



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Judicial Review 36 of 2012

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

BETWEEN

VICTONELL ACADEMY LIMITED.....APPLICANT

VERSUS

THE MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT

AND

STEP-UP HOLDINGS (K) LTD.....INTERESTED PARTY/APPLICANT

RULING

On 17th August 2012 I allowed the *ex parte* Applicant's application dated 28th May 2012 for leave to institute judicial review proceedings for the judicial review orders of certiorari prohibition and mandamus. I declined to grant an order for stay.

By an application dated 8th August 2012, Step-Up Holdings Ltd, (*the Interested Party*), sought leave to be enjoined as an Interested Party for the Judicial Review Application. There was no objection to that application, and was deemed to have also been allowed on 17th August 2012 when the court also directed that the substantive motion be filed within 21 days and thereafter counsel were to file and exchange written submissions at least before 10th October 2012 and the substantive application be heard on 15th October, 2012.

Parties appeared before court on 30th August 2012 when counsel for the Interested Party sought a date for the hearing of the *ex parte* Applicant's application for a stay. That arm of the application was urged on 5th September 2012.

Counsel for the Respondent opposed that application relying on the Court of Appeal decision in **REPUBLIC VS. COMMISSIONER OF CO-OPERATIVES**, *ex parte Kirinyaga Tea Growers Cooperative Savings and Credit Society Ltd* [1999]1 E.A. 239, where the court held that the judge granting leave has no power to separate the granting of leave *ex parte* from the issue of whether or not leave shall act as a stay.

Order 53 of the Civil Procedure Rules provides -

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule;

(2) an application for leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the ground on which it is sought and by an affidavit verifying the facts relied on;

(3) ...

(4) the grant of leave under this rule to apply for an order of mandamus, or an order of certiorari shall if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the Judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.

The rules are thus clear, the application for leave is made *ex parte*, and heard *ex parte*. Under rule 4, the issue of granting a stay must also be determined at the time leave is granted to commence judicial review proceedings unless the court adjourns under the proviso and the matter is heard within 7 days. There is no power to separate the grant of leave and stay. I would therefore agree with the decision of the Court of Appeal cited above.

In the circumstances, I must, which I hereby do, dismiss the Interested Party's application dated 30th August 2012 with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Nakuru this 5th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE