



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

JUDICIAL REVIEW NO. 3 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE CLERK, COUNTY

ASSEMBLY OF MURANG'A.....1ST RESPONDENT

THE SPEAKER, COUNTY

ASSEMBLY OF MURANG'A.....2ND RESPONDENT

EX PARTE CYRUS KIIRU MWANGI & 4 OTHERS

RULING

1. The *ex parte* applicants are aggrieved by the order made on 28th June 2018. The court had granted leave to the *ex parte* applicants to bring judicial review proceedings against the respondents. The court however ordered that the leave granted was *not* to operate as a *stay*.
2. The *ex parte* applicants have now presented a *notice of motion* dated 2nd July 2018. They pray for review of the order to the intent that the leave granted acts as a *stay* of the respondents' *notice* to pass a vote of no confidence against the *ex parte* applicants contrary to *Standing Order 187*; or, removing the 5th *ex parte* applicant as chairman of one of the Assembly's Committees through a *flawed* process.
3. The application is supported by the affidavit of *Margaret Kimani*, learned counsel for the *ex parte* applicants, sworn on even date.
4. The motion is contested by the respondents. In a nutshell, the respondents' case is that the impugned order is *not* capable of review at this stage; and, that the notice of motion is *incompetent*. Those matters are bolstered by seven *grounds of opposition* dated 5th July 2018.
5. On 5th July 2018, I heard learned counsel for both parties. I have considered the notice of motion, grounds of opposition and the rival submissions.
6. The substantive notice of motion for judicial review is yet to be filed. I will thus refrain from commenting or deciding on the merits of the anticipated matter. The key question on this occasion is whether there are sufficient grounds to *review* the impugned order; or, whether the court has *jurisdiction* to do so.
7. The present motion is predicated upon section 80 of the Civil Procedure Act; Order 45 Rule 1; and

Order 40 rule 1 of the Civil Procedure Rules. The procedure in judicial review proceedings is primarily found in Order 53 of the Civil Procedure Rules 2010. The procedure is *sui generis*; it is a self-contained code. See generally Republic v Commissioner of Cooperatives Ex Parte Kirinyaga Tea Growers [1999] 1 EA 245. I am persuaded by the views of Ang’ote J in Republic v Kahindi Nyafula ex parte Kilifi South East Farmers Cooperative, High Court, Malindi, Jud. Rev. 3 of 2013 [2014] eKLR. The learned judge had this to say-

“Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure. A party, other than invoking the provisions of Order 53 cannot invoke the provisions of the civil Procedure Act and the Rules made thereunder.”

8. The application for leave to bring proceedings in judicial review is a *separate* proceeding; it is brought in chambers *ex parte*. Those were the genre of proceedings before the court on 28th June 2018. Where leave for example is not granted, the intended substantive proceedings come a cropper.

9. Whether or not to grant stay is also at the *discretion* of the court granting leave. Order 53 Rule 1 (4) of the Civil Procedure Rules 2010 donates wide and unfettered *discretion* to grant a stay. That discretion must however be exercised *judiciously*. The key considerations are whether the applicant has established an arguable case worth of further investigation during the substantive hearing; whether the stay would be *efficacious* in the circumstances; and whether failure to grant the stay would render the substantive motion nugatory. See R v Registrar of Companies ex parte Githongo [2001] KLR 299 at 306, R v Clerk County Assembly of Baringo Ex Parte Kamket, Eldoret, High Court, J.R. 8B of 2014 (unreported).

10. The court found that the *ex parte chamber summons* dated 28th June 2018 did *not* in its prayers set out the *actual writs* sought in judicial review. Learned counsel for the *ex parte* applicants, Ms. Kimani, contends that since the statutory statement outlined the writs of *prohibition* and *certiorari*, the court erred. That would not cure the defect in the *prayers* in the chamber summons. The true remedy lies in an *appeal*.

11. But if I be wrong on that point, the pith of the decision for denial of stay was clearly stated by the court on 28th June 2018: The court found that it was not *efficacious* to grant the stay on the basis of the materials before it on that date.

12. The *ex parte* applicants contend that the impugned actions I referred to earlier may come to pass; and, that the intended *substantive notice of motion* will be rendered *nugatory*. Those are powerful arguments. But I am afraid that the court lacks jurisdiction to *review* the order of 28th June 2018. I began by stating that the procedure in judicial review is *sui generis*; and, that Order 53 of the Civil Procedure Rules 2010 is a *self-contained* code. I also said that the application for leave to bring proceedings in judicial review is a *separate proceeding* brought in chambers *ex parte*.

13. It is not thus open to the *ex parte* applicants to file a *fresh* notice of motion to canvass the grant of stay *interparties*. Leave having been granted, and the stay denied, the original chamber summons is *spent*. The question of stay cannot be *resurrected*. The remedy for the *ex parte* applicants lies in an *appeal*. See Kenya Association of Air Operators v Director General Kenya Civil Aviation Authority & another, High Court, Nairobi Misc. Civ. Appl. 258 of 2008 [2008] eKLR, National Bank of Kenya Ltd v Njau [1995-98] 2 EA 231 (CAK).

14. I *decline* the invitation to *review* the orders made on 28th June 2018. The upshot is that the application dated 2nd July 2018 is *dismissed*. Considering the predicament the *ex parte* applicants find themselves in; and, that the substantive notice of motion has not been filed, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 5th day of July 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

Ms. Kimani for the *ex parte* applicants instructed by R. M. Kimani & Company Advocates.

Mr. Kamau for the respondents instructed by Mbugua Ng'ang'a & Company Advocates.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.