REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 116 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE TRAFFIC ACT, CAP 403

AND

THE NATIONAL TRANSPORT & SAFETY AUTHORITY ACT

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT….....1ST RESPONDENT

CS, FOR TRANSPORT & INFRASTRUCTURE....2ND RESPONDENT

PS, STATED DEPARTMENT OF TRANSPORT....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

KENYA ROADS BOARD.....5TH RESPONDENT

KENYA URBAN ROADS AUTHORITY.....6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....7TH RESPONDENT

***EX PARTE:* HON. MIKE SONKO MBUVI**

RULING

Introduction

1. By a Notice of Motion dated 15st July, 2015, the ex parte applicant herein, **Hon. Mike Sonko Mbuvi**, seeks the following orders:

> **1. This matter is set for hearing on July 22nd 2015, and it is imperative that the court gives directions on the *Ex parte* Applicant's plea set out in the annexed Notice of Motion.**
>
> **2. The determination of the orders of mandamus respecting the 2nd and 4th Respondents sought in prayer 4 of the *Ex parte* Applicant's Notice of Motion dated 20th April 2015 implicates the *Ex parte* Applicant's annexed Notice of Motion hence the urgency arising.**
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> **3. As framed, the provisions of Order 53 of the Civil Procedure Rules governing judicial review proceedings such as mounted by the *Ex parte* Applicant do not prescribe the process to be adopted where the subject matter needs to be viewed or a visit of *locus in quo*, for a proper determination of the orders sought.**
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> **4. The Court needs to assess the impact of traffic jams caused by the 4th Respondent's inaction at the 2 points of Thika Road superhighway subject of these proceedings, to wit, the bumps and rubble strips erected along Thika Superhighway at the "Survey of Kenya" point and at Homeland/Lenya Breweries point.**
>
> **5. The Ex parte Applicant has sought in the substantive judicial review Motion that an order do issue to compel and direct the 2nd Respondent Cabinet Secretary in charge of Infrastructure and the 4th Respondent Kenya Highway Authority to forthwith remove the bumps and rubble strips erected along Thika Superhighway at the specific point identified as "Survey of Kenya" and at Homeland/Kenya Breweries point, and that they ensure that pedestrians use the provided footbridges along the said Thika Highway.**
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> **6. That congestion so created and complained of is NOT capable of being demonstrated on prayer by affidavit evidence neither can photograph evidence fully demonstrate the extent of the damage created by the 2nd and 4th Respondent's inaction.**
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> **7. Consequently, this honourable court needs to view and witness for itself the 2 points along Thika Superhighway where traffic grid locks build up on account of totally unwarranted bumps and rubble strips that ought to be removed forthwith.**
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> **8. The Ex parte Applicant wishes to thus demonstrate that he is not merely lodging these proceedings for the sake of it but to the intent that a just and fair decision will be made in accordance with this court's mandate to uphold the Rule of Law and further social and economical justice.**
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> **9. Upon the court assessing for itself the said 2 points, then its discretion can be exercised based on actual facts fully verified by the court as opposed to deciding the matter without the benefit of such evidence.**

2. The said Motion which was expressed to be brought under Articles 48 and 159(2)(d) of the Constitution as well as the inherent powers of the Court was supported by an affidavit sworn by **Harrison Kinyanjui**, the ex parte applicant's counsel on 15th July, 2015.

3. According to the deponent, he was aware that as framed, the provisions of Order 53 of the ***Civil Procedure Rules*** governing judicial review proceedings such as these do not prescribe the process to be adopted where the subject matter needs to be viewed or when a visit of *locus in quo* is to be made, for a proper determination of the orders sought. It was however his belief that this honourable court needs to

assess the impact of traffic jams cause by the 2nd and 4th Respondent's inaction at the 2 points of Thika Road superhighway cited in these proceedings, to wit, the bumps and rubble strips erected along Thika Superhighway at the "Survey of Kenya" point and at Homeland/Kenya Breweries point.

4. He was therefore of the belief that this Court ought to view for itself at 3 points the impact of the said rubble strips and bumps as follows during rush hours (anytime between 6.30am in the morning on any week day; and anytime between 5.00pm and 8.00pm in the evening on any weekday) at least 300 meters before the said bumps on either side of the Thika superhighway and at the said bumps and at least 300 metres after the said bumps on either side of the Thika superhighway.

5. While appreciating that this course of action is rare in judicial review proceedings, the deponent deposed that the notice of motion raises novel issues and their applicability in judicial review proceedings that entitle the court to invoke its inherent power to adjudicate on the subject matter herein. In these proceedings, it was averred that the *ex parte* Applicant seeks in the substantive judicial review motion that an order do issue to compel and direct the 2nd Respondent Cabinet Secretary in charge of Infrastructure and the 4th Respondent Kenya Highway Authority to forthwith remove the bumps and rubble strips erected along Thika Superhighway at the specific point identified as "Survey of Kenya and at Homeland/Kenya Breweries point, and that they ensure that pedestrians use the provided footbridges along the said Thika Highway which plea has todate not been contested.

6. The deponent believed that in exercising its discretion even in the face of such muted silence, this honourable court ought to have at its disposal the negative impact that he congestion so created and complained of by the *ex parte* Applicant is not capable of being demonstrated on paper by affidavit evidence neither can photographic evidence fully demonstrate the extent of the damage created by the 2nd and 4th Respondents' inaction.

7. The deponent therefore asserted that this Court needs to view and witness for itself the 2 points along Thika Superhighway where traffic grid locks build up on account of totally unwarranted bumps and rubble strips that ought to be removed forthwith as sought by the *ex parte* Applicant who wishes to demonstrate that he is not merely lodging these proceedings for the sake of it to the intent that a just and fair decision will be made in accordance with this court's mandate to uphold the Rule of Law and further social and economic justice. In his view, upon the court assessing for itself the said 2 points, then its discretion can be exercised based on actual facts fully verified by the court as opposed to deciding the matter without the benefit of such evidence.

8. It was further suggested that the presence of all the affected parties during such visit of *locus in quo* would enable each party to make appropriate observations such as would aid and assist them in respect of the parties' response herein.

9. To the deponent, the application was made in absolute good faith and it is not in any way prejudicial to any party and that the frontiers of judicial review ought to be expanded in appropriate cases such as this in order to arrive at a just conclusion.

10. It was his view that, since the public interest generated out of these proceedings is great, the court ought to permit the plea sought so that the decision made will have been based on fully assessed facts.

11. According to the applicant, the calling up of a fil from the subordinate court for the High Court to exercise its supervisory jurisdiction is an example of the Court going out of its way from the affidavit evidence brought before it hence the Court is not confined to affidavit evidence. That course, it was submitted is in tandem with the Court's jurisdiction to do justice s contemplated in Article 159 of the Constitution. According to the applicant, the public interest in the outcome of these proceedings is great hence the Court ought to weigh this against the refusal to assess the merits of the case by witnessing for itself the basis of prayer 4 of the Motion. In support of his position the applicant relied on *inter alia* **Republic vs. Public Procurement Administrative Review Board & Another ex-parte Avante International Technology Inc [2013] eKLR** and **Zziwa Ssalongo & Another vs. Kafumbe High**

Court, Kampala Civil APPEAL No. 33 of 2012, a decision of the Uganda High Court and urged the Court to grant the orders sought herein in the interest of justice as no prejudice has been demonstrated by the respondents o militate against the grant thereof.

Respondents' Case

12. The application was opposed by the 1s respondent who filed the following grounds of opposition:

> **1. THAT the application in its entirety offend the provisions of order 3 Rule 4 (2) and (3) of the Civil Procedure Rules 2010 by purporting to introduce evidence by a visit to the locus in quo which would in turn require the adduction of viva voce evidence contrary to the strict rule that evidence in Judicial Review proceedings should be limited to the sworn Affidavits presented before court and not evidence obtained from a visit to the locus in quo or subsequently viva voce evidence.**
>
> **2. That the entire application is misconceived as an order by this court directing that there be a visit to the Locus in quo will in effect be a usurpation by this court of powers ungranted by the Judicial Review jurisdiction of the High Court; which jurisdiction is confined to the review of the decision making process and whether the decision or act complained of is tainted with illegality, irrationality and procedural impropriety and not the merits or the outcome of the decision complained of.**
>
> **3. That the application herein is had in law, misconceived, incompetent, a nullity, frivolous and an abuse of the court process intended to advance the political and self-seeking machinations of the Applicant.**

13. It was submitted on behalf of the 1st respondent while reiterating the said grounds that judicial review can only be canvassed by affidavit evidence since it is a special jurisdiction and hence consideration of viva voce evidence is contrary to Order 53 rule 4(2) of the ***Civil Procedure Rules.*** A visit to the locus in quo, it was contended amounts to adduction of *vova voce* evidence not available to parties adjudicating a dispute under judicial review under which is a public law remedy challenging not the decision itself but the circumstances and procedure adopted by the public body in arriving at the decision.

14. In support of these submissions the 1st respondent relied on **Mombasa Civil Appeal No. 312 of 2012 Emfil Limited vs. Registrar of titles Mombsa and 2 Others (2014) eKLR, Nairobi Judicial Review Application No. 22 of 2012 Khobesh Agencies Limited & 32 others vs. Minister of Foreign Affairs and International Relations & 4 Others (2013) eKLR, Nairobi Judicial Review Misc. App. No 374 of 2013 Republic vs. Tanathi Water Service Board and 2 others Ex parte Senator Johnstone Muthama, Sanghani Investment Limited vs Office in Charge Nairobi Remand and Allocation Prison (2007) 1EA 354** and **Chief Constable of North Wales Police vs Evan (1982) 3ALL ER.**

Determination

15. The first glaring issue in the application is that the supporting affidavit is sworn, not by the applicant, but by his counsel. That the rules of evidence relating to affidavits generally apply to judicial review proceedings was put beyond doubt in the decision of the East African Court of Appeal in **Life Insurance Corporation of India vs. Panesar [1967] EA 614** in which **Sir Charles Newbold, P** pronounced himself as hereunder:

> **"Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. That the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings does not therefore mean that there exist no rules as to what may be set out in the affidavits, other than rule 3 of Order 18, or as to what evidence may be led**

before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before…I would accept it…the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of Order 18 rule 3(1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise rule 3 would be a classic example of straining at a gnat but swallowing the camel. Even in relation to rule 3 the court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact…It is clear that the court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out precisely which are the facts based on information and the source of that information. To suggest that the court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is manifestly absurd. Whereas it is true that the Evidence Act does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence instead of oral evidence is destroyed at a blow."

16. One such well known rule is that advocates ought to avoid the temptation to wade into litigation in which they are acting as counsel by embroiling themselves into the murky waters of the dispute in which they appear for their clients. In **Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. In the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463, Ojwang, J** (as he then was stated as follows:

"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs".

17. In this case, the issue of whether or not the erection of bumps on the subject road has led to a snarl-up thereon is clearly a factual issue and it is not alleged that the issue is undisputed. Further the supporting affidavit does not even aver that the information therein was obtained from the client. As was held in **Small Enterprises Finance Co. Ltd. vs. George Gikubu Mbuthia Nairobi HCCC No. 3088 of 1994**, advocates should not depose to contested matters of facts.

18. Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.

19. As the applicant appreciates, the orders which are being sought in this application the subject of this ruling are rather unusual in judicial review proceedings. This position was appreciated by the Court of Appeal in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** where the Court held:

> **"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application."**

20. The purpose of a visit of the *locus in quo* was explained in Ugandan case of **E. Kangye vs. E. Bwana Kampala HCCS No. 38 of 1989** in which **Ouma, J** expressed himself as follows:

> **"The law relating to *locus quo,* is well settled. It is to enable witnesses clarify what they have stated in court and must do so on path… When the court goes to the *locus quo* it goes to check on the evidence given in court, and not fill in gaps. If trial court had to fill in gaps, it would run the risk of being a witness in the case, which should be avoided which did not happen in this case… the intention of visiting a *locus in quo* is to enable the court to clarify the evidence and to enable the court to form impressions or findings."**

21. Similarly in **Zziwa Ssalongo & Another vs. Kafumbe** (supra) it was held:

> **"Visiting a locus in quo is not mandatory and depends on the circumstances of each case. In *Yeseri Waibi vs. Edisa Lusi Byandala [1982] HCB* it was held that the practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill the gap for them or [the] court may run the risk of making itself a witness in the case."**

22. Therefore even in ordinary civil proceedings where the Court deals with the merits of the case, a visit to the *locus in quo* is the exception rather than the rule. Its purpose is primarily to make the Court understand the nature of evidence adduced by the parties rather than to collect missing evidence. It is therefore my view that even in civil cases, there should be special circumstances before a decision to visit the *locus in quo* is made and the court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to visit the *locus in quo*. This Court appreciates the role of public interest in litigation and as it held in **Republic vs. Public Procurement Administrative Review Board & Another ex-parte Avante International Technology Inc** (supra):

> **"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."**

23. However as has been said before public interest is on the same plane as public policy. Whereas the Courts have recognised that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, that when you get astride it, you never know where it will carry you. See **Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.**

24. I have on my part considered the grounds upon which these judicial review proceedings are premised and I am not satisfied that this is a matter in which an order for a visit to the *locus in quo* ought to be made. The grounds are majorly premised on breach of constitutional provisions and in my view such

issues are dealt with by this Court routinely without the necessity of vising the *locus in quo*.

25. Accordingly I decline to grant the orders sought herein and direct that the substantive motion proceeds to hearing in the usual manner.

26. The costs of this application are awarded to the Respondents.

27. Those shall be the orders of the Court.

Dated at Nairobi this 15th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the ex parte applicant

Miss Chimau for the 1st, 2nd, 6th and 7th respondents and holding brief for Mr Agwara for the 4th and 5th respondents

Cc Patricia