



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC APPL. NO.491 OF 2002**

**KENYA NATIONAL CHAMBER OF COMMERCE AND**

**INDUSTRY LTD .....1ST APPLICANT**

**THOMAS M. MUTUSE .....2ND APPLICANT**

**SAMUEL N. MUINDI .....3RD APPLICANT**

**JOSEPH M. MATEU .....4TH APPLICANT**

**BENJAMIN MUNYWOKI MUKULA .....5TH APPLICANT & OTHERS**

**V E R S U S**

**COUNTY COUNCIL OF MAKUENI .....RESPONDENT**

**R U L I N G**

The respondent / applicant filed a Notice of Motion here dated 19th July 2002 asking that the matter be placed before the Honourable the Chief Justice for directions for orders to have this file transferred to Machakos High Court, that the Ex-parte stay granted on 22nd May 2002 be vacated / set aside or discharged forthwith. It was expressed that the respondent obtained an ex-parte order of leave to operate as a stay before Hon. Mbitio J. without full material disclosure that the said order had been refused by another Judge. They wanted it discharged because it was oppressive and they claimed it gave unfair advantage to the applicant.

On 22nd July 2002 the court gave orders to stay all the matters until 26th July 2002 when the matter of transfer of the case was to be mentioned.

On 26th July 2002 the respondent herein filed an application requesting the court to review its said order of 22nd July 2002 and I ordered that the two applications be heard together on 30th July 2002 and that stay order to remain in place until 30/7/02 but on the hearing day on 30th July 2002 Mr. Annan for the respondent argued a preliminary point against the first Notice of Motion of 19th July 2002 saying that orders of Mbitio J. of 22nd May 2002 cannot be discharged under order 39 rule 4 of Civil Procedure Rules by another Judge other than Justice Mbitio because it is like reviewing Judge Mbitio's orders outside of Order 44 rule 4 of the Civil Procedure Rules which requires same to be done by same Judge.

Secondly that the application for discharge ought to be by chamber summons under order 39 rule 4 and not by notice of motion. That the orders were made under Judicial Review Application Order 53 and ought to remain in force until the notice of motion is heard and that orders given under Order 53 cannot be set aside or reviewed under Order 39.

However Mr. Musili opposed the preliminary objection saying that they are not in fact asking for review and that the order of stay in Judicial Review can be discharged like an injunction under Order 39 rule 4, of the Civil Procedure.

I have heard both counsel in this matter and the undisputed fact is that the main case here is really an application for Judicial Review filed on 7th May 2002 and the order which was given by Mbiti J. was one of stay at the time of giving leave under Order 53 rule 4 and not injunction. Under Judicial Review in this jurisdiction injunction remains private law remedy and not Public Law one under Order 53. I can do no better than quote the judgment of an English Court of Appeal Judge in the case of *Rv SEC. OF STATE FOR EDUCATION AND SCIENCE, EXP. AVON COUNTY COUNCIL* [1997] 1 QB 558 per LJ.Glidewell discussing the difference between Stay and injunction in Judicial Review Proceedings. He said in part:-

*“Proceedings for judicial review in the field of Public Law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application for certiorari is a challenge to the way in which a decision has been arrived at. The decision - maker may take part in the proceedings to argue that his, or its decision was reached by an appropriate procedure. But the decision – maker is not in any true sense an opposing party, any more than an inferior court whose decision is challenged is an opposing party”.*

Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned.

An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view, correctly described as a stay. For these reasons I am of the opinion that a decision made by an officer of Government Ministry, tribunal or Local authority can, in principle, be stayed by an order of the court like injunction.

If I am correct in my view that essential question is whether the phrase a stay of proceedings is apt to include decisions and the process of arriving at it. I believe that where the applicant wants to challenge an order given at the Leave stage he can apply to set aside the leave or direction given ex-parte at that forum for leave or stay. According to English Practice this ought to be done promptly, but order 39 cannot be used to set aside the ex-parte Judicial Review Order of stay because in Judicial Review the Order of Stay differs from injunction as I have stated above and because it is an order directed not at a party to the litigation but at the decision making process of the court, tribunal or other decision maker.

It may not be an order capable of being breached by a party to the proceedings or any one else and may not be enforced by contempt.

It is therefore evident that it cannot be obtained or reviewed as though it was an injunction.

The second issue whether application is or is not a review and should be heard by the Judge who issued it is not pertinent in view of what I have said above but suffice to say that Review is a jurisdiction the court exercises not by its inherent jurisdiction but through statutory liberty which in our case is Section 80 of Cap. 21 and under Order 44 Rr (2) and (4) only the Judge who made the order or passed the decree is the one with the right to review it and no one else except if that Judge who made the order is outside the jurisdiction. (See Order 44 Rule 1 and 2 of the Civil Procedure Rules) but where the Review is upon some ground OTHER than the discovery of such new and important matter or evidence as is referred to in paragraph / of Order 44 r2 or the existence of a clerical or mathematical mistake or error apparent on the face of the decree then such application must be made to the Judge who passed the decree.

That is the procedural law applicable, but it cannot be said that this was an application for review as review must be expressly under Order 44 of the Civil Procedure Rules.

For all these reasons I agree with what Mr. Annan has submitted and I allow the objection but the

question of transfer of this case to Machakos is pertinent and is not affected by this order. The respondent be at liberty to apply.

Main application be set down for hearing. Cost to the objector / applicant.

**A. I. HAYANGA**

**J U D G E**

**11/9/02**

**Read to Mr. Annan**

**For applicant**

**Read to Miss Muteti**