REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Coram: Odunga, J)

JUDICIAL REVIEW CASE NO. 312 OF 2019

IN THE MATTER OF AN APPLICATION BY RICHARD KALEMBE NDILE - FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDEMUS AGAINST MACHAKOS COUNTY GOVERNMENT, H.E THE GOVERNOR MACHAKOS COUNTY, THE DIRECTOR PLANNING COMPLIANCE & ENFORCEMENT AND MACHAKOS COUNTY GOVERMENT.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, THE ENVIRONMENT AND LAND COURT ACT, NO. 19 OF 2011 (SECTION 13), THE LAND REGISTRATION ACT, NO. 3 OF 2012 AND THE PHYSICAL PLANNING ACT (CAP 286 LAWS OF KENYA), SECTIONS 3,4, AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP.26 LAWS OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLES 2(4) 2 (5) (6) 20, 21, 22, 23, 27, 47, 50 AND 159 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CORDINATION ACT CHAPTER 387 LAWS OF KENYA

BETWEEN

RICHARD KALEMBE NDILE.....APPLICANT

AND

MACHAKOS COUNTY GOVERNMENT.....1ST RESPONDENT

GOVERNOR MACHAKOS COUNTY.....2ND RESPONDENT

DIRECTOR OF PLANNING,

MACHAKOS COUNTY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

EX-PARTE.....REPUBLIC

RULING

Introduction

1. On 11th July 2019, this Court granted leave to the applicant to commence judicial review proceedings but directed that the issue whether that grant of leave would operate as a stay be heard and determined after an inter partes hearing. It follows that the only pending prayer and which is the subject of this ruling is the prayer seeking direction that the leave granted herein do operate as a stay.

2. In the premises I intend to deal only with those averments and submissions which are relevant to the prayer for stay.

Applicants' Case

3. According to the applicant herein, he is the registered owner of LR Nos. 26 Mlolongo Karesh Building (Post Bank), Macha Beach Resort and 1504/20/27 Karsh Plaza, Mlolongo (hereinafter referred to as "the suit properties") where he has operated business since 2013 without any political interference. According to the applicant following the 2nd Respondent's advertisement for potential investors wishing to invest in Machakos, he bought five acres of land from different people around the vicinity of the area which had natural depression rectified through movement of tectonic plates. It was averred that the applicant created a natural conservancy that attracted wild animals like ostrich, Guinea Fowls, Golden Goose, Tortoises, Dik-dik, Wildebeest, Monkeys, Snakes, Fish and over 5o varieties of birds. The applicant's case is that the most popular activities are boat-riding, fishing and bird catching and that he has never interfered with the eco-system of the area but that instead neighbours water their animals in the area for free while wild animals, birds and reptiles similarly enjoy the water which bond has added value to the eco-system of the area.

4. However, the applicant averred that on 26th June, 2019 the 1st Respondent issued a notice directing the applicant not to use the food plant at Macha Beach Resort until certain conditions set by the Respondent were met. The following day on 27th June, 2016, the applicant was issued with two enforcement notices regarding the suit properties directing the applicant to comply with the dictates of the notices within a period of one day and thirty days respectively and that unless the said notices were complied with the said buildings would stand closed and the tenants would be evicted. The applicant however averred that he obtained all the necessary approvals from the Water Resources Management Authority dated 21st February, 2017 and presented Development Plans to the 1st, 2nd and 3rd Respondents who approved the same on 10th March, 2010. Further, the applicant has paid all the statutory charges to the Respondents

5. The applicant averred that he has invested over Kshs 120,000,000/= in the suit properties which has added value and employs over 140 youth (men and women).

6. It was the applicant's complainant that taking into account the principle of proportionality, the Respondents employed the most draconian method not commensurate with the grievances, if any and that the applicant has never been furnished with any evidence of the complaints regarding the noise levels. In his view, his activities are legitimate and have not harmed the environment in any way whatsoever but to the contrary he insisted that they have added value to the ecosystem.

7. It was therefore contended that the Respondents' actions violated sections 3, 4 and 5 of the Fair Administrative Action Act, 2015 amongst other provisions. It was the applicant's position that the said action was taken in bad faith after the applicant defended **Governor Mike Mbuvi Sonko** for value addition in service delivery in Nairobi City County which action offended the 2nd Respondent and in a show of impunity proceeded to close the applicant's hotels and offices.

8. After setting outs his case in the verifying affidavit sworn in support of the Chamber Summons for leave and stay and the only paragraph that address the issue of stay is paragraphs 39 of the verifying affidavit.

9. In his written submissions, the applicant avers that the decision whether the leave granted should operate as a stay is an exercise of judicial discretion and that if stay is not granted it may render the Applicant's substantive motion nugatory hence it will be in the best interest of justice to allow leave to operate as stay of the enforcement of the notices.

10. It was submitted that since this is a well deserving case where leave should operate as a stay, if stay is not granted; it may render the entire application an academic exercise or render the Applicant a pious explorer in the judicial process. In this regard reliance was placed on the holding in **Republic vs Anti-Counterfeit Agency & 2 Others** that:

> **"The purpose of stay in Judicial Review proceedings is to suspend the proceedings that are under challenge pending determination of the challenge. It preserves the status quo. It makes the judicial process more effective…"**

11. The applicant further relied on Article 3(1) as read with article 21(1) of the Constitution which obligates all State and non-State actors to respect, uphold, defend, protect, promote and fulfil the values and principles in the Constitution. Taking all the circumstances of this case into account, the Applicant therefore urged the Court to grant the stay orders based on **Republic vs. Cabinet Secretary for Internal Security ex parte Gregory Oriaro Nyauchi & 4 Others [2017] eKLR** and P**ravin Galot vs. Chief Magistrates Court at Milimani Law Courts [2017] eKLR.**

12. It was the Applicant's submissions that he has shown that he has a prima facie case with chances of success since his application raises serious legal and constitutional questions. Taking all the circumstances of this case into account he urged the Court to exercise discretion in favour of allowing leave to act as a stay of the notice until the matter is heard and determined and/or further orders of the court.

Respondents' Case

13. The application was however opposed by the Respondents. They relied on a replying affidavit sown by **Dessent Ingati**, the sub county

Physical Planning Officer, Mavoko Sub County, County Government of Machakos in which it was averred that on 27th June, 2019, the deponent and others carried out routine inspection of commercial and residential buildings within Mavoko Sub County in the ordinary course of business and among the building inspected include plot numbers 1504/20/27 and christened Karesh Plaza and LR 26 known as Karsh Building Mlolongo.

14. With regard to Karesh Plaza, the inspection established that the building is commercial in nature and was developed without approved development plans; that the building is still under construction on the upper floors; that the developer has never applied for or received a certificate of occupations as required by law; and that the lower floors of the building are occupied by tenants.

15. That following the said inspection the deponent issued the developer with an enforcement notice [form PPA7] dated 27th June, 2019 which notice was received by one **Penina Landi**, the building manager, which notice is necessary for the protection of the health and safety of the public in accordance with the ***Physical Planning Act***. According to the deponent, the occupation of a building under construction is not allowed under the building codes as set out in the ***Local Government [Adoptive] By Laws Order 1968***. Further, under ***Physical Planning Act [building and Development Control Rules [1998]*** the developer of a building who wishes to occupy is required to apply to the physical planner for inspection and certificate of occupation which the applicant failed to do so.

16. It was averred that whereas the enforcement notice issued to the applicant, reserved the applicant's right of appeal, the applicant did not exercise the said right.

17. With regard to the building known as Karesh Building the inspection established that the construction is a commercial/residential development; the premises is constructed without approved building plans from the County Government of Machakos; the building is poorly lit and poorly ventilated; the building is occupied without a certificate of occupation issued by the County Government of Machakos; and the building is a danger to public health and safety. Following the said inspection, the deponent issued the applicant with a thirty [30] days' notice to make provision for the defects noted which notice was to commence from 28th June, 2019 and has not lapsed. According to him, the notice is necessary for the protection of public health and safety and the said notice also reserved the applicant's right of appeal which right the applicant has not exercised.

18. It was deposed that the notices issued to the applicant are reasonable and lawful with the sole objective being the protection of public safety in accordance with the law. Under the said notice, the applicant was required to produce any building approvals and occupation certificates in his possession for verification but the applicant has not produced any building approvals or occupation certificates as required.

19. It was therefore the deponent's view that the applicant is not entitled to stay of the notices issued to him as such stay to result in aiding and abetting the unlawful acts of the applicant which acts are a danger to public health and safety.

20. The Respondents also relied on an affidavit sworn by **Issac Syuki Matheka**, the Public Health Officer Government of Machakos County, Department of Health and Emergency Services.

21. According to him, his day to day duties include the routine inspection of business premises to confirm compliance with operating licence conditions and public health regulations. On or about March 2019, several counties in Kenya including Machakos experienced an outbreak of cholera and other hygiene related diseases as a result of which his department intensified inspection of food handling business premises throughout the county. Following the increased inspections, on 5th March, 2019 his officers visited the premises known as Macha Beach Hotel operated by the applicant herein, **Richard Kalembe Ndile** and following the inspection the deponent's officers **Boniface Mwilu** and **Lucy Ndinda**, both public health officers under his department, issued the proprietor of the premises with a repair notice dated 7th March, 2019 requiring him to correct specified defects within 14 days of the notice. I attach and mark M-3 a copy of the repair notice. On 26th June, 2019, a follow up inspection was carried out by the deponent and his officers during which the inspection noted numerous defects including those previously the subject of the repair notice dated 7th March 2019.

22. According to the deponent, the defects noted included unavailability of liquid waste management solution, un recycled pond water, lack of valid food and hygiene licence, lack of kitchen store [dry and cold storage], lack of protective clothing for cooks and lack of impervious tops on all food preparation tables. Owing to the grave danger posed to public health by the defects noted, the deponent issued an immediate not to use notice and directed the proprietor to remedy the defects since the premises houses a bar and restaurant. He explained that the notice not to use a food plant was issued under the ***Food, Drugs and Chemical Substances [Food Hygiene] Regulations 2012*** with the objective of protecting public health and safety.

23. It was therefore averred that the notice not to use the premises was regular and lawful in the circumstance.

24. In their submissions, it was contended that an order of stay would in effect aid the continuation of the unlawful actions of the applicant to the detriment of public health and safety. The court was therefore urged to carefully balance the private commercial interests of the applicant with the public interest and good governance aims of the respondents. In this regard the Respondents relied on the decision in **R (H0 vs. Ashworth Special Hospital Authority (2003) 1 WLR 127**. Based on the decisions in **Munir Sheikh Ahmed vs. Capital Markets Authority [2018] KLR** and **Taib A. Taib vs. Minister for Local Government & Others Mombasa HCMiscA No. 158 of 2006**, it was argued that since the closure notice in respect of Macha Beach Hotel has since been fully implemented, it is inappropriate to order stay.

25. It was submitted that the conduct of the applicant in filing multiple proceedings in this court over the same subject matter amounts to abuse of court process hence disentitling the applicant to favourable exercise of discretion. In this respect the Respondents relied on **Republic vs. Sacco Societies Regulatory Authority ex parte Joseph Kiprono Maiyo & 3 Others [2017] eKLR**.

Determinations

26. I have considered the application, the affidavits filed herein and the submissions made by the parties and this is the view I form of the issues raised.

27. As already noted hereinabove, this court granted leave to the applicant to commence judicial review proceedings based on the finding that there is a prima facie case disclosed by the applicant. However, the mere fact that the application discloses a *prima facie* case does not necessarily qualify the matter to a grant of stay. The Court despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct the leave so granted to operate as a stay of the proceedings in question. Stay of proceedings or the questioned decision being discretionary ought only to be granted where the same is necessary and not as a matter of course. That discretion, like any other judicial discretion must therefore be exercised judicially and not capriciously or whimsically.

28. However, Order 53 rule 1(4) of the ***Civil Procedure Rules*** provides:

> ***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.***

29. In my view, even where the Court grants orders of stay under the aforesaid provision, it has wide powers to do so on such terms as are just including the period for which the stay is to last.

30. This Court has similarly held that as opposed to the grant of leave which a party is entitled once a *prima facie* case disclosing grounds for judicial review are established, the grant of direction that the leave operate as a stay is an exercise of judicial discretion which must be based on the prevailing circumstances. It may be granted at any stage of the proceedings and may similarly be varied, set aside or vacated all together depending on the circumstances of the case. It follows that an application for stay of the proceedings or decision in question can be made at any stage of the proceedings in a judicial review application as the determination of an application for stay must necessarily depend on the prevailing circumstances and where the circumstances change, the court is perfectly entitled to grant stay. In other words, a decision made with respect to stay is not necessarily caught up by the doctrine of *res judicata* though the same may amount to an abuse of the process of the court if made with the intention of overturning an earlier decision or as a means of haranguing the court.

31. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. 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. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

32. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

33. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review application nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

34. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited…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… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."**

35. Therefore, it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability as opposed to the possibility of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the only determinant factor.

36. In making a determination whether or not to grant the stay, the Court must place the respective cases of the parties before it in a legal scale. It must balance the competing interests in order to arrive at a just decision. Where the Court has found that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation. In my view the Court must have the power to guard against actions by some of the parties to the suit which are geared towards the dissipation of the subject matter before it before a determination is made one way or the other with respect to the rivalling issues placed before it. In other words, the Court must be in a position to ensure that whatever decision it finally arrives at, the proceedings before it are not seen to have been a circus.

37. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** this involves:

> **"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."**

38. It therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

39. As stated hereinabove this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell. I associate myself with the holding of Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

> **"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore… parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."**

40. I therefore agree that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

> **"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."**

41. In this application, as I have stated above, the only paragraph that deals with the limb of stay is a bland statement in paragraph 39 of the verifying affidavit and it states as follows:

> ***That the applicant remains apprehensive that if this Honourable Court does not intervene, the applicant herein is likely to suffer prejudice and irreparable harm.***

42. It is upon the applicant who seek to stay the decision under challenged to prove that there is an imminent threat of the impugned proceedings or action being undertaken and determined before the judicial review proceedings or that an action has been taken whose effect is to render the outcome of the latter nugatory. It is therefore not sufficient to simply make a bald statement that the applicant is likely to suffer prejudice and irreparable harm. Such a statement must be expounded upon by the applicant in order to show the circumstances and the manner in which the decision that is threatened or has been taken is likely to render the proceedings nugatory or remove pith of the litigation and leave only a shell or a dead stem. In this case, apart from the said general statement, no material has been placed before this Court on the basis of which the Court can arrive at the decision that without a stay, the Motion will be rendered an academic exercise.

43. In this case the respondents have countered the applicant's case by stating that the decision was necessary for the protection of the health and safety of the public. Where there is such a contention, the burden on the applicant is by no means lighter since Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. Therefore, under the current constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

44. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore, the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination. As appreciated by **Francis Bennion** in ***Statutory Interpretation,*** 3rd Edition at page 606:

> **"it is the basic principle of legal policy that law should serve the public interest. The court…should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".**

45. In this case the material placed before me does not displace the need to guard the public safety health and safety alluded to by the Respondents. While the applicant's case is clearly arguable, in these proceedings he has failed to place before me any or any sufficient

material on the basis of which I can stay the impugned decision.

46. Apart from the foregoing, the applicant herein is also the petitioner in Petition No. 24 of 2019 which was filed on 10th July, 2019 the very day these proceedings were commenced. However, whereas these proceedings were brought before me on 11th July, 2019, the petition had been brought before me a day earlier on 10th July, 2019. In these proceedings, the following orders are sought in the Motion:

> **1. That this application be certified urgent.**
>
> **2. That an order of Judicial Review by way of *Certiorari* to call to this honourable court and quash the Enforcement Notice dated 27-6-2019 issued by the 1st Respondent to the Applicant purporting that the structures on plots L.R. No. 26 Mlolongo Beach Resort Macha Beach Resort and 1054/20/27 were constructed without approved plans and that the change of user in the said piece of land is unavailable and that no occupation certificates were ever issued and further an order of certiorari do issue to call/remove into the High Court and quash the enforcement notice issued by the Sub County physical planner Mavoko dated 27-6-2019 and Environment Restoration Order issued by Patrick Kimeu, Ag. Director Environment dated 26-6-2019 and enforcement notice by Chief Officer Lands and Physical Planning demanding the Applicant vacate all tenants within 1 day dated 27-6-2019 be called to the High Court and be quashed.**
>
> **3. That an order of Judicial Review by way of *Prohibition* directed to the Respondents prohibiting them, their agents, employees and or anybody deriving authority from the said Respondents be restrained from interfering and/or enforcing, tampering, and/or disrupting or doing anything prejudicial to the legitimate business by the Applicant in all that piece or parcel of land being land reference plots L.R. No. 26 Mlolongo Karesh Building Building (Post Bank), Macha Beach Resort and 1504/20/27 Karsh Plaza Mlolongo.**
>
> **4. That an order of *Mandamus* do issue compelling the Respondents by themselves, their agents, employees and or anybody whosoever to re-open the premises of the Applicant at:**
>
> > **a) Macha Beach Resort (Machakos)**
> >
> > **b) Karesh Plaza (Mlolongo)**
> >
> > **c) Karesh Plaza (Post Bnak Mlolongo)**
> >
> > **Unconditionally pending the hearing and determination of the Judicial Review herein.**
>
> **5. That a declaration do issue declaring that the Respondents are constitutionally obligated to act lawfully, fairly and reasonable in the exercise of their constitutional mandate, which principles were violated in the Enforcement Notice dated 27-6-2019, Environment Restoration Order issued by Patrick Kimeu- Ag. Director Environment dated 26-6-2019 against the Applicant herein.**
>
> **6. Such further and other relief that the honourable court may deem just and expedient.**
>
> **7. The costs be awarded to the Applicant.**

47. In the petition the petitioner seeks inter alia an order of certiorari to quash the decision of the Respondent contemplated in the notice dated 26th June 2019 for closure of Macha Beach Hotel and enforcement notices dated 27th June, 2019 for closure of Karesh Plaza Mlolongo and Karesh Building (Post Bank). He also seeks a permanent injunction restraining the Respondent from closing the petitioner's business premises being Macha Beach Hotel, Karesh Building (Post Bank) and Karesh Plaza Mlolongo or in any way interfering with the petitioner's running of the said businesses.

48. A cursory perusal of the orders sought in both actions may not be exactly similar. However, since under the current constitutional dispensation, reliefs in the nature of judicial review may be issued in a constitutional petition, the applicant could have sought the relief sought herein in the petition. While there is still room for consolidation of the two causes I however do not agree with the respondent that this matter is sub judice.

Order

49. However, considering my findings as regards the merits of the prayer for stay, the said prayer is disallowed.

50. The costs will be in the cause.

Read, signed and delivered in open court at Machakos this 23rd day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okerosi for Mr Ondieki for the applicant

Mr Mungatta for the 1st, 2nd and 3rd Respondents

CA Geoffrey