



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

JR. APPLICATION NO. 16 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

AND

JAFFAR AHMED MOHAMED.....EX-PARTE APPLICANT

RULING

1. On the 20th November 2019, the court (Ogola, J) granted the Ex-parte Applicant leave to commence Judicial Review proceedings for orders of certiorari to bring to this court for purposes of being quashed the decision of the respondent made on 21st August 2019 revoking the approval of building plans of a proposed extension on PLOT NO. 3877/I/MN made on 6th June 2019 subject to the conditions thereto. The court directed that the issue whether the leave granted should operate as stay will be canvassed inter partes. This ruling is therefore the subject of that issue.

2. The Ex-parte applicant submitted that he is the bona fide registered proprietor of all that parcel known as PLOT NO. 2877/I/MN. A copy of the title is annexed to the Ex-parte Applicant's verifying affidavit. The Ex-parte Applicant avers that he submitted his application for approval of a proposed extension on the said parcel on 14th March 2019 and the Application was approved by the Respondent on 6th June, 2019. That upon the said approval, the Ex-parte Applicant commenced a multi-million construction on the parcel and was almost at completion when on 21st August, 2019 the Respondent unilaterally revoked the said approval. It is the Ex-parte Applicants submission that the Respondent did not follow the dispute resolution mechanism provided for under Section 13 and 15 as read with Section 33(3) and (4) of the Physical Planning Act, Cap 286 Laws of Kenya.

3. The Ex-parte Applicant submitted that the respondent's decision was made unilaterally and unprocedurally and should be frowned upon by this court and should not be allowed to stand pending the hearing of the substantive motion. The Ex-parte Applicant submitted that the respondent has not tendered any evidence in form of an affidavit indicating that the Respondent had lodged a complaint against the decisions under challenge before the liaison committee or whether the liaison committee had reached any determination to warrant the Respondent's decision. The Ex-parte applicant contends that without such material placed before this court and considering that the Ex-parte Applicant is almost at the completion of the building, the leave granted should operate as stay. The Ex-parte Applicant further submitted that he has proved that he has an arguable case and as such the Respondent was mandated to prove their readiness to compensate the applicant for the losses incurred. That the respondent will suffer no loss in the event the stay sought is issued. The Ex-parte Applicant relied on the case of **Oil Com Kenya Limited –v- Permanent Secretary, Ministry of Roads & Public Works & Another (2008) eKLR**.

4. The respondent opposed the application through grounds of opposition dated 4th December, 2019 on the following grounds:

i. That this matter deals with approvals of building permits and as such, any grievance by an aggrieved party should first be dealt with the internal mechanisms established under Section 33 of the Physical Planning Act Cap 286 Laws of Kenya.

ii. That this Honourable court lacks jurisdiction in the first instance till the Ex parte Applicant exhausts the said internal mechanisms pursuant to Section 33 of the Physical Planning Act Cap 286 Laws of Kenya and Section 9 of the Fair Administrative Action Act.

iii. That as such, prayer 4 of the said application i.e. seeking that leave sought to commence judicial review proceedings do

operate as a stay of execution of the revocation notice dated 21st August 2019 against the Ex parte Applicant pending the hearing and final determination of the substantive motion to be filed is premature and ought not to be granted.

iv. That as such, the said application is ill conceived, frivolous, vexatious and is otherwise an abuse of court process and ought to be dismissed with costs awarded to the respondent.

5. I have considered the application. The only issue for consideration is whether the leave granted herein should operate as stay. The applicable law is Order 53 Rule 1(4) of the Civil Procedure Rules which provides 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.”

6. The decision whether or not to grant a stay pursuant to leave granted is thus an exercise of judicial discretion, and that discretion must be exercised judiciously. 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 have been discussed by the courts in various decisions.

7. In **George Philip M Wekulo –v- Law Society of Kenya & Another (2005)eKLR** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay as there is nothing remaining to be stayed. A similar decision was also made in **R-v- Capital Markets Authority Ex parte Joseph Mumo Kivai & Another (2012) eKLR**. According to these decisions, it is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. In **Jared Benson Kangwana –v – Attorney General, Nairobi HCCC No. 446 of 1995**, it was held that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. In the case **Taib A. Taib –v- The Minister for Local Government & Others, Mombasa HC MISCA. NO. 158 of 2006**, Maraga, J (as he then was) expressed himself as follows:

“... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decisions 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 decisions 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. It is however not appropriate to compel a public body to act.... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

8. In **Munir Sheikh Ahmed –v- Capital Markets Authority (2018)eKLR**, Nyamweya J held that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances and that where the action or decision is implemented, then the court needs to consider the completeness or continuing nature of such implementation. The other factor to consider in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of public interest. In **R-v- Capital Markets Authority Ex parte Joseph Mumo Kivai & Another (supra)** Majanja, J held that judicial review proceedings are public law proceedings for vindication of private rights and for this reason public interest is a relevant consideration in the granting of stay orders. It has also been held that where there is a public interest element involved, the court must strike a balance between the rights of an individual and the public interest and in striking the balance, the court should usually refuse to grant a stay unless satisfied that there is a strong and not merely an arguable, case that a tribunal's decision was unlawful. See **R(H) –v- Ashworth Special Hospital Authority (2003) IWL 127**.

9. Applying the above principles to the present application, it is this court's position that granting stay would amount to determining the substantive motion as its effect would allow the Ex parte applicant to continue with the construction works before the impugned revocation decision has been determined. In other words, granting the stay sought will mean that the court will have quashed the impugned decision at this stage and before hearing the parties in the substantive motion. I have perused the impugned decision dated 21st August 2019. The respondent states inter alia, that they have determined that the building under construction is outside the commercial zone on Links Road and as such is restricted by the existing zoning laws to a maximum of ground plus one floor. It is only after hearing the substantive motion that the court can determine whether or not the respondent was justified in revoking the permit that had earlier been granted to the Ex-parte Applicant. In my view the applicant can be compensated in damages. The best way to balance the rights of both parties in the circumstances of this case is to direct that the substantive judicial review application be disposed of in the shortest time possible. In the result, the court declines to grant an order of stay. Costs to abide the outcome of the substantive motion.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of February 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

No appearance for applicant

No appearance for respondent

Yumna Court Assistant

C.K. YANO

JUDGE