Orwoba v Attorney General & 4 others (Judicial Review Miscellaneous Application E008 of 2023) [2024] KEHC 111 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E008 OF 2023

FROO OLEL, J

JANUARY 17, 2024

IN THE MATTER OF: UNPROCEDURAL SUSPENSION OF HON.GLORIA MAGOMA ORWOBA FROM THE SENATE HOUSE FOR THE REMAINDER OF SECOND SESSION OF THE THIRTEENTH PARLIAMENT

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010, PARLIAMENTARY POWERS & PRIVILEGES ACT 2017 AND THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

HON. GLORIA MAGOMA ORWOBA ..... EXPARTE APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CLERK OF THE SENATE ..... 2ND RESPONDENT

SPEAKER OF THE SENATE ..... 3RD RESPONDENT

THE SENATE COMMITTEE ON POWERS AND PRIVILEGES .... 4TH RESPONDENT

THE SENATE ..... 5TH RESPONDENT

JUDGMENT

A. Introduction

1. Before court for determination are two Notice of Motion applications dated 29th September 2023, and the second application is dated 11th October 2023 respectively and both filed are by the 2nd – 5th Respondents/Applicants. The first Notice of Motion application dated 29th September 2023 is filed

under provisions of under provision of Article 50(1), 159 and 165 of *the Constitution* of Kenya, Sec 3A and 6 of the *civil procedure Act*, Cap 21, Order 2 rule 15 (1)(d) of the Civil procedure rules and all other enabling provisions of law.

2. In the said application the applicant seeks for various orders with the pertinent ones being;

   a. That this Honourable court be pleased to discharge, vacate and/or set aside the orders made on 28th September 2023 pending hearing and determination of the substantive Judicial review Application herein.

   b. That this Honourable court be pleased to stay the judicial review Application herein pending the hearing and determination of Nairobi High court Constitutional petition No E283 OF 2023; Gloria Orwoba Vs Attorney General, Clerk of the senate & 3 others , wherein the matters in issue are directly and substantially the same with the instant Ex parte application and it is between the same parties.

   c. That in the alternative, the Judicial review Application be struck out and/or dismissed for being an abuse of the court process.

   d. That this Honourable court be pleased to grant any other order it may deem fit and just.

   e. That the costs of this application be provided for.

Summary of the Pleadings

3. The said application was supported by the grounds on the face of the said application and the supporting affidavit of one mohammed ali (MBS), the Deputy clerk of the senate. He deponed that the applicant obtained the Ex parte orders by Misrepresentation of facts and deliberate Misrepresentation of *the constitution* and the law. Further the applicant had deliberately withheld from court the fact that she had filed a similar suit in the High court Nairobi through HCCPET NO. E283 of 2023 (Gloria Orwoba Vs Attorney General, Clerk of the Senate & 3 others – herein after referred to as the "Nairobi petition"), which had a date for hearing on 14th November 2023. This instant Judicial review application was therefore sub judice as it raised similar issues as the ones raised in the "Nairobi petition".

4. It was the Respondents/applicants position that Article 103 of *the constitution* did not come into play in matters where the speaker is aware why a Member of the senate is unable to attend eight sittings. The respondent was suspended from the house as per the recommendation of the committee on powers and Privilege's. Her suspension was a practise engraved in the procedure of the legislature as a form of punishment for a member who violated the house procedure or whose conduct breached the privileges of the house, thus the respondent was not in danger of losing her seat.

5. Further it was the applicant's contention that the Respondent was accorded a proper opportunity to appear before the committee on power and privilege's but spurned the opportunity and was unwilling to participate in the committee deliberations. The committee thus had no option but to conclude the inquiry without her impute as they were time bound to make their findings, and proceeded to impose their penalty. Due to the two matters pending before two different courts, there was the risk of conflicting orders being issued and substantive justice dictated that the orders earlier issued be vacated for being procured through an outright abuse of the court process.

6. This application was opposed by the respondent gloria magoma orwoba, who filed her replying affidavit dated 9th october 2023. she averred that she had withdrawn the "Nairobi Petition" on 28th September 2023 and served the Respondents/Applicant's with the said notice of withdrawal of the said petition. Further the respondent denied not disclosing the fact that she had earlier filed the "Nairobi

petition" and specifically stated that in paragraph (n) on the grounds in support of the chamber summons she had clearly disclosed the existence of the said petition and its none viability. Also at paragraph 4(d) of the affidavit verifying the facts the existence of the said petition was disclosed.

7. On her part she had made full and frank disclosure of the facts and therefore it was not true that she had mislead court or misapprehended the facts. Further also having withdrawn the "Nairobi Petition" the current application could not be misconstrued to be sub judice. The respondent also accused the applicants of attempting to pre-empt the court and usurping its powers by drawing legal conclusions on matters which were up for determination, especially as regards the effect and tenor of Article 103 vis a vis her suspension, whether she was afforded a proper opportunity to be heard and whether the suspension was lawful. These were substantive issues which the court had to determine and thus the court was not wrong in granting the stay orders issued on 28th September 2023.

8. It was thus only fair and just to have all issues determined on merit without the short cuts as a sought by the Respondents/Applicants.

Second Application

9. The 2nd application by the Respondents/Applicants is the one dated 11th October 2023, brought pursuant to Rule 8 of *the Constitution* of Kenya (Protection of Rights and Fundamental freedom) practise and Procedure Rules 2013, Section 1A, 1B, 3A, 6, 15 and 18 of the *Civil Procedure Act*, Cap 21, Order 2 Rule 15 of the Civil Procedure Rules, 2010 and all other enabling provision of law. The Respondents/Applicants seek for order that;

    a). That the Exparte application dated 28th September 2023 be struck out for being an abuse of the court process and further being in gross violation of Rule 8 o of *the constitution* of Kenya (Protection of Rights and fundamental freedom) Practice and Procedure Rule 2023.

    b). That in the alternative this honourable court be pleased to withdraw and transfer this matter to the High Court at Nairobi for hearing and determination.

    c). That this Honourable Court do consolidate this suit with Nairobi High Court Petition No. E283 of 2023, Gloria Orwoba versus Attorney General, Clerk of the Senate and 3 others for hearing and determination; and

    d). That this honourable court be pleased to grant any other orders it may deem fit and just; and

    e). That costs of this application be provided for.

10. The said application is supported by the grounds of the face of the said application, the supporting affidavit and further affidavit of eunice gichogi dated 12th october 2023 and 30th october respectively. the ex parte applicant on the other hand did oppose this application vide her replying affidavit dated 25th October 2023.

Summary of the Pleadings

11. The Respondents/Applicants aver that Ex parte applicant had earlier on 4th August 2023 filed Nairobi High court Petition no. E283 of 2023, Gloria Orwoba versus Attorney General, Clerk of the Senate and 3 others against the same Respondents herein and based on the same facts as the current case. In the first petition (hereinafter referred to as the Nairobi petition) the court had refused to grant conservatory orders and directed that the matter be mentioned on 21st September 2023, on which date the Ex parte applicant sought to amend her petition as the 5th Respondent had adopted the 4th Respondent report suspending her from the house for the reminder of the second session of the thirteenth parliament.

12. The court did direct that the said "Nairobi Petition" be heard on 14th November 2023. It was the Respondents/Applicants contention that rather than amend her petition, the Applicant/Repondent proceeded to file this instant judicial review application and deliberately withheld information from court regarding the 'Nairobi Petition' and the court's refusal to grant any intervening orders in the said petition.

13. It was thus clear that the Ex parte applicant had obtained the orders herein through misrepresentation of *the constitution* and the law. The instant judicial review application was therefore sub-judice and created an untidy situation where there were two concurrent matters were pending before different courts involving the same parties and regarding the same subject matter. Further Rule 8 of *the constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 did provide that "every suit shall be instituted in the High Court within whose jurisdiction the alleged violation took place and the High court could order that a petition filed be transferred to another court of competent jurisdiction either on its own motion or on the application of a party. Since the alleged violation being investigated took place in Nairobi and all parties resided within Nairobi, the said suit ought to be struck out or be transferred to Nairobi for hearing and determination.

14. The court was also informed that through the Applicant/Respondent had purported to withdraw the 'Nairobi Petition' by filing a notice of withdrawal, the said notice had not been endorsed by the court. It was thus imperative that the orders sought herein be granted in the interest of substantive justice and to avoid wastage of precious judicial time. The Respondents/Applicants in their further affidavit did reiterate that even through the Applicant/Respondent had filled a notice of withdrawal of the 'Nairobi Petition' the same had not been endorsed and the matter was still active. Further they intended to oppose the withdrawal of the suit as the court's authority had not been sought to file a similar petition before the Machakos High Court, which petition was filed in violation of Rules and of *the constitution* of Kenya (Protection of Rights and Fundamental freedom) Practice and Procedure Rules 2013.

15. To the extent that the Applicant/Respondent had filed two similar petitions concurrently in two courts raising the same issues the 2nd petition filed was an abuse opt the process of the court and ought to be struck out and/or dismissed with costs to the 2 – 5th Respondents/applicants.

16. The Applicant /Respondent did oppose the said application dated 11th October 2023 and filed her Replying Affidavit dated 25th October 2023 in opposition thereto. She stated that the application was misconceived and founded on misapprehension of the facts as Nairobi Petition No E283 of 2023 (Nairobi Petition) was effectively withdrawn vide the notice of Withdrawal dated 28th September 2023, which notice had been served upon the Respondent's Counsel. Further she could not be faulted for withdrawing the said petition as it no longer served her interest.

17. The High Court under Article 165 (5) had exclusive jurisdiction to deal with and determine constitutional matters and there was nothing inhibiting or stopping this court from hearing and determining this application. *The constitution* of Kenya (Protection of Rights and Procedure Rules 2023 could not be used to oust the jurisdiction of the court, which was a special jurisdiction donated under *the constitution* and was superior to the said "Mutunga rules". This court also had judicial powers to examine and determine if the 2nd - 5th Respondent had used their quasi-judicial powers in an improper manner.

18. Finally, it was the petitioner's contention that this court could not consolidate this petition and the 'Nairobi petition' which for all intent and purposes had been withdraw. The Applicant/Respondent urged this court to dismiss this application with costs.

B. Submissions

The 2nd – 5th Respondents Submissions

19. The Respondents/Applicants submitted that this suit was similar in all fours with the 'Nairobi Petition'. The parties were the same and all issues arose from the same set of circumstances. In the Nairobi Petition' the applicant had been denied Ex parte orders and the learned judge had granted the applicant leave to amend her petition. Instead of doing so, she had opted to file a new petition while deliberately withholding from court information relating to the fact that the 'Nairobi petition was pending. She in effect was in two courts of concurrent jurisdiction and that constituted an abuse of the process of court and the court thus ought to strike out and/or dismiss the 2nd petition filed. Reliance was placed in David Ndii and others versus Attorney General and others 2021 eKLR and Republic versus Paul Kihara Kariuki, Attorney General and 2 others ex parte Law Society of Kenya (2020) eKLR and Nyanza Garage versus Attorney General where it was emphasized that multiplicity of suits between the same parties over the same subject matter had to be avoided.

20. Order 25 Rule of the Civil Procedure Rules 2010 did provide that a suit could be withdrawn by consent of all the parties or with leave of court upon making consequential orders including the award of costs. The 'Nairobi Petition' thus could only be marked as withdrawn once the trial court endorsed the 'notice of withdrawal to give it effect. This process of endorsing the notice to withdraw had not been affected and thus the 'Nairobi Petition' was still alive and was not abandoned as the petitioner so urged. Reliance was placed in Theluji Dry Cleaners Ltd versus Muchiri and 3 others (2022) KLR 46 where it was held that the act of filing a notice of withdrawal or discontinuance of a suit was not sufficient. It had to be endorsed by the Deputy Registrar to make it have legal consequences.

21. The 2nd – 5th Respondents further did submit that the 2nd Petition filed violated provisions of Rule 8 of *the Constitution* of Kenya (Protection of Rights and Fundamental freedom) practice and procedure rules 2013, which provided that "Every case would be instituted in the High court within whose jurisdiction the alleged violation took place and the High Court had the power to order that a petition be transferred to another court of competent jurisdiction on its own motion or on application by either party." The violation complained of took place within the senate of Kenya in Nairobi and all parties involved herein reside and/or are located in Nairobi and thus there was absolutely no reason as to why this petition had to be filed in Machakos. The 2nd – 5th Respondent thus urged this court to struck it out the suit and/or transfer it back to Nairobi. Reliance was placed in Setya Bhama Gandhi versus Director of Public Prosecution and 3 others (2018) eKLR, Republic –vs- Paul Kihara Kariuki, Attorney General & 2 others Exparte Law Society of Kenya [2020] eKLR and David Kahungu –vs- Zikarenga & 3 Others Kampala HCCS No. 36 of 1995.

Applicant/Respondent Submissions

22. The Applicant/Respondent did oppose both applications and filed her submissions dated 7th November, 2023. She stated that she had filed a notice to withdrawal in the "Nairobi Petition" and duly served it upon all the parties including the Respondents herein, as required under Order 25 Rule 2 of the Civil Procedure Rules. The need of endorsement was not mandatory and the same had been held so by the Court of Appeal Beijin Industrial Designing and Researching Institute -vs- Lagoo Development Ltd. [2015] eKLR, where it was held that "A party's Right to withdraw a matter before the court cannot be taken away. A court cannot bar party from withdrawing his matter".

23. Similar decisions had also been made by the Court of Appeal in Pil Kenya Limited -vs- Joseph Oppongo [2009] eKLR & Kofinaf Company Ltd & Another -vs- Nahasho Ngige Nyagah & 20 Others [2017] eKLR.

24. Further the Applicant/Respondent submitted that this suit was not sub-judice as the "Nairobi petition" had already been withdrawn. The principle of sub-judice could only arise if and more than one suit existed, which was not the case herein as the "Nairobi Petition" had been withdrawn and discontinued.

25. As regards provisions of Rule 8 of *the Constitution* of Kenya (protection of Rights and Fundamental Freedom), Practice and Procedure Rules 2013 the same had to be considered and appreciated when considered together with Article 165(3) of *the Constitution* of Kenya 2010.The court's jurisdiction flowed from either *the constitution* or legislation or both and the court could not aggregate to itself jurisdiction exceeding what was provided for in law.

26. The 2nd – 5th Respondents submissions were therefore misguided as the applicant was challenging an administration decision by the Respondents and the rules governing Judicial review were different and distinct from those governing constitutional petitions. Under Judicial Review proceedings the law applicable was "*The Constitution* of Kenya and Section 9 of the Fair Administrative Actions Act. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013" did not apply in these proceedings and thus irrelevant and could not be considered herewith.

27. The Applicant/Respondent thus urged this court to find that the orders sought by the 2nd – 5th Respondents were unmerited. This suit could not be consolidated with the "Nairobi Petition" which had been withdrawn and there was not good ground made justifying their request to have this suit transferred to Nairobi. It was in the best interest of justice to dismiss both application and proceed to expeditiously hear and determine the Judicial Review Application.

C. Analysis & Determination

28. I have considered the application dated 29th September 2023, and the application 11th October 2023, the grounds in support thereof, the supporting Affidavits, the respondents replying affidavits and both set of submissions filed respectively by both parties and would narrow down the issues for determination as being

    a. Whether this Judicial review Application should be struck out an/or be dismissed for being an abuse of the process of the court and for the reason that it was Sub judice and filed in gross violation of Rule 8 of *the constitution* of Kenya (Protection of Rights and fundamental freedom) Practice and Procedure Rules 2023.

    b. Whether this court should discharge, vacate and/or set aside the orders made on 28th September 2023 pending hearing and determination of the substantive judicial review Application herein.

    c. Whether this Honourable court should be pleased to withdraw and transfer this matter to the High court at Nairobi for hearing and determination.

    d. Who should pay costs costs .

A. Whether this Judicial review Application should be struck out an/or be dismissed for being an abuse of the process of the court for the reason that it was Sub judice and filed in gross

violation of Rule 8 of *the constitution* of Kenya (Protection of Rights and fundamental freedom) Practice and Procedure Rules 2023.

29. Section 6 of the *Civil Procedure Act*, provides that;

> " No court shall proceed with a trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

30. The supreme court of Kenya in Kenya National Commission of Human Rights Vs Attorney General; Independent Electoral & Boundaries commission & 16 others (Interested parties) had the occasion of pronouncing itself on the subject of sub judice and aptly stated that;

> " {67} The term "sub judice" is defined in Black's law Dictionary 9th Edition as "Before the court or judge for determination". The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of the courts, with competent jurisdiction issuing conflicting decision's over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party seeking to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

31. On the other hand " *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) practise and procedure Rules 2013" also known as the "Mutunga rules" were formulated to guide petition/proceedings filed under Article 22 of *the constitution* of Kenya 2010. At Rule 3(1) thereof it expressly provides that; "These rules shall apply to all proceedings made under Article 22 of *the constitution*", while under Rule 8(1) & (2) thereunder further provides that, "Every case shall be instituted in the High court within whose jurisdiction the alleged violation took place, and Rule 8(2) further provides that, " Despite sub rule (1), the High court may order that a petition be transferred to another court of competent jurisdiction either on its own motion or on the application of a party."

32. First and foremost, the proceedings herein are judicial review proceedings filed under a different provision of the *law reform Act*, Cap 22 and Order 53 rule 3 & 4 of the civil procedure Rules. The promulgation of *the constitution* of Kenya has further elevated judicial review proceedings to a substantive and justiciable right under *the constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined under Article 47 of the said constitution, which provides that "every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. See SC Petition No 6 (E007) of 2022 Consolidated with Petitions No 4(E005) & 8(E010) OF 2022 Edwin Harold Dayan Dande & 3 others Vs IG National Police Service & 5 others .

33. It is therefore plainly obvious that these proceedings have not been brought under the provisions of Article 22 of *the constitution* of Kenya 2010 as envisaged under Rule 3(1) of the "Mutunga Rules" and thus Rule 8 (1) & (2) thereof are not applicable to these proceedings. Be that as it may the Applicant/Respondent has not denied the Respondents/Applicants allegations that,

the administrative proceedings complained against occurred with the parliamentary building, (The senate), all parties reside in Nairobi and thus there is no justifiable ground to have this matter heard and determined at Machakos High Court. The proceeding herein are brought pursuant to provisions of the Civil procedure rules, which are anchored by the Act, Cap 22.

34. Section 1A & 1B provide for just, expeditious, proportionate and affordable disposal of suits in a timely manner and at an affordable cost. Sec 3A further provides that, "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court." I do find that based on these provisions, given that all parties reside in Nairobi and the cause of Action arose in Nairobi, further so as to avoid the impression of a litigant forum shopping it would be in the best interest of all parties to have this suit transferred to the High court -Nairobi (constitutional & Judicial review division for hearing and determination).

35. As regards the issue of sub judice the Supreme Court of Kenya in Kenya National Commission of Human Rights Vs Attorney General; Independent Electoral & Boundaries commission & 16 others (Interested parties did clearly lay down the three (3) factors to be considered for a matter to be sub judice. Namely;

    a. There is more than one suit over the same subject matter,

    b. That one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly;

    c. That the suits are between the same parties or their representatives.

36. The Respondents/Applicants insist that even though in the " Nairobi petition" the Applicant/ Respondent has filed a notice to withdraw the said petition, the same had not been endorsed by the court and thus the said matter for all purposes was still pending. The respondent on the other hand summitted that for all intent and purposes the said petition had been withdrawn and the endorsement of the said withdrawal notice was just a formality.

37. Rule 25 rule 1 of the Civil procedure Rules provide that;

> "At any time before the setting down of the suit for hearing the plaintiff may by notice in writing which shall be served upon all the parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be defence to any subsequent action."

38. Scanning the various court decisions on this point as to whether the notice of withdrawal has to be endorsed for it to come into effect and/or whether the withdrawal is automatic on filing of the said notice of withdrawal of suit, I am inclined to go with the latter position, which has been endorsed by various court of appeal decisions that, the said withdrawal of a suit is a right which cannot be taken away from a litigant.

39. In Beijin Industrial Designing and Researching Instittute Vs Lagoo Development Ltd (2015) eklr Makhadia, ouko & Minoti JJA accepted the proposition advanced by the supreme court in Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 Others SC APP NO 16 of 2014, where it was reiterated that ;

> …." A party's right to withdraw a matter before court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that a court can do is to male an order as to costs where it is deemed appropriate."

40. In John Ochanda Vs Telkom Kenya Ltd SC APP NO 25 of 2014, Ibrahim SCJ, was considering an application for leave to withdraw a notice of appeal under Rule 19 of the supreme court rules which allows a party to withdraw at any time before judgement to withdraw any proceedings with leave of the court. He stated;

> " I do hold the view that a prospective Appellant is at liberty to withdraw a notice of Appeal at any time before the Appeal has bene lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the civil procedure rules or court of Appeal rules, the right to withdraw or discontinue proceedings or withdraw a notice of Appeal respectively ought to be allowed as a matter of right subject to the issue of costs, which can be claimed by the respondents if any. In this particular case, there cannot be any reason for inter parties hearing and the matter can proceed Ex parte as the right to withdraw cannot be taken away."

41. The superior courts have thus settled this issue that where a notice of withdraw of a suit has been filed, the suit will be deemed withdrawn and all that remains is for the court or the parties to determine the issue of who bears the costs of the withdrawn suit. The "Nairobi petition" thus is deemed withdrawn on filing of the notice of withdrawal and a such "two suits by the same party, based on the same facts, and seeking similar orders do not exist in the context of the pleaded facts herein". These proceeding are thus not sub judice and this suit therefore cannot be struck out.

II. Whether this court should discharge, vacate and/or set aside the orders made on 28th September 2023 pending hearing and determination of the substantive judicial review Application herein.

42. The starting point for this application is Order 53 Rule 1(4) of the Civil Procedure Rules, which gives this court the power to grant leave to operate as stay. Order 53 Rule 1(4) of the Civil Procedure Rules, provide as follows;

> " The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

43. The granting of leave to operate as an order for stay is discretionary and should be exercised judiciously. In Taib A. Taib vs. The Minister for Local Government (supra), the court did state that;

> " The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken.

44. Also in judicial review proceedings the standard for the grant of an order of stay is much higher than that of obtaining leave. This was discussed in Republic v National Transport & Safety Authority & 10 others [2014] eKLR where the court held as follow;

> " In judicial review, the threshold for obtaining leave to commence is low and obtaining leave is not in itself evidence of a strong case for issuance of stay orders. In order to obtain leave to commence judicial review proceedings, an applicant only needs to show that he

has an arguable case. The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise the Court will be reluctant to suspend the operation of a law."

45. The principles that guide courts before the granting of a stay order were also discussed by Odunga J in James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR where he held as follows;

> " 42. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay may be granted. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.
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> 43. In this case, the period of suspension of the applicant is still running. In other words the act complained of is not complete and has not come to an end. .....
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> .....However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist."

46. The applicant urged this court to set aside and vacate the orders issued herein dated 28th September 2023 on grounds that they were procured through Misrepresentation of facts and deliberate misrepresentation of *the constitution*. The "Nairobi petition" was pending, where the applicant had been denied ex parte conservatory orders. Further the respondent had misinterpreted Article 103 of *the constitution* as she would not lose her seat on account of missing eight sittings, for the reason that her suspension was recommended by the powers and privileges committee of the house and that the house speaker would be aware as to why she would not be attending senate house sittings.

47. The respondent on the other hand denied that she made any misrepresentation of facts and the applicants were mistaken to allege that the "Nairobi petition" was still active/alive, yet she had withdrawn it. Further the respondent averred that in her pleadings, she did disclose the fact that the "Nairobi petition" existed and thus had made full and frank disclosure as required in law. Finally, she averred that her application raised weight issue in law, which had to be determined on merit and not preliminarily as the Respondents/Applicants wanted.

48. As discussed above, the standard for the grant of an order of stay is a high one and the applicant must demonstrate that he/she will cause irreparable harm should the court not intervene. This court did consider the application for leave and did deem it fit to grant stay, for reasons stated in the proceedings. The applicant raised fundamental questions regarding her inalienable right to fair administrative action, which issues have to be considered on merit.

49. Secondly as regards the issue of full disclosure, the law dictates and demands that any litigant who seeks an equitable order must come to court with clean hands and must make full disclosure. In the case of

WEA Records Ltd Vs Visions Channel 4 Ltd and others (1983) 2 All ER – 589, Sir Donaldson MR held at page 593 that:-

> "As I have said, ex- parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this – He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order."

50. In the case of Tate Access Floor Vs Boswell (1990) 3 All ER 303, the court held at page 316 thus: -

> " No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the exparte order and may mark its displeasure, refuse the Plaintiff further inter-partes relief even though the circumstances would otherwise justify the grant of such relief." (Emphasis added)

51. In the case of The King Vs The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1917) 1 KB 486, Warrington LJ stated at page 509 that:-

> " It is perfectly well settled that a person who makes an exparte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

At pages 513 to 514, Scrutton L.J emphasized that:-

> " Now the rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an exparte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement." (Emphasis added)

52. Finally, in the case of Brinks-MAT Ltd Vs Elcombe (1988) 3 All ER 188, the Court set out what the court has to consider to be material non-disclosure as follows:-

> " In considering whether there has been relevant non disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i)The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) The nature of the case which the applicant is making when he makes the application. (b) The order for which application is made and the probable effect of the order on the defendant, and (c) The degree of legitimate urgency and the time available for the making of inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a Plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see Bank Mellat v Nikpour at (91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not for every omission that the injunction will be automatically discharged.
>
> A locus poenitentiae (chance of repentance) may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.
>
> .....when the whole of the facts, including that of the original non-disclosure, are before it, (the court) may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed."

53. From the foregoing, it is clear that under our Civil Procedure Rules, an exparte order can be discharged. The court has a wide discretion in a proper case to discharge its orders made exparte and Such discretion has to be so exercised judiciously and in terms of the known legal principals. The applicant did disclose in her pleadings the existence of the "Nairobi petition" as pointed out in her replying affidavit. This was done at paragraph (n) of the chamber summons and paragraph 4(d) of the affidavit verifying the facts. This points to full and frank disclosure of material fact, for which she must be given the benefit of doubt.

54. That being the case the Respondents/Applicants allegation of misrepresentation of facts is not proved and the issue of misrepresentation of *the constitution* does not arise at this stage as both parties will have their day in court to argue on the merits or otherwise of the pending motion. The prayer to discharge,

vary and/or to set aside the orders issued on 28th September 2023 therefore has no merit and the same is dismissed.

55. The final issue for determination is whether this suit should be transferred to Nairobi. At paragraph 24 above a determination to that effect has been made.

Disposition

56. The court having considered all the issues raised in both the Notice of motion applications dated 29th September 2023 and 11th October 2023 I do grant the following orders;

    a. That all the prayer sought in the Notice of motion application dated 29th September 2023 are not Merited and the same are dismissed with Costs to the Applicant/Respondent.

    b. Pray 2 of the Notice of motion application dated 11th October 2023 is allowed, but all the other remining prayers in the said application are dismissed as unmerited. Each party will bear their own costs for this application.

    c. This file is transferred to Millimani High court (Constitutional & Judicial Review Division) for hearing and determination. For avoidance of Doubt the stay orders issued on 28th September 2023 will remain in force until this suit is heard and determined.

    d. This file is to be mentioned before the Deputy Registrar -High court (Constitution & Judicial Review Division) on 12th February 2023, for purposes of it being allocated an appropriate date before the presiding Judge of the said division for purposes of Directions.

57. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY, 2024.

In the presence of;

No appearance for Petitioner

Mr. A Opola for 1st Respondent

Mr. A. Opola for 2nd to 5th Respondent

COURT ASSISTANT- SUSAN/SAM