



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NO. 97 OF 2020**

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

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....RESPONDENT**

**EX PARTE APPLICANTS:**

**1. NAIROBI CITY WATER AND SEWERAGE COMPANY**

**2. NAHASHON MUGUNA MAINGI**

**RULING**

**The Application**

1. The *ex parte* Applicants herein are aggrieved by a decision by the Respondent to arrest of the 2<sup>nd</sup> *ex parte* Applicant on 9<sup>th</sup> May 2020 on charges of discharging pollutants into the aquatic environment contrary to Section 72(1) of the Environmental Management and Co-ordination Act of Kenya and failing to exercise due diligence to ensure compliance contrary to Section 145(1) as read with Section 144 Environmental Management and Co-ordination Act. The plea taking is scheduled for 13<sup>th</sup> May 2020 at the Chief Magistrate's Court at Makadara.

2. The *ex parte* Applicants have moved this Court in an application by way of Chamber Summons dated 12<sup>th</sup> May 2020, seeking orders that the said application be certified urgent, and for leave to apply for judicial review orders of certiorari and prohibition to quash and prohibit the said criminal proceedings. The *ex parte* Applicants also seek orders that the said leave operate as a stay of their intended arrest, charging, arraignment and prosecution in the said criminal proceedings, and that the costs of the application be provided for.

3. The application is supported by the *ex parte* Applicants' Statutory Statement dated 12<sup>th</sup> May 2020, and a verifying affidavit sworn on the same date by Patrick Maina, the 1<sup>st</sup> *ex parte* Applicant's legal officer. In summary, the grounds are that the 2<sup>nd</sup> *ex parte* Applicant is the Managing Director of the 1<sup>st</sup> *ex parte* Applicant, and has not been accorded notice or fair administrative action of the charges brought against him. Further, that the 1<sup>st</sup> Applicant is body corporate capable of being sued in its own right, and that the sewerline in question is not owned by the 1<sup>st</sup> *ex parte* Applicant, who only has rights of usage.

**The Determination**

4. I have considered the application dated 12<sup>th</sup> May 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicants have demonstrated that this matter is urgent in light of the intended arraignment of the 2<sup>nd</sup> *ex parte* Applicant to answer to criminal charges on 13<sup>th</sup> May 2020.

5. On the orders sought by the *ex parte* Applicants for leave to commence judicial review proceedings, the applicable law on leave 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 HCMCA 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.

6. 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* Applicants have provided evidence of the charge against the 2<sup>nd</sup> *ex parte* Applicant. The *ex parte* Applicants have also averred to the grounds and reasons why it considers the Respondent's action to be illegal and *ultra vires*.

7. 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.

8. 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.”**

9. 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.

10. 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. 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**.

11. In the present application the 2<sup>nd</sup> *ex parte* Applicant is due to take plea today 13<sup>th</sup> May 2020, and the Respondent's decision to charge and conduct criminal proceedings against him is therefore amenable to stay. In addition, there is need to stay the criminal proceedings until the legality of the Respondent's decision is established. The stay orders sought by the *ex parte* Applicants are therefore merited to this extent.

### **The Orders**

12. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 12<sup>th</sup> May 2020 is found to be merited. I accordingly grant the following orders:

**I. The *ex parte* Applicants' Chamber Summons application dated 12<sup>th</sup> 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* Applicants are granted leave to apply for an order of Certiorari to bring to this Court and quash the decision of the Respondent and/or its agents/servants to institute and undertake criminal proceedings, summon and or cause the 2<sup>nd</sup> *ex-parte* Applicant in the intended criminal prosecution pending for plea taking in the Chief Magistrate's Court at Makadara for the alleged offences of discharging pollutants into the aquatic environment contrary to Section 72(1) of the Environmental Management and Co-ordination Act of Kenya and failing to exercise due diligence to ensure compliance contrary to Section 145(1) as read with Section 144 Environmental Management and Co-ordination Act.**

**III. The *ex parte* Applicants are granted leave to apply for an order of Certiorari to bring to this court for purposes of being quashed and to quash the decision of the Respondent contained in the Charge Sheet and all the proceedings in Chief Magistrate Court at Makadara, including taking of pleas, any appearance, taking of statements or any matter whatsoever related to the said charges.**

**IV. The *ex parte* Applicants are granted leave to apply for an order of Prohibition prohibiting the Respondent from proceeding with or carrying out any further proceedings, prosecuting, charging, summoning, directing the taking of pleas or in any manner dealing with the or conducting the intended criminal proceedings against the 2<sup>nd</sup> *ex parte* Applicant in Makadara or any other Court proceedings based on the same factual and evidentiary basis as in the intended prosecution in the Chief Magistrate's Court at Makadara.**

**V. The leave so granted herein to institute these judicial review proceedings shall operate as a stay of the intended criminal proceedings against the 2<sup>nd</sup> *ex parte* Applicant by the Respondent pending the hearing and determination of the *ex parte* Applicants' substantive Notice of Motion or further orders by this Court.**

**VI. The costs of the Chamber Summons dated 12<sup>th</sup> May 2020 shall be in the cause.**

VII. The *ex parte* Applicant shall file and serve the Respondent with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 12<sup>th</sup> May 2020 and its supporting documents, a copy of this ruling, and a mention notice, within fourteen (14) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondent shall be required to file their responses to the substantive Notice of Motion within fourteen (14) days from the date of service.

IX. This matter shall be mentioned on 15<sup>th</sup> June 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* Applicants' substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com), and shall also avail the electronic copies in word format.

XI. 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.

XII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIV. 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 Wednesday, 13<sup>th</sup> May 2020.

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 15<sup>th</sup> June 2020, and bring it to the attention of a Judge in the Division on that date for directions.

XVI. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY 2020

P. NYAMWEYA

JUDGE