



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 122 OF 2015**

**E-COACH LIMITED.....1<sup>ST</sup> APPLICANT**  
**CITY TO CITY BUS SERVICES LIMITED.....2<sup>ND</sup> APPLICANT**  
**G-COACH BUS LIMITED.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**THE INSURANCE REGULATORY AUTHORITY.....1<sup>ST</sup> RESPONDENT**  
**SAMMY MUTUA MAKOVE.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS....1<sup>ST</sup> INTERESTED PARTY**  
**INVESCO INSURANCE COMPANY.....2<sup>ND</sup> INTERESTED PARTY**

**RULING NO.1**

1. The matter for consideration by this Court is the applicants’ chamber summons application dated 18<sup>th</sup> April, 2015 in which they seek leave to apply for orders of certiorari, mandamus and prohibition against the decision of the respondents made on 8<sup>th</sup> April, 2014 to cancel their insurance policies.
2. According to the papers filed in Court, E-Coach Limited, City to City Bus Services Limited and G-Coach Bus Limited who are the 1<sup>st</sup> to 3<sup>rd</sup> applicants herein are transport companies licensed by the National Transport and Safety Authority (NTSA) to operate along Nairobi, Garissa and Mandera route.
3. On 8<sup>th</sup> April, 2015 the 1<sup>st</sup> Respondent, the Insurance Regulatory Authority whose core statutory mandate is to regulate the insurance sector in Kenya issued Circular No. 1C & RE 5/2015 signed by the 2<sup>nd</sup> Respondent, Commissioner of Insurance and Chief Executive Officer, Mr. Sammy M Makove. The Circular read as follows:

**“TO: ALL INSURANCE COMPANIES, REINSURANCE COMPANIES AND INSURANCE BROKERS**

## **RE: CIRCULATION OF ENTITIES ASSOCIATED TO AL-SHABAAB**

**The Financial Reporting Centre has been designated by the Counter Financing of Terrorism Inter-Ministerial Committee as the agency responsible for circulation of the Domestic List to Supervisory bodies specified under the First Schedule to the Proceeds of Crime and Anti-Money Laundering Act (as per United Nations Security Council 1373 Resolution). This is to inform you that the Counter Financing of Terrorism Inter-Ministerial Committee had forwarded to the Financial Reporting Centre the attached list for circulation in accordance with the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations 2013.**

**Your attention is drawn to amongst others Regulation 11(3) of Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations 2013 which requires reporting institutions to take appropriate action by amongst others, freezing until further notice, the property or funds of designated persons. Reporting institutions are also required to take action in accordance with the Prevention of Terrorism Act, 2012 and the Proceeds of Crime and Anti-Money laundering Act, 2010.**

**Please be guided accordingly and cancel all insurances of any of the named persons immediately.”**

4. Consequently, the 2<sup>nd</sup> Interested Party, Invesco Assurance Company Ltd wrote to the applicants on 13<sup>th</sup> April, 2015 cancelling their insurance contracts. The letters stated that:

### **“RE CANCELLATION OF INSURANCE CONTRACTS**

**We write to you in reference to the Kenya gazette notice dated 7<sup>th</sup> April, 2015, and in accordance with the Prevention of Terrorism Act, 2012 and the Proceeds of Crime and Anti-Money laundering Act, 2010.**

**As a reporting institution, under the law we are obligated to cancel all insurance contracts between you and Invesco Assurance Company Limited. We therefore wish to inform you that we have cancelled all your PSV insurance contracts with effect from 13<sup>th</sup> April, 2015.**

**You are therefore required to surrender all the current certificates of insurance to the nearest branch of Invesco near you.”**

5. The applicants being aggrieved by the actions of the respondents and the 2<sup>nd</sup> Interested Party have thus brought the instant application. In exercise of my discretion under the proviso to Rule 1 of the Order 53 of the Civil Procedure Rules 2010, I directed that the application be served for *inter partes* hearing.

6. On 29<sup>th</sup> April, 2015 Invesco Insurance Limited who had been named as the 3<sup>rd</sup> Respondent was re-designated the 2<sup>nd</sup> Interested Party. At the same time the Director of Public Prosecutions (DPP) was admitted into these proceedings as the 1<sup>st</sup> Interested Party.

7. The respondents and the interested parties opposed the grant of leave. A perusal of the grounds upon which relief is sought as contained in the statutory statement shows that the applicants are alleging illegality, irrationality and breach of the rules of natural justice by the respondents.

8. In the case of **Aga Khan Education Service Kenya v Republic ex-parte Seif [2004] eKLR** the Court of Appeal gave its guidance, as to what is expected of this Court at the leave stage, as follows:

**“We think both Mr. Inamdar and Mr. Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under Order 53, there must be prima facie evidence of an arguable case and for that**

**proposition both counsel rely on this Court's decision in: IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS and IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal No. 144 of 2000 in which the Court approved and applied the principles to be found in the English case of R v SECRETARY OF STATE, ex p. HERBAGE [1978] 1 ALL ER 324 where it was stated thus:**

**“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see Halsbury's Laws of England, 4<sup>th</sup> Edition Vol 1 (1) paragraph 167 at page 1276.”**

**So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth.”**

9. Once a prima facie case is demonstrated, an applicant should be granted leave. From the pleadings filed in Court, I am satisfied that the applicants have an arguable case. This being an application for leave, I must be cautious not to delve into the merits of the matter lest I prejudice the case of any of the parties. Without saying much, I therefore find that the applicants have an arguable case and I grant them leave to commence judicial review proceedings and apply for orders as set out in their application.

10. The applicants have through the same application asked this Court to order that the grant of leave does operate as stay of the Circular of the respondents dated 8<sup>th</sup> April, 2015 pending the hearing and determination of the substantive notice of motion.

11. The purpose of stay in judicial review proceedings was clearly brought out by Maraga, J (as he then was) in **Taib A Taib v Minister for Local Government and 3 others [2006] eKLR** when he stated that:

**“I wish to state that, as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction. It is the non-availability of injunctions against the Government that Glidewell LJ had in mind when in the case of Republic – Vs – Secretary of State for Education and Science, Ex-parte Avon County Council (No2) CA(1991)1 ALL ER 282, he said: -**

**“An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.”**

**That this court has jurisdiction to grant orders of stay has never been in issue given the provisions of Order 53 Rule 1(4). What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious.**

**I also want to state that in judicial review applications like this one 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. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?**

**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. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken**

by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.”

12. Odunga, J distilled the principles to be taken into account by the court when granting stay in **James Mburu Gitau t/a Jambo Merchant v Subcounty Public Health Officer Kiambu County [2013] eKLR** and concluded that:

**“The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction and some of them are that the decision sought to be quashed has been implemented leave ought not to operate as a stay; 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; that the objective of granting stay is to ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application; that 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; that it is however not appropriate to compel a public body to act and that a stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted. See George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005; Jared Benson Kangwana Vs. Attorney General Nairobi HCCC No. 446 of 1995; Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006.”**

13. The respondents filed a notice of preliminary objection dated 28<sup>th</sup> April, 2015. The relevant arguments that emerge therefrom are that the actions of the respondents are within the law specifically the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and the Prevention of Terrorism Act (POTA); that the application is premature as the applicants have only been listed for purposes of investigations for the purposes of their being declared as specified entities; and that issuance of stay will frustrate investigations against the applicants and go against the public interest.

14. The DPP relied on the affidavit sworn on 29<sup>th</sup> April, 2015 by Senior Prosecution Counsel, Duncan Ondimu in support of the application to join the DPP as an Interested Party in these proceedings. The gist of the DPP’s case is that the decision of the respondents was premised on Gazette Notice No. 2326 issued by the Inspector General of Police listing entities and individuals suspected of supporting terrorism and terrorism activities. Further, that the Anti-Terrorism Police Unit is investigating the applicants’ activities as they are suspected to have links with the Al-Shabaab terrorist group and the recent acts of terrorism in the country.

15. From the cited authorities it is clear that the stay of a decision is meant to ensure that an applicant’s case is not rendered nugatory. Where stay is efficacious, the Court should grant it. Above all, the decision on the question of stay is a matter for the court’s discretion.

16. In the case before me, the applicants are no doubt incurring massive losses as their buses have been grounded as a result of the impugned decision. On the other hand, the respondents assert that their actions are aimed at curbing the terrorist acts that have recently engulfed the country. At this stage, the Court is not privy to the facts which led the respondents into taking the drastic actions they took.

17. Mr. Mutinda for the respondents submitted that if at the conclusion of the investigations it emerges that the applicants are innocent of the allegation of funding of terrorist activities, they can always be compensated. Apart from the fact that the applicants are incurring losses, it cannot be said that failure to grant stay will render these proceedings nugatory. In order to remedy the issue of losses, the matter can

be heard expeditiously subject to the cooperation of the parties herein. It is hoped that the government agencies involved in the investigations are alive to the suffering of the applicants and will move to conclude the investigations without undue delay.

18. Considering the serious allegations against the applicants, and being alive to the fact that compensation is a viable remedy for any loss occasioned to them by the respondents' actions, the balance of convenience should tilt in favour of public safety and security. The leave granted will therefore not operate as stay.

19. The costs for the application to abide the outcome of the substantive notice of motion

Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of May, 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**