



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 112 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN
THE NATURE OF JUDICIAL REVIEW**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF THE COUNTY ASSEMBLY OF NAIROBI

BETWEEN

BEATRICE KWAMBOKA.....APPLICANT

VERSUS

LEADER OF MAJORITY PARTY

OF THE NAIROBI COUNTY ASSEMBLY RESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 8th April, 2015, the applicant herein, **Beatrice Kwamboka**, seeks leave to apply for an order of certiorari to removed into this Court and quash the Respondent's decision made vide an internal memo dated 31st October, 2014 discharging the Applicant from all the Committees in which she is a member. She also sought leave to apply in the alternative for an order of mandamus compelling the Respondent to table the reinstatement made by the Respondent vide an internal memo dated 13th January, 2015 for approval by the Select Committee. The applicant also sought an order that the grant of leave does operate as a stay of the impugned decision of the Respondent to dismiss the applicant from the Committees in which she is a member pending the hearing and determination of these proceedings.

Applicant's Case

2. According to the applicant, following her election on an Orange Democratic Movement Party ticket as the ward representative for Mountain View Ward in the Nairobi County Assembly, she served on the Water and Sanitation Committee and the Housing and Planning Committee till the Respondent vide a

memo dated 31st October, 2014, discharged her from all the Committees in which she was a member without being informed the reasons therefor and without being afforded an opportunity of being heard.

3. According to her the decision did not have the support of the Orange Democratic Party and was therefore a personal decision/.

4. By another Memo dated 13th January, 2015 to the Speaker of the Assembly, the Respondent sought to reinstate the applicant to the said two Committees.

5. It was the applicant's case that the decision to dismiss her therefrom was irregular, fatally defective, bad in law and ought to be discharged, vacated and/or set aside on the grounds that it was outside the mandate of the Respondent as that is the mandate of the Party; the decision was procedurally ultra vires as there was no communication from the party to the Respondent or the Speaker to that effect; the decision was irregular as it did not emanate from the party or its secretariat; and that by discharging her from the Committee the Respondent violated section 14(4) of the **County Governments Act** which mandates that each member of the Assembly be appointed to at least one committee.

6. It was therefore contended that the said decision smacks of impropriety, is absurd, arbitrary, ultra vires, blatantly illegal, capricious, unjust and untoward. In addition it was contended that the same decision was driven by ill will and lacked good faith and amounted to abuse of power. To the applicant the said decision was unlawful, unjust, unreasonable and irrational.

Respondent's Case

7. According to the Respondent the applicant was discharged from being Committee members in compliance with the County Assembly Standing Orders and that there is no provision for being informed of the reasons for the decision to discharge a member from a committee. The Respondent contended that his decision was that of the Coalition of Parties which elected him and not his own personal decision as alleged.

8. In the Respondent's view, the decision was regular, procedural and legal.

9. With respect to the reinstatement of the applicant, the Respondent averred that he had carried out his mandate in accordance with the law and it was upon the County Assembly to continue with the process.

Determination

10. I have considered the issues raised in this application as well as the submissions filed. From the submissions, it would seem that the same were directed at the substantive Motion rather than an application for leave.

11. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held 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 and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.

12. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of 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 if 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 complaints 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 partes* 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”.

13. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General [2005] 2 KLR 189** in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

14. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated 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.”

15. In **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199**, the Court of Appeal was of the view 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.

16. 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....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 John vs. Rees [1970] Ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

17. It is therefore clear that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he or she is not required at that stage to go into the depth of the application, he/she has to show that he/she has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. As was held in Re: Kenya National Federation of Co-Operatives Ltd & Others [2004] 2 EA 128 based on Judicial Review Handbook (3 Ed) By Michael Fordham:

“A claimant for permission is under an important duty to make frank disclosure to the Court of all material facts and matters and it is especially important to draw attention to matters which are adverse to the claim, in particular: (1) any statutory restriction on the availability of judicial review; (2) any alternative remedy; (3) any delay/ lack of promptness and so need for an extension of time. In facing up to adverse points, the claimant will have an early opportunity to explain why those points are not fatal and why the case should be permitted to proceed (that is a “confess and avoid”). The duty of “full and frank” disclosure harks back to the time when permission for judicial review was *ex parte*.”

18. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to

make a decision.”

19. In this case, the applicant’s case is that the Respondent acted ultra vires as he had no powers to discharge the applicant from the said two committees. This contention if true, would amount to an illegality. It was further contended that the decision was made without the applicant being afforded an opportunity of being heard. In effect the applicant contends breach of the rules of natural justice, allegation which if true would amount to procedural impropriety. The grounds relied upon by the applicant, if true would warrant the grant of judicial review remedies.

20. I have considered the issues raised herein and it is my view that the applicant had established a prima facie case and the leave sought is deserved. Accordingly I grant leave in terms of prayer 2(a) and (b) of the Chamber Summons dated 8th April, 2015. Let the substantive Motion to be filed and served within 14 days.

21. With respect to the direction that the leave granted do operate as a stay, this Court has held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre:**

“...it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant’s case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.”

22. Apart from the foregoing the Court must also look at the likely effect of granting the stay to the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

23. In this case the effect of the grant of the stay would in effect amount to reinstating the applicant to the said Committees. By doing so the applicant shall have achieved, even if only temporarily, what she intends to seek in the substantive Motion.

24. In order not to be confronted with such untidy circumstances, where the Court finds that the applicant ought not to have been reinstated after she has in fact been reinstated, it is my view that the lesser evil would be not to interfere with the said decision. Accordingly I decline to direct that the grant of leave herein shall operate as a stay in the manner sought.

25. The costs of this application will be in the cause.

26. The making of the decision herein was delayed by the attempts to promote an out of Court settlement as mandated under Article 259(2)(c) of the Constitution.

Dated at Nairobi this 27th day of January, 2016.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mochama for the Applicant

Cc Patricia