REPUBLIC OF KENYA

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

Misc Appli 993 of 2007

DR. PAUL NYONGESA OTUOMA & 2 OTHERS……...APPLICANT

VERSUS

ATTORNEY GENERAL & 2 OTHERS……..……RESPONDENT

RULING

The background information briefly is to the effect that on 3.9.2007 Aluoch J. granted the applicants herein leave to apply for judicial review. The issue of leave granted to operate as stay was deferred to another date. When parties appeared for the argument of the same inter parties this court made an order on 4.9.2007 to the effect that the substantive application be filed to bring on board the respondents so that they too could file their papers in order for them to gain locus standi in the matter. After parties filed their papers, a preliminary objection was raised to this Courts jurisdiction to entertain the matter. The Preliminary Objection was heard inter parties and a ruling delivered on 24th day pf September, dismissing the preliminary objection asserting that the court had jurisdiction to entertain the issue.

On 8.10.2007 when parties came to pursued the issue of leave operating as a stay, Counsel for the respondent raised an issue as on what basis the applicants were pursuing the matter. In view of the fact that Counsel for the applicant had mentioned that the prayers they seek are in the chamber summons. Counsel further sought to know whether they were raising the issue orally (informally) or formally.

In a brief ruling this court referred to its ruling delivered on 24.9.2007, at page 65 last paragraph to 66 first paragraphs as regards the issue of whether after the chamber summons, had become spent, on what basis was the issue of leave granted operating as stay being revisited. Secondly whether an oral application suffices or a formal application was called for and if so how the same could be presented to court. At page 66 last paragraph this court made reference to the case of **NJUGUNA VERSUS MINISTER FOR AGRICULTURE (2000) 1 E.A. 184.** In this case the Court of Appeal faulted the superior Courts move of denying leave to apply for judicial review to a party seeking the same. The Court of Appeal went further to state that if on the material before it, is satisfied that leave should be given then, the same should not be withheld because the opposite party has a remedy, in that he can apply to have the leave granted set aside through the invocation of the inherent powers of the court. At page 69 of the said ruling, last paragraph, and this court made observations that the Court of Appeal had invoked the doctrine of the inherent powers of the courts both in the Njuguna case and the Shah case to fill up gaps left by silent rules. At page 70 of the said ruling line 1 from the top, this court, had this to say "*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 ex parte 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 application must be formal. This does not rule out the possibility of an oral application like in the circumstances of this case. No where in the authorities decided by the Court of Appeal cited herein, does the Court of Appeal say that these two powerful tools are a preserve of the Court of Appeal. They are available to superior courts. The only fetter attached to them is that they have to be exercised judicially. The court went further to state that:

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 the issue are the same facts that the court is now proposing to hear them 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 tat the exparte chamber summons stage are the same papers that are to be relied upon at the substantive stage. The court continues further..

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"

At page 71 this court quoting a passage from the Court of Appeal's decision in the case of **COMMISSIOENR OF LANDS VERSUS HOTEL KUNSTE LTD 1995 – 1998 1 E.A.(E.A.K.)** to the effect that judicial review is concerned not with the private rights or the merits of the decision, being challenged but with the decision making process. Its purposes is to ensure that an individual is given fair treatment by an authority to which he has been subjected. At page 72 this court went on to say that the call to fair treatment does not end with the authority to which the litigant has been subjected and for whose action the said litigant has moved to court to have them quashed or prevented from further continuing through the remedy of judicial review. That the requirement 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 Courts view that denying a litigant accessibility to a relief available to him provided by statute will be an unfair treatment granting a litigant a hearing is not perse a clean bill that he will get what he is asking for. He will have exercised his right of seeking the relief granted to him by statute of which this court is sure that it was not put there for cosmetic value. It is meant to be accessed and enjoyed by the litigants subject of cause to the court determining that it should be enjoyed by such a litigant" on the basis of the foregoing assessment this court followed it by making holding no.6 at page 83 which is to the effect that "*no where in the authorities 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 of rule 6 thereof which allows any party who appears to the Court to be interested and wishes to be heard can be allowed to be 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 record."*

This courts excursion into the previous ruling is firstly for purposes of laying a foundation stone for the current ruling and secondly as a following up to the courts interim ruling made on 08.10.2007 when Counsel for the respondent sought to know from the court on what basis the applicants counsel was basing his application for leave granted operating as stay herein on that date this court made observations and or ruled among others that it had already ruled that in the absence of express rules being in place to provide guidance on how the issue of leave can be raised after the substantive application has been filed an oral application cannot be ruled out. Further that even if this court is not to go by the order of Aluoch J. because the exparte proceedings, became extinct the moment the substantive proceedings for both parties were filed, the court, had its own orders on record that the issue of leave granted operating as stay

be gone into after the substantive application is filed. Further that since the Court had already ruled that oral applications are not ruled out, Counsel, for the applicants was directed to lay the basis on the record orally and he proceeded to do so.

As a following up to the above this Court has had occasion to revisit this issue again. Section 9 of the law Reform Act Cap.26 Laws of Kenya

des 9(a) "*Any power to make rules of Court to provide for any matters relating to the proceedings 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 in the rules 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 grant relied upon except with the leave of the court other than the relief and grounds specified when the application for leave was made.

(2). Subject to the provision of subsection 3, rules made under subsection (1) may prescribe that application for an order of mandamus prohibition or certiorari shall in specified proceedings be made within six months or such shorter period as may be proscribed, after the act or omission to which the application for leave relates.

(3). In the case of an application for an order of certiorari to remove any judgment, order decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment; order decree, conviction or other proceedings or such shorter period as may be prescribed under any written law and where that judgment, order decree, conviction or other proceedings is subject to appeal and a time is limited by law for the bringing of the appeal the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired"

It is instructive to note that Section 9 of the Law Reform Act does not donate power to the rules committee to make rules concerning stay or more particularly leave granted operating as stay. It is therefore the finding of this court that order 53 rule 1(4) does not have its base in the parent Act to order 53 which is the Law Reform Act. The only reasonable inference or construction that can be drawn by this Court is that it was slotted in by the rules committee. This adds further credit to the argument advanced by this court in its ruling of 24.9.2007 that the two are distinct to each other and the court through its inherent powers can order that the same be dealt with at different stages of the proceedings.

This court has had occasion since its ruling of 24.9.2007 to read the ruling of Aluoch J. in the case of **ANNE RAMA AND 60 OTHERS VERSUS KENYATTA UNIVERSITY AND REGIONAL INSTITUTE OF BUSINESS MANAGEMENT NAIROBI MISCELLENOUS APPLCIATION NO. 962 OF 2007** decided on 12th October, 2007. At page 8 of the said ruling Aluoch J. noted at line 5 from the top that she had granted leave to file an application of judicial review but had declined to order the leave to operate as a stay and directed that the application for stay be served and heard inter parties on 11.9.2007. At paragraph 2, of the said ruling the learned judge maintained that she brought herself within the ambit of Order LIII (1) sub rule (2) and (4). Noted that under rule 2 she had not imposed any terms as to costs and under rules 4 she had not directed that the grant of leave do operate as a stay but she had ordered "*otherwise*" by directing that the application for stay be served and heard inter partes on a date given in court. That she had exercised her inherent jurisdiction under rule 4 of Order LIII because according to her she did not find that this rule prohibits a court from dealing with the matter of leave and stay in the manner she dealt with. At page 9 of the ruling 2nd paragraph, noted that the Law Reform Act is the substantive law and it provides for rules on the matter of leave and note stay at Section 9. At page 12 of the ruling paragraph 2 approved reasoning of justice Rawal in a ruling on the subject where the said

Judge had stated in her ruling that Section 9, particularly 9(b) "*does not make any provisions or does not make any mention as regards the procedure which includes the procedure concerning the said leave to operate as a stay. This sub-rule (1)(4) of Order LIII can be said to have been made without any support from an Act of Parliament. However in my view, this may not be relevant ….. But I can safely say that even in the absence of the said sub rule, there cannot be any impediments on the part of the court to grant the remedy of stay*"

This reasoning by Aluoch J. though a decision of a court of concurrent jurisdiction just goes to persuade further the stand taken by this Court that the issue of leave granted operating as a stay can be dealt with separately and after leave to apply for judicial review has been granted.

The next to be dealt with is for this Court to demonstrate that the method applied by this Court namely by ordering that the issue of leave granted operating as stay be gone into after the substantive application has been filed and responded to, and the respondent brought on board as ordered by this Court on 04.09.07, that the objection upheld by this Court vide its ruling of 24.09.07 and as well as the direction given on 08.10.07 at the start of the arguments leading to this ruling is within the law and that the proceedings leading to this ruling as well as the ruling itself are properly anchored on principles of law applicable. That is having been orally originated after the ex parte chamber summons proceedings were ruled to have become spent by this court as found in the ruling of 24.09.07 and as confirmed by this court following on oral request by the respondents Counsel for this court to clarify on what basis the issue was being revisited. This Court still maintains the same view that the proceedings leading to this ruling are procedural and properly anchored in law.

The first authority for this is that under the Civil Procedure processes accessibility to the Courts for an interim relief such as the one subject of this ruling is by way of an interlocutory chamber summons or notice of motion either ex parte or inter partes as the case may be. These are provided for under order 50 of the Civil Procedure rules. Decisions by both the Court of Appeal as well as superior Courts within this jurisdiction have ruled that these two processes in the manner provided for under Order 50 Civil Procedure Rules have no application to proceedings under order LIII Civil Procedure Rules. These cases have been examined in this courts own ruling delivered on 5th day of October 2007. Being a ruling in the case of Lithotech exports (PTY) LIMITED VERSUS ELECTORAL CO MMISSION OF KENYA NAIROBI MISC. APPLICATION NUMBER 999 OF 2007. The relevant case law is set out at pages 37-38 of that ruling. At line 10 from the bottom on page 37, this court cited the Court of Appeal decision of the case of **REPBULIC VERSUS COMMUNICATION COMMISSION OF KENYA (2001) 1 E.A. 1999** where the Court of Appeal held inter alia that the provisions of order L rule 16 of the Civil Procedure Rules do not apply to proceeding under Order LIII, which stand has been followed by the superior courts.

On the same page 37 at line 5 from the bottom there is quoted the case of **REPUBLIC VERSUS MINISTER FOR LOCAL GOVERNMENT AND ANOTHER EXPARTE MWAHIMA (No.2) (2002) 2 KLR 574** Onyancha J. had held inter alia that:-

where proceedings are governed by an Act of Parliament then they have to be interpreted and construed strictly in accordance with the said parent Act, that the mere fact that the Law Reform Act and Order LIII of the Civil Procedure Rules are silent on certain aspects cannot of itself necessitate the application of the rules and Sections of the Civil Procedure Act even such section as Section 3A of the Civil Procedure Act, that order LIII draw its strength from the Law Reform Act Cap.26 Laws of Kenya. It is self sufficient and where it is silent resort should be had to the Law Reform Act and not to any provisions of the Civil Procedure Act and the Rules.

Further on page 38 the same paragraph, this court cited another superior court's decision namely the case of **WELAMONDI VERSUS THE CHAIRMAN ELECTORAL COMMISSION OF KENYA (2002) 1 KLR 486** Ringera J. as he then was held inter alia that *judicial review proceedings under Order 53 of the Civil Procedure Act is a special procedure which is invoked whenever orders of certiorari, mandamus or prohibition are sought either in criminal or civil proceedings. In exercising powers under Order 53 the court is exercising neither civil nor criminal jurisdiction in the sense of that word. It is*

exercising jurisdiction sui generis. It therefore follows that it is incompetent to invoke the provisions of Section 3A and order 1 rule 18 of the Civil Procedure Rules and Section 42, 79 and 80 of the Constitution of Kenya the Court of Appeal decision is binding on this Court.

The other two superior Court decisions are of a persuasive nature to this Court. However where they state the correct position in law or reiterating a principle set by the Court of Appeal, there is no way this court can depart from them. The ones cited above were reiterating the stand taken by the Court of Appeal on the issue and so there is no way this Court can take a contrary view.

Having been prohibited from turning to order 50 Civil Procedure Rules and having been directed that in the event of any gaps or where the rules are silent one has to turn to the parent Act for a solution, when this court turns to the parent Act Cap.26 Laws of Kenya, the court is confronted with Section 9 thereof which provides for the making of the rules in Order 53 Civil Procedure Rules when Scrutinized the court finds that chamber summons is provided for under order 53 rule 1(2) and it is specifically for seeking the relief's set out therein. The next is the notice of motion for the substantive application provided for under order 53 rule 3 for the presentation of the substantive application. There is no provision for the mode of applications for interim reliefs. The Court of Appeal has ruled in the Njuguna case that inherent powers can be invoked. Since the same Court of Appeal has ruled that even Section 3A which enshrines the inherent powers of the Court cannot be invoked, then a litigant who finds the doors for chamber summons and notice of motion closed because they are non existent under Order 53, Civil Procedure Rules for purposes of interim reliefs cannot be faulted for resorting to an oral application in the absence of any provision of law or case law outlawing oral requests, the applicant cannot be faulted.

Another way of dealing with it is to try and determine whether the chamber summons becomes extinct and or spent as soon as the substantive application takes root. Aluoch, Nambuye and Onyancha JJJ. Had occasion to consider this in the case of **REPUBLIC VERSUS THE HON. ATTORNEY GENERAL AND 2 OTHERS EXPARTE LEMMY GACHECHE WA MIANO AKA GACHECHE WA MIANO, NAIROBI MISC. APPLCIATION NUMBER 81 OF 2007.** At page 14 last paragraph we noted that "*our attention had been drawn to the observations made by the Court of Appeal in the case of* ***REPUBLIC VERSUS COMMUNICATION COMMISSION OF KENYA (200) 1 E.A. 199*** at page 207 paragraph 9-h where the Court of Appeal had made observations thus "*in our view the fallacy in Dr. Kiplagats contention was principally in his assuming that it is the chamber summons application for leave to apply for the orders which originates the proceedings under order LIII. The proceedings under that order are then originated by the notice of motion filed pursuant to the leave granted. It would be some what ridiculous to bring the application for leave by way of an originating summons is then swallowed up or submerged in the notice of motion."* At page 15 line 1, Aluoch and Nambuye JJ with Onyancha J. dissenting observed that (Aluoch, Nambuye JJ) the central theme in this passage are the words <u>swallowed up or submerged in the notice of motion.</u> Our construction of those words is found at line 2 of the said page where we said "*our construction of these words is that this does not mean that fresh proceedings are to be filed in separate fresh files, although we agree in principle that once the substantive notice of motion is filed the ex parte proceedings become extinct and or die in so far as their exparte status is concerned. However, since they are the foundation stone on which the substantive motion is anchored, they continue living or drawing breath through the substantive motion. This is so because the very papers and issues for which leave was sought and obtained are the same papers and issues on which the substantive application is based until and unless leave is sought to introduce new issues. This co existence to us does not invite the opening of a fresh file with a new number for the substantive application*". Although the issue under inquiry was the issue whether the chamber summons and the Notice of Motion should be contained in the same file or in separate files, what is of importance to the proceedings is the status of the chamber summons once the notice of motion takes root. As per observation of the Court of Appeal in the cited case, the chamber summons filed becomes extinct or dies only in so far as its exparte status is concerned. The substance does not die. It is submerged in the substantive application. It continues drawing breath or strength within the substantive application. This co existence means that any issues not dealt with at the exparte stage can be revisited at the substantive stage. And since no guidance has been given by the Court of Appeal, in the Njuguna case on how the Courts inherent powers are to be invoked and having come to the conclusion that there is no provision for accessing an interim relief by way of notice of motion and or chamber summons, an oral application

remains as the most likely candidate as a mode for raising such issues. It therefore follows that the mode of procedure invoked herein is not only procedural but within the legal principles as well as case law and so it is properly anchored on the relevant legal previsions governing the accessing of the said relief.

Having dealt with the legal and procedural aspect, the court moves to determine another important aspect of the relief namely its human rights perspective. Access to justice is not only a procedural and legal issue but also a human rights issue. Human rights are enshrined in international, and Regional human rights instruments as well as the Kenya Constitution. Preamble (a) and (b) of the U.N. Charter reaffirms faith in fundamental human rights on the dignity and worth of the human person in the equal rights, of men and women and the establishment of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.

The right to access to justice and in particular to the relief of leave granted operating in stay until, the applicants are heard on their substantive application has its original subscription in the universal declaration of human rights. (UDHR) Article 10 guarantees full equality to fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against hi m. Article 11(a) there of guarantees the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Article 21(1), on the other hand guarantees the right to take part in the government of his country dictates or through freely chosen representatives vide article 30, thereof states parties to the treaty under taken not to engage in any activity or to perform any act aimed at the destruction of any of the rights prescribed therein.

The African Charter on human and peoples rights in which has prescriptions of human rights at the African, Regional level, in preamble 10 demonstrates that the state parties are firmly convinced of their duty to promote and protect human and peoples rights and freedoms, taking into account the importance traditionally attached to these rights and freedoms in Africa. Vide article 2 thereof the state parties recognize the rights, duties and freedoms enshrined in the charter and under took to adopt legislative or other measures to give effect to them. Article 7 thereof guarantees every individual the right to have his case heard comprising the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventional laws, regulations, and customs in force (b) the right to be presumed innocent until proved guilty by a competent court or tribunal etc. Article 13 thereof prescribes the guarantee of the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law. Article 14(1) of the International covenant on civil and political rights provides inter alia that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Whereas Article 25 thereof guarantees the right to take part in the conduct of public affairs directly or through freely chosen representatives. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage held by secret ballot, guaranteeing free expression of the will of the electors, vide article 2 thereof each state party which is a party to the covenant undertakes to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the said covenant without discrimination of any kind such as race colour, sex language, religion, political or other opinion, national or social origin, poverty, birth or other status.

In addition to the foregoing there is also in existence an instrument on African regional political arrangement under the name and sty le of the constitutive Act of the African Union vide objective g-h under Article 3 thereof, the member states undertook to promote democratic principles and institutions, popular participation and good governance and to promote and protect human and people's rights in accordance with the African charter on human and peoples Rights and other relevant human rights instruments. Among its principles vide article 4 thereof, principal M thereof state parties undertook to have respect for democratic principles, human rights, the rule of law and good governance.

Turning to the Kenya Constitution a reading of the same reveals that Section 77(2) guarantees the presumption of innocence until proved guilty. Where as Section 77(a) provides that a court or other

adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law shall be independent and impartial and where proceedings for such a determination are instituted by a person before such a court of law or other adjudicating authority the case shall be given a reasonable time. Section 79 and 80 thereof prescribe for the freedoms of expression assembly which go to cover the right to belong to political parties, right to participate in ones government either by self or through legally elected representatives.

This courts excursion into the human rights instruments both international, regional and National is simply to show that accessibility to justice or to courts of law to agitate the grant of a relief such as the subject, of this ruling is not only a matter of legal procedure and legal provisions but is a matter of human rights. It is ones basic human rights to approach the courts for a relief. It is the duty of the legal provision and the courts to make that accessibility possible. It also goes to show that establishment of institutions such as the courts and the office of the Attorney General is also a human rights issue. This calls upon all the stake holders, in a proceeding such as this to take cognizance, of the human rights aspect of the procedural as well so that the end result takes cognizance of the procedures aspect to the matter as well as the human rights aspect. That, is to ensure that the correct procedure has been followed to access the courts. This court has already established that the current proceedings has been followed to recess the relief. Secondly, to ensure that the relief claimed is provided for within the legal prescriptions governing it. This court has already established that the relief being sought here is within the legal prescriptions governing it. Thirdly to ensure that the rights of the parties before court are not to trampled upon by either the court or either litigant. In other words all litigants stand equal before the court. This equality has to be more pronounced and to be seen to have been observed especially in proceedings that involve the state as a litigant.

This court had occasion to deal with similar issues in the case of Lithotech exports (PTY) **LIMITED VERSUS ELECTORAL COMMISSION OF KENYA NAIROBI MISC.APPL. NO.999 OF 2007**. The ruling was delivered on 5th October 2007. At page 30 of the ruling, line 3, from the bottom one of the issues that the court was called upon to determine was "*whether this court was to hold the interests of 30 million Kenyans as being of paramount. Consideration as opposed to the rights of the foreign company*" The relevance of this question will be seen at a later stage. This court after scouting through various instruments on human rights both international, regional and national, and after setting out the provisions of section 77(a) of the Kenya Constitution made observations at page 34, 2nd paragraph to the effect that "*the oath of office of the trial judge enjoins him/her to render justice to all who come to the seat of justice in search of the same without distinction. That legal human rights instruments both international, regional and national enjoin this court to render justice to all without distinction. Meaning that the rights of the litigants in these proceedings all rank equal and the same is to be decided in accordance with the law. This culminated in holding No.2 of that ruling which is to the effect that the legal and human rights prescriptions referred to in the ruling as well as the oath of office of a judge enjoins the court to treat all litigants inclusive of international ones coming to seek justice before it equally. It therefore followed that both the 30 million Kenyans and the applicant company stand on equal footing before the judgment seat of this court. They win and loose on merit and on the basis of the law applied and not sympathy*.

Before winding up the court's, assessment on the human rights, prescriptions, it should be noted that this court takes judicial notice of the fact that Kenya is a signatory to all the above treaties and conventions. It is therefore bound by the Viena law on treaties. Article 26, 27 and 46 thereof are relevant. Article 26 makes provision for the operating of the doctrine of pacta sunt servanta which makes provisions that any treaty enforce is binding upon the parties to it and must be performed by them in good faith. Article 27 on the other hand provides that a party may not invoke the provisions of its international law as justification for its failure to perform a treaty. Article 46 allows a party to a treaty to withhold its consent to the treaty if it can be demonstrated that the consent is in violation of its internal law which violation is required to be manifest and concerns a rule of its internal law of fundamental importance.

Against the foregoing background information is the submissions of the applicants Counsel to this Court. The details are on record. The salient features of the same are.

(1). That there is hanging on the mind of the applicants on alleged offence of murder committed way back in 2005 and in respect of which some people have been arrested and charged with offences before the magistrates court in Busia. The state has applied for and obtained a warrant of arrests in respect of the applicants herein.

(2). The applicants besides pleading innocence, suspect mischief and that is why they have come to this court to seek justice from this court. The main substantive application is pending hearing.

(3). It is in that account that they have come to this court seeking orders that leave granted herein do operate as stay so that they can be given an opportunity to be heard on the main cause before an decision can be taken either to arrest and prosecute or not to arrest and prosecute them.

(4). That if stay is not granted then the entire judicial review proceedings pending will be rendered nugatory.

(5). That the right of the state to prosecute will not be taken away if stay is granted. It is just to a wait the determination of the sustentative application.

In opposition the respondent advanced the grounds that the applicants themselves have dis entitled themselves of the relief they are seeking from this court because of the following reasons.

(1) The entire application is a non starter and the fact that leave has been granted is no cure. It is not a must that since they have leave then they must have stay. Stay is an exercise of discretion of the court which discretion should not be exercised on the basis of sympathy but judiciously .

(2) The stay should be denied where there is no likelihood of success in the main substantive application. The substantive application herein is likely to suffer such a fate as the mandatory notice which is supposed to precede the filing of the papers was not complied with. Neither was that procedure excused by the court when granting leave. It is their stand that failure to comply with this requirement does not only go to deny the applicants the right to a stay but also robs them of the right to the leave granted herein. On that basis the applicant is entitled to invite the court. Orally to strike out the proceedings.

(3) The applicants have failed in their duty of full disclosure, of all the relevant material particulars when they presented their application to court especially matters which are adverse to the claim. The issue of lack of compliance with notice was not disclosed to the court at any one stage until raised by the respondents and the only reason for failure to do so was because they feared suffering consequences for non compliance. The duty of full and frank disclosure is a requirement under Order 53 Civil Procedure Rules and the applicant's failure to comply with that is fatal to their application and this court should set aside the order for leave and deny stay.

(4) The applicants have also misled and deceived he court. This is so because the relief sought is to prevent prosecutions for murder an offence triable by the high court only and yet they applicants, have moved to this court to prohibit the Attorney General, Commissioner of police and Busia magistrates court in a bid to cover up the really issues in controversy. This court is called upon to tell the applicants that their tricks well not work.

(5) The applicants have also disentitled themselves to the relief because of their conduct. They have deponed that warrants have been issued against them. Instead of availing themselves to the authorities, they have gone under ground and this court should punish them for that mischief.

(6) The court should respect and uphold the doctrine of separation of powers by declining to aid litigants who are deliberately violating the law and defying lawful authority with impunity.

(7) The material placed before the court cannot stand scrutiny of the judicial eye and as such, this court cannot give stay on the basis of the said material. There is evidence of death of the relatives of the

applicants having occurred and although they complain that the Attorney General has not taken action on one hand, on the other they state that there are prosecutions going on in Busia Court. On the other hand it is alleged that demonstrations were held and as a result of which subsequent death, occurred on account of which a warrant of arrest has been issued for the applicants. It is the stand of the respondent that applicants cannot justify their complaint for Attorney General in action on account of the death that occurred earlier on for which prosecution is going on in Busia Court, and then fail to justify the Attorney General's action for seeking their arrest for the subsequent deaths. To them a life is life and the Attorney General is entitled and has a duty to uphold the law without fear or favour.

(8) Exhibits relied upon have no link or connection to the proceedings herein as they have attempted to draw into these proceedings certain personality such as the Hon. The Vice president of the Republic of Kenya and the office of the Attorney General. What the law requires to be laid before it is concrete evidence and not rumours, suspicion, supposition or consecutive.

(9) This court should not concern itself with the political aspirations of the first applicant who says he has been targeted and harassed for political reasons. The allegation is unfounded as there are many other political aspirants in the same arena and area who are not complaining of harassment. No explanation has been given as to why the applicant should be targeted. It therefore follows that the link between the political aspiration and the murder for which the applicants are being sought is speculative and this court should not pay much attention to it.

In reply to the Respondents Counsel's submissions, as well as the submissions on case law, to which this court will revert to shortly, Counsel for the applicant reiterated his earlier submissions and then stressed the following points.

(1) That the office of the Attorney General does not have absolute powers in the exercise of their functions, as the action of the Attorney General as well as the officials under him can be impeached thro ugh judicial review. These are the proceedings that will make the Attorney General to be called upon to demonstrate whether the intended action is being exercised for ends of enforcement of the law and administration of justice or not. It is their stand that there is jurisdiction to question the exercise of power where the same has been coloured by oppression, unfairness, ill will. More so when the Attorney General has no power to determine the criminality duty or innocence of any suspect as he only operates on reasonable suspicion.

(2) The issues before this Court are issues whether leave granted should operate as stay and not issues of whether the offence of murder alleged to have been committed by the applicants exists or does not exist that can be gone into at the substantive stage. What is before this court is whether the intended prosecution is an abuse of the due process of the court. They maintain that if the process of seeking to bring the applicants before court is tainted then it can be quashed.

(3) It is their stand that at this stage of the proceedings this court is only to concern itself with the issue of leave granted operating as stay because Aluoch J., looked at the papers on record and was convinced that there was a basis for granting leave to apply for judicial review. In doing so, the learned judge concluded that there was an arguable case to allow the proceedings to move to the next page. These orders have not been appealed against or sought to be discharged. As long as they stand this court cannot impeach the granting of leave. The forum in which that can be questioned is during the hearing of the substantive application.

(4) The court is asked to be guided by all the authorities, and rulings, relied upon which were results or by products of the substantive hearing of the main application, and give the applicants a chance to have their substantive application heard and disposed off on merit.

(5) They still maintain that the Attorney General's discretion can be questioned where it has been used improperly like in this case.

(6) They agree that the Attorney General, is not subject to direction from anybody when exercising his

powers, but where a litigant has reasonable grounds to show that the Attorney General, was taking action on the direction of another person that is challengeable.

(7) They maintain that all that they are required to show at this stage is that they are entitled to leave granted operating as stay. The stage where they will be required to show that they have an arguable case will be at the stage of the hearing of the substantive application.

(8) That the central theme the application is to prevent the arrest and the prosecution of the intended proceedings before the Busia Magistrate court and not the high court.

(9) Concerning the statutory notice, they contend that they made a prayer, to the court to have compliance with the notice, excused and if the court chose not to make orders in respect of the same, they cannot be blamed for that.

(10) They deny being guilty of non disclosure or making attempts to mislead the court.

The parties have also relied on case law at length and for purposes of the record I proceed to set them out here under. The applicant relied on the decision in the case of **KURIA AND 3 OTHERS VERSUS ATTORNEY GENERAL (2002) 2KLR 69** holding No.10 and 11 at page 70 and 71. These are to the effect that where the prosecution is an abuse of the process of Court as is alleged in this case, the duty of the court is to ensure that it maintains its integrity and ensure that justice is not only done but is seen to be done by staying and or prohibiting prosecutions brought to bear on extraneous consideration. It does not matter whether the decision has been made or not, what matters is the objectives which the court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus where as the Court cannot order that the prosecution be not commenced, because already it has, it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing.

In the case of **JARED KANGWANA VERSUS ATTORNEY GENERAL NAIROBI MIS. APPL.446 OF 1995 OKUBASU J.** as he then was (now JA) at page 2 of the ruling line 12 from the bottom. It is observed "*on my part I would say that most of what was submitted should form part of the submission during the hearing of the main application for the prohibition order. In this ruling I have to be very careful in what I say least I could go into the merits of the main application*". At page 3 line 7 from the top it is stated:

"*I cannot say that this application is frivolous but what has to be noted is that leave to file the application has been granted. On the face of it the application raises points deserving determination by way of judicial review*" on the same page at line 2 from the bottom the court ruled that on the basis of the foregoing, it allowed the application for stay and ordered costs for the application to be considered at the main hearing.

They also refer to text material at page 217 of their bundle which in summary is to the effect that stay of proceedings in judicial review should be interpreted not restricted to an inferior tribunal but to an executive decision as well. It is also to be given a wide interpretation so as to enhance the effectiveness of judicial review jurisdiction. A narrow interpretation exposes a serious short coming in the armory of powers available to the court when granting permission to apply for judicial review. Its purpose is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. By preserving the status quo it aids the *judicial* process and makes it more effective. It will also ensure, so far as possible that if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. It is premised on the ground that proceedings for judicial review in the field of public law are not a dispute between two parties, each with interest to protect, for which an injunction may be appropriate. It is simply a challenge to the way in which a decision has been arrived at. Although the decision maker may take part in the proceedings to defend his decision, he Is not in the true sense an opposing party.

Further at page 219 of the applicants bundle, it is noted that where there is the possible need to stay any proceedings it is essential not merely as a matter of courtesy but it has to preserve the status quo where there is satisfaction that the application is not totally useless.

The respondents had a longer list and so the court will just scheme through them. In the case of **NIPUN MAGINDA PATEL VERSUS THE HONOURABLE THE ATTORNEY GENERAL AND ANOTHER NAIROBI HCCC MISC. APPL. 463/2005** the exparte orders were discharged after hearing of the substantive motion. The proceedings suffered penal consequences because the applicants failed to pass the illegibility test because they failed in their duty to make full disclosure of all potential material matters to the court. In the case of **TERESIA WANJIRU GITHINJI VERSUS THE HON. THE ATTORNEY GENERAL AND ANOTHER NAIROBH HCCC NO. 1295 OF 2005,** the matter was also heard on merit and it suffered penal consequence because firstly the applicant who had alleged malice and oppressions failed to prove that the said officer had been activated by malice and oppression in laying the said charges. Secondly the Attorney Generals powers can only be curtailed if it can be shown that the decision is capricious, unfair or oppressive or against public policy which the applicant had not demonstrated. Thirdly granting her the relief sought would have amounted to rubber stamping the applicants flagrant disobedience of court orders and court processes.

In the case of **SURJIT SINGH HUNSAN VERSUS THE PRINCIPAL MAGISTRATE KIBERA AND ANOTHER, NAIROBI MISC. APPLCIATION NUMBER 519 OF 2005,** the proceedings were faulted on merit because the court upheld the duty of the police to investigate once a complaint is made and there was no evidence to show that the investigation was actuated by malice. All that the police was required to establish is proof that there was reasonable suspicion for preferring charges. On that account the court made finding that the applicant had not demonstrated that the Attorney General and the police acted maliciously by, unfairly or oppressively in their investigations and subsequent decision to charge the applicant.

In the case of **HENRY MUTIE MWANGELE VERSUS THE ATTORENY GENERAL MACHAKOS HCCC MISC. APP.NO.194 OF 2001,** the applicant lost the proceedings because the court ruled on merit that even in instances where civil proceedings are pending, if the Attorney General receives a complaint, he has to investigate it and on reasonable grounds a prosecution may be instituted. Secondly the supposed victim failed to show that his rights or liberties were under threat by the prosecution in a manner not intended to further the ends of justice.

From the foregoing assessment this court has managed to identify the following principles as forming pillars of its conclusion:-

(1) Access to justice for the relief sought, is not only a legal right but a basic human right.

(2) The office of the Attorney General in proceedings of judicial review is not an opponent.

(3) Access to Court to agitate ones cause is a right however incompetent it may be.

(4) The relief is properly anchored both an legal principles under which it is brought and secondly on principles derived from case law.

(5) The remedy of leave granted operating as stay should be given wide interpretation on to enhance effectiveness of the remedy of judicial review and secondly not to be unnecessarily withheld so as the applicant can get the full benefit of his success should he succeed ultimately.

(6) The usual handy tools of inherent powers of court, discretion of the court and lack of prejudice are available to this court in these proceedings.

On the Courts assessment of the facts herein, it is clear that at the start of the proceedings leading to this ruling, this Court was faced with a simple plea from the applicant, namely that the leave, granted to them to apply for judicial review herein be ordered to operate as stay. It is common ground that though

the court, to which the application for leave to apply for judicial review was presented has jurisdiction to grant both the leave to apply for judicial review and then takes a step further and order that leave granted to operate as stay, but the court in the first instance herein did not do that. It instead granted leave and ordered that the issue of that leave operating stay be heard on merit inter parties. It is also common ground that an objection was raised by the respondent as to whether this court had jurisdiction to entertain that issue once declined at the leave stage. This court with the help of both Counsels went over legal provisions on the subject, as well as case law and after due consideration, this court, in its ruling, of 24.9.207 ruled that it had jurisdiction to entertain the same hence these proceedings. It is also common ground that at the start of the arguments leading to this ruling, Counsel for the Respondent raised an issue or sought clarification or directions as to the basis on which the applicants Counsel was raising that issue. The court, recalling its finding in the ruling to the objection, ruled that the issue can be raised orally in Court following up on the sequence of events that had taken place earlier on in the proceedings or on record. This Court has revisited that issue and for the reasons already set out at the outset of this ruling it in convinced that the request for leave granted operating as stay is properly anchored both in law and procedure firstly:-

(a). since it is now trite law that provisions of order 50 Civil Procedure Rules providing for access to interim relief in our proceedings through chamber summons, as well as notice of motion are not applicable to judicial review, and since the only chamber summons and notice of motion provided for under judicial review are those relating to the ex parte application and the substantive application, and having also ruled that inherent powers of the court are available to the court in these proceedings, in the absence of clear provisions as to access, a litigant, accessing the relief orally cannot be faulted. Secondly that as per the court of appeal observation, that thee ex parte proceedings are submerged into the substantive application as soon as the substantive application is filed, it is the finding of this court that the exparte proceedings so submerged continues to draw breath through the substantive application and any issues not dealt with at the ex parte stage can be revisited.

(2). This court has also gone ahead to consider the other aspect of the issue namely the issue of human rights. The right to seek an order for leave granted to operate as stay is not only a procedural and legal issue but also a human rights issues. It therefore follows that the right to grant or to withhold the same can only be done within the law.

(3). While still on the issue of human rights, this court, is enjoined by prescriptions in human rights instruments both at the international, regional and National level that access to courts of law is to be accorded on equal basis. Herein both the applicants and the office of the Attorney General stand or loose on the basis of law and not sympathy.

(4). Turning to the points raised for and against the grant of the relief sought which points have been extensively set out in the body of the ruling. It is to be noted that several points have been raised which touch both the interim relief sought and the substantive application in respect of which the court is grateful as they went along way to assist the court in the assessment of the facts herein as set out on record. Both Counsels also made thorough submissions on case law in respect of which the court is also grateful as this has enabled the court to know which point qualifies to be an interim point and which one is a point to be considered at the hearing of the substantive application. As persuaded by the decision in the Kangwana case, the duty of this court is to decide whether to short circuit the substantive application and deal with it at once and for all or refrain from doing so and deal with the issue of leave granted operating as stay only, and leave the rest of the issues to be dealt with by the court that will deal wit the substantive application. This Court has adopted the mode of focusing on the issue of leave granted operating as stay for the reasons to be given herein.

(5). For the applicant their plea is to get the relief sought. The respondents have opposed it on a number of issues that the court now proceeds to answer;

(i) It has been argued that the proceedings is a non starter because the statutory notice was not complied with , there is no justification shown for failure to comply with the notice and the applicants are dis entitled to the relief for failure to disclose this fact. This court's, findings on this is that, indeed no

mention by the court which granted leave has been noted on the record as to whether it was excused or not. However, as submitted by the applicants counsel revisiting that issue and trying to is unsit orders granted for leave to apply for judicial review will be tantamount to reviewing those orders. It is also to be noted that on the basis of those orders that objection was raised and a ruling made. Unseating them will require a request for review not only for those orders but also the orders on the preliminary objection. It is the finding of this court that though this is a valid point to be interrogated; this is not the proper stage for interrogating that. The proper stage for interrogating that as well as deciding on the penal consequence for non compliance will be at the substantive hearing stage.

(b) Counsel for the respondent, asserted his right to move the court orally to unsit these orders, on the same footing as the applicant's counsel has moved the court orally on the issue subject of this ruling. This court is bound by its finding that access to interim reliefs orally is available to litigants under order 53 Civil Procedure Rule. However the exercise of that right does not guarantee success to a litigant to the relief sought. Just as the applicant is not guaranteed his request on lease granted operating as stay likewise the respondents counsel is not guaranteed its right to succeed as its objection. The request is to be made and it is up to the court to determine whether in the circumstances of the case as displayed by the facts and in the light of the pleadings before it the request is to be acceded to or not.

It is the finding of this court that in view of the observations in number (a) above justice herein demands that those issues be dealt with at the substantive level.

(c) Issue was raised about the applicant's failure to disclose candidly all the material particulars necessary in this matter both in their favour as well as those against them, in addition to this there was an assertion that the applicants also deliberately misled the court especially by saying that the proceeding sought to be stayed were pending before Busia Chief Magistrates Court, when in fact what they applicants are being sought for is an offence of murder in respect of which it is only the high court which has a discretion deal with it. The finding of this court is that in instances of lack full of disclosure and mis conduct where proved can disentitle a litigant, to a relief that he or she may be seeking from the court. In the circumstances of this case in order to determine existence or non existence of lack of full disclosure and misconduct this, the court, has, short circuit the substantive application and subsume it into these proceedings for the interim relief and then dispose it off guided by the case law relied on by the applicants and the respondents Counsel's it is evident that the penal consequences for non disclosure and misconduct were suffered after the party had been heard on the merits. It is the finding of this court that short circuiting the substantive application will render: nonsensical Aluoch J. orders on granting leave to apply for judicial review

(i) it will also render nonsensical this courts orders of 24.9.2007 that the applicant is entitled to be heard on his request for leave granted to operate as stay.

(ii) It will also deny the applicant a right to have his cause heard on merit however incompetent it may be. From the human rights prescriptions set out earlier on in this ruling, the right to be heard is not hinged on the competence of the course. Just as the applicant's counter parts, in the case law cited were heard on merit, and relief declined, in the absence of justification for departure from the said case law, the applicant's cause should not suffer preferential treatment.

(d). As regards the applicant's conduct of going under ground on learning that warrants of arrest were out for them, the best way to deal with that is not to have their proceedings suffer penal consequence by having them, thrown out on that account. It is enough to state that the state has an alternative remedy to punish them for being fugitives to justice. The state also has other means that it can use to catch up with them namely its security network including Interpol. It will therefore not be right for the state to demean itself by trying to punish the applicants for their mischievous behavour through the court process in these proceedings. Such an action is likely to rob the court of veil its of independence in the eyes of un seasoned minds which might mistake such an action and fail to see it as a purely judicial action and mistake the respondent's lawful action to be its action of whipping its opponents through the judicial process.

(e). The court was also urged and called upon to respect the authority of the office of the Attorney General, respect the doctrine of separation of powers and refrain from assuming the role of directing the Attorney General on how to discharge its functions and allow the Attorney General to discharge its functions unhindered. In response to this, this courts, view is that the authority that set up the office of the Attorney General is the same authority that set up the court institution. Each has defined functions and rules within which to operate. In a situation where rules allow a court of law to inquire into certain matters affecting the office of the Attorney General, like in this case, the court, can not be faulted for assuming that role. What the court is being called upon to do at this juncture is not to direct the Attorney General not to proceed with the intended action absolutely. But simply to hear the applicant on his plea that the Attorney General, has not exercised its right to prosecute properly, before the Attorney General can proceed to proceed to prosecute. This is being done through the remedy of judicial review which is available to the litigant and this court can not be faulted for entertaining it. Proceeding to hear a party as to whether leave granted to apply for judicial review is to operate as stay or not is not a directive to the Attorney General to refrain from taking any action in the matter. It is the court which will be seized of the substantive application which will determine whether to ask the Attorney General to proceed or not to proceed with the prosecution.

Further to this, it is trite law that the office of the Attorney General is the custodian of the law of the state. It is the duty of this Court to ensure that at no time should proceedings in which the Attorney General is involved are to be viewed as oppressive and a perspective in nature. Where there i s a likelihood of such misconception arising in the mind of the litigants in particular, and in the general public in general, the court, has a duty to balance the interests of all the stake holders to avoid a wrong impression being created.

(f) Concerning lack of material to support the reliefs being sought and lack of nexus between the exhibits relied upon and the matter being inquired into, as ruled earlier, these are matters to be gone into, at the substantive hearing level and making any comments on them will not only be a trespass to the function of that court that will become seized of it at the substantive level, but might also prejudice the outcome and or results of the substantive application. It will be the business of the trial court to sift through the evidence and exhibits and then arrive at a finding either for or against the applicant as the case may be.

The court was also called upon to note that the proceedings are merely meant to advance the political ambition of the first applicant. In response to this the court is alive to the fact that it is enjoined not to be distracted by any extraneous matters. It is also to be noted that courts do not operate in a vacuum. The court is not to give a blind eye to the characters in the scenario displayed herein. The court does not live in a bottle of its own. It is not media blind and deaf. All it has to guard against is importing extraneous matters into the proceedings. Herein the office of the Attorney General and a luminary have been named either rightly or wrongly to be responsible for the Attorney Generals misuse of power. These are on record. The reason given for harassment or prosecution are the impending general elections. The court is not expected to ignore all these. It has to be vigilant and take caution and ensure that those named rightly or wrongly are not portrayed as persecutors and violators of other people's rights, with impunity. Such a situation can be employed by busy bodies and other unseasoned minds who have not read the pleadings herein, those who have not heard arguments advanced by both counsels herein, those who do not know the rules or principles of law to the situation being inquired into, can actually use the proceedings as a lethal weapon against the innocent and brand the state and these others as oppressor and persecutors. Such an attitude whether real or imagined, right or wrong issues, in the circumstances of this case is likely to tarnish the good intention of the office of the Attorney General to carry out its statutory duties in the pursuit of justice and vindication for the dead, and relegate it to one of a violator of peoples rights with impunity. This is likely to erase the faith of the would be consumers of the end result of the intended prosecution and incite contempt for the ultimate result of the intended prosecution.

This court has considered and weighed the rights of each side herein and found that firstly the Attorney General's right to prosecute is an indefinite right. It can never be lost unless taken away procedurally. The applicant's right not to have their judicial review proceedings heard on merit Is not an indefinite right and once lost it is irrecoverable.

A long side the above is the applicants right to have their cause heard on merit when weighed against the Attorney General's right to hold on the court and find that the right to have ones cause heard on merit however incompetent weights heavier than the right to hold on the institution of the prosecution. It is a human rights issue. The human rights prescription set out here in do say that only competent causes are to be heard. Even incompetent ones should be given an opportunity to see the court rooms. The court is supported on this by the submission of the applicants counsel and the case law that most of the cases where the applicants lost were heard on merit. As stated earlier on no justification or special circumstances have been shown as to why a different approach should be given to this case by this court.

Thirdly there is mention that the move has been taken to curtail the applicant's political ambitions. It is also noted herein that the right to participate in ones government through self or others is basic right. The proceedings herein show that the 1st applicant wishes to exercise that right. This court has weighed that right against the Attorney Generals right to prosecute and found that the applicant's right weighs heavier than that of the Attorney General. The reason is that if shut out now, the whole blame will be heaped on the office of the Attorney General and the perceived alleged luminary behind it. It may be this is mischievous. This court is not devoid of tools to deal with that mischief. The best way to deal with that is to defer the Attorney Generals right to prosecute temporarily so that in the event that the out come is negative that will be the end of the story. This is better than having perpetual bragging by the applicant that had it to not been for the action of so and so it would have been xyz for me. There will be no harm in the temporary action being taken as the Attorney General has taken over 2 years to move to prosecute since 2005. A further wait of 120 days from today will not result in the closure of the Attorney General's office It will remain open.

For the reasons given above the court is inclined to grant the order of leave granted to apply for judicial review by Aluoch J. on 3.9.07 to operate as stay for a period of (120) one hundred and twenty days from today, during which time the parties are expected to process the substantive application and have it disposed off speedily on merit considering the nature of the complaint contained therein. In the meantime in view of the nature of the proceedings the parties are advised to process the proceedings and have it disposed off as soon as possible.

(2) Costs of the application will be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2007.

R. NAMBUYE

JUDGE