



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 106 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

NAIROBI METROPOLITAN SERVICE.....2ND RESPONDENT

EX PARTE APPLICANT: CONSUMER LINK COMMUNICATIONS LIMITED

RULING

The Application

1.Consumer Link Communications Limited, the *ex parte* Applicant herein, states that it has a license from the Respondents to put up outdoor advertising upon terms governed by the license, the 1st Respondent’s policy on outdoor advertising and the Nairobi County Outdoor Advertising and Signage Control and Regulations Act, and which specifically allow for visibility of the advertising and prevent competitors from blocking the same.

2. The *ex parte* Applicant is therefore aggrieved by the decision of the Respondents to permit the erection of an outdoor advertising that has blocked the applicant’s advertisement. The 2nd Respondent has been sued on the ground that it has taken over the 1st Respondent’s physical planning department and duties, and the *ex parte* Applicant states that it is thus jointly and severally culpable for the 1st Respondent’s wrongs.

3.The *ex parte* Applicant has consequently moved this Court in an application by way of Chamber Summons dated 18th May 2020, seeking the following orders:

“1. THAT the application be certified urgent and be heard *ex parte*.

2. THAT leave be granted to the applicant to institute judicial review proceedings seeking:

a) An Order of *Certiorari* to remove into this Court for quashing and to quash the decision of the 1st and 2nd Respondents to permit the erection, commissioning and operation of an outdoor advertising led screen sign along Uhuru Highway Nairobi at KEMU Towers within a distance of 100 metres of the applicant’s wall wrap outdoor advertising signage situate/ erected at Hazina Towers along and or facing Uhuru Highway/ University Way, Nairobi, and or in any manner whatsoever that blocks the visibility from the public of the applicant’s wall wrap.

b) An Order of prohibition to stop the 1st and 2nd respondents from licensing the erection and operation and or continued operation of any outdoor advertising sign at or near the applicant’s wall wrap outdoor advertisement and signage located or erected at Hazina Towers along and or facing Uhuru Highway/ University Way, Nairobi.

c) An Order of *mandamus* to compel the 1st and 2nd respondents to remove the outdoor advertisement led sign erected within 100 metres at Kemu Towers at or near the University Way Round About and or in such a manner as to block or deter the visibility to the public of the applicant's wall wrap outdoor advertisement sign situated or located at Hazina Towers facing Uhuru Highway/ University Way, Nairobi.

3. THAT leave so granted to institute judicial review proceedings do hereby operate as a stay to suspend the operation, use and lighting of the outdoor advertising LED Screen sign erected along Uhuru Highway Nairobi at KEMU Towers within near the applicant's wall wrap outdoor advertising signage at Hazina Towers along and or facing Uhuru Highway/ University Way, Nairobi.

4. THAT Costs be to the applicant.

5. Any other order that is just and equitable.”

4. The application is supported by the *ex parte* Applicants' Statutory Statement dated 18th May 2020, and a verifying affidavit sworn on the same date by Joseph Ngéthe Gitau, the *ex parte* Applicant's director. In summary, the *ex parte* Applicant avers that it is an outdoor advertising company with a current licence to erect and operate an outdoor advertising structure known as a wall wrap, at Hazina Towers Nairobi facing the Uhuru Highway/ University Way. Further, that it has erected one such wall wrap on behalf of its commercial client, Coca Cola Limited, having leased that site from the landlord at Hazina Towers, and after the 1st Respondent's planning department approved the erection and operation of the said wall wrap after following due process.

5. However, that the 1st Respondent violated the terms of the approval and licence it gave to the *ex parte* Applicant by permitting the erection of a LED Screen Outdoor Advertising Sign at KEMU Towers Uhuru Highway/ University Way Round About, about less than 10 metres from the *ex parte* Applicant's wall wrap, that has blocked the visibility of, and distracts the public from viewing the said *ex parte* Applicant's wall wrap.

6. The *ex parte* Applicant annexed various documents in support of its case, including copies of approval of development permission for the construction of the wall wrap given to it by the 1st Respondent, excerpts of the applicable policies and provisions of the law it relies upon, and copies of the demand notices it made to the Respondents.

The Determination

1. I have considered the application dated 18th May 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent in light of the alleged continuing obstruction of its wall wrap at Hazina Towers.

2. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law 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 was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

3. It is also trite that in an application for leave such as the present one, 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. In the present application, the *ex parte* Applicant has provided evidence of the license granted to it by the 1st Respondent to put up an outdoor wall wrap, and has also averred to the reasons why it considers the Respondents' actions to be illegal, while citing the applicable legal provisions in this regard.

4. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

5. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“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.

6. In **R (H) vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

7. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

8. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

9. In the present application it would appear that the implementation of the impugned Respondents' decision is complete, as the offending LED Screen Outdoor Advertising Sign at KEMU Towers Uhuru Highway/ University Way Round About is up and operational. In addition, the owner/proprietor/licencee of the offending LED Screen Outdoor Advertising Sign has not been joined in these proceedings, as he or she is likely to be affected by any orders given in relation to the said LED Screen Outdoor Advertising Sign. To this extent the *ex parte* Applicant needs to identify the said owner/proprietor/licencee, and serve him or her with the pleadings it has filed in this suit, to facilitate his or her participation. The stay orders are therefore to this extent not merited.

The Orders

10. In light of the foregoing observations and findings, the *ex parte* Applicant's Chamber Summons dated 18th May 2020 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants' Chamber Summons application dated 18th May 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing *ex parte* at the first instance.

II. The *ex parte* Applicant is granted leave to institute judicial review proceedings seeking an order of Certiorari to remove into this Court for quashing and to quash the decision of the 1st and 2nd Respondents to permit the erection, commissioning and operation of an outdoor advertising LED screen sign along Uhuru Highway Nairobi at KEMU Towers within a distance of 100 metres of the Applicant's wall wrap outdoor advertising signage situated/ erected at Hazina Towers along and or facing Uhuru Highway/ University Way, Nairobi, and or in any manner whatsoever that blocks the visibility from the public of the Applicant's wall wrap.

III. The *ex parte* Applicant is granted leave to institute judicial review proceedings seeking an order of Prohibition, to stop the 1st and 2nd Respondents from licensing the erection and operation and or continued operation of any outdoor advertising sign at or near the Applicant's wall wrap outdoor advertisement and signage located or erected at Hazina Towers along and or facing Uhuru Highway/ University Way, Nairobi.

IV. The *ex parte* Applicant is granted leave to institute judicial review proceedings seeking an order of Mandamus to compel the 1st and 2nd Respondents to remove the outdoor advertisement LED sign erected within 100 metres at Kemu Towers at or near the University Way Round About and or in such a manner as to block or deter the visibility to the public of the Applicant's wall wrap outdoor advertisement sign situated or located at Hazina Towers facing Uhuru Highway/ University Way, Nairobi.

V. Prayer 3 of the *ex parte* Applicant's Chamber Summons dated 18th May 2020 seeking orders that the leave so granted to institute judicial review proceedings do hereby operate as a stay to suspend the operation, use and lighting of the outdoor advertising LED Screen sign erected along Uhuru Highway Nairobi at KEMU Towers near the Applicant's wall wrap outdoor advertising signage at Hazina Towers is declined.

VI. The costs of the Chamber Summons dated 18th May 2020 shall be in the cause.

VII. The *ex parte* Applicant shall file and serve the Respondents and the owner/proprietor/licencee of the LED Screen Outdoor Advertising Sign at KEMU Towers Uhuru Highway/ University Way Round About with (i) its substantive Notice of Motion (ii) the Chamber Summons dated 18th May 2020 and its supporting documents, (iii) a copy of this ruling, and (v) a mention notice, within twenty-one (21) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the *ex parte* Applicant's substantive Notice of Motion within twenty-one (21) days from the date of service by the *ex parte* Applicant.

IX. This matter shall be mentioned on 14th July 2020 for further directions.

X. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

XI. In this respect, all the parties shall file their pleadings, applications and written submissions electronically, by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com, and shall also avail the electronic copies in **word format.**

XII. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

XIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XIV. The parties shall also be required to send the respective affidavits of service by way of electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

XV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling and the extracted orders to the *ex parte* Applicant by electronic mail by close of business on Thursday, 21st May 2020.

XVI. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 14th July 2020, and bring it to the attention of a Judge in the Division on that date for further directions.

XVII. Parties shall be at liberty to apply.

11. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE