REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 8 OF 2017

IN THE MATTER OF AN APPLICATION BY EDWIN HAROLD DAYAN DANDE, ELIZABETH NAILANTEI NKUKUU, PATRICIA NJERI WANJAMA AND SHIV ANOOP ARORA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE CHIEF MAGISTRATE'S COURT AT NAIROBI AND THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE CRIMINAL CAUSE NO. 1735 OF 2016

BETWEEN

EDWIN HAROLD DAYAN DANDE……....…….1ST APPLICANT

ELIZABETH NAILANTEI NKUKUU…….....…….....2ND APPLICANT

PATRICIA NJERI WANJAMA …….……..……...…3RD APPLICANT

SHIV ANOOP ARORA…….……...…...4TH APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ……....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT NAIROBI.....2ND RESPONDENT

RULING ON LEAVE AND STAY

1. By a chamber summons dated 16th January 2017, the applicants Edwin Harold Dayan Dande, Elizabeth Nkukuu, Shiv Anoop Arora and Patricia Njeri Wanjama seek from this court orders that:

a) Leave be granted to the applicant to apply for and order of **certiorari** to remove into this court and quash the decision of the Director of Public Prosecutions, the first respondent herein, made on or about 4th November 2016 to institute criminal proceedings against the applicants in

criminal cause No.1735 of 2016 before the Chief Magistrate's Court at Nairobi.

b) Leave be granted to the applicants to apply for an order of **certiorari** to remove into this court and quash the proceedings in criminal cause No. 1735 of 2016.

c) Leave be granted to the applicants to apply for an order of **prohibition** to prohibit the Chief Magistrate's court from hearing and determining the matter in criminal cause No. 1735 of 2016

d) The grant of leave herein does operate as a **stay** of the impugned proceedings pending the hearing and determination of this matter.

e) Costs of this application be provided for.

2. The application is predicated on 11 grounds on the face of the application, the statutory statement, verifying affidavit and a bundle of annextures in support thereof. The verifying affidavit is sworn by the 1st Applicant Edwin Harold Dayan Dande on his own behalf and on behalf of his co-applicants.

3. The first applicant is the Chief Executive Officer of Cytonn Investments Management Ltd. All the applicants are former employees of British American Asset Manager Ltd ('BAAM') currently known as **BRITAM** Assets Manager (K) Limited, which is a subsidiary company of British American Investments Company Limited (BRITAM). The first applicant Edwin Dande was the Chief Executive Officer, the 2nd applicant Elizabeth Nkukuu was the Senior Portfolio Manager, the 3rd applicant Patricia Wanjama was the Assistant Company Secretary and Head of Legal whereas the 4th applicant Shiv Arora was an Investments Analyst.

4. The four applicants then resigned from BRITAM Assets Manager (K) Limited following a dispute arising from a tripartite joint venture arrangement for the identification and development of real estate which had gone sour with parties suing one another and blaming one another for failure and trading accusations of impropriety leading to five civil suits instituted by BRITAM Assets Manager (K) Limited. After the applicants resigned from BRITAM Assets Manager (K) Limited, they formed a rival company Cytonn Investments Ltd.

5. BRITAM Assets Manager (K) Limited, former employer of the applicants moved in and engaged Cytonn in litigation accusing it of fraud with regard to sums invested in real estate deals as part of the partnership between BRITAM, BAAM AND ACORN Group Limited (AGL).

6. At the heart of the various suits are allegations that the applicants herein defrauded BRITAM for between 8.1 billion and 9.7 billion shillings transferred by the applicants to various other persons, as summarized in the verifying affidavit at paragraph 7a,b,c,d,e.

7. According to the applicants depositions, the said suits have since been settled as between Acorn Group Limited (AGL) and BRITAM via various consents and the suits withdrawn against the applicants as shown by annexture EHDD3 copies of the said orders. That besides the civil suits, the BAAM/BRITAM also lodged two criminal cases against the applicants, and also lodged a complaint against the 3rd applicant with the advocates Disciplinary Committee. As against the 2nd and 4th applicants a joint complaint was lodged with the Certified Financial Analyst Institute(CFA1)whereas as against the 2nd applicant, a complaint was lodged with the Institute of Certified Public Accountants of Kenya (ICPAK).

8. That following incessant harassments, the applicants lodged Judicial Review proceedings against the Inspector General of Police complaining that the (IG) was at the instigation of BAAM abusing their statutory powers and that their investigations were tainted not with vindictiveness of criminal law but elimination of potential business competitors; that there was no reasonable basis for investigating the applicants over matters which had been settled.

9. The proceedings for Judicial Review were vide JR 435 of 2014 but that on 14th September 2016 Honourable Odunga J declined to grant reliefs as sought by the applicants in the substantive motion on the basis that the court would be usurping the powers of the Director of Public Prosecutions. However, the learned judge granted prohibition against the respondents from arresting the applicants pending the decision of Director of Public Prosecutions on whether or not to charge the applicants with any criminal offences. That the said judge also granted a temporary stay pending the filing of an appeal against his decision to the Court of Appeal.

10. That the complainants have orchestrated a campaign in the media to try the applicants and that it is clear that the Director of Public Prosecutions is now being prevailed upon by the complainants to charge the applicants with offences related to claims which are long settled in civil suits and which settlements were by consent of all the parties.

11. That it was while the stay orders of Honourable Odunga J were still in force that the Director of Public Prosecutions and the Director of Criminal Investigations Department instituted criminal proceedings against the applicants before Resident Magistrates Court at Nairobi vide criminal case No. 1735 of 2016.

12. That when the matter came up for plea taking before the Resident Magistrate, the applicants produced copy of the stay order and with the concurrence of the prosecutor, the trial court adjourned the matter.

13. That the amounts contained in the charge sheets is the amounts that were settled vide the various consents filed in the civil court and that none of the applicants personally benefited from any payment or transfer of the said funds and that neither was there any loss of money belonging to BAAM/BRITAM hence there was no reasonable factual basis upon which the Director of Public Prosecutions could conclude that charges of theft by servant should be made against the applicants hence the prosecution of the applicants is motivated by ulterior motives including the frustration of the applicant's investment company.

14. The application by the applicants was seriously opposed by the respondent Director of Public Prosecutions who filed grounds of opposition dated 23rd January 2017 on 24th January 2017 contending that:

> 1. The application is an abuse of the court process and Resjudicata as the same has been conclusively determined in JR 435 of 2014 by Odunga J with the last ruling having been given on 20th December 2016 and that there is a pending appeal and therefore this application ought to be filed in the Court of Appeal for stay pending appeal.
>
> 2. That in any event the applicant has not demonstrated a prima facie case for stay of proceedings pending the hearing and determination of either this application or the appeal and the application for leave is opposed as the application is an abuse of the court process as leave cannot be granted in the same matter twice.
>
> 3. That the respondents were acting within the law in that:
>
> > a) respondents are mandated to investigate all possible criminal offences and an attempt to stop such execution of mandate would result to an attempt to stop such execution of mandate and result to an even greater injustice in the criminal justice system;
> >
> > b) That if at all that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings;
> >
> > c) That the applicants have not adduced sufficient evidence before the court on merit to show that prejudice has been occasioned;

d) That the respondents do not require the consent of any person or authority for the commencement of criminal proceedings;

e) That the respondents are not acting under the direction of control of any person or authority;

f) That the applicants have not demonstrated that in executing their mandate, the respondents have acted without or in excess of the powers as conferred by the law or acted maliciously, infringed, violated, contravened or any other manner failed to comply with or respect and observe the foregoing provision of the Constitution or any other provision of thereof.

15. The respondents therefore prayed that the application for leave and stay be struck out or be dismissed with costs.

16. The parties' counsels urged the application orally before me on 24th January 2017 with Mr Amoko advocate representing all the applicants and Mr Ashimosi Assistant Director of Public Prosecutions representing the respondents.

17. According to Mr Amoko, the Director of Public Prosecutions in preferring charges against the applicants as per the annexed charge sheet did not take into account the fact that the dispute between the applicants and the complainants had been resolved vide several civil suits which were settled by consents and with the applicants herein accounting for every cent of how the money they allegedly stole was spent in the name of the complainant.

18. That the dispute involved investments done in the name of the complainant and therefore the only question was whether the investment as such was prudent, which in itself cannot be criminal. Further that the evidence availed shows at page 911 of the bundle of documents filed by the applicants herein together with the application that the expenditure for shs 10 million was utilized for the launch of a fund for the complainant yet the Director of Public Prosecutions wants not to hear of that and is not even interested in looking at the materials before preferring the charges.

19. It was further submitted that the complainant has recovered all monies from the several entities vide HCC 352/2014 hence there can be no theft by servant as the money was recovered by a consent order of 23rd October 2015.

20. Concerning the 1.5 billion, it was submitted by Mr Amoko that the property purchased was retransferred to the complainant hence no action of theft by servant can be sustained as the applicants never stole nor benefit from the alleged loss which was no loss or at all hence it is unreasonable to charge the applicants with theft. Mr Amoko further submitted that powers of the Director of Public Prosecutions have been abused as shown in the filed authorities and that on the facts, there is an arguable case for entitlement to Judicial Review orders.

21. On the issue of stay, Mr Amoko submitted that there are 2 aspects in that the Director of Public Prosecutions has been communicating with the press yet the applicants are in competition with the complainants who are hell bent to tarnish the business reputation of the applicants, which is a clear sign of bad faith. Further that should the criminal proceedings proceed as intended, the purpose of this case will be defeated unless stay of prosecution is granted. Reliance was placed on **Republic vs Director of Public Prosecution exparte Senator Muthama** case where the court held that stay is intended to preserve the subject matter. Further reliance was placed on a similar holding made in **Exparte Njuguna Ndungu vs Ethic and Anti Corruption Commission.**

22. Mr Amoko also submitted that his clients had disclosed that there were previous Judicial Review proceedings which were unsuccessful(as shown by page 201 of the bundle of annextures) but that Honourable Odunga J made it clear that the Director of Public Prosecutions had not made any decision to charge the applicants. That these proceedings are challenging the Director of Public

Prosecution's decision to charge the applicants and that their complaint is that the decision to charge the applicants was made when the order of stay by Honourable Odunga J was still in force and which only lapsed on 20th January 2017. Counsel prayed for the orders sought.

23. In opposition, Mr Ashimosi the Assistant Director of Public Prosecutions submitted wholly replying on his grounds of opposition which I have entirely reproduced in this ruling and maintained that the application herein is Resjudicata JR 435/2014 which was determined on 14th September 2016 by Hon Odunga J. That the applicants had enjoyed an interim stay of their arrest and prosecution until 20th January 2017 hence the Director of Public Prosecutions could only have charged them after 20th January 2017.

24. Further, that it was after the dismissal of JR 435/2014 on 14th September 2016 that the Director of Public Prosecutions made a decision to charge the applicants herein.

25. That after the said dismissal of JR 435/2014, the applicants obtained stay pending appeal which was also dismissed by Odunga J and that the learned judge only granted a temporary stay in view of the vacation.

26. That the criminal proceedings were mentioned on 21st December 2016 and plea was or is scheduled to be taken on 2nd February 2017 before the magistrate's court.

27. In addition, it was submitted by Mr Ashimosi that there is an application pending before the Court of Appeal for stay hence this court cannot grant leave and stay over the same proceedings.

28. Further, that the issue of how the money allegedly lost was spent by the applicants was raised before Honourable Odunga J in JR 435/2014 hence this application is an abuse of court process as Odunga J considered all the issues concerning the settled civil disputes.

29. Mr Ashimosi submitted that this application ought to have been filed before the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules since this court is functus officio.

30. Further, that the applicant has not established a prima facie case to warrant leave and stay since the allegations against the Director of Public Prosecutions have not been substantiated as there is no breach of the Constitution, law or abuse of power. Counsel urged the court to strike out or dismiss the application as filed.

31. In a brief rejoinder, Mr Amoko submitted that in the application at (page 125) before Honourable Justice Odunga, the Director of Public Prosecutions was not a party thereto at that time; as he had not made his decision to charge the applicants with the offence and that therefore the application is merited; and that Resjudicata does apply only to private law and not public law.

32. Counsel for the applicants maintained that his clients had an arguable case and that stay is necessary.

DETERMINATION

33. I have carefully considered the applicant's application dated 16th January 2017 the grounds, statutory statement, verifying affidavit and the annextures thereto. I have also considered the respondent's grounds of opposition and the respective parties' oral submissions supported by the authorities relied on by Mr Amoko counsel for the applicants as filed on 24th January 2017.

34. The applicant's application is expressly brought under the provisions of Section 11 of Fair Administrative Action Act, the Section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 Rule, 1 ,2 and 4 of the Civil Procedure Rules, 2010.

35. From the material placed before me, the issues for determination are

1) Whether Resjudicata is applicable in these proceedings and therefore whether the court is functus officio JR 435/2014.

2) Whether the application for leave and stay are merited.

3) What orders should this court make?

36. On whether Resjudicata is applicable in public law matters, Mr Amoko submitted that it does not. Mr Ashimosi did not pick up that theory and only submitted that this matter is Resjudicata JR 435/2014 which was fully determined by Honourable Justice Odunga J.

37. It is important to first dispose of the applicability of the doctrine of Resjudicata to public law matters. In Kenya, the law in Resjudicata is engrained in Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which stipulates that:

> ***" No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such she has been subsequently raised and has been heard and finally decided by such court.***

38. The doctrine of Resjudicata is founded on public policy and is aimed at achieving two purposes namely, that there must be finality to litigation and that persons should not be bogged down with the same account of litigation.

39. A final decree of a court or judgment or ruling of a court of competent jurisdiction once becomes absolute, puts to rest and entombs in eternal quiescence every adjudicated as well as justiciable issue between two or more parties to a dispute (See J.L. Onguto J in **Eliud Nyauma Omwoyo V Kenyatta University & 3 Others [2016] e KLR** citing with approval several decisions including **KCB Ltd v Muiri Coffee Estate Ltd & Another [2016] e KLR, Nicholas Njeru V Attorney General & 8 Others [2013] e KLR** and **Gordon V Gordon [1952] 59 so 2d 40 & Grown Estate Commissioners V Dorset County Council [1990] 1ALL ER 1923.**

40. The learned judge also observed that ***"24. caution must however always be taken in the application of the doctrine of Resjudicata as it has been the potential locking out even deserved litigants from the doors of justice. In constitutional litigation the caution must be extra as there is the chance that a violation may occur severally. The doctrine however applied in constitutional cases with equal measure, the question as to whether the doctrine applies to constitutional petitions having been settled by the Supreme Court in the case of KCB Ltd V Muiri Coffee Estate Ltd & Another [2016] e KLR, where the Senior Counsel observed:***

> ***" Resjudicata is a doctrine of substantive law, its essence being that once the legal rights of parties having been judicially determined, such edit stands as a conclusive statement as to those rights. It would appear that the doctrine of Resjudicata is to apply in respect of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Honourable Norbert Mao V Attorney General, Constitutional Petition No. 9/2002 [2003] UG CC 3 the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of the Constitution. The matter arose from an accident in which officers of Uganda Peoples Defence Forces attacked prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and judgment had been given in Honourable Ronald Reagan Okumu* **V** *Attorney General Miscellaneous Application No. 0063 of 2002, HCT 02 CV MA 063 of 2002. The Constitutional court dismissed the petition,***

on a plea of Resjudicata declining the petitioner's pleas that certain important constitution now sought, had not been accommodated in the earlier judgment."

41. From the above decisions, it is clear that the doctrine of Resjudicata is applicable in public law litigation and even if Section 7 of the Civil Procedure Act would be inapplicable to proceedings under the Law Reform Act or the Fair Administrative Action Act, it is clear that a court of law would not hesitate to find, under the same circumstances that the doctrine of Resjudicata would be applicable, under its inherent jurisdiction, that the subsequent application is an abuse of court process since a litigant cannot be allowed to litigate under the same title for reliefs claimed in a previous proceedings between the same parties and over the same subject matter.

42. In other words, once a litigant's legal rights are judicially determined and settled by a court of competent jurisdiction, such determination stands as conclusive statement of those rights.

43. Judicial Review remedy is now a constitutionally embedded remedy as espoused in Articles 22 and 23 of the Constitution, for enforcement of fundamental rights and freedoms and with regard to the fair administrative action right, it is a right enshrined in Article 47 of the Constitution as implemented by the Fair administrative Action Act No. 4 of 2015. It therefore follows that where a litigant seeks to relitigate over matters which have been fully determined by a court of competent jurisdiction, this court would not hesitate to find that subsequent proceedings are Resjudicata the earlier proceedings and therefore an abuse of court process.

44. Lenaola J in **Okiya Omtata Okoiti & another V Attorney General & 6 others [2014] e KLR** added his voice to the debate and observed that:

"***Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of Resjudicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the constitutional court and where the court is called upon to re- determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore, it must be sparingly invoked in rights based litigation and the reason is obvious."***

45. Therefore, the question is whether these proceedings are Resjudicata JR 435/2014. At page 125 of the applicant's bundle of exhibits is a chamber summons dated 13th November 2014 by the same applicants herein against the Inspector of Police and the Directorate of Criminal Investigations Department, seeking for leave to apply for Judicial Review orders to prohibit them from investigating, arresting, harassing and or in any other manner interfering with the liberty and or property of the applicants; and leave be granted to apply for an order of mandamus compelling the Inspector General of the National Police Service and the Directorate of Criminal Investigation Department to return the Cell phones impounded from the applicants; and that leave granted do operate as stay of the actions complained in prayer (1) of the chamber summons.

46. The Honourable Odunga J did grant leave as well as stay and upon fully hearing the notice of motion which was filed on 19th November 2014, vide his judgment found at pages 137-210 of the bundle, containing 74 pages, the learned judge dismissed the notice of motion in the manner sought but issued a prohibition against the respondents therein prohibiting them from taking any action in the nature of criminal proceedings until the Director of Public Prosecutions makes a determination on the matters. The learned Judge also found that the police acted hastily and so he declined to make an order for costs.

47. The learned judge was clear that no decision had been taken by the Director of Public Prosecutions to prosecute the applicants hence some of the issues raised in the proceedings were speculative.

48. In the present case, it is not denied that the Director of Public Prosecutions has now taken an administrative decision as contemplated in Section 2 of the Fair Administrative Action Act, 2015, to

prefer charges against the applicants and even drawn a charge sheet which is due for plea on 2nd February 2017.

49. It is also not in dispute that the Director of Public Prosecutions was never a party to the JR 435/2014 and therefore there is no way these proceedings which seek to quash the decision of the Director of Public Prosecutions to prosecute the applicants and to stop the Chief Magistrate's court from proceeding with the impending trial can be Resjudicata JR 435/2014.To hold otherwise will as correctly stated by Honourable Onguto J in the Eliud Nyauma case and Lenaola J in the Okiya Omtata case, be stretching the doctrine of Resjudicata too far and especially in rights-based litigation in a matter which is not that clear.

50. As at the time of JR 435/2014,the Director of Public Prosecutions had not made any decision to prosecute the applicants and it is for that reason that Honourable Odunga J made it crystal clear that it was speculative as to what would be the next cause of action after the Inspector General and Director of Criminal Investigations have investigated the alleged commission of the offences.

51. The powers of the Director of Public Prosecution which are being challenged are quite distinct from those of the Inspector General and Director of Criminal Investigations pursuant to Article 157 of the Constitution and Section 24 of the National Police Service Act respectively.

52. Accordingly, I find that the plea of Resjudicata is not well taken in this matter and I disallow it.

53. On whether the application for leave to institute Judicial Review proceedings and for stay is warranted in the instant proceedings, it is important to appreciate the purpose for leave and stay in Judicial Review matters. In **Republic vs county Council of Kwale & Another Exparte Kondo & 57 others Mombasa HC MCA No. 384/1996,** Waki J (as he then was) made it clear that:

> ***" the purpose for 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 is 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 complainants 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 parties 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."***

54. The yardstick for the grant of leave was set by the Court of Appeal in **Mirugi Kariuki Vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> ***"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the***

exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought."

55. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK),** the Court stated:

"Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in court instead of denying him…. Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of <u>Donoghue vs. Stephenson</u> in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of <u>John vs. Rees [1970] Ch 345 at 402.</u> In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."

56. From the above decisions, it is clear that grant of leave to commence Judicial Review proceeding is not a mere formality nor a practice of magic. Leave is not to be granted as a matter of course. It is upon the applicant to demonstrate to the court that he or she has a prima facie case which is available for grant of leave.

57. However, the applicant is not expected to delve into the depths of the merits of the case but he must show that the proceedings are not statute barred and that he should be granted an opportunity to be heard at the substantive stage.

58. In the instant case, it is conceded that the decision to charge the applicants with criminal offences

of stealing by servant was made after 14th September 2016, the date when the applicants lost their bid to prohibit the Inspector General and Director of Criminal Investigation from investigating, arresting or harassing them until the Director of Public Prosecutions makes a decision to charge them as per the judgment of Odunga J. The applicants then filed notice of appeal to challenge that decision of Odunga J, and which appeal is yet to be considered. In the ensuing period, the applicants had a temporary reprieve and it was within that stay period that the Director of Public Prosecutions made a determination to prefer criminal charges against the applicants as contained in the annexed charge sheet.

59. According to the applicants, there is abuse of power from the conduct of the respondents and that the charges are intended to eliminate them as potential business competitors of the complainants.

60. Further, that there is no foundation or reasonable basis for charging them and prosecuting them for stealing by servant when all the allegedly stolen money was recovered vide civil suits and consents recorded and that neither were the applicants found to have benefited from the alleged loss hence the criminal prosecution is laced with malice and ulterior motive.

61. As earlier indicated, this court cannot be tempted to delve into the merits of the matter on the authorities cited. However, I find that on the material placed before the court, allegations of unreasonableness, abuse of power and ulterior motive, this court finds that those are issues which are arguable and therefore the applicants ought to be granted an opportunity to ventilate their grievances fully before this court for, that is their inalienable right to accessing justice, as the application, on the face of it is not frivolous.

62. The court will also determine whether the applicants are seeking to interfere with the constitutional mandate of the respondent and hence the need to venture into that issue based on the materials place before the court; at the substantive stage.

63. It is for that reason that I would exercise my unfettered discretion and grant the applicants leave to institute Judicial Review proceedings as sought in the chamber summons dated 16th January 2017. The substantive motion shall be filed and served within 7 days from the date hereof, not only upon the respondents but also upon the complainants in the criminal case.

64. On whether the leave granted shall operate as stay of the decision and proceedings filed before the Chief Magistrate's court Nairobi in criminal case No. 1735 of 2016, I note that the decision to charge the applicants has already been reached by the Director of Public Prosecutions hence until it is quashed vide substantive proceedings, the DPP cannot be prohibited.

65. However, the decision as to whether or not to grant a stay is an exercise of judicial discretion which discretion must be exercised judiciously. The circumstances under which stay can be made in Judicial Review proceedings until hearing and determination of the those proceedings or until the court orders otherwise were well set out in the case of **Taib A. Taib Vs The Minister for Local Government & Others Mombasa HC Miscellaneous Application No. 158/2006** where by Maraga J (as he then was)

66. expressed himself as follows:

> ***"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."

67. In the instant case, it is clear that the applicants are due to take plea in the Chief Magistrate's Court at Nairobi on 2nd February 2017. The question is whether the application herein shall be rendered nugatory if stay is not granted and the applicants at the end of the day, are successful litigants.

68. Stay is intended to preserve the status quo so that should these proceedings be successful, the applicants should not be found to have been merely pious explorers in the judicial process. That should never be the intention of any court of law. Although the burden of proving the success of the application to be filed lies on the applicants, in my humble view, if the prosecution of the applicants proceeds as scheduled, and their motion is successful, then the leave herein granted shall serve no useful purpose.

69. Court orders are never made in vain. It is for that reason that I would allow the prayer 4 of the chamber summons that leave hereby granted do operate as stay of the impugned criminal proceedings vide criminal case No.1735 of 2016 before the Chief Magistrate's court at Nairobi until the motion is heard and determined, which hearing shall be fast tracked and determined with expedition.

70. And in order to ensure that the court retains the supervision of the process of hearing and determination of these proceedings, I order that the respondents shall file and serve the applicant's counsel with replying affidavit to the main motion once filed and served, within 7 days of the date of service.

71. This matter shall be mentioned on 15th February 2017 for directions on the hearing. Each party to bear their own costs of these proceedings.

Dated, signed and delivered at Nairobi this 1st day of February 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Amoko for the exparte applicants

Mr Ashimosi for the 1st respondents

CA: Gitonga