



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. MISC E041 OF 2020**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR**

**JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

ZHANG AIXIAN.....APPLICANT

**VERSUS**

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup> RESPONDENT

CHIEF MAGISTRATE'S COURT, KIBERA.....4<sup>TH</sup> RESPONDENT

**AND**

JIANG BAOQI.....1<sup>ST</sup> INTERESTED PARTY

SILZHA LIMITED.....2<sup>ND</sup> INTERESTED PARTY

REGISTRAR OF COMPANIES.....3<sup>RD</sup> INTERESTED PARTY

EDWARD ATE NANOK.....4<sup>TH</sup> INTERESTED PARTY

**RULING**

1. On 18<sup>th</sup> September 2020, this Court made the following orders in a ruling delivered on that date on the Applicant's Chamber Summons dated 17<sup>th</sup> September 2020:

a) The Applicant's Chamber Summons application dated 17<sup>th</sup> September 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* and on a priority basis.

b) The Applicant is granted leave to apply for an order of Certiorari to remove into this Court and quash the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to charge and prosecute the Applicant in Kibera Chief Magistrate's Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian)

c) The *ex parte* Applicant is granted leave to apply to apply for an order of Prohibition to prohibit further proceedings in Kibera Chief Magistrates Court Police Case No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian).

d) The leave so granted herein shall operate as a stay of further proceedings in Kibera Chief Magistrates Court Police Case

**No 145/93/200 and Criminal No. 896 of 2020 (Republic vs Zhang Aixian) pending the hearing and determination of the substantive application or until further orders.**

2. The Applicant has now filed another application by way of a Notice of Motion dated 1<sup>st</sup> October 2020, seeking the following orders:

**1. This application be certified as urgent and heard *ex parte*.**

**2. The Court be pleased to clarify that the order granted on 18 September 2020 directing that there be stay of proceedings in Kibera Criminal Case No 896 of 2020 means that as a result of the suspension of the proceedings in Kibera Criminal Case No 896 of 2020 the Applicant should be released unconditionally pending the hearing and determination of the proceedings hearing and subject to the outcome of these proceedings.**

**3. The Court be pleased to grant consequential relief orders directing the Officer in charge or commanding Industrial Area Prisons to forthwith release the Applicant.**

**4. The Court be pleased to grant any such other and further consequential orders and reliefs under Section 11 of the Fair Administrative Actions Act.**

3. The application is supported by an affidavit sworn by Valentine Ataka, the Applicant's advocate. The main grounds for the application are that despite the order of this Court on 18<sup>th</sup> September staying the decision to charge and prosecute the Applicant in Kibera Criminal Case No 896 of 2020, the Applicant is still under incarceration at Industrial Area Prison, yet he is yet to plead to the amended Charge sheet. Further, that on 21<sup>st</sup> September 2020, the Kibera Magistrate Court, the 4th Respondent herein, was requested to order the release of the Applicant on account of this Court's orders of 18 September 2020, and that in a ruling given on 25<sup>th</sup> September 2020 the said Magistrate's Court acknowledged this Court's orders but declined to make any consequential orders on the matter, saying that its hands are tied on account of the orders of 18<sup>th</sup> September 2020. Therefore, that the effect is that the Applicant who has been in custody since 4<sup>th</sup> September 2020 continues to be incarcerated without first pleading to charges against him.

#### **The Determination**

4. I have considered the application dated 1<sup>st</sup> October 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. This for reason that the application is seeking relief for the Applicant who is incarcerated in prison.

5. On the orders sought in the said application by the Applicant, I wish to reiterate that the purpose of stay order in judicial review proceedings as explained in ruling delivered herein on 18<sup>th</sup> September 2020 as follows:

**“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 including Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006.”**

6. Therefore, the stay order granted herein on 18<sup>th</sup> September 2020 is not a substantive order from which other consequential orders can flow in other related proceedings as sought by the Applicant, and its only purpose is to ensure that the present judicial review proceedings are not rendered nugatory. In addition, the stay order does not address the substance of the Applicant's dispute, either in these judicial review proceedings or in the criminal proceedings in Kibera Criminal Case No 896 of 2020, and is therefore not capable of giving rise to the kind of substantive consequential orders that are sought by the Applicant.

7. The Applicant should therefore move the appropriate forum with jurisdiction to grant the orders he is seeking, which is certainly not this Court. I also note in this regard that the Applicant's advocate has averred that he has filed a Revision Application in HCCCCR MISC 242 of 2020 for the file in the criminal case at Kibera Magistrate's Court to be called to the High Court, and that there has been inordinate delay resulting in the revision being deferred to 21<sup>st</sup> October 2020. To this extent, the application herein dated 1<sup>st</sup> October 2020 is also an abuse of the process of Court.

#### **The Orders**

8. In light of the foregoing observations and findings, I accordingly order as follows:

**I. The Applicant's Notice of Motion dated 1<sup>st</sup> October 2020 is hereby certified urgent and admitted to hearing *ex parte* on a priority basis.**

**II. The Applicant's Notice of Motion dated 1<sup>st</sup> October 2020 is hereby struck out, with no order as to costs.**

**III. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 16<sup>th</sup> November 2020 as earlier directed.**

**IV. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicant by electronic mail by close of business on Monday, 5<sup>th</sup> October 2020.**

**V. Parties shall be at liberty to apply.**

9. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> OCTOBER 2020**

**P. NYAMWEYA**

**JUDGE**