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

Misc Appli 169 of 2004

IN THE MATTER OF AN APPLICATION BY GREENHILLS INVESTMENT LIMITED, MARKET MASTERS LIMITED AND SUGAR CANDY LIMITED FOR ORDERS OF PROHIBITION, CERTIORARI & MANDAMUS

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT & COORDINATION ACT OF 1999

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, (CAP.265) PHYSICAL PLANNING ACT (CAP 286) LAWS OF KENYA

REPUBLIC:.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

PUBLIC COMPLAINTS COMMITTEE.....2ND RESPONDENT

CITY COUNCIL OF NAIROBI:.....3RD RESPONDENT

EXPARTE

GREENHILLS INVESTMENTS LIMITED

MARKET MASTERS LIMITED

SUGAR CANDY LIMITED

RULING

This is an application by the First Respondent, the National Environment Management Authority and is

made under the provisions of Order 50, Rules 1,2 and 17 and Order 53,Rule 1(4) and section 60 of the Constitution of Kenya and section 8, Law Reform Act, chapter 26 Laws of Kenya. It seeks the following orders that:-

1. The stay granted by the Honourable Mr. Justice Isaac Lenaola on the 19th February,2004 and brought to the attention of the Respondent in hand written form stating that:-

" **Leave granted under 2 above do operate as a stay in terms of prayer 4 of the Application dated 18.2.2004"**

and the penal notice issued on 19th February,2004 are set aside and vacated.

2. The application for judicial review presented to the court on 24th Febrauary,2004 by Notice of Motion dated 24th February,2004 and premised on the order of grant of leave to apply made by the Honourable Mr. Justice Isaac Lenaola on the 19th February,2004 is dismissed and the Notice of Motion struck out with costs to the Respondents.

3. Costs of this application are awarded to the Applicant the National Environment Management Authority.

The Applicant sets out the following grounds in support of the application namely, that:-

(i) The Applicant relies on the replying affidavit of Professor Francis Dommy Pitt Situma sworn and filed in these proceedings on the 7th April,2005 and served on the concerned parties that same day.

(ii) At paragraph 8 of the affidavit shows that there is to date no extracted and perfected order for leave and stay in these proceedings.

(iii) Paragraphs 9 through to 15 of the affidavit show that no attempt has been made or is being made to comply with the conditions in the orders made by the Honourable Mr. Justice Isaac Lenaola who granted leave and stay. The Learned judge had directed that a hearing date should be fixed on priority basis once the Notice of Motion commencing the judicial review proceedings had been filed. No such date has been fixed.

(iv) Paragraphs 16, 17, 18 and 29 of that affidavit show that the application for judicial review is an abuse of the court process, scandalous and frivolous: the relief's sought in the Notice of Motion does not tally with the relief for which leave was sought and granted contrary to order 53 and rule 4.

(v) Paragraphs 39 and 40 of Professor Situma affidavit show that the application for judicial review is for the enforcement of fundamental rights and freedoms enshrined in the Constitution of Kenya and an application for such enforcement should be under the Constitution (Protection of Fundamental Rights and Freedoms of the individual) practice and procedure Rules, 2001 (Legal Notice No.133 of 2001).

(vi) Paragraph 45 of that affidavit shows that at the ex parte application for leave to apply for judicial review crucial and material information relating to the City Council of Nairobi 'effluent standards for disposal into natural watercourses' was suppressed contrary to law and laid down procedure on ex parte applications.

(vii) The application for judicial review is incompetent, frivolous and vexatious of the National Environment Management Authority and an abuse of the process of the court and is prematurely in court as there has been no appeal to the National Enviroment Tribunal in the first instance as required by section 129 of the Environmental Management Co-ordination Act, 1999. See paragraphs 50, 51, 52, 53, and 54 of Professor Situma's affidavit already referred to herein.

(viii) The Honourable court the High court has inherent powers and jurisdiction to grant this present

application.

(ix) There is in fact and law no proper application for judicial review to proceed to full hearing.

The application is also supported by two affidavits, one sworn on 7th April,2005 by the Director of Legal services of the First Respondent Prof. Francis D.P. Situma and the other by counsel for both the First and Second Respondents, Mr. S.M. Mwenesi sworn on 10th May,2005.

The application is opposed by the three Exparte Applicants who filed Grounds of opposition and a Replying Affidavit sworn by a director of the First Exparte Applicant and First Respondent herein, Mr. Hamed Ehsani on 16th May,2005. The Third Respondent, the City Council of Nairobi filed two affidavits in support of the First Respondent's application and was sworn by its Assistant Town Clerk (Legal), G.C.K Katsoleh.

Having carefully considered the application herein, the affidavits and the submissions by the three counsel, I would start by stating that this court exercising its inherent jurisdiction is entitled to entertain and consider an application to strike out a notice of motion made under the provisions of Order 53, of the Civil Procedure Rules seeking judicial review orders. However, such an application can only be granted in very exceptional circumstances. For instance, if the court has no jurisdiction to determine the issues in dispute or to grant the orders sought, an aggrieved party need not wait until the hearing of the substantive application to have the question of jurisdiction dealt with. I dealt with a similar situation recently in Miscellaneous Civil Application No. 759 of 2004, **MOMBASA SEAPORT DUTY FREE LTD –VS- THE KENYA PORTS AUTHORITY** (unreported) and only due to the similarity of issues, I wish to refer to an observation I made in this regards:-

"**.....This may be particularly necessary, if the grant of leave was ordered to operate as a stay of the decision being challenged and the aggrieved party has been prejudiced or adversely affected. Considering the length of time proceedings take to be concluded in our courts, an aggrieved party has a right to seek termination of the proceedings by way of notice of motion to strike out the original notice of motion. This is called self-help. However, it is to be noted that this action would only be entertained in exceptional circumstances e.g. where the court lacks jurisdiction ab initio, where the application is statutorily time – barred etc. It would be wrong and improper for an aggrieved party to seek to strike out merely on allegations of wrong or improper exercise of discretion by the Judge granting the leave.....**"

The court was guided by the decision of the court of Appeal in **AGA KHAN EDUCTION SERVICES KENYA –V- REPUBLIC, EX PARTE ALI SELF & TWO OTHERS, CIVIL APPEAL NO. 257 OF 2003** where it was held:-

"**.....We would, however, caution practitioners that even though leave granted exparte, can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear – cut cases, unless it can be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with application to set aside leave.....**"

Having said the foregoing and set out the thresh hold in this ruling, I would first ask myself, what are the jurisdictional issues which have been raised by the First Respondent's application? Having carefully studied the nine grounds set out in the application, I am of the view that Grounds (iv), (v) and (vii) raise or disclose issues of the jurisdiction of this court to grant the orders sought in the Notice of Motion dated 24th February, 2004. I will deal with them one after the other:-

(iv) Paragraphs 16,17,18 and 29 of that affidavit show that the application for judicial review is an abuse of the court process, scandalous and frivolous, the relief sought in the Notice of Motion

does not tally with the relief for which leave was sought and granted contrary to order 53 rule 4.

It is trite law that the substantive application for judicial review orders upon the grant of leave to file it must apply or pray for the specific orders for which leave was granted. Leave being a mandatory and prerequisite requirement, the application must comply with the terms of the leave granted and the orders tally with those for which leave was granted.

Regarding the name of the First Respondent and whether the correct party has been sued, I would say that there can be no dispute that the decision contained in the letter dated 5th February,2004 is that of the National Environment Management Authority. The Authority's Board is merely an internal organ and not a legal person or entity. Under the Environment Management Co-ordination Act of 1999, it is the First Respondent which is vested and clothed with the legal capacity to be a corporate body. It is my view therefore that any reference to the National Environmental Management Authority Board in the body of the application for leave and orders granted are a misnomer and a mere misdescription. In any event, the naming of the parties in the heading of the application for leave and the orders granted are clear and properly named and refer to the First Respondent.

With regard to the relief's sought and upon perusal of the chamber summons dated 18th February,2004 and the Notice of Motion dated 24th February,2004, it is clear that no leave was sought by the Applicants to file an application for declaratory orders. This means that the inclusion of declarations and/or declaratory orders in the application are improper and unlawful. In any case, the High Court exercising its jurisdiction of judicial review as conferred by section 8 of the Law Reform Act, chapter26, Laws of Kenya has no jurisdiction to consider applications for declaratory orders or to grant such orders. I do not agree with the Applicants submissions that the High Court can invoke its powers under section 60 of the Constitution to grant declarations or declaratory orders in judicial review proceedings. This court is guided and bound by the decision of the court of Appeal in **KENYA NATIONAL EXAMINATION COUNCIL –V- REPUBLIC, EX PARTE GEOFFREY GATHENJI NJOROGE, AND OTHERS,** CIVIL APPEAL No.266 of 1996 in which the efficacy and scope of judicial review remedies in Kenya were judicially expounded.

(v) **Paragraphs 39 and 40 of Professor Situma's affidavit show that the application for judicial review is for the enforcement of fundamental rights and freedoms enshrined in the constitution of Kenya and an application for such enforcement should be under the constitution (protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 (Legal Notice No. 133 of 2001).**

I have considered the submissions in support of the above mentioned ground and the reply. I have also carefully perused the Notice of Motion dated 24th February,2004 and the statutory statement. The Applicant's seek orders of **Prohibition,** three orders of **certiorari** and three orders of **Mandamus.** I have already dealt with the orders of declarations. The three orders of prohibition, certiorari and mandamus are judicial review orders and remedies.

The Applicants have referred to the decisions sought to be quashed by orders of certiorari as unlawful, adverse and unconstitutional. Strictly, the Applicant's need not have described the decisions of the First and Second Respondents in these terms. However, having used these terms, and in particular referring to the decisions as "inter alia unconstitutional" does not make their application as one seeking the enforcement of Fundamental Rights and Freedoms under the provisions of section 84 of the constitution. What are important are the remedies sought and the basis or grounds for seeking them. We have already seen that the substantive remedies sought are orders of prohibition, certiorari and mandamus. All these are judicial review remedies as envisaged by the Law Reform Act and Order 53 of the Civil Procedure Rules.

In my view, the statutory statement in the substantive pleading in judicial review proceedings. The Notice of Motion is merely the legal or procedural vehicle for commencing the proceedings and bringing the statutory statement before the court. The relief's sought and the ground is in the Notice of Motion and the statutory statement must be consistent and tally with each other. UI find that the orders sought in the

Notice of Motion and the statutory statement are similar.

What of the grounds? If the grounds set out in the application refer to and allege the violations of Fundamental Rights and Freedoms as protected by the provisions of sections 70 to 83 (inclusive) then one could rightly claim that the application seeks the enforcement of substantive constitutional rights. The grounds set out in the application and the statutory statement are as follows;-

a) The acts by the Respondents are arbitrary and ultra vires the Local Government Act, Town Planning Act and Environment management Co-ordination Act.

b) The acts of the Respondents are illegal, unconstitutional arbitrary and oppressive.

c) The acts of the Respondents are contrary to the law and public policy.

d) The Respondents' acts are activated by malice and irrelevant considerations

e) The Respondents' acts are in breach of the Rules of Natural Justice.

f) The Respondents have illegally acted as judges in their own cause.

g) The remedies prayed for will stop the Respondents from abusing their powers.

h) The Applicants shall suffer grave irreparable business loss and loss of income if the business premises are closed down.

i) The said loss cannot be compensated for and or adequately compensated by way of damages.

Apart from the reference to the term "unconstitutional" in Ground (b), I do hold that all the grounds and/or basis for the application in Grounds (a), (b), (c), (d), (e), (f) and (g) are founded on Administrative law and judicial review principles. Grounds (h) and (i) are alleged consequential damage or injury that the Applicants claim they will suffer as a result of the implementation of the decisions by the First and Second Respondents. The Applicants have invoked principles or grounds of:-

· Arbitrariness

· Oppression

· Violation of law and public policy

· Breach of Rules of Natural Justice,

· Respondents acting as judges in their own cause

· Abuse of power

in respect of the decisions being challenged. These are well established principles and motions of administrative law which if alleged and proven to exist, would make decisions of the First and Second Respondents amenable to judicial review.

It is true that the Applicants and in particular the verifying affidavit of Mr. Hamed Ehsani (paragraphs 47 and 48), have invoked the provisions of section 77 (4) of the Constitution. However, this reference does not constitute or make the application before the court to be a constitutional reference for the enforcement of Fundamental Rights and Freedoms. It is my view that many breaches of the due process, Principles of Good Governance and violations of the express provisions of statutory provisions and law often lead to or have the effect of violating the Fundamental Rights and Freedoms of the individual. However, what is important as far as the jurisdiction of the court and the legal procedures are

concerned is the manner in which the proceedings have been commenced and the remedies that are sought. Judicial review to me is a judicial process to protect and enhance Due process and the Rule of Law. These are ultimately underpinned in the Constitution. However, judicial review strictly does not amount to enforcement of the Bill of Rights (Chapter 5 of the Constitution). This is expressly provided for in section 84 of the Constitution.

In conclusion on this point, references and the opinion of the deponent of the verifying Affidavit invoking the provisions of the Constitution do not by themselves, make an application for judicial review to be a constitutional reference. In any case, the reliance on the constitution is contained in only a few paragraphs and does not affect the nature of the proceedings.

(vii) The application for judicial review is incompetent, frivolous and vexatious of the National Environment Management Authority and an abuse of the process of the court and is prematurely in court as there has been no appeal to the Natural Environment Tribunal in the first instance as required by section 129 of the Environmental

Management Co-ordination Act, 1999. See paragraphs 50, 51,52,53 and 54 of Professor Situma's affidavit already referred to herein.

Section 129 (1) and (2) of the National Environmental Management Co-ordination Act provides as follows:-

" **Section 129 (1) any person who is aggrieved by:-**

(a) -

(b) -

(c) -

(d) -

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder:

may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose."

This provision does not oust the jurisdiction of the High Court of considering applications for judicial review of the decisions of the National Environmental Management Authority. However, it is an arguable point of law whether the existence of this statutory or alternative remedy in law precludes the Applicants from coming to the High Court to seek judicial review orders. The Respondents are entitled to argue that the Applicants are so precluded or barred. This is quite different from a claim that this court has no jurisdiction to hear the application by virtue of section 129 of the Act. I see no ouster of the court's jurisdiction. The Ex parte Applicants may well be entitled to argue that the right of appeal can only be exercised if there was due process before the decisions were reached and that an inquiry of the manner in which the decisions were reached can only be fairly inquired into by the High Court by way of judicial review. It is deemed that when the court grants leave then it has found that the application in its entirety discloses an arguable case for judicial review. This decision is made by the Judge hearing the application for leave and in exercise of his/her **discretion**. As a result, the right or appropriate time to raise this issue is at the hearing of the substantive application. The grant of leave cannot be set aside or

application dismissed by way of an interlocutory application, to in effect, strike out the substantive application on this ground before the hearing on its merits.

Having considered the three jurisdictional grounds in the application, I do hereby find on the basis of the foregoing, that the grounds must fail and hold that this court has jurisdiction to entertain and consider the notice of motion. This now brings me to the other grounds in the application namely, Grounds (ii), (iii) and (vi). Ground (i) does not disclose any specific ground but merely relies on the Replying Affidavit filed by the First Respondent in respect of the substantive application.

(iii) At paragraph 8 the affidavit shows that there is to date no extracted and perfected order for leave and stay in these proceedings.

This is a matter that can be resolved on the basis of the court record. Upon perusal of the court record/file, I have seen a sealed and signed order of this court issued on 19th February,2004. It is duly signed by the Deputy Registrar. This court has not been told whether this order was ever served on the Respondents or not. The First Respondent has alleged that it was served with a handwritten order and notes of the judge granting leave. As the Applicant/First Respondent has not taken issue with the question of service in grounds in the application, the matter shall rest there. There are allegations in First Respondent written submissions that the Ex parte Applicants have not filed an affidavit of service showing that all concerned and affected parties have been served as required by Order 53, Rule (3) of the Civil Procedure Rules. However, this point is not part of the list of grounds set out in the application. It is trite that one must set out the grounds on which an application is founded and the statements of fact in the affidavit must be confined to the disclosed grounds. It follows therefore, that I am not obliged to consider these allegations made from the bar.

(iii) Paragraphs 9 through to 15 of the affidavit show that no attempt has been made or is being made to comply with the conditions made by the Honourable Mr. Justice Isaac Lenaola who granted leave and stay. The Learned judge had directed that a hearing date should be fixed on priority basis once the Notice of Motion commencing the judicial review proceedings had been filed. No such date has been fixed.

The Ex parte Applicants applied for leave on the 19th February,2004 before Justice Isaac Lenaola who granted the same. The Judge ordered that the substantive application be filed within 14 days from the date of the a grant of leave and the same be fixed for hearing on priority basis. The First Respondent confirmed being served with the hand-written orders, copies of the chamber summons seeking leave and the penal notice annexed to it on the same day, 19th February,2004. The application for judicial review orders was filed on the 24th February,2004 but the First Respondent did not disclose in its application when it was served with the same. The First Respondent has not complained about any failure or late service of the Notice of Motion dated 24th February,2004.

On the 18th June, 2004, the firm of Kamande & Company Advocates entered a Memorandum of Appearance on behalf of the First and Second Respondents. Two months later, the said firm filed the First and second Respondent's Replying Affidavit. It was sworn by Winny Wamaitha Kamande on 9th August,2004. It was the substantive reply to the application and contained detailed averments of facts touching on the merits of the case.

Due to the lack of facts as to what transpired between 24th February,2004 and 18th June,2004 and the fact that there is no complaint by the First Respondent about any delay in service of the Notice of Motion, the less I say about this period the better. However, once the Applicants were served with the Replying Affidavit of the First and Second Respondents, then the Applicants were obliged to take immediate steps to comply with the court order of 19th February,2004, namely, to fix the application for hearing on a priority basis. The Applicants have not shown what steps they took towards the prosecution of their application once the pleadings were all on record and the matter possible to proceed to hearing. The Applicants this time certainly did nothing to set down the application for hearing.

On the 1st October,2004 the First and Second Respondents retained new counsel as it would appear from their subsequent Replying Affidavit that there was some controversy as to the appointment of Kamande and Company, Advocates to act for the First and Second Respondents. This does not concern the court but I would understand why the two Respondents were quiet between 9th August,2004 when Kamande & Company Advocates filed the first Replying Affidavit and 1st October,2004 when they retained new counsel. However, it is not the conduct of the Respondents which is first under scrutiny but that of the Applicants who were granted leave and stay upon conditions by this court.

Again upto the time the new Advocates came onto record on 1st October,2004 there is no evidence that the Applicants took any single step to set down their application for hearing. The Applicants through their counsel wrote letters on 27th October,2004 addressed to both M/S Kamande & Company Advocates and S. Musulia Mwenesi Advocates inquiring as to which firm would act for the First and Second Respondents or whether they would be acting jointly. In the First Applicant's affidavit, it was deponed that upto October,2004 there were conflicting signals as to the firm which was properly on record for the First and Second Respondents. It is stated that the Ex parte Applicants advocates were served with the Notice of Appointment of Advocates filed by S. Musalia Mwenesi on the 28th October 2004. However, M/S Kamande & Company, Advocates still insisted that they were on record in the matter. The Ex parte Applicants asserted that in the spirit of fair play and upholding of justice, they were constrained not to proceed with the matter since the First and Second Respondents were not clear on their legal representation.

The Ex parte Applicants also claimed that they had severally invited the two Respondents and the City Council of Nairobi, the Third Respondent but have in their continuous quest to delay the hearing of the application failed to turn up at the court Registry to take dates for the hearing of the application,. The Ex parte Applicants purportedly annexed copies of documents to Mr. Hamed Ehsani's affidavit to prove this ("HE5). However to this court's consternation, their was no single letter of invitation by the said Applicants to the Respondents inviting them to fix hearing dates. To the contrary, there is one letter dated 14.10.2004 from the counsel of the Third Respondent inviting the Exparte Applicant's advocates and Kamande & Co. Advocates, for the First and Second Respondents to fix a hearing date on 26th October,2004. The second letter is of quite some interest and significance. It is a letter dated 11th November,2004 by Kariuki Muigua & Company, Advocates to their clients the three Ex parte Applicants. It reads as follows:-

" **.....**

17th November,2004

GREENHILLS INVESTMENTS,LIMITED

MARKET MASTERS LIMITED/SUGAR CANDY LIMITED

NAIROBI.

Att. Mr. Sanjay Shah.

Dear Sirs,

RE: MISC. APPLICATION NO.169 OF 2004

MARKET MASTERS LIMITED, GREENHILLS INVESTMENTS LIMITED & SUGAR CANDY LIMITED

–VS- NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY AND 2 OTHERS.

We refer to this matter.

Kindly note that we did not take a hearing date on the 26th October,2004 as the respondents did not attend although they are the ones who had invited us. We shall be taking a date for next year.

In the meantime kindly address our interim fee note earlier sent to you

Yours faithfully,

KARIUKI MUIGUA & CO. ADVOCATES "

This copy of the said letter was annexed to the Replying Affidavit of the Ex parte Applicants and the contents are absolutely clear. The deponent's/ Mr. Hamed Ehsani's statement that the bundle "HE 5" contained letter of invitation was false and intended to mislead this court. The said documents were annexed to give substance to the Exparte Applicant's claims that they have been diligently taking steps with a view of prosecuting the application with a hope that this court would be cursory and fail to notice the true contents of the 2 letters.

It is the Third Respondent which had sent out the invitation to fix a hearing date and not the Ex parte Applicants as alleged in the affidavit of Mr. Hamed Ehsani. On the material day, it would appear that the Respondents did not send a representative to fix a date, What did the Applicants do when they attended at the Registry? They did not take a hearing date and serve the hearing notices on the Respondents. Instead their counsel writes to them telling them what happened and that:-

"**.....we shall await to be invited again. We shall be taking a date for next year..**"

These are the counsel for the Ex parte Applicants who came before this court under a certificate of urgency, for orders of leave and stay and who felt so much threatened that they initially served hand-written court orders. These are the parties who were ordered by this court to fix the hearing of the application "**on priority basis".** The said counsel not only deliberately did not take a date but announced that they would wait to be invited. Whose application was it? Who was given the orders of stay on terms? Who was told to fix the hearing on a priority basis? It was not the Respondents but kith Applicants. Without butting an eyelid the Applicants counsel declared that they would take " **a date for next year"** . Indeed by the time the First Respondent took out this application on 10th May,2005, the Ex parte Applicants had not procured or fixed a hearing date of their application. This is despite the fact that they have enjoyed the order of stay from 19th February,2004 and on the express orders of this court that the application be fixed for hearing on priority basis.

The First Respondent has invited this court to find that the Ex parte Applicants are in contempt of the Court Orders made on 19th February 2004 on the ground that they have deliberately disobeyed the orders of the court and continue to do so. The First Respondent has relied on the English case of **HADKINSON –V- HADKINSON (1952) 2 ALL ER 567** and invited the court to refuse to hear the Applicants' Notice of Motion in the circumstances. My understanding of the prayers in the application herein is that this court exercises its powers and discretion and dismisses the Notice of Motion for the said disobedience and/or non-compliance or in the alternative to set aside and vacate the order of stay granted.

It is my view that the Ex parte Applicants have deliberately chosen not to comply with this court's order that their application be fixed on a priority basis. It is my view and I do hold that the leave and order of stay was granted on this condition. Compliance was absolutely mandatory. The Ex parte applicants have disobeyed the said orders by their calculated and deliberate inaction. This is because the existing status quo operates in their favour. However, they obtained and sustained the situation by virtue of court orders which were granted on terms. If the Ex parte Applicants did not comply with the conditions or terms, upon which leave and stay was granted this court has the power and discretion to make such orders that will ensure that the said orders are either obeyed or put a stop to the said non-compliance which is clearly an abuse of the court process.

The usual punishment for contempt of court is either the court refusing the hear the contemnor or by

committal or attachment until the

contempt is purged. However, the scenario hear is quite different in that the disobedience is due to a negative act, non-compliance. As a result, this not a case of ordinary contempt of court but a case of actual gross abuse of the court process. In **HALSBURY'S LAWS OF ENGLAND**, 4th Edition, Reissue, at P.277, abuse of the process of the court is discussed:-

" **The court has power to punish as contempt any misuse of the court's process. Thus forging or altering of court documents and other deceits of like kind are punishable as serious contempt. Similarly, deceiving the court or the court's officers by deliberately suppressing a fact, or giving false facts may be a punishable contempt.**

Certain acts of a lesser nature may also constitute an abuse of the process as, for instance, initiating or carrying on proceedings which are wanting in bona fides or which are frivolous, vexatious as oppressive. In such cases the court has extensive alternative powers to prevent an abuse of its process by striking out or staying proceedings without leave....."

It is my view that this court is able to punish the abuse of the process of court here without necessarily citing the Ex parte Applicants for contempt of court. In this case, the Ex parte Applicants after obtaining ex parte order of leave in accordance with the law and discretion of the court also secured an order that the grant of leave would operate as stay of the orders, recommendations and directives of the Respondents. The Orders were granted and the applicants ordered to fix a hearing date on priority basis. To me this was the condition for the grant of the orders. The Ex parte Applicants have deliberately disobeyed the said orders. This amounts to an abuse of the court process and oppressive to the Respondents. This court shall not countenance this type of conduct and allow its orders to be abused and used to mete out injustices and oppression to the other parties. The ex parte Applicants obviously do not intend to prosecute their application expeditiously or on priority basis. It is their choice and wish but they shall not be allowed to do so at the expense of the Respondents who have patiently and law – abidingly obeyed the orders of stay for over a year by the time this application was filed. Not a single letter of invitation to fix a hearing date was sent even after the alleged confusion of legal representation was over.

Lastly, I come to ground (iv)

(iv) **Paragraph 45 of that affidavit shows that at the ex parte application for leave to apply for judicial review crucial and material information relating to the City Council of Nairobi ' effluent standards for disposal into natural water courses' was suppressed contrary to law and laid down procedure on ex parte applications**.

I have considered this ground, paragraph 45 of Prof. Situma's affidavit and submissions. The First Respondent's allegations that there was suppression of material facts at the time the Applicants obtained leave and stay are not supported by sufficient evidence. For this court court to take action on the basis of non-disclosure of material facts there must be clear and cogent evidence to prove the said fact. It is not a matter of conjecture inferences and conclusions. I am unable thus to apply here the principles in the case of **REG .V. KENSINGTON INCOME TAX COMMISSIONERS, EXPARTE PRINCESS EDMOND DE POLIGNAC (1917) I. K. B. 486 C.A.**

The Third Respondent, the City Council of Nairobi on its part had filed an application dated 10th June, 2005 seeking inter alia for an order:-

" **2. That the Chamber Summons application dated 18th February,2004 seeking leave to file judicial review orders and notice of motion dated 24th February,2004 seeking judicial review orders be struck out and or dismissed as against the 3rd Respondent with costs."**

The Third Respondents asserts that the application discloses no cause of action against it. At the hearing of the First Respondents application it was agreed by counsel that this application be heard

together with that of the First Respondent. The Third Respondent supported the First Respondent's application and prosecuted its own.

Upon careful consideration of Third Respondent's application I do find that strictly while there are no orders of certiorari being sought against the City Council of Nairobi in respect of any decision it has made. In the event any orders of prohibition and/or mandamus are granted in favour of the Ex parte Applicants, then such orders may involve and affect the City Council of Nairobi as the subject of this application relates to construction of a sewage system or waste disposal system. Even if the court found that the Third Respondent strictly ought not to have been joined as a Respondent, I think that it would have been inevitable to enjoin or order that it be served as an interested party since it would certainly be affected by any orders which would be granted in favour of the Ex parte Applicants. As a result, since the Third Respondent has filed its response and has been involved in these proceedings to date, I direct that it continues to be a party herein as the Third Respondent.

The end result is that I do hereby declined to strike out the Notice of Motion dated 24th February,2004 as prayed in Order 2 of the First Respondent's application and in the Third Respondent's application. However, in exercise of this court's inherent jurisdiction and to prevent the continued abuse of the process of the court by the Ex parte Applicants, I do hereby allow Order 1 of the said Notice of Motion and hereby set aside and vacate the Order of stay granted on 19th February,2006 by this court. The said order of Leave is hereby discharged forthwith. For the avoidance of doubt, the First, Second and Third Respondents are at liberty to proceed to carry out exercise and discharge their respective statutory powers and duties irrespective of the pendency of the Notice of Motion dated 24th February,2004. The Ex parte Applicants may prosecute the same at the pace they desire or not at all.

The costs of these applications shall be borne by the Ex parte Applicants and paid to the Respondents.

DATED AND DELIVERED AT NAIROBI ON THIS 20TH SEPTEMBER,2006.

M. K. IBRAHIM

JUDGE