave and stay in the following cases:

(1) HC MIS APP. 663/2006 DENIS KURIA AND 3 OTHERS VERSUS MNISTER FOR ROADES AND PUBLIC WORKS AND OTHERS.

(2) HC MIS. APP. 747/2006 HON UHURU KENYATTA AND OTHERS VERSUS REGISTRAR OF SOCIETIES…….

therefore do agree with the Respondents and interested party's submission that since the judge dealt with the issue of leave on 28th December 2006 and granted the same, this court is functus officio as regards the issue whether the leave can operate as stay. All that is left for the Applicant is to prepare for the hearing of the substantive motion."

In Misc. App 1645 of 2005 in the matter of the land disputes tribunal **GATANGA VERSUS ELIA NGIMBA MUIRURI** on an application for judicial review presented outside the 6 months statutory period allowed for presentation of an application for judicial review Emukule J at page 8 of the Ruling paragraph 3 made the following observation. " In my humble view, it would not be correct to say or argue that once an award of a Land Disputes Tribunal has been entered by the court it becomes irreproachable. A judgment of the court of the Senior Resident Magistrate arising out of an unlawful award of or by a land Dispute Tribunal cannot stand because it is founded upon an illegality and an illegality remains an illegality irrespective of the time and by whom committed." At page 10 paragraph 2 the learned judge added

"*For the reasons of illegality as I have already stated above, I would grant prayer No (ii) of the notice of motion in terms thereof."*

Lastly in Nairobi **MISC. APP NUMBERS 473 OF 2006**. In the matter of **BISHOP PAUL KAMAU NJOROGE AND 5 OTHERS VERSUS THE AG AND 2 OTHERS** as Respondents **and PAUL MUTHEE KAMAU AND 6 OTHERS** as interested parties. The brief facts are that the matter came before Rawal J. on 30th August 2006 and 1st September 2006 seeking grant of leave for orders of judicial review. Rawal J granted leave exparte under Rule (1) (2) of Order LVIII in both applications but made orders that she would hear inter partes the issue as to whether the leave so granted should operate as stay or not. Objection was filed to the said orders with the central theme of the objection being that "*leave cannot operate as stay once the judge failed and or refused to grant the same at an exparte stage of hearing of the application (see page 4 of the ruling line 11 from the top"*. On the same page in reference to Court of Appeal decision in the case of **REPUBLIC VERSUS COMMISSIONER OF COOPERATIVES** (supra) and **SHAH VERSUS RESIDENT MAGISTRATE** also (supra) the learned judge observed further "Both these cases are from the Court of Appeal and if the court in fact decided these issues, as observed I have to put my tools down as I am simply bound by the decision of the Court of Appeal as per rules of precedent. "*After doing surgery to the two CA decisions the learned judge at page 8 of the ruling line 14 from the bottom stated thus "with utmost humility I am of an opinion, from the facts of the two cases, relied on and observed by me herein before, that the observation made by Court of Appeal in the aforesaid two cases were not made on the issues which were directly before the court for determination. At the risk of being repetitive or immodest the orders made by Aluoch J. were not under attack before or for direct determination by the Court of Appeal. This is my understanding there is no decision of the CA of Appeal on this issue……*"

Having arrived at the above conclusion that the issue of granting leave to apply for judicial review first and then deferring the issue of leave to operate as stay to another date on the basis of the same chamber summons was not the issue before the Court of Appeal in both cases, the learned judge, proceeded to interpret the provision of order LIII Civil Procedure Rules on the issue of leave operating as stay. At page 11 line 12 from the bottom thereof observed thus:

"At the time of enactment of Law Reform Act, the legislature thought it fit to adopt the judicial powers of English Courts as per Section 7 of the Administration of Justice Miscellaneous Act 1938. That was in 1956 and the relevant Act in the United Kingdom was the said Act.

Kenyan Legislature has, however failed to make any significant development in the said law or failed to keep abreast with the development made in the field of administrative law in the United Kingdom. However Kenya Judiciary has continued, Like the courts in the United Kingdom, to consider the three remedies of Judiciary review a very important means to uphold and defend the rule."

After a brief discussion of the development of the law on judicial review in England, the learned judge at page 12 of the ruling line 7 from the top made note of the fact that despite the mandatory requirement in the provisions of the law in England, English Courts declined to be overpowered by the said mandatory provision and held that the application which is meant to be heard exparte may be in appropriate cases adjourned for persons or bodies against whom relief is sought to be represented and heard."

At page 14 turning back to the subject of consideration before her, the learned judge noted at line 11 from the top paragraph 3 that she was expected or had been called upon to interpret provision which are procedural in nature and that it was well settled that Rules of Procedure cannot be allowed to become mistresses of justice. It is the handmaid of justice." At paragraph 5, line 12 from the bottom, that "*Rules of Procedure are not themselves an end but the means to achieve the ends of justice. Rules of procedure are tools targeted to achieve justice and are not hurdles to obstruct the pathway of justice."* At line 4 from the bottom the learned judge defined the role of a judge thus "A judge must think of himself as an artist who, although he must know the hand books, should never trust them for his guidelines, in the end he must rely upon his almost instinctive senses of where the line lay between the word and purpose which lay behind it." At page 15 line 4 from the top: "A judge must not alter the material of which the Act is known but he can and should iron out the creases. "At line 8 from the top "……, the courts in Kenya and

of course in the U.K. have come out strongly in favour of the discretion of the court to allow the other party to enter in the arena at the appropriate stage to avoid multiplicity of process of setting aside the initial orders of leave. It was to make the procedure more effective, just and fair specifically to suit an adversarial system of justice."

In this court's own view, the learned judge having assured herself as having laid a proper foundation for her forth coming decision or conclusion on the assessments of the facts on the preliminary objection before her boldly declared at paragraph 4, 5 of the ruling. "The court as stated in the case of Kingston (supra) gets jurisdiction after the grant of the leave and there is no legal basis to stop or obstruct the court to get representations from the other side before it can grant a more substantial and drastic, if I may state so, remedy of stay. In my view, what the court decides after representations from the other side shall be more judicially viable than what the court would do before such representation. It can be a safer and fairer manner to avoid greed, in roads and hindrance to the rights and obligations of the opposite part. I have carefully tried to read and re-read the provision of sub-rule 1(4) of order LIII Civil Procedure Rules and I do not read any prohibition of the court not to bifurcate two stages of the application.

Moving to the actual construction of the relevant provisions the learned judge pointed out that the rules under Order 53 Civil Procedure Rules are made in pursuance to the provision of Section 9 of the Law Reform Act Cap 26 Laws of Kenya. In interpreting that provision, the learned judge stated at page 16 paragraph 2. This subsection (9 (b)) does not make any provision or does not make any mention as regards procedures which include the procedure concerning the said leave to be operating as stay. This sub-rule (1) of Order LIII can be said to have been made without any support from an Act of Parliament. However in my view this issue may not be relevant at this stage bit I can safely state that even in the absence of the said sub rule, there can be any impediment on the part of the court to grant the remedy of stay.

Be that as it may (paragraph 3 page 16), what I intend to observe is that any restriction on the inherent power of the court to grant appropriate orders deemed fit has to be secured from the constitution, and an Act of Parliament cannot stifle that power. However I have observed that the language he said rule 1(4) does not in any event hinder the court's jurisdiction to make an order that it shall adjourn the hearing of application for stay to the inter parties hearing. What the court can do at the exparte hearing, it can do at the inter parties hearing shall. I shall also take support from the observation made in the case of **ROSAFRIC LTD AND 3 OTHERS VERSUS THE MINISTER OF FINANCE MISC. CA NO. 1392 OF 2001** (unreported): that there is nothing in Order LIII of Civil Procedure Rules which stifles this court's unlimited, original and inherent jurisdiction. The decision emphasized that the court should welcome the opportunity to be assisted by the opposite party at an early stage.

It is also my humble view that it shall be a travesty of law and an Affront to the inherently unlimited power of the court if the court is not allowed to grant orders inter partes which it can give exparte.

This interpretation of the law as hereby put forth by me makes it amenable to the spirit of order LIII Civil Procedure Rules of law and independence of judiciary as a protector and defender of the constitution and the right of the subjects of Kenya." On the basis of the foregoing reasons the learned judge dismissed the preliminary objection before her.

At the end of the setting out of the case law emanating both from the Court of Appeal and the various superior courts of this jurisdiction a person reading this ruling might think that this was an unnecessary spree into this area. But the sole purpose and benefit of it was for this court to try and get as much information as it can lay its hands on, on how other courts have approached the interpretation and construction of what has been termed as "a special restrictive and closely guarded interpretation" of both Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and order LIII of the Civil Procedure Rules. It was therefore simply to gather tools to be employed in discharging what this court has been called upon to do. The call by the Respondent objector or is that it be bound by the guidelines provided by the Court of Appeal in the decided case law and strictly follow those footsteps and uphold the doctrine of precedent. While the call of the applicant is that this court has power to revisit an area not wholly covered by the Court of Appeal decision and come up with its own interpretation or guidelines on the matter.

In proceeding to discharge this task this court has to bear in mind the fact that in seeking guidelines from decision of both courts, it is not to behave as if it is sitting on appeal, review or judgment of these decisions. But to bear in mind that the provisions of law construed and or interpreted by these courts, is the same one that it has been called upon to interpret, in the peculiar circumstances of the orders made by Aluoch J on 3.09.07 and its own order of 4th September 2007. Also to bear in mind as observed by Rawal J, in the last quoted case that judicial precedent applies and is binding where an inferior court is bound by the decision of a higher court on the same issue.

Armed with that, this court proceeds to interpret the provision it has been called upon to interpret. The proceedings, before Aluoch J of 3rd September 2007 were originated by chamber summons under Order LIII rule 1(2). There is no dispute that case law on interpretation of this rule is that it is a requirement that it be made exparte to a judge in chambers. The operative words are "An application for such leave aforesaid shall be made exparte to a judge in chambers……." The commanding word here is "shall". The meaning assigned to this word in "words and phrases" (supra) is that where there appear in Acts of Parliament or in private constitutions they should be construed "imperatively". If construed as such it means that proceedings on the chamber summons should be handled exparte both for the granting of leave to apply for judicial review as well as the issue as to whether the leave granted is to operate as stay or not where this is dealt with in one package. The only objection, anticipated to it is where the opposite party moves to challenge the leave granted continuing to operate as a stay probably at the inter parties hearing. This is not however the kind of objection being inquired into in these proceedings.

The kind of objection being inquired into, in these proceedings, relates to a scenario where by, the judge, before whom the chamber summon for leave to apply for judicial review decides to grant leave to apply for judicial review and then defer the issue of whether the leave granted is to operate as a stay to another date 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 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 of the relief to be considered on another date before this court .

In a similar occurrence later on this matter went upto the Court of Appeal and it was considered by the Court of Appeal in the case of **REPUBLIC VERSUS COMMISSIONER OF CO-OPERATIVES exparte KIRINYANGA TEA GROWERS CO-OPERATIVE SAVING AND CREDIT SOCIETY LTD** (supra). In its decision the Court of Appeal was 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 a stay. 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 a stay."*

A reading of the body, of the judgment, giving rise to that decision, show that the Court, of Appeal in its wisdom was construing the provisions of Order LIII rule 1(2) and 1(4) of the Civil Procedure Rules. Sub-rule 2, reads" An application for such leave as aforesaid shall be made exparte to a judge in chambers, and shall be accompanied by a statement setting out the names and description of the applicant' the relief 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 terms as to costs and as to giving security as he thinks fit". Sub-rule 4 on the other hand reads." 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." A reading of these two provisions 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" from the order for the said "leave to operate as stay. But the Court of Appeal in its own wisdom in the cited case stated that the two reliefs must be considered exparte by the same judge.

In another court of appeal decision before another panel but with one judge who was not on the panel

in the Kirinyaga case agreed with the stand of the first panel that the granting of the reliefs should not be split but went further and added that instead of splitting the granting of the entire application can be adjourned and heard inter partes. This was the decision in the case of **SHAH VERSUS RESIDENT MAGISTRATE NAIROBI** (supra). In the body of the ruling by Keiwua JA the authority to defer the whole application and have the same heard inter partes is stated at page 211 of the decision paragraph a – b. "The authority to do so is within the discretion of the judge". Owuor JA as she then was and Gicheru JA agreed with the stand of Ole Keiwua JA. This reasoning formed the central 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 defer the issue of leave operating as stay to be canvassed inter partes. More so when the underlying reason in the instances is the same. Namely to alert the other side of the impending procedure to avoid surprise, get the respondent's opinion and then give a fair ruling for ends of justice to both parties. This little observation is not meant to criticize the Court of Appeal's decision but just to point out possible lacunaes to be filled by the Court of Appeal at an appropriate time n order to sharpen the tools of trade for the superior court in this area of law. Another aspect that guidance was not provided on, was on the basis of what papers the opposite party, would be heard, as there is no indication that the exparte chamber summons was to be served on the opposite party or it is only a hearing notice which was to be served to notify the opposite party to come to court. Neither was there guidance as to whether the opposite party would be allowed to present evidence in opposition to the leave being granted or only against operating as stay at that chamber summons stage.

Next in line is one other Court of Appeal decision **ZAKHEM CONSTRUCTION (KENYA) LTD VERSUS PERMANENT SECRETARY MINISTRY OF ROADS AND PUBLIC WORKS AND CHIEF ENGINEER PUBLIC WORKS** (supra). Among the panel was one judge who was on the panel in the Kirinyaga case (supra). In this case, the Judge who became seized of the chamber summons exparte deferred the whole chamber summons to be heard inter parties. The argument of counsel objecting at page 4 of the judgment was that since Order LIII rule 1(2) requires that the application be made exparte to a Judge in chambers it must follow that the same must also be heard exparte in chambers. In response to that submission at line 10 from the bottom, the Court of Appeal made observation that "*generally speaking and particularly in Kenya, unlike in the United Kingdom where these rules have been amended Mr. Mutua would appear to be right in the prima facie reading of the provision."* The learned Judges then referred to their two previous authorities in the **SHAH CASE AND THE REPUBLIC VERSUS COMMISSIONER OF CO-OPERATIVES** case. In fact on the same page 4 of the judgment it is stated clearly that the authority relied upon by Keiwa JA to rule that the whole application can be deferred to another date to be heard inter partes was based on an English decision **O'REILLY VERSUS MACKMAN AND ANOTHER [1982] 3AER 1124.** The said English decision was interpreting a specific rule under the English rules of procedure to the effect that the application for leave which would be heard exparte but in practice was often adjourned in order to enable the proposed Respondent to be represented……. At page 5 of the judgment the Court of Appeal acknowledged the fact that in the **REPUBLIC VS 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 softened on that stand when they held that a judge has a 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 amendment of the rule, there was a power to adjourn an application for leave for hearing inter partes.

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 readily conceded that the hearing of the application inter partes occasioned no prejudice at all to the appellant"

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.

Be that as it may, this court stands guided by the sentiments of the majority of the Court of Appeal judges panel in the case of **ABU CHIABA MOHAMED VERSUS MOHAMED BWANA BAKARI AHMED H.S. MRAJA AND ELECTORAL COMMISSION OF KENYA NAIROBI CA 238 OF 2003** decided by a bench of (7) seven Court of Appeal Judges. At page 6 of the judgment line five (5) from the top there is found a stern warning to errant superior court judges who wittingly or unwittingly or otherwise attempt to trespass onto 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 overrule the decision of this court even if she disagrees with the decision and the comments in her judgment must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. I would respectively point out to the learned judge that 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 overrule or side-step the court's decisions can only result in unnecessary costs to the parties involved in litigation."

This court stands warned accordingly but whether it is going to side-step or fall into step the current standing on the issue of splitting the two reliefs of leave to apply for judicial review and leave granted to operate as stay will depend on the situation on the ground in this matter. But before I come to that it is good to acknowledge the reaction of the superior court judges on the issue in the few decisions cited herein, namely Wendoh J in the case of the matter of application by **TOURISM PROMOTION SERVICES LTD HIGH COURT MISC. APP. NO. 772 OF 2006**, and Mohamed Ibrahim J in **JULIUS ODOLNOBERTS AND 11 OTHERS VERSUS PUBLIC SERVICE COMMISION AND 2 OTHERS High Court MISC CIVIL APPLICATION NO. 1305 OF 2004** have stated that this is the correct position.

Rawal J on the other hand in the case of **REPUBLIC VERSUS CHIEF MAGISTRATE'S COURT NAIROBI AND ANOTHER EXPARTE HINESH K CHUDASAMA NAI MISC. APP. NO. 473 OF 2006** whose salient features have already been set out extensively elsewhere in this ruling. It is to be noted that this court is not sitting on appeal over Justice Rawal's decision. But the court cannot ignore the fact that the objection raised before her was on the same grounds as those raised here, namely the splitting of consideration of the two reliefs namely leave to apply for judicial review being heard exparte where as considerations of the second limb of leave to operate as stay to be head inter parties. A reading of her reasoning tends to show that a major factor weighting in her upholding her stand was based on the fact that the central issue in the two decisions namely the Shah case and the Kirinyaga Tea Growers Co-operative Society Ltd case were other issues other than the issue of splitting the reliefs. She was of the opinion that this was a side issue and therefore the Court of Appeal's decision on the same points was orbiterdicta as to whether she is correct in her application of those decisions is for the Court of Appeal to decide. However on the part of this Court it agrees entirely with the learned Judge as regards the principles of law that should guide a judge faced with a similar situation. These are:

(1) The High Court has unlimited jurisdiction. It can enlarge old remedies, it can invent new ones. If that is what it takes or was necessary in an appropriate case to secure and vindicate the rights breached. That anything less would mean that the court itself, instead of being the protector, defender and guarantor of the constitutional rights would be guilty of the most serious betrayal. This pronouncement in this court's opinion is in line with the three celebrated Court of Appeal decisions. Because by the Court of Appeal taking a softened stand from the first discretion of a strict application of the rules to a softer stand that the court's decision can be invoked, the Court of Appeal was simply enlarging an old remedy and creating anew one namely using the court's discretion to break the chain of strict application of the rules.

(2) That litigants come before court to vindicate their claims is correct because that is the business that

courts are set up for.

(3) Pronouncement that the Kenyan legislature has however failed to make any significant development in the area of judicial review is acknowledged by the Court of Appeal in the **ZAKHEM CASE** supra when it was noted that it had come to their knowledge that in the UK even before the rules were amended to specifically provide for hearing of the respondent on the ex parte chamber summons before issue of leave and leave operating as stay were made, the court had a discretion to avail that relief or opportunity to the respondent.

(4) The pronouncement that Kenyan Judiciary has continued to consider the three remedies of Judicial Review a very important means to uphold and defend the rules of law has testimony in the voluminous case law on the subject and the creation of a special Division for these types of reliefs.

(5) A pronouncement that the court is always faced with variety of facts and circumstances and to place it into a straight jacket of procedure especially in the field of very important sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and discretionary powers of the High court is correct and it is 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 that it be exercised judicially. It is a very powerful tool in the judicial process used to change the old remedies and enlarge new ones. The Kenyan jurisprudence on judicial review is a beneficiary by virtue of the Court of Appeal having laid down a principle that the court has a discretion to defer the exparte chamber summons and have it heard inter partes was an effective weapon against the strict application of rules at the expense of substantive justice to the parties as circumstances permit.

(6) A pronouncement 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, is in line with the Court of Appeal recognition that the court has a discretion to adjourn the whole application to be heard inter partes where there is no prejudice to the applicant. This is in line with a cardinal principle of law hammered by the Court of Appeal itself that in as much as possible courts the superior court inclusive should lean towards disposing off matters on merit (by hearing both parties) as opposed to leaning towards technicality (giving drastic relief on the testimony of one side)

(7) A pronouncement that jurisdiction under Order LIII was an invitation to interpret rules and that it is settled law the rules of procedure cannot be allowed to become mistress of justice but hand maids of justice is born out by the reasoning in the Court of Appeal decisions as the construction and or interpretation was on the effect and purport of rules 1(2) and 1 (4) of Order LIII.

The first decision in the **COMMISSIONER OF CO-OPERATIVES CASE** the Court of Appeal elevated Rules of procedure to be masters of Justice. But in the softened stand in the **SHAH CASE** the rules of procedure were made to be hand maids of justice. This too is a cardinal principle which has been hammered by the Court of Appeal itself in numerous cases. Just to name a few (see the case of

NDEGWA WACHIRA VERSUS RICARDA WANJIKU NDANJERU (1982 – 88) I KAR 1062 and Civil Ap.. Nai 165 of 1999 (KSM 14/99) Sara Hersi Ali versus Kenya Commercial Bank.)

8 A pronouncement that a judge must not alter the material of which the Act is known, but he can and should iron out the creases is the sole purpose for the existence of the interpretative role of a court of law and that is precisely what this court is being called upon to do.

9. 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 more substantial and drastic remedy of stay, is definitely in line with the Court of Appeals softened stand of being proper for the judge exercising his/her discretion in adjourning the exparte application to another date with notice to the other side for purposes of hearing both parties. This court agrees with the reasoning of the learned judge that the decision coming out of an inter partes hearing will be more balanced and take into account the interest of justice to both sides as

opposed to a decision based only on representations from one party.

10. A pronouncement that a reading of sub rule 1(4) of Order 53 Civil Procedure Rules does not reveal any real prohibition for the court not to grant leave first and then defer the issue of leave operating as stay to another date for inter parties hearing is correct. Because a plain reading of the said rule does not prohibited splitting the two limbs. This is also confirmed by the Court of Appeal decisions especially the case of **SHAH** and **ZAKHEM** which have explained it away on the basis of the court's discretion and lack of prejudice to the complaining party.

11. A pronouncement that any restriction on the inherent powers of the court must specifically be provided for by either the constitution or statute is correct because existence or availability the inherent power of the court is a very important as well as powerful tool in the administration of justice. The court has judicial notice of the fact that this tool creates an avenue for access to justice to litigants where no provision of law exists to enable them access justice. This court also agrees with the learned judge on the observation that construction of sub rule 1(4) should not be done in such away so as to appear as if this provision exists to stiffle the courts in unlimited 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, an institution that protects and safeguards the rights of litigants who come before it in search of justice on equal footing. I must point out that what the learned judge left out was that the only limitation of the court's exercise of its original and inherent jurisdiction is a requirement that it be exercised judiciously.

Tuning back to the issue of the court being functus officio in so far as it is being called upon to consider the issue of whether leave to apply for judicial leave granted herein by Aluoch J. can be ordered to operate as stay by another judge and on a different day. The basis of the objection is the Court of Appeal decisions already set out herein. On this issue the following factors are not in dispute.

(1) That the matter went before Aluoch J on 3rd September 2007 and leave to apply for judicial review was granted.

(2) That the issue of leave granted operating as stay was deferred to 4th September 2007 pending service or notice of the proceedings to the opposite party and then have this issue heard inter parties.

(3) That on 4th September 2007 the matter came before Nambuye J. The issue was raised before her. The opposite party was present and informed the court that they already have their grounds of objection ready and were willing to be heard.

(4) That Nambuye J after noting representations of both counsels on record, directed that the best way to handle that issue was to bring the Respondent properly on board by serving the substantive application on them, having them, file their responses thereto and then have the matter proceed on 6th September 2007. On 6th June September 2007, when the parties appeared in court to make representations on the issue as to whether leave granted should operate as stay, or not, is when the Respondents counsel notified the court that that issue could not be canvassed because they had filed a preliminary objection against this court proceeding with the same. The matter was then deferred for hearing of the preliminary objection inter parties which was done and its arguments thereof are the subject of this ruling.

(5) It is also not in dispute that no decision has been made by any judge as at now as to whether leave granted to apply for judicial review should or should not operate as stay.

(6) It is also on record that this court has already ruled earlier on in this ruling that this issue is not Res judicata because it was not finally determined by Aluoch J.

(7) It is not in dispute that as per the jurisprudence flowing from the Court of Appeal on the subject, once a superior court grants leave to apply for judicial review and it defers deliberations to another date on the issue as to whether that leave is to operate as stay or not it becomes functus officio.

(8) It is not also in dispute that the doctrine of judicial precedent is binding on this court as far as decisions of the Court of Appeal are concerned on the same subject. The call by the objector here is that this court has to follow that command without question.

(9) It is not also in dispute that this court has cited two decisions by the superior courts one declining to follow the Court of Appeal command and went ahead to give reasons for refusing to be bound. It is also not in dispute that despite paying glowing tribute to the pronunciations on in principles of law on the subject by Rawal J, in the quoted case, this court is not bound by that decision. Neither is it bound by the decision of Wendoh J in Nairobi miscellaneous application number 772 of 2006 being an application by Tourism Promotion Services Ltd. But it is bound by the principle upheld by Wendoh J as it was based on the Court of Appeal decision on the subject.

Applying the foregoing to the issue of functus officio, it is therefore necessary to establish as regards on the basis of whose orders was the matter coming up for hearing inter partes on the issue of leave. Were they the orders of Aluoch J. If it was on the basis of Aluoch J's orders then in the wake f the Court of Appeal decisions, the matter is foreclosed. I is on the basis of Judge Nambuye's orders then a basis has to be laid as to whether she had jurisdiction to do so.

To resolve this the court has to turn to the entries on record. What came before Nambuye J on 4th September 2007 was the exparte chamber summons. The sequence of events on that day are as follows:

Mr. Orengo: leave to apply for judicial review has been granted. Stay has not been granted. We are here to argue the issue of leave to operate as stay in the presence of the A.G.

Mr. Kiage: We were served with the application and a hearing notice…. We have the grounds but no affidavit yet.

Mr. Orengo: under the rules, they cannot file any papers. The rules do not allow proceedings to be filed.

Court: adjourned for 10 minutes to enable counsels agree on the way forward.

10.55 a.m.

(11.25 a.m)

Court: In the court's, view the only way that the Respondent can be brought on board, to enable them participate in the inter parties hearing is by bringing them on board through the filing of the substantive application.

Mr. Orengo: We have discussed outside the court and we have agreed that we file the motion, by 1.00 p.m. today, and then be heard on Thursday at 11.00 a.m.

Mr. Kiage: That is okay.

Order: By consent stood over to 6th September 2007 at 11.00 a.m. for presentation on arguments on leave to operate as stay"

The sequence of events on 4th September 2007 show clearly that the order of Aluoch J deferring the issue of leave granted operating as stay which were based on the basis of the exparte application ceased to have effect as at 11.25 a.m. when the court made an order with the consent of both parties that the best way to argue the issue of leave operating as stay is to have the substantive application filed and served, have the respondents file response to it and then hear the parties. It therefore follows that as at the time the matter came up for hearing inter parties on 6th September 2007, it was on the basis of Nambuye J.'s order of 4th September 2007 made at 11.25 a.m. No decision has been made on the basis of these orders

and so the court is not functus officio.

A question, that may arise now, is whether this court had jurisdiction to make those orders on the basis of oral representations from counsel for the applicant as there is no formal application presented to court asking the court to revisit that issue after the substantive proceedings have brought both sides on board. 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. It sates:

1(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 directs operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise"*. Likewise 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.

Before making findings as to whether this court was right or not, it is necessary to see if there is anything from the Court of Appeal which can be of assistance to this court in trying to resolve the issue. In the case of **NJUGUNA VERSUS MINISTER FOR AGRICULTURE [2000] 1 EA 184,** at page 186 paragraph g – h the Court of Appeal made the following observation". 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 granting leave. The appropriate procedure for challenge 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. (See Halisbury's Laws of England (4th Ed) volume 1(1) paragraph 167 at page 276"). On the basis of that reasoning the Court of Appeal 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.

This passage in the Njuguna case (supra) was quoted in the case of **REPUBLIC VERSUS COMMUNICATION COMMISSION OF KENYA [2001**] EA 199 at page 204 at paragraph a – c

The perincuriam holding in the Njuguna case as well as its approval its approval in the CCK case (supra) are not directly dealing with whether leave granted to apply for judicial review can operate as stay or not or when the same can be granted. But it has been quoted by this court solely to introduce a second most powerful tool in the judicial process, namely the invocation of the inherent powers of the court. This court says it is the second most important tool in the judicial process because in the decision in the **SHAH CASE**, the Court of Appeal, introduced with approval, following the trend in the practice in English courts, that a judge, faced with an exparte application, for leave, has a discretion to defer it and have it heard inter parties even in circumstances where there is no express provision empowering such a judge tae such an action. The yardstick is just for the judge reaching a conclusion that on the facts before him/her there is need to hear both parties. Principles stating why courts should not overlook this procedure have been established by the Court of Appeal itself. In the case of **FIRST BANK LIMITED VERSUS AMALO COMPANY LTD KISUMU C.A 215 OF 2000.** At page 4 of the judgment, the court of appeal stated "the principle which guides the court on the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit." In **ESSANJI AND ANOTHER VERSUS SOLANKI [1968] EA, 224** the Court of Appeal held inter alia that "The spirit of the law is that as far as possible the exercise of judicial discretion, the court ought to hear and consider the case of both parties in dispute in the absence of any good reason not to do so.

On the inherent power of the court, these are provided for under Section 3A of the Civil Procedure Act. The circumstances under which the doctrine or the power is to be invoked and applied have been laid down by the Court of Appeal itself. Just to quote a few. In the case of **KIBUTHA VERSUS KIBUTHA [1984] KLR 243** (CA) it was held inter alia that the inherent power of the court under the Civil Procedure Act (Cap 21) Section 3A cannot be invoked so as to override other rules unless it can be shown that special circumstances exist or that injustice would be occasioned by the application of t such rules. Also in the case of **AFRICAN IMPORT AND IMPORT LTD VERSUS CONTINENTAL CREDIT FINANCE LTD AND ANOTHER [2004] 1 KLR 121,** the holding is that Section 3A of the

Civil Procedure Act will not aid a person where there is clear provision of law governing a matter in which a step or steps shall be taken in action.

Although the authorities cited on the inherent powers, of the court, concerned proceedings under the Civil Procedure Rules, the observations of the Court of Appeal in the **NJUGUNA CASE** supra and the **SHAH CASE** (supra) show clearly that these two powerful tools are also available to the court in judicial review proceedings. In both incidences they were employed to fill up gaps left by silent rules. In these proceedings the court is dealing with a silent provision on sub rule 1(4) where 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. The observation by the Court of Appeal in the Njuguna case is that

"The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court" does not suggest that such applications must be formal. This does not rule out the possibility of an oral application like in the circumstances of this case. Nowhere in the authorities decided by the Court of Appeal cited herein, does the Court of Appeal say that these two powerful tools are the preserve of the Court of Appeal. They are available to all courts. The only fetter attached to them is that they have to be exercised judicially.

Applying that to the action of Nambuye J, herein, it is clear that in the absence of specific rules requiring a formal application by the applicant to be heard on the issue of leave operating as stay an oral application cannot be ruled out. The Respondent suffers no prejudice because the very facts, on the basis of which the court could have heard the applicant exparte, on this issue are the same facts, that the court, is now proposing to hear the parties on the issue inter parties. This is so because rules of procedure under Order 53 Civil Procedure Rules on judicial review require that the very papers filed by the applicant at the exparte c/s stage are the same papers that are to be relied upon at the substantive stage.

A question may arise at this point in time as to whether there may be justification for this court to be labour this issue instead of advising litigants to proceed to hear the substantive application. It is this court's finding that it is necessary because it is a relief provided by statute to a litigant seeking justice through this judicial review process. The reasons as to why the legislature found it just to slot it in is beyond the scope of this ruling. It is enough to say that the very nature of the relief of judicial review as a remedy necessitated it. In the case of **COMMISSIONER OF LANDS VERSUS HOTEL KUNSTE LTD** 1995 – 1998 1 EA (CAIC) 1. the Court of Appeal has held inter alia 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 has been subjected. The call to fair treatment does not end with the authority to which the litigant has been subjected and for whose actions the said litigant has moved to court to have them quashed or prevented from further continuing through the remedy of judicial review. The requirements of 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 determined between them. It is this court's view that denying a litigant accessibility to a relief available to him provided by statute will be an unfair treatment. Granting the 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 for cosmetic value. It is meant to be accessed and enjoyed by the litigant's subject of cause to the court determining that it should be enjoyed by such a litigant. In saying so this court has not embarked on an imaginative spree of its own. But it is following the foot steps of the Court of Appeal, in the case of **NJUGUNA AND OTHERS VERSUS MINISTER FOR AGRICULTURE** (supra). In this case the Court of Appeal and vindicated a litigant who had been denied the remedy or relief of applying for leave to apply for judicial review. 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/herself of a remedy or relief provided 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's 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 deference 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 application allowed on the basis of judicial discretion and inherent powers of the court which do not rule out oral applications where circumstances permit. This court has also ruled that no prejudice will 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 firstly following its foot steps 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 inter parties

(2) In the case of **ZAKHEM**, the Court of Appeal went ahead and approved the action in the **SHAH CASE** and then added the issue of lack of prejudice being suffered by the opposite party.

(3) In the Njuguna case the Court of Appeal went ahead 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 provided for the same

Secondly the court will be keeping in step with the stand taken by superior courts of concurrent jurisdiction that, though judicial review is a special jurisdiction, and there is a requirement that its provisions 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. In the case of **JARED BENSON KAGWANA VERSUS ATTORNEY GENERAL NAIROBI HIGH COURT MISC. APPLICATION NO. 446 OF 1995 (UR)** Okubasu J as he then was (now JA) on an application for stay which was in effect an order for leave granted operating as stay as leave to apply for judicial review had already been granted, and judicial review, proceedings set in motion, the learned judge with the consent of both counsel agreed in principle that the procedure was in order though no specific provision is provided for such a procedure in the judicial review rules heard, parties on merit and granted the order.

In the case of **KURIA AND OTHERS VERSUS THE ATTORNEY GENERAL [2002] 2 KLR** 69 Mulwa J as he then was has ruled that application for judicial review should not be stifled by old decisions and concepts but must be expansive, innovative and appropriate to cover new areas wherein they suit. In the case of Republic versus **COMMISSIONER OF CO-OPERATIVE DEVELOPMENT AND ANOTHER EXPARTE GUSII FARMERS RURAL SACCO LTD** [2004] 1 KLR 483 Bauni J. has 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 Elias **NGUMBA MUIRURI VERSUS LAND DISPUTES TRIBUNAL AND ANOTHER NAIROBI MISC. APPL. 1645 OF 2005** Emukule J. has ruled that where illegalities and irregularities are involved, the court cannot give a blind eye to them and allow them to pass unrebuked just because the rules of judicial review have to be strictly adhered to. In the case of **REPUBLIC VERSUS CHIEF MAGISTRATE'S COURT NAIROBI AND ANOTHER EXPARTE HINESH K CHUDA SAMA** AND**others** Misc. Application No. 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. It is however to be noted that being decisions of courts of concurrent jurisdiction, they are only persuasive in nature. However, it should be noted that issues in them forming the basis of those holdings

have not been tested on appeal and rule on. However, where they make pronouncements on basic principles of law known in the judicial process, like issues of the judicial discretion of the court and inherent powers of the court, there is no reason to depart from them.

These decision both by the superior court and the Court of Appeal have generated jurisprudence

providing good guidance to this court in its attempt to reach a reasonable conclusion on the matter under inquiry herein as set out hereunder

(1) In the case of **REPUBLIC VERSUS COMMISSIONER OF COOPERATGIVES KENYA TEA GROWERS SACCO LTD** emphasis was the strict application of the rules in Order 53 rule 1(2 Civil Procedure Rules, an option which is still open to the superior court.

(2) In the **SHAH CASE** the Court of Appeal led the way by showing that where circumstances permit the use of the court's discretion can be resorted to break the strict rules of procedure in Order 53 rule 1(2) Civil Procedure Rules.

(3) In the **ZAKHEM CASE** the Court of Appeal added another important tool for the exercise of judicial discretion namely, that there should b e no complaint that the issue of granting leave to apply for judicial review and for that leave to operate as stay were not dealt with exparte where no prejudice has been suffered by the opposite party.

(4) In **KURIA CASE AND 3 OTHERS VERSUS THE ATTORNEY GENERAL [2002] 2 KLR 69,** is to the effect that limits of judicial review should not be curtailed but nurtured to meet new challenges. It is an avenue for accessing reliefs like any other in the judicial process.

(5) In the case of **REPUBLIC VERSUS COMMISSIONER OF COOPERATIVES GUSII FARMERS RURAL SACCO [2004] I KLR 483** is of the view that leave to apply for judicial review and leave granted to operate as stay are not intertwined. They are severable and can be deliberated upon separately unless circumstances dictate otherwise. Issue of stay should be determined after the opposite party has been given an opportunity to b e heard so that his/her rights are not infringed.

(6) **In JARED BENSON KAGWANA VERSUS ATTORNEY GENERAL Nairobi HCCC MISC. App. 446 OF 1995 (ur) . 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 commenced in his favour nugatory. In such circumstances, the need to do justice to a litigant are compelling factors both in the invocation of the court's inherent powers and the exercise of the court's discretion.

(7) The matter of an application by **TOURISM PROMOTIONS SERVICES LIMITED,** High Court Misc. Application No. 772/2006 where the superior court has truncated the exparte chamber summons and granted leave to apply for judicial review and deferred that consideration of that leave operating as a stay to another date, the court is functus officio and cannot deal with that issue. Parties are required to proceed with the substantive application filed.

(8) In the **REPUBLIC VERSUS CHIEF MAGISTRATE'S COURT NAIROBI AND ANOTHER EXPARTE HINESH C CHUDA SAMAMISC. CIVIL APPLICATION NO 473 OF 2006** provisions of Order 53 Civil Procedure Rules should not be construed in such a manner so as to appear as if they are stifling the court's unlimited and inherent jurisdiction as well as its exercise of the judicial discretion.

(9) In Misc. App 1645 of 2005 in the matter of land Disputes Tribunal **GATANGA VERSUS ELIAS NGUMBA MUIRURI** Judicial discretion can be invoked to overlook the 6 months period required for accessing judicial review in instances where illegalities and irregularities are involved.

Being guided by the Jurisprundence set out above gathered from case law this court proceeds to make the following orders

1). The issue of leave granted to operate as stay is not Res Judicata as it was not finally adjudicated and determined by Aluoch J. on 3.9.2007. This is proved by her order No.4 when her Ladyship directed that application for leave to operate as stay be heard inter parties on 4.9.2007. The doctrine of Res Judicata only applies where issues have been finally determined as between the parties.

2). Although judicial review as a remedy has its foundation in English Law and practice it can not be said to be foreign as it is anchored on a local Act of Parliament namely the Law Reform Act Cap.26 Laws of Kenya and the attendant rules of procedure under Order 53 Civil Procedure Rules. There is now an abundance of legal jurisprudence on the subject handed out by both the superior courts and the court of appeal. It is therefore safe to say that this remedy is as much Kenyan like any other remedy within the Kenyan judicial process.

3). This court is not functus officio in as far as the issue of leave granted to apply for judicial review operating as stay for the following reasons:-

(i) The objection arises because of the mistaken belief that the ex parte chamber summons on the basis of which Aluoch J. deferred that issue to be heard inter parties is or was still alive as at the time Nambuye J. decided to hear the matter inter partes. The order of Aluoch J. died and ceased to exist at 11.25 a.m. on 04.09.07 when Nambuye J. made an order that the proper way to deal with that issue inter parties, was to file the substantive application, have the respondent respond to it and then have representations on the matter.

(ii) Following on No.(i) above when the issue was revisited on 06.09.07, it was being revisited not on the basis of Aluoch J's order of 03.09.07 but on the basis of Nambuye J. orders of 04.09.07 made at 11.25 a.m.

(iii) Indeed there is no formal application reintroducing the issue after the substantive application was filed. However sub rule 1(4) on the strength of which the applicant wishes to agitate it, is silent as to whether it must be dealt with at the leave stage and cannot be dealt with at the inter parties stage. In the absence of an express provision that this cannot be agitated at a later stage does not rule out the possibility of it being revisited at the inter parties stage, on the basis of the substantive application.

(4) Authority for this court's finding that the issue of leave granted to apply for judicial review operating as stay can be revisited at the substantive stage is form the court of appeal decisions themselves as shown hereunder

(i) In the case of **SHAH** the Court of Appeal recognized the availability of the courts or judges discretion to adjourn an exparte application for inter parties hearing where circumstances permit for a process required by the rules to be commenced and finalized ex parte. This is proof that judicial discretion can be employed to break the chains of strict applicability of rules of procedure in judicial review proceedings.

(ii) In the ZAKHEM case the same Court of Appeal approved the exercise of the courts discretion in the Shah case and went ahead to add another important tool that is of "lack of prejudice". Where the court has exercised its discretion and there is no prejudice suffered by the opposed party, rules of procedure should not be vindicated.

(iii) In the case of **NJUGUNA AND OTHERS VERSUS MINISTER OF AGRICULTURE** the same court of appeal approved another important tool in the judicial process which is the availability of the invocation of the inherent powers of the court in matters of judicial review. In this case the Court of Appeal vindicated a litigant who had been denied leave to apply for judicial review by ruling that leave should have been granted as the opposite party could invoke the inherent powers of the court and apply to set aside leave granted. This avenue was created for a remedy not provided for under Order 53 Civil Procedure Rules as they do not provide for the aggrieved party challenging leave granted on the face of the same.

(5). This Court has already made observations that the exercise of the courts discretion and invocation of the courts inherent powers of the court are very important and powerful tools at the disposal of the court in the discharge of its judicial functions. They are not a preserve of the Court of Appeal. They are available to the superior court, and that is why the superior courts judges, in the SHAH AND NJUGUNA cases, were corrected on the proper manner to exercising that discretion.

6). No where in the authority cited by the Court of Appeal does it say that these powers have to be invoked formally. This being the case, oral applications can be entertained where circumstances permit especially in circumstances where rigorous adherence to rules of procedure is not provided for like under Order 53 Civil Procedure. This assertion on the part of the court is strengthened by presence rule 6 there of which allows any party who appears to the court to be interested and wishes to be heard can be allowed to b e heard. The form of accessing the hearing is not given and it does not rule out an oral application to be heard on the basis of the documentation on the record. If this is the correct interpretation then this court cannot be faulted on its orders of 04.09.07 that the applicant be heard on the issue of the leave granted operating as stay at the substantive stage.

7). The relief of having leave granted to apply for judicial review operating as stay provided for in sub rule 1(4) is not for cosmetic value. It is supposed to be accessed by litigants and so there is no justification in denying a party a right from being heard on the issue of a relief which the law provides that he can avail himself of the same subject to the court granting it. Where a court has decided judicially that in the circumstances presented before it before making a drastic order in the matter both sides should be heard, issues of technicalities should not be accommodated.

8. For the reasons given the preliminary objection is dismissed with costs. Parties are at liberty to fix the matter either before this court or before the judges of the judicial bench to canvas the issue of leave granted to apply for judicial review operating as stay.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2007.

R. N. NAMBUYE

JUDGE