



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JR NO. E006 OF 2020

IN THE MATTER OF

AN APPLICATION BY NATIONAL SOCIAL SECURITY FUND FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST

THE CHIEF MAGISTRATE'S COURT AT MILIMANI

AND

IN THE MATTER OF:

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

THE MAGISTRATE'S COURT ACT, NO. 26 OF 2015

AND

IN THE MATTER OF:

EXERCISE OF SUPERVISORY JURISDICTION OVER THE SUBORDINATE COURTS

BETWEEN

NATIONAL SOCIAL SECURITY FUND APPLICANT

AND

SOKOMANIA LTD.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI.....2ND RESPONDENT

RULING

What is before the court is a Chamber Summons application dated 10th September, 2020 brought by the National Social Security Fund (hereinafter referred to only as "the Applicant") seeking the following orders;

1. Spent.
2. That leave be granted to the Applicant to apply for orders of certiorari to bring to this honourable court for purposes of quashing all proceedings currently subsisting before the Milimani Chief Magistrate's Commercial Court in MC ELC 1447 of 2020.
3. That leave be granted to the Applicant to apply for orders of certiorari to quash the orders of the Chief Magistrate's Court issued

on 31st January, 2020, 2nd September, 2020, 4th September, 2020 and all subsequent orders issued in Milimani Chief Magistrates Commercial court in MC ELC 1447 of 2020.

4. That this Honourable court be pleased to grant the Applicant leave to apply for orders of prohibition prohibiting any or further proceedings over the suit property for want of jurisdiction.

5. That leave granted in prayers 2, 3 and 4 do operate as a stay of the orders issued and proceedings undertaken thereon before Milimani Chief Magistrate's Commercial Court in MC ELC 1447 of 2020.

The application was brought on the grounds set out in the statement of facts dated 10th September 2020 and a verifying affidavit sworn by Austin Ouko on the same date. The Applicant averred that the 2nd Respondent lacks pecuniary jurisdiction to hear and determine MC ELC NO. E1447 of 2020 (hereinafter referred to as "the lower court suit"). The Applicant averred that the dispute in the lower court involves outstanding license fees arrears amounting to Kshs. 23,900,000.00/= and that the issues raised in the lower court suit have been heard and determined by the Business Premises Rent Tribunal in Tribunal Civil Application No.15 of 2016, Sokomania Ltd & Another v The National Social Security Fund (hereinafter referred to as "the Tribunal case") hence *res judicata*.

The Applicant averred that it is the registered proprietor of all those parcels of land known as L.R No. 209/12219 and L.R No. 209/12287 on which it has set up 230 parking bays (hereinafter referred to as "the suit property"). The Applicant averred that it had granted to a company known as Value Zone Ltd. a license to manage the suit property on its behalf in 2014. The Applicant averred that Value Zone Ltd. assigned the said license to the 1st Respondent which agreed to pay a monthly license fees of Kshs.1, 300,000/- to the Applicant.

The Applicant averred that the said license agreement between the Applicant and Value Zone Ltd. lapsed in August, 2015 and was extended for 2 months up to 31st October, 2015 after which the same was not renewed. The Applicant averred that the 1st Respondent defaulted in paying the license fees and upon the lapse of the term of the license agreement, the Applicant elected not to renew the same. The Applicant averred that in January, 2016 the 1st Respondent filed a reference before the Business Premises Rent Tribunal in Tribunal Case No.15 of 2016 (the Tribunal case) purporting to be the Applicant's tenant.

The Applicant averred that on 29th May, 2020, the Tribunal ordered the 1st Respondent to pay outstanding license fees arrears and wind up its operations or relocate its business from the suit property by 1st September, 2020. The Applicant averred that appeals from the Business Premises Rent Tribunal lie in the Environment and Land Court and not in the Chief Magistrate's Court. The Applicant averred that following that decision of the tribunal, the 1st Respondent moved the 2nd Respondent in the lower court suit through an application dated 25th August, 2020 seeking an order for the status quo be maintained in relation to the suit property and an injunction against the Applicant restraining it from taking possession of the suit property. The Applicant averred that the 2nd Respondent issued three orders in the lower court suit which contradict each other and all in contravention of the final orders of the tribunal in the Tribunal case which have not been stayed, varied or set aside on appeal.

The Applicant averred that on 31st August, 2020, the 2nd Respondent issued an order directing that the status quo in relation to the suit property be maintained pending the hearing and determination of the application before it by the 1st Respondent. The Applicant averred that the said order was served upon it after it had taken possession of the suit property pursuant to the said order of the tribunal. The Applicant averred that on 2nd September, 2020 the 2nd Respondent issued an order that the party that was in possession of the suit property was to remain in possession until the 1st Respondent's application was heard and determined. The Applicant averred that on 4th September, 2020, the 1st Respondent issued another order ex-parte granting an injunction against the Applicant restraining it from preventing the 1st Respondent's employees, servants/agents from entering and performing their duties on the suit property pending final determination of the 1st Respondent's application.

The Applicant averred that the orders referred to above were illegally obtained by 1st Respondent without disclosing material facts to the court and that the same are contradictory and difficult to obey. The Applicant averred that the 1st Respondent also moved the High Court in Miscellaneous Civil Application No. E080 of 2020 through an application dated 3rd September, 2020 seeking leave to appeal out of time against the tribunal's judgment of 29th May, 2020 aforesaid. The Applicant averred that the 1st Respondent has continued to initiate suits in different courts so as to engage the Applicant in continuous litigation with a view to depriving the Applicant of its right to the suit property.

In its submission in support of the application, the Applicant submitted that Article 22 of the Constitution guarantees a right to institute court proceedings to enforce the Bill of Rights and that Judicial Review is one the remedies available for violation of fundamental rights and freedoms enshrined in Article 23(3) (f) of the Constitution. The Applicant submitted further that Section 7 of the Fair Administrative Action Act allows any person aggrieved by an administrative action or decision to apply for review of the administrative action or decision. The Applicant submitted that the said provision of the Fair Administrative Action Act is in line with Article 48 of the Constitution that guarantees a right of access to justice. The Applicant submitted that the requirement of leave to apply for judicial review has become obsolete. The Applicant nevertheless cited several authorities among them, Republic v Kenya Revenue Authority, Ex Parte Keycorp Real Advisory Limited [2019] eKLR, Republic v County Council of Kwale & Another, Ex-parte Kondo & 57 others [1996] eKLR and Mexiner & Another v A.G.[2005]1 KLR 189 to demonstrate that it is entitled to the leave sought. The Applicant submitted that it should be granted leave to institute Judicial Review application because the lower court suit seeks orders that challenge the orders issued in the Tribunal case without following the acceptable route. The Applicant submitted further that the court should invoke its supervisory jurisdiction conferred by Article 165(6) and (7) of the Constitution over the 2nd Respondent so as to protect public interest which requires that the Applicant be enabled to manage and invest its members' contributions.

The Applicant submitted that the 2nd Respondent is a state organ and as such its decisions are within the scope of the definition of an administrative action under section 2 of the Fair Administrative Action Act, 2015. The Applicant submitted further that the 2nd Respondent violated the rules of natural justice when it issued ex-parte orders on 4th September, 2020 which fundamentally prejudiced the Applicant's

rights as enshrined in the Constitution. In support of this submission, the Applicant cited Onyango Oloo v Attorney General [1986-1989] EA 456.

The Applicant submitted further that the 2nd Respondent lacked jurisdiction to entertain the 1st Respondent's suit in the lower court. In support of this submission, the Applicant cited The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] KLR 1, Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Application No.2 of 2011 and Joseph Muthee Kamau & Another v David Mwangi Gichure & Another [2013] eKLR. The Applicant submitted further that the lower court suit is *res judicata*. The Applicant cited Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR in support of this submission.

The Respondents' case:

The 2nd Respondent did not respond to the application. The 1st Respondent filed grounds of opposition dated 30th October, 2020 and a replying affidavit sworn by Anthony Maina on 2nd November, 2020.

In its grounds of opposition, the 1st Respondent submitted that the application is fatally defective as it offends the provisions of Section 9 (2) (3) and (4) of the Fair Administrative Action Act, 2015. The 1st Respondent submitted that the acts complained by the Applicant are not within the purview of judicial review court. The 1st Respondent contended that the application is intended to delay the hearing of the 1st Respondent's suit in the lower Court. The 1st Respondent submitted that the application if allowed would violate Article 159 (2) (d) of the Constitution as it seeks to deny the 1st Respondent the right to access justice without delay. In its replying Affidavit, the 1st Respondent averred that a remedy of judicial review is not available where an alternative remedy exists and that it is a remedy of last resort to be invoked only when other avenues such as right of appeal have been explored.

In its submissions, the 1st Respondent reiterated that the acts complained of by the Applicant are not within the purview of judicial review. In support of this submission, the 1st Respondent cited among others; Alice Sisina v Land Registrar Kajiado & Another [2015] eKLR and John K.Malembi v Trufosa Cheredi Mudembei & 2 others [2019]eKLR. The 1st Respondent submitted that the Magistrate's Courts Act, 2015 grants subordinate courts jurisdiction to handle claims relating to Environment and Land. The 1st Respondent submitted that the 2nd Respondent dealt with the issue of jurisdiction of the lower court and that what the Applicant is seeking is an appeal against the said decision camouflaged as judicial review application.

The 1st Respondent submitted further that due process was followed by the 2nd Respondent and that no substantive orders were issued without the Applicant being given a chance to be heard. In support of this submission, the 1st Respondent cited among others, Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR. The 1st Respondent submitted further that the issues raised by the Applicant do not present exceptional circumstances, reason or any sufficient cause for this Court to ventilate upon hence the court should proceed with utmost caution on the call to exercise its supervisory powers over the 2nd Respondent. In support of this submission, the 1st Respondent cited Republic v Chief Magistrates Court at Milimani, Director of Public Prosecutions & 2 others (Interested Parties), Ex-parte Pravin Galot [2020] eKLR and Director of Public Prosecutions v Perry Mansukh Kansagara & 8 others [2018] eKLR.

The 1st Respondent also submitted that the application offends the provisions of Section 9 (2)(3) and (4) of the Fair Administrative Action Act as the applicant ought to have appealed against the lower court decision or applied for it review and setting aside. In support of this submission, the 1st Respondent cited Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others, [2016] eKLR, Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 Others, Ex-parte Alfred Kiptoo Keter & 3 Others [2018] eKLR and Speaker of National Assembly v Njenga Karume [2018] 1KLR 425.

The 1st Respondent submitted further that Applicant neither annexed the entire proceedings of the lower court nor the orders complained of and as such the court cannot set aside that which has not been presented before it. In support of this submission, the 1st Respondent cited Samson Kirerea M'ruchu v Minister for Lands & Settlement C. A 21 of 1999, Hussein Ali & 4 Others v Commissioner of Lands, Land Registrar & 7 others [2013] eKLR, Uhuru Highway Development Ltd. v Central Bank of Kenya & 2 Others, Civil Application No.Nai.140 of 1995, Margaret Nduati & Another v Housing Finance Company of Kenya, Nairobi (Milimani)HCCC No.307 of 2001 and Johnson Kimeli v Barcalys Bank of Kenya Ltd., Kisumu HCCC No.171 of 2003.

Determination:

Three issues arise for determination in the application before the court which I will consider together. First, whether the impugned orders of the 2nd Respondent are within the purview of judicial review, secondly, whether the Applicant has made out a case for grant of the leave sought to institute judicial review application and finally, whether leave if granted should operate as a stay.

Judicial review as a relief is provided for in among others; Article 23 (3) of the Constitution of Kenya 2010, section 8 of the Law Reform Act Chapter 26 Laws of Kenya, section 13(7) of the Environment and Land Court Act 2011, section 7 of the Fair Administrative Action Act 2015 and the Common law. In my view, no leave is required to seek judicial review as a relief under Article 23(3) of the Constitution where proceedings are instituted to enforce the Bill of Rights under Article 22 of the Constitution or where proceedings have been brought under section 7 of the Fair Administrative Action Act, 2015 for the review of an administrative action. Such leave is also not required under the Environment and Land Court Act 2011 before such relief is sought.

Leave is however still required in my view where an applicant for judicial review moves the court under the Law Reform Act Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules. Following the promulgation of the Constitution of Kenya, 2010 and Fair Administrative Action Act, 2015, applicants for judicial review orders have a choice. They can anchor their judicial review applications under the Constitution of Kenya 2010 and/or the Fair Administrative Action Act, 2015 in which case they will not need leave of the court or

go for the same relief under the Law Reform Act Chapter 26 Laws of Kenya and Order 53 of the Civil Procedure Rules like in the present case and be bound to seek leave of the court.

The Applicant has submitted that the requirement for leave to apply for judicial review is obsolete since the relief is now anchored in the Constitution and Fair Administrative Action Act 2015. That argument may be correct but as I have stated earlier, whether a party requires leave or not depends on how a party has moved the court. What is before this court is an application for leave. The Applicant cannot bring an application for leave to apply for judicial review and then turn around and claim that such leave is unnecessary.

The rationale for seeking leave to apply for judicial review has been given in many decisions of this court. In Republic v County Council of Kwale & Another, Ex Parte Kondo & 57 Others(supra) the court stated 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.”

As to the test to be applied in applications for leave, the court in Njuguna v Minister for Agriculture [2000] 1 E.A 184, held that:

“the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”

The court’s power of judicial review is discretionary and the court will not grant the order where there is an alternative appropriate remedy. In the book; Public Law in East Africa published by Law Africa, the author, Ssekaana Musa has stated as follows at page 250:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

In Speaker of the National Assembly v Karume(supra) the court stated that:

“In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

In Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others, [2015] eKLR the court stated that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

In Rhoda Wanjiru Kibunja v R. O. Mbogo, Resident Magistrate, Children’s Court, Milimani & another [2019] eKLR the court stated that:

“43. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. This is the power the applicant is invoking in this case. However, as noted earlier, the impugned decision is a judicial function, which to me is not amenable to judicial review but is appealable to the High Court. In fact, the reasons cited by the applicant are grounds for appeal as opposed to grounds for judicial review. The applicant is on record stating that she did not appeal and that the time prescribed for filing an appeal has since lapsed, hence the reason she seeks to review the decision. The said reasoning is legally flawed, it offends the provisions of the law setting out time limits for filing appeals and seeks to open doors for a litigant to file an appeal disguised as a judicial review.”

It is on the foregoing principles that the Applicant’s application will be considered. I am in agreement with the 1st Respondent that the impugned orders of the 2nd Respondent are not within the purview of judicial review. The orders complained of by the Applicant were made by the 2nd Respondent in exercise of its judicial function conferred by law. While making the impugned orders, the 2nd Respondent was not acting as an administrative body but as a judicial body. The 2nd Respondent’s decision was therefore judicial rather than administrative. I am of the view that orders made by a Magistrate’s Court in exercise of its judicial function are not amenable to judicial review as administrative action.

I am of the view that orders made by a Magistrate’s Court in exercise of its judicial function should be appealed or where sufficient reason exists, should be reviewed under the supervisory jurisdiction of the court under Article 165(6) of the Constitution rather than being subjected to judicial review. In the present case, the 1st Respondent filed an application in the lower court in which it sought several orders. The application was opposed by the Applicant on various grounds including want of jurisdiction and *res judicata*. The 2nd Respondent considered the issues of jurisdiction and *res judicata in limine* and made a considered ruling. The Applicant is aggrieved by the said ruling and the

various orders that have been made by the 2nd Respondent in the lower court suit. I am in agreement with the 1st Respondent that to a large extent, what is being challenged by the Applicant in these proceedings is the merit of the 2nd Respondent's decisions. I am also in agreement with the 1st Respondent that to the extent that the Applicant is challenging the merit of the orders issued by the 2nd Respondent in the lower court, the Applicant had alternative remedy of appeal.

The Magistrate's Court Act, 2015 and the Environment and Land Court Act, 2011 give any person aggrieved with a decision of a Magistrate's Court on matters relating to environment and land a right of appeal to this court. The Applicant had a right of appeal to this court against the impugned orders. Interestingly, after filing the present application for leave to institute judicial review application, the Applicant lodged an appeal to this court namely, ELCA No. E048 of 2020 against an order that was made by the 2nd Respondent on 4th November, 2020 in the lower court suit the proceedings of which is sought to be stayed in the application herein. No reason has been put forward by the Applicant as to why it did not appeal against the orders which are sought to be reviewed herein. The Applicant had a right also to apply to this court for stay of execution of the said orders once he had lodged an appeal.

The need to exhaust alternative remedies before judicial review is sought is now anchored in the Fair Administrative Action Act, 2015 which the Applicant has called to its aid in its submissions in the present application. Section 9(1) of the Fair Administrative Action Act, 2015 provides that:

“Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Articles 22(3) of the Constitution.”

Section 9(2) of the said Act provides that:

“The High Court or subordinate court under subsection 1 shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under other written law are first exhausted.” (emphasis mine).

Although the impugned orders are not administrative actions under the Fair Administrative Action Act, 2015, it is clear from the foregoing that where there are internal mechanisms such as review or appeal or where a written law provides for a remedy for an administrative action or decision, this court is barred from entertaining any application for judicial review of such action or decision unless it is satisfied that such remedies have been exhausted. The Applicant has not satisfied me that it had exhausted the remedies that were available to it before approaching this court for leave to apply for judicial review of the 2nd Respondent's orders in question. As I have stated earlier, if the Applicant had filed an appeal, it had a right to apply for stay of execution of the said orders of the 2nd Respondent. It cannot therefore be said that the appeal process would not have been the most appropriate or convenient to him more particularly where there is evidence that the Applicant has appealed against an order issued by the 2nd Respondent in the lower court suit.

The Applicant has also called into its aid the supervisory jurisdiction of this court under Article 165(6) of the Constitution. It is common ground that this court has supervisory jurisdiction over the Magistrate's Court in respect of matters falling within its jurisdiction. What is disputed is whether this is an appropriate case in which the court should exercise that jurisdiction. The Applicant contended that valid grounds have been put forward to warrant the exercise of the court's supervisory jurisdiction while the 1st Respondent submitted to the contrary. The 1st Respondent submitted that this court's supervisory jurisdiction should be exercised sparingly and only in exceptional circumstances. The 1st Respondent cited several cases which it argued have laid down the principles that should guide the court in exercise of its supervisory jurisdiction. I will refer only to three of them. In Alice Sisina v Land Registrar Kajiado & another(supra) the court stated as follows:

“10. The orders issued by the trial court were in clear contravention of the statutory and legal requirements on framing, registration and filing of civil suits in our courts. The criteria and standard is provided for in the Civil Procedure Act and Rules.

11. I am of the considered view that this is a proper case in which the High Court is under duty in its oversight role to correct the error, mistake or legality of the proceedings and subsequent orders. The purpose is to ensure the ends of justice are met and to prevent abuse of the process of the court by the litigant.

12. I am satisfied that the letter by the Principal Land Registrar, Kajiado raises questions of the correctness, legality and regularity of the proceedings and a decision by the learned trial magistrate on the notice of motion dated 7/10/2015.

13. In exercising inherent supervisory powers under Article 165 (6) and (7) of the Constitution. The proceedings and orders granted cannot be allowed to stand the test of legality and propriety. There is therefore constitutional and statutory necessity to set aside the orders against the respondent.”

In Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot(supra), the court stated as follows:

“59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and

prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. (see, *Gallagher v Gallagher* 212 So. 2d 281,283(La. Ct.App.1968)).

60. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* AIR 1951 Cal.193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere” (see *D.N. Banerji v P.R Mukherji* 1953 S.C 58).

In *Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others*(supra), the court stated as follows on the same issue:

“150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court’s intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:

- a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;**
- b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;**
- c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.**
- d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring “the fair administration of justice”;**

This list showing rationale for intervention is of course not exhaustive.

151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:

- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings**
- ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question**
- iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;**
- iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;**
- v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;**

152. The above situations are not exhaustive neither are they unique to only the exercise of Supervisory Jurisdiction.”

The above cases that were cited by the 1st Respondent give some guidance on the exercise of the court’s supervisory powers under Article 165(6) of the Constitution. I am in agreement with the 1st Respondent that the supervisory power should be exercised sparingly and only in exceptional circumstances. It is also clear that the power should not be exercised where there is an appropriate alternative remedy. As I have stated earlier, the Applicant had a right of appeal against the orders of the 2nd Respondent sought to be reviewed. There is however some aspect of the Applicant’s application that gives me some discomfort as far as the alternative remedy of appeal is concerned. The Applicant’s complaint does not concern only the orders that were issued by the 2nd Respondent but also the proceedings before the 2nd Respondent as a whole. Whereas, the orders that were issued by the 2nd Respondent could be appealed or reviewed as I have held, I have doubts with regard to the appealability of the entire proceedings before the 2nd Respondent which the Applicant has termed an abuse of the process of the court since the same is challenging the decision of the tribunal. I am persuaded that the Applicant has made out a case for the exercise of this court’s supervisory jurisdiction with respect to the proceedings before the 2nd Respondent.

I have noted that 1st Respondent’s suit in the lower court seeks principally to retain possession of the suit property. In its plaint in the lower court, the 1st Respondent has sought among others; general damages for trespass, a declaration that the intended termination of the 1st

Respondent's license and re-entry into the suit property by the Applicant is unlawful and an order in the nature of equitable relief of forfeiture revoking the Applicant's decision to terminate the 1st Respondent's license. The lower court suit was filed by the 1st Respondent after the tribunal's judgment of 29th May, 2020. In the tribunal's judgment, the 1st Respondent was given up to 1st September, 2020 to vacate the suit property and handover possession of the same to the Applicant. It is common ground that the said order of the tribunal has not been stayed, varied or set aside. I am of the view that in seeking to retain possession of the suit property against the tribunal's order, the 1st Respondent is setting the stage for collision between the 2nd Respondent and the tribunal which is an abuse of the court process. I am persuaded that the 1st Respondent should not have instituted the lower court suit while the orders of the tribunal were subsisting.

There is now in existence two conflicting orders; one issued by the tribunal in the tribunal case and the other issued by the 2nd Respondent in the lower court suit. The tribunal ordered the 1st Respondent to vacate the suit property by 1st September, 2020. The 2nd Respondent on the other hand issued an order restraining the Applicant from taking possession of the suit property which in effect stayed the order of the tribunal. The 2nd Respondent has no power to stay orders of the tribunal. The prevailing situation now is that the Applicant is claiming possession of the suit property pursuant to a lawful order of the tribunal while the 1st Respondent is similarly claiming possession of the suit property pursuant to an order of the 2nd Respondent. This court being a superior court with supervisory jurisdiction over both the tribunal and the 1st Respondent has a duty to avert chaos that is likely to result in the enforcement by the parties of the conflicting orders. Since, the orders made by the tribunal were the first in time, I am of the view that this court would be abetting an injustice against the Applicant and undermining proper administration of justice if it fails to intervene in this matter.

Due to the foregoing, it is my finding that whereas the impugned orders by the 2nd Respondent are not amenable to judicial review the same having been made by the 2nd Respondent in exercise of its judicial function and there being in existence a statutory remedy of appeal to this court against the same, the underlying proceedings in which the said orders were issued amounts to an abuse of the court process and is amenable to review in exercise of this court's supervisory jurisdiction under Article 165(6) of the Constitution. Since the proceedings and the orders of the 2nd Respondent are inseparable, I am inclined under the supervisory jurisdiction of the court to grant leave to the Applicant which is actually superfluous to challenge the proceedings of the lower court and the orders of the 2nd Respondent made therein. It is also my finding that a case has been made out for the leave to operate as a stay.

In conclusion, I hereby make the following orders;

1. The Chamber Summons application dated 10th September, 2020 is allowed in terms of prayers 2, 3, 4 and 5 thereof.
2. The Judicial Review application shall be filed within 21 days from the date hereof.
3. The costs of the application shall abide the outcome of the Judicial Review application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Aradi h/b for Mr. Eredi for the Applicant

Mr. Omboko for the 1st Respondent

N/A for 2nd Respondent

Ms. C. Nyokabi-Court Assistant