REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

JUDICIAL REVIEW NO. E003 OF 2021

VICTOR JUMA OWITI AND 4 OTHERS.....APPLICANTS

VERSUS

MICHEAL ABALA WANGA AND 2 OTHERS.....RESPONDENTS

RULING

The County Government of Kisumu issued a public notice reference no **CGK/COK/CM/PHL/VOL.1 through** Mr Micheal Abala Wanga on behalf of the Kisumu City Board on 2nd of March 2021 prohibiting residents of select areas of Kisumu City from interring their deceased kin in those areas. Being aggrieved with that decision the Applicants brought this action as residents of the affected areas seeking leave to file judicial review proceedings, decrying lack of public participation among other things and averring that the decision was arbitrary, ultra vires and against the rules of natural justice. Vide an Application under Certificate of Urgency dated 17th March 2021 the Applicants sought orders that the court be pleased to grant the Applicants leave to apply for the Judicial Review Order of ***Certiorari*** to remove and Bring before this Honourable Court, the Public Notice Reference No. **CGK/COK/CM/PHL/VOL.1** dated and issued by the 1st Respondent on 2nd March 2021 (hereinafter also referred to as the impugned Notice) on what he referred to as Disposal of Dead Bodies and ***Prohibition*** to prevent and or stop the 1st Respondent and/or the 2nd and 3rd Respondent, in person or through their agents, from enforcing the impugned Notice to the detriment and prejudice of the Applicants and or the general residents of the identified areas within Kisumu County. That the Court be pleased to order that the leave prayed for above if granted to operate as stay of the implementation and or enforcement of the impugned Notice.

The Application is supported by the grounds on its face and the sworn affidavit of Victor Juma Owiti, in which he avers that the notice purporting to designate certain sites for burials and cremations while prohibiting the same in other areas was issued without due process.

That the notice was issued without due consideration of the fact that residents in the affected areas were freehold land owners who deserve a hearing before such drastic action is taken. And further that the notice purported to create an illegal offence not contemplated by the law.

In response the Respondents' filed a replying affidavit dated 12th April 2021 sworn by Mr Micheal Abala Wanga in which he stated that the decision to issue the notice was informed by the evolving cosmopolitan nature of Kisumu which was growing exponentially. That this growth had led to increase in population and land scarcity thereby behooving the County to place moratoriums on burials within the City's jurisdiction. It was his contention that the constitution assigns the County Government exclusive jurisdiction over regulation of burial sites and cemeteries.

He asserted that in accordance with the Urban Areas and Cities Act the County has the mandate over land use, planning and zoning in ensuring that the City Master Plan is implemented.

He further averred that the Public Health Act provides that every person should be buried in a designated area such as a Cemetery, Hindu Crematorium and/or Muslim Cemetery, and it was upto the City Board to designate such areas. He concluded by stating that with the changing times it was no longer viable to hold on to the customary sentimental attachment to land. He subsequently called for dismissal of the application.

APPLICANT'S SUBMISSIONS

In their submissions dated 1st April 2021 the Applicants' laid down the following issues for determination; -

a. Whether the issuance of the impugned Notice was an Administrative Action amenable/susceptible to Judicial Review.

b. Whether the Application has met the threshold for the grant of leave to apply for the judicial orders sought.

c. Whether the application is one that would deserve the court's exercise of discretion for leave to operate as stay of execution.

On the first issue the Applicants' submitted that the issuance of the notice was an administrative action given that it was exercised by the County. It was their contention that any person including themselves who was aggrieved by an administrative action could apply for review of the decision.

On the second issue the Applicants' submitted that seeking leave was a prerequisite to seeking judicial review orders. They relied on the authorities of **REPUBLIC VS COUNTY OF KWALE & ANOTHER ex parte KONDO & 57 OTHERS, MEIXNER & ANOTHER VS A.G, ADEN NOOR ALI VS INDEPENDENT & BOUNDARIES COMMISSION & 3 OTHERS** and **INDEPENDENT SOCIETY VS INDEPENDENT ELECTORAL BOUNDARIES COMMISSION**, to buttress this point.

It was their submission that the 1st Applicant was a resident of Obunga Slums within Railways Ward of Kisumu while the 2nd to 5th Applicant's were residents in various areas affected by the notice. That each of the Applicants' were freehold title holders and thus had sufficient interest or locus standi to institute these proceedings.

It was their further submission that he Notice had Drastically changed their way of life and therefore the application herein was arguable for the reason that:

a. The 1st Respondent acted illegally by purporting to identify and designate official cemeteries and crematoriums, in the process creating an offence not contemplated in law.

b. The 1st Respondent acted irrationally and in an ultra vires manner.

c. The Notice was unreasonable for want of due process and lack of public participation.

d. The Notice was unreasonable as it was made without due regard to the customary rights of the residents

e. The Notice was discriminatory for selectively prohibiting burial in some areas and leaving out other parts of Kisumu.

With regard to whether the Application concerns public law it was their contention that the offices of the Respondents were creations of statute exercising public function and their actions amounted to administrative action amenable to judicial review.

They concluded by stating that the application was not hopeless frivolous or vexatious as it had very high chances of success.

On whether the Application for leave should act as stay of execution counsel for the Applicants' submitted that this court has discretionary powers to direct that leave applies as stay of execution of the Notice. They relied on the case of **REPUBLIC VS SECRETARY OF STATE FOR EDUCATION AND SCIENCE, ex parte AVON COUNTY COUNCIL** cited with approval in **REPUBLIC vs NATIONAL ASSEMBLY & ANOTHER ex parte COALITION FOR REFORM AND DEMOCRACY,** where it was stated that;

"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 been finally determined is in my view, correctly described as a stay."

They also relied on the cases of **MUMA & KANJAMA ADVOCATES VS NATIONAL INDUSTRIAL TRAINING AUTHORITY & ANOTHER, R(H) .vs. ASHWORTH SPECIAL AUTHORITY and TAIB A TAIB .vs. THE MINISTER FOR LOCAL GOVERNMENT & OTHERS.**

Which more or less stressed on the fact that leave should operate as stay of execution. They urged the Court to allow Application as prayed.

RESPONDENTS SUBMISSIONS

Vide their submissions dated 9th July 2021, the Respondents outlined the following issues for determination.

a. Whether the Notice was rightfully furnished in accordance with the law.

b. Whether the Applicants are entitled to leave in their quest for Judicial Review.

c. Whether the Applicants' application if granted shall operate as a stay of the implementation and or enforcement of the Public Notice.

On the first issue the Respondents submitted that the County Government is mandated by the constitution to oversee matters regarding cemeteries, funeral parlours and crematoriums, via Article 185(1) and schedule 4 part 2 of the constitution. Therefore, they were legally justified to issue guidelines.

They contended that Section 20(1) of the Urban Areas and Cities Act mandates the city to enforce land use and zoning laws. They further placed reliance on section 144(1)(2) of the Public Health Act which provides that burials should be done in designated sites.

It was their further submission that the Urban Area and Cities Act 2011 first schedule Section 5 confers upon the City Board the responsibility of providing space for cemeteries and crematoria.

In conclusion while urging the court to find that the County Government Acted well within their jurisdiction they referred the court to the case of **Republic vs Commissioner of Customs Services ex-parte Africa K-link International Limited Nairobi [2012]eKLR.**

Where the court held that Judicial Review is mainly concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself.

On the second issue counsel for the Respondents, contended that the application herein was frivolous, futile and fatally defective thus not worthy for consideration by this court, as the right procedure was followed in issuing the Notice.

It was their further contention that there was no need for public participation as the City is the body tasked with carrying out land use and enforcing laws and policies already in place. They argued that even if there was need for public participation it wasn't mandatory and lack thereof did not invalidate the Respondents' action. They relied on the case of **Institute of social Accountability & Anor .vs. The National Assembly & 7 Others [2017] eKLR**

The respondents further submitted that the Applicants' lacked locus Standi to institute these proceedings as they had failed to prove ownership of land in the affected areas. They relied on the case of **Law Society of Kenya .vs. Commissioner of Lands,** where the court held that *Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in court of law.*

On the last issue it was counsel's submissions that having failed to prove ownership then the Applicants' were not entitled to stay of execution. They supported this argument by citing the case of **Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015]eKLR**

Where the court stressed the importance of an Applicant demonstrating a prima facie case before he/ she could be granted a conservatory relief, and that public interest and relevant material facts were major factors a court should consider while exercising its discretion in granting a conservatory order. On the strength of this authority counsel for the Respondents' urged this court to deny the Applicants stay of execution.

They further submitted that if leave granted acts as stay then this would affect the smooth administration of the county, to buttress this point they relied on the authority of **Republic vs Attorney General & 8 others [2009]eKLR** in which the court was of the opinion that leave granted for judicial review should not operate as stay if it would violate the needs of good administration.

They urged this court to deny the Applicants the prayer that Leave operates as stay for the reason that they had failed to demonstrate how they would be prejudiced or inconvenienced if leave is not granted save for cultural and sentimental attachment to the land.

They urged the court to dismiss the Application with costs to the Respondents.

ISSUES FOR DETERMINATION AND ANALYSIS

1. Whether the Applicants have met the threshold for grant of leave to apply for judicial review.

2. Whether the leave if granted may operate as stay of execution of the order.

WHETHER THE APPLICANTS HAVE MET THE THRESHOLD FOR GRANT OF LEAVE TO APPLY FOR JUDICIAL REVIEW.

The legal basis for leave prior to commencing Judicial review is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court has been sought and granted. As aptly put in the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** relied on by the Applicants, which Iam in agreement with the reason for leave was explained by Waki J. (as he then was), as follows:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

It is trite law that in an application for leave the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. This point was stressed in the case of **Njuguna *v Ministry of Agriculture*** [2001] 1 E.A as quoted in the case of **Uwe Meixner & another v Attorney General [2005] eKLR** Where the court stated as follows;-

."… leave should be granted, if on the material available the court considers without going into the matter in depth that there is an arguable case for granting leave".

The prerequisites to granting leave were further aptly stated in the case of **Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR as**; -

I. Applicant must prove "sufficient interest" or locus Standi

II. That he or she is affected by the decision being challenged.

III. That the Applicant has an arguable case and that the case has a reasonable chance of success

IV. That the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law;

V. That the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function.

With the above in mind the Applicants have provided proof of the notice by the Respondents. They have equally provided identity cards and a title deed of Ochieng Winyo the 2nd Applicant to prove that they reside in the area affected by the notice. The 1st and 3rd -5th Applicants have however not provided proof of residency in the affected areas.

In their submissions counsel for the Respondent had raised doubt as to the capacity of the Applicants to institute this action alleging that they were not residents of the affected areas. They have argued that the Title Deed is in the names of Ochieng Winyo while the identity card provided is in the names of David Ochieng Winyo therefore these maybe two different people. I believe the Applicants have proved sufficient interest on a balance of probabilities that they are residents of that area. The first Applicant has stated in the verifying affidavit that he has been authorized to swear the affidavit on behalf of the other Applicants. The Respondents on their part have not placed before court any evidence to disprove that David Ochieng Winyo and Ochieng Winyo are two different individuals or the piece of land does not fall within the affected areas.

Further the issue of public participation has been raised prominently a fact which has not been denied by the respondents. On the contrary they have argued that Public Participation was not mandatory as they were merely carrying out their duties. This however flies in the face of Section 5 (1) (b) of the Fair Administration Actions Act, which states that administrative bodies shall consider all views submitted in relation to the matter before taking the administrative action.

In view of the foregoing and given that the Respondents are exercising public function I find that the applicants have met the threshold for grant of leave to institute judicial review.

WHETHER THE LEAVE MAY OPERATE AS STAY OF EXECUTION OF THE ORDER.

In deciding whether to grant the above-mentioned prayer or not, courts are guided by various factors such as whether the decision is complete or is of a continuing nature. In the case of **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR,** it was held that**;**

"it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings."

A look at the current notice shows that it is a continuing order and therefore is amenable to being stopped at any time. In addition, there is need to prevent the implementation of the said decision until the legality of the Respondent's decision is established, in light of the prejudice pleaded by the Applicant. The stay orders sought by *the ex parte* Applicants are therefore merited to this extent.

In view of the foregoing the application is granted thus the leave prayed for above if granted to operate as stay of the implementation and or enforcement of the impugned Notice.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE