



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 89 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

BETWEEN

SAUTI COMMUNICATIONS LIMITED.....APPLICANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT

RULING

The Application

1. Sauti Communications Limited which is the Applicant herein, states that it is a limited liability media company. The Applicant has sued the Communications Commission of Kenya (hereinafter referred to as “the Respondent”), in relation to a decision made in a letter dated 12th April 2020, by which the Respondent revoked and repossessed the Applicant’s radio broadcasting frequency spectrum licence designated as 91.0Mhz.

2. The Applicant has now filed an application by way a Chamber Summons dated 5th May 2020, is seeking the following orders:

1. That the Court be pleased to certify this matter as urgent and the same be heard *ex parte* in the first instance.

2. That the Court be pleased to grant leave to the Applicant to apply for an order of Certiorari removing to this Court for purposes of being quashed, the decision of the Respondent made on 12th April 2020 by virtue of a letter under *Ref CA/FSM/BC/60 Vol 1* revoking and/or repossessing the Applicant a radio broadcasting frequency spectrum licence designated *91.0 MHz*

3. That the Court be pleased to grant leave to the Applicant to apply for an order of Prohibition to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from taking any steps, actions, and measures to enforce its decision contained in the letter dated 12th April 2020 under *Ref CA/FSM/BC/60 Vol 1* repossessing the Applicant a radio broadcasting frequency spectrum licence designated *91.0 MHz*.

4. That the Court be pleased to grant leave to the Applicant to apply for an order of Prohibition to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from acting upon the decision made on 12th April 2020 and/or assigning the radio broadcasting frequency spectrum licence in question to any persons or entity other than the Applicant..

5. That the Court be pleased to grant leave to the Applicant to apply for an order of Mandamus to compel the Respondent to assign the Applicant the radio broadcasting frequency spectrum licence in question

6. That the grant of leave do operate as a stay of the decision, directives and acts of the Respondent until determination of the application herein or until the Judge orders otherwise.

7. That the costs of the application be provided for.

3. The grounds for the application are stated in the Applicant's statutory statement dated 5th April 2020, and a verifying affidavit sworn on the same date by Musili Nzambu, the Applicant's director. In summary, the Applicant alleges that the Respondent's decision and action is unprocedural, unreasonable, illegal, unconstitutional and an infringement of the Applicant's legitimate expectation under the law, as the Applicant has complied with all regulatory requirements.

4. The Applicant annexed a copy of the Respondent's letter dated 12th April, 2020 as "Annexure MZ1" to its verifying affidavit. Also annexed were copies of its application for a broadcasting licence dated 24th June 2004; the authority given to it to operate a TV station and FM Radio station by the Ministry of Information and Communications dated 16th August 2004; the requests and application for frequency allocation to the Respondent; and the assignment of a frequency by the Respondent dated 22nd October 2004. The Applicant also provided evidence of copies of correspondence between the parties on issues raised by the Respondent in 2019 on the use and change of site of the frequency allocated to the Applicant.

The Determination

5. I have considered the application dated 5th May 2020 and the reasons offered in support of the urgency, and I am satisfied that the Applicant has demonstrated that this matter is urgent. This for reasons that the Respondent may take further actions arising from its decision of 12th April 2020, including that of assigning the subject frequency to a third party as indicated in the said letter.

6. On the orders sought by the Applicant 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 reason for the leave was 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** 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".

7. It is 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 Applicant has provided evidence of the assignment to it of the subject frequency by the Respondent, and of the Respondent's letter dated 12th April 2020 revoking the said assignment. The Applicant has also averred to the reasons why it considers the said revocation to be illegal and *ultra vires*.

8. To this extent, and in light of the evidence adduced, I find that the 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.

9. 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."

10. 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.

11. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

"... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision 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 decision 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...."

12. This factor was also discussed in R (H). vs Ashworth Special Hospital Authority (supra) where Dyson L.J. held as follows:

“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”

13. A similar position has been taken by Odunga J. in Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and in James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR, where the learned judge 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.

14. I am in agreement with the above-cited decisions. It therefore follows 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.

15. In the present application the Respondent stated in its letter of 12th April 2020 that it had repossessed the Applicant’s frequency assignment with immediate effect, and would assign it to a deserving applicant. Therefore, there are still actions the Respondent intends to undertake in relation to the said revocation and reassignment, and its decision is therefore of a continuing nature and thus amenable to stay. 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.

The Orders

16. In light of the foregoing observations and findings, the Applicants’ Chamber Summons dated 5th May 2020 is found to be merited. I accordingly grant the following orders:

I. The Applicants’ Chamber Summons application dated 5th May 2020 be and is hereby certified as urgent, and that the same is hereby admitted to hearing *ex parte* and on a priority basis.

II. The Applicant is granted leave to apply for an order of Certiorari removing to this Court for purposes of being quashed, the decision of the Respondent made on 12th April 2020 by virtue of a letter under *Ref CA/FSM/BC/60 Vol 1* revoking and/or repossessing the Applicant’s radio broadcasting frequency spectrum licence designated *91.0 MHz*.

III. The Applicant is granted leave to apply for an order of Prohibition to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from taking any steps, actions, and measures to enforce its decision contained in the letter dated 12th April 2020 under *Ref CA/FSM/BC/60 Vol 1* repossessing the Applicant’s radio broadcasting frequency spectrum licence designated *91.0 MHz*.

IV. The Applicant is granted leave to apply for an order of Prohibition to prohibit and restrain the Respondent either by itself, agents, employees or whatsoever from acting upon the decision made on 12th April 2020 and/or assigning the radio broadcasting frequency spectrum licence in question to any persons or entity other than the Applicant.

V. The leave so granted herein to the Applicant shall operate as a stay of the implementation of the Respondent’s decision contained in its letter dated 12th April 2020 addressed to the Applicant, and of any further directives or actions taken pursuant to the said decision, pending the hearing and determination of the substantive Notice of Motion.

VI. The costs of the Chamber Summons dated 5th May 2020 shall be in the cause.

VII. The Applicant shall file and serve the Respondent with the substantive Notice of Motion, and shall also serve the Respondent with the Chamber Summons dated 5th 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 its response to the substantive Notice of Motion within fourteen (14) days from the date of service.

IX. This matter shall be mentioned on 8th 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 Applicant’s 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 with copies to 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 with copies to 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 with copies to 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 Thursday, 7th May 2020.

XV. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 8th 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.

17. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF MAY 2020

P. NYAMWEYA

JUDGE