REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 124 OF 2015

REPUBLIC...APPLICANT

VERSUS

ATTORNEY GENERAL...1ST RESPONDENT

INSPECTOR GENERAL OF POLICE......................2ND RESPONDENT

CABINET SECRETARY OF INTERNAL SECURITY……………………………………………….3RD RESPONDENT

COUNTER FINANCING OF TERRORISM

INTER-MINISTERIAL COMMITTEE ....4TH RESPONDENT

INSURANCE REGULATORY AUTHORITY............5TH RESPONDENT

CENTRAL BANK OF KENYA ....6TH RESPONDENT

AND

KENYA COMMERCIAL BANK....................1ST INTERESTED PARTY

GULF AFRICAN BANK..............................2ND INTERESTED PARTY

FIRST COMMUNITY BANK ....3RD INTERESTED PARTY

INVESCO INSURANCE COMPANY............4TH INTERESTED PARTY

Ex-parte

SABRIN BUS SERVICES LIMITED

RULING NO. 1

1. The ex-parte Applicant, Sabrin Bus Services Limited is a limited liability company registered in Kenya carrying on the business of transporting passengers and goods within the country through

Nairobi, Mwingi, Garissa, Habasweni, Wajir, Dadaab and Liboi. The Attorney General, the Inspector General of Police, the Cabinet Secretary for Internal Security, the Counter Financing of Terrorism Inter-Ministerial Committee, the Insurance Regulatory Authority who are the 1st to 6th respondents respectively are all state agencies performing various roles as mandated by the Constitution and the laws of Kenya. Kenya Commercial Bank, Gulf African Bank, First Community Bank and Invesco Insurance Company who are the 1st to 4th interested parties are limited liability companies registered in Kenya carrying on banking and insurance business. When the matter came up for hearing on 29th April, 2015, the Director of Public Prosecutions (DPP) applied and was granted leave to join this matter as the 5th Interested Party.

2. The Applicant is among eighty five entities given notice by the 2nd Respondent on 7th April, 2015, through Gazette Notice No. 2326 in the Special Issue of the Kenya Gazette Vol. CXVII–No. 36, to demonstrate within twenty hours why they should not be recommended to the 3rd Respondent for listing as specified entities in the terms of sections 2 and 3 of the Prevention of Terrorism Act, 2012 (POTA).
3. The Applicant is aggrieved by the decision contained in the said Gazette Notice and has approached this Court through the chamber summons application dated 15th April, 2015 seeking leave to commence judicial review proceedings and apply for orders of certiorari, prohibition and mandamus as set out in the application. Through the same application the Applicant prays that the leave granted should operate as stay of **"the suspension of the vehicle insurances of the applicant pending the hearing of the substantive application."** The application is supported by the statutory statement, the verifying affidavit of the General Manager of the Applicant, Issa Mohamed Ahmed and the annextures to the affidavit.
4. The respondents and the 5th Interested Party opposed the application. I will first address the question as to whether the Applicant has met the threshold for the grant of leave to apply for judicial review orders. The threshold for the grant of leave to commence judicial review proceedings is a low one. An applicant only needs to establish an arguable case. 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: <u>IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS</u> and <u>IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT</u>, Civil Appeal No. 144 of 2000 in which the Court approved and applied the principles to be found in the English case of <u>R v SECRETARY OF STATE, ex p. HERBAGE</u> [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, 4th 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."

5. A perusal of the Applicant's pleadings shows that the respondents are accused of illegality, irrationality and breach of the rules of natural justice. The accusations are not frivolous and they merit a substantive hearing. In my view the Applicant has an arguable case. I need not say more. Leave is therefore granted to the Applicant to commence judicial review proceedings and apply for orders as set out in the application.
6. The remaining question is whether the leave granted should operate as stay. The 1st, 2nd, 3rd 4th and 5th respondents filed a notice of preliminary objection on 28th April, 2015. The gist of the 1st

to 5th respondents' case is that the actions of the 2nd, 3rd and 4th respondents are within the law specifically the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and the Prevention of Terrorism Act (POTA) which laws domesticate and implement Kenya's international obligations on anti-money laundering and combating the financing of terrorism; that the application is premature as the Applicant has only been listed for the purposes of investigations with a view to its being declared a specified entity; that the Applicant was granted an opportunity to demonstrate why it should not be declared a specified entity and has acquiesced to the process by filing questionnaires with the Inspector General of Police; that granting stay will frustrate investigations against the Applicant and thus go against the public interest as such orders amount to aiding and abetting terrorism activities; and that the issue of the cancellation of the Applicant's insurance by Invesco Insurance Company is a matter for litigation through private law.

7. In my view, most of the objections of the 1st to 5th respondents are better left for consideration after the hearing of the substantive notice of motion. The only objection that should be considered at this stage is their claim that granting stay will frustrate investigations and will also go against the public interest.
8. The 6th Respondent, the 1st Interested Party and the 4th Interested Party submitted they were only complying with the directives of the 3rd Respondent as required by the law. The DPP submitted that the respondents acted on sufficient evidence and took precipitate action against the Applicant. It is the DPP's case that the law allows the police to move in where there is suspected criminal activity.
9. This being a judicial review application, the Applicant is simply questioning whether the respondents have complied with the law. At this stage, the Court needs to guard against commenting on the merits of the proceedings. All the material to be considered is yet to be placed before the Court.
10. In **Taib A Taib v Minister for Local Government and 3 others [2006] eKLR (Mombasa High Court Misc. Civil Application 158 of 2006)** Maraga, J (as he then was) explained the purpose of stay in judicial review proceedings as follows:

"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."

11. Odunga, J considered the matters 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."

12. Applying the said principles to the matter before me, I find that the decision which the Applicant wishes to challenge has already been made and implemented. The Applicant applies for the suspension of the decision to cancel its insurance covers so that it can operate its fleet of buses. It goes without saying that the Applicant must be incurring heavy losses as a result of the decision to ground its buses. The loss is, however, not irreparable. The Applicant's losses can be quantified and compensated if at the end of the day it is established that the respondents acted unlawfully. For that reason, one cannot say that this matter will be rendered nugatory if the impugned decision is not suspended.
13. It should be noted that the respondents allege that they are acting in the interest of public safety and security and in such a situation public rights are to be preferred to private rights as public necessity is greater than private necessity. This Court is alive to the fact that at all times the rule of law is at the apex of public interest. However, where the Court is not seized of all the facts, it is better that the interests of the majority be allowed to take preference over the business interests of an individual. In the circumstances, I find that the balance of convenience tilts in favour of not granting stay. The prayer, that the leave to commence judicial review proceedings operates as stay is therefore rejected and dismissed.
14. The best remedy in a case like this is to hear and determine the proceedings expeditiously and that is what I propose to do. The costs in respect of the application for stay shall abide the outcome of the substantive notice of motion.

Dated, signed and delivered at Nairobi this 12th day of May , 2015

W. KORIR,

JUDGE OF THE HIGH COURT