Manabo Holdings LLP v Capital Markets Authority (Miscellaneous Civil Application E078 of 2022) [2022] KEHC 15492 (KLR) (Judicial Review) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15492 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS CIVIL APPLICATION E078 OF 2022

AK NDUNG'U, J

NOVEMBER 17, 2022

BETWEEN

MANABO HOLDINGS LLP ..... APPLICANT

AND

CAPITAL MARKETS AUTHORITY ..... RESPONDENT

Application for stay dismissed due to two-year delay

The applicant sought judicial review to quash and restrain the implementation of Circular No. 8 of 2020 on performance measurement for Collective Investment Schemes. Manabo argued that the circular was adopted unlawfully, without proper public participation or parliamentary oversight, and risked causing substantial harm to investors. The applicant also requested a stay of the circular's enforcement pending determination of the case. The Capital Markets Authority opposed the stay, citing public interest and market stability. The court dismissed the request for stay, finding the application was made after a delay of 2 years and that public interest outweighed the applicant's concerns.

Reported by John Ribia

Civil Practice and Procedure *– interim orders – application for stay – conditions - what conditions did court take into consideration in an application for stay of a circular of an administrative regulatory body - whether an application for stay of a circular of an administrative body 2 years after the circular was issued was against public interest as other actors had already taken measures to comply with the circular*

Brief facts

Manabo Holdings LLP filed a judicial review application challenging the legality and implementation of Circular No. 8 of 2020 issued by the Capital Markets Authority (CMA), which set new standards for performance measurement and presentation for Collective Investment Schemes. The applicant argued that the circular was unprocedurally adopted without adequate public participation or parliamentary scrutiny and that its enforcement would adversely affect investors and market players. Despite requesting supporting

documentation from CMA in October 2021, no response was received. The applicant sought a stay of the circular's enforcement, but the court ultimately declined, citing public interest and delayed filing.

Issues

i. What conditions did court take into consideration in an application for stay of a circular of an administrative regulatory body?

ii. Whether an application for stay of a circular of an administrative body filed 2 years after the circular was issued was against public interest as other actors had already taken measures to comply with the circular.

Held

1. Whether or not to grant a stay pursuant to leave was an exercise of judicial discretion, and that discretion must be exercised judiciously. The applicable law on whether leave so granted should operate as a stay was order 53 rule 1(4) of the Civil Procedure Rules, which provided that the grant of leave to apply for an order of prohibition or an order of *certiorari* shall, under the courts directions, operate as a stay of the proceedings in question until the determination of the application, or until the judge ordered otherwise.
2. Once the court had granted leave, the question of whether the application was arguable became moot as that was the basis upon which leave would have been granted. The relevant consideration then became one centered on whether the substantive motion would be rendered nugatory if stay was not granted.
3. Public interest as an overriding factor when determining whether or not to grant stay orders. As a matter of public interest, the court could refuse to order for leave granted for orders of judicial review to operate as a stay where such a stay would violated the needs of good administration.
4. The implementation of the Capital Markets Authority decision/circular was still ongoing as positive actions were need to be taken by the parties for circular to be fully complied with, in particular the regulated entities still needed to take steps in complying with the decision/circular. The circular/decision was not self-executing.
5. The High Court had jurisdiction and the discretion to stay the decision/circular but that discretion had to be exercised judiciously. The discretion should also be exercised sparingly where a decision had been fully implemented by some members of the public (stakeholders), and/or implementation was still ongoing.
6. Where there was a public interest element involved, only where an applicant had made out a strong case can discretion lean on their favour. In the instant case, staying the impugned decision/circular would not only affect the applicant, but also other members of the public (market players), including the ones that had wholly embraced and implemented the decision/circular, thus possibly presenting challenges to good administration in capital markets.
7. Where public interest was involved, the court must strike a balance between the rights of an individual and the public interest element involved. There had been a notable delay in the presentation of the judicial review application. The argument by the applicant that the failure by the respondent to reply to their inquiry led to the delay was not satisfactory. Such failure would, to the contrary, be the catalyst to a prompt institution of a judicial review application as failure to give reasons for an administrative action was fertile ground for judicial review. In the intervening period during the delay, there had been implementation of the Circular, if the stay was granted as a result of this belated challenge to the Circular, it would undermine the orderliness already established by the implementation of the Circular since 2020. Such stay would disorganize the operations of market players like fund managers leading to uncertainty. Balancing the scales, the public interest in the matter leaned in favour of upholding the public interest as against the individual rights of the applicant.
8. It had not been demonstrated that in absence of stay, the substantive motion would be rendered nugatory or that the respondent would suffer irreparable harm.

Application dismissed.

Citations

Cases

Kenya

1. *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* Petition 454 of 2012; [2013] KEHC 6313 (KLR) - (Explained)
2. *Munir, Sheikh Ahmed v Capital Markets Authority* Judicial Review Application 269 of 2018; [2018] KEHC 1556 (KLR) - (Explained)
3. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] eKLR - (Explained)
4. *Republic v Capital Markets Authority ex parte Joseph Mumo Kivai & another* Judicial Review 355 & 356 of 2012; [2012] KEHC 576 (KLR) - (Followed)
5. *Republic v Cabinet Secretary for Transport & Infrastructure & 6 others ex parte Kenya Country Bus Owners Association(Thro' Paul G. Muthumbi – Chairman) Samuel Njuguna – Secretary Joseph Kimiri – Trasurer & 8 others,Mbukinya Bus Service(Kenya) Ltd,Crown Bus Services Ltd,Kampala Coaches Ltd,Traticom Enterprises Ltd,Ugwe Bus Services,Trisha Collections Ltd,Panther Travel Ltd & Neon Courier Services Ltd* Judicial Review 124 of 2014; [2014] KEHC 7795 (KLR) - (Followed)
6. *Republic v County Assembly of Kisii Committee of Powers and Privileges & 9 others ex parte Karen Nyamoita Magara* Judicial Review Application 3 of 2020; [2020] KEHC 217 (KLR) - (Explained)
7. *Republic v Diretor of Public Prosecutions & 2 others ex parte Jayesh Umedlal Shanghavi & another (Interested Party)* Judicial Review Miscellaneous Application E184 of 2021; [2022] KEHC 1563 (KLR) - (Followed)
8. *Republic v Mwangi Nguyai & 3 others ex-parte Haru Nguyai* Miscellaneous Application 89 of 2008; [2013] KEHC 4004 (KLR) - (Explained)
9. *Republic v National Construction Authority & 2 others; Joint Building and Construction Council (ex-parte)* Judicial Review Application E1120 of 2020; [2022] KEHC 333 (KLR) - (Explained)
10. *Republic v National Transport & Safety Authority & 10 others* Judicial Review Case 447 of 2014; [2015]eKLR - (Explained)
11. *Republic v Public Procurement Administrative Review Board ex-parte Syner- Chemie Limited* Judicial Review 371 & 372 of 2016; [2016] KEHC 2718 (KLR) - (Explained)
12. *Republic v Richard Kerich & 5 others* Judicial Review Miscellaneous Application 363 of 2013; [2013]eKLR - (Followed)
13. *Taib A Taib v Minister for Local Government & others* Miscellaneous Civil Application 158 of 2006; [2006] KEHC 3166 (KLR) - (Followed)
14. *Tubei , Rosaline & 8 others v Patrick K Cheruiyot & 3 others* Environment and Land Miscellaneous Application 5 of 2014; [2014] KEELC 413 (KLR)
15. *Wandayi , James Opiyo & others v Kenya National Assembly & 2 others* Petition 246 of 2016; [2016] KEHC 3163 (KLR) - (Explained)

United Kingdom

1. *R (H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127 - (Followed)
2. *R v Monopolies and Mergers Commission ex parte Argyll Group PLC* [1986] 1 WLR 763 - (Explained)

Regional Court

Re Bivac International SA (Bureau Veritas) [2005] 2 EA 42 - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rules 1(4); 2 - (Interpreted)
2. Constitution of Kenya articles 35, 43, 47 - (Interpreted)
3. Law Reform Act (cap 22) section 9(3) - (Interpreted)

Advocates

None mentioned

RULING

1. By way of a chamber summon dated May 27, 2022, the *ex parte* applicant sought for leave to apply for Judicial Review orders, That:

    i. This application be certified as urgent and service thereof be dispensed with in the first instance.

    ii. Leave be granted to the applicant to apply for an order of Judicial Review in the nature of certiorari to remove into this honourable court and quash the decision of the respondent to publish and enforce Circular No 8 of 2020 on performance measurement and presentation for Collective Investment Schemes (CIS).

    iii. Leave be granted to the applicants to apply for an order of Judicial Review in the nature of *mandamus* to restrain the respondent from further implementation of the decision of the Respondent to publish and enforce Circular No 8 of 2020 on performance measurement and presentation for Collective Investment Schemes (CIS)

    iv. Leave be granted to the applicants to apply for an order of Judicial Review in the nature of Prohibition to preclude, prohibit and/or restrain the respondent from enforcing circular number 8 of 2020 on performance measurement and presentation for Collective Investment Schemes (CIS).

    v. Further or in the alternative an Injunction to restrain the respondent from any further enforcement of the unregularly, unlawful and un-procedural circular 8 of 2020 further enforcement of the unregularly, unlawful and un- procedural circular 8 of 2020 on performance measurement and presentation for Collective Investment Schemes (CIS)

    vi. The leave so granted do operate as a stay of the aforesaid decision of the respondent.

    vii. The Costs of this application be provided for.

2. On June 6, 2022, this court made a decision granting prayers ii, iii, and iv of the application. For prayer vi, that the leave so granted do operate as a stay of the impugned decision by the respondents, the court directed that the same be canvassed by way of skeletal written submissions. That subject is the basis of this Ruling.

Applicant's Case

3. The *ex parte* applicant, in advancing its case, filed skeletal submissions dated June 30, 2022, and also a supplementary skeletal submissions dated July 7, 2022.

4. The applicant's position is that the leave should operate as stay, in this instant case, as implementation of the impugned decision/circular is yet to be completed – that which position is confirmed by the respondent's letter dated September 29, 2021 sent to industry players asking them to comply with the impugned regulations. That the principles for the granting of an order that the leave do operate as stay are complied with in this case. Reliance was placed on the case *James Opiyo Wandayi v Kenya National Assembly & 2 others* [2016] eKLR.

5. The applicant submitted that the respondent's decision should be considered as arbitrary, hasty, and ill-advised procedurally. That there was nothing so urgent in the guideline as to forego important provisions of the law including parliamentary scrutiny. Notably, that the respondent's only defence, as captured on their filed replying affidavit is that the applicant is guilty of laches, which theapplicant submits it's just an excuse to escape judicial review.

6. The applicant stated that this honourable court is invited to examine whether the respondent followed the law in coming up with the regulations, and if not, the extent to which the regulations will affect the market players - including the applicant - if stay is not granted against the operationalisation of the illegal regulations.

7. It was contended by the applicant that the trite law is that judicial review is a special supervisory jurisdiction concerned with the legality, rationality, and procedural propriety of the exercise of administrative actions, whereby a recognizable public law wrong has been committed. Reliance was placed on the cases of *Republic v National Construction Authority & 2 others; and Joint Building and Construction Council (ex parte)* (Judicial Review Application E1120 of 2020) [2022] KEHC 333 (KLR) (Judicial Review).

8. The applicant maintains that if leave does not operate as a stay, it will be sending a message to both therespondents and other administrative bodies that they may do as they please and that they may ignore the public's right to fair administrative action, while choosing to comply with the law whenever it suits them. That article 47 of the *Constitution* of Kenya guarantees the Right to Fair Administrative Action which includes the right to expeditious, efficient, lawful, reasonable, and procedurally fair action.

9. It was its' submission that therespondent's decision to implement the guidelines will not only affect investments worth billions of shillings, but will also hold investors and market players' hostage - with their expectation that the same guidelines also apply retrospectively - even when the same did not follow the laid down procedure as expected of statutory instruments.

10. That if the respondent is not stopped, it will cause irreparable harm to investors; thus, theapplicant pleaded that this honourable court does grant stay before the determination of the substantive motion.

11. It was posited by the applicant that if stay is not granted, the existing investments would be affected especially because: (a) It challenges the viability of various investments which has led to liability for management of the various funds, that were already regulated by the respondent (b) The guidelines did not consider the issue of what happens with existing investment contracts that run for longer periods of time which they should have considered from their purported public participation and Parliamentary scrutiny of the regulations. (c) In exercise of their democratic right to information (article 35 of the *Constitution* protection of their economic rights (article 43 of the *Constitution*), the Applicants (through their fund manager Cytonn Asset Managers Limited) requested the respondents to furnish them with information that would help them make informed decisions about their investments, which request has not been responded to, to date (d) The circular did not provide any transition period that would grant market players a chance to comply and even worse, the guidelines also applied retrospectively.

12. That this court has jurisdiction to give stay on decisions that have disregarded stakeholders' right to fair administrative action and which would affect the stakeholders unfairly. The Fair Administrative Action Act operationalized the right to fair administrative action enshrined in article 47 of the *Constitution* of Kenya (2010). In the present matter, that the guidelines imposed by the respondent are an administrative action that is within the supervision of the High Court under Judicial Review.

13. That the applicant is seeking protection, by this honourable court, so that investors and market players do not suffer injustices; this, by asking that the respondents decision be stayed, as the court looks at the substantive issues. Also, that it is in public interest that stay be granted. The case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR was relied on.

14. Further, the applicant in their supplementary skeletal submission, and in response to the Respondent's skeletal submission, particularly on the issue of laches as alleged by the respondent, asserted that it was not indolent as it wrote a letter dated October 6, 2021- requesting that the Authority furnish it with the documents supporting the circular but the same did not elicit any response.

15. The applicant stated that before the letter, the respondent did not offer any timelines and/or grace period, and therefore the applicant experienced uncertainties. That as it was waiting for communication from the respondent on timelines, it only received an email asking fund managers to comply with the circular.

16. To the applicant, the respondent's actions pointed to the fact that it was at all times fully aware of the doctrine of laches, and were very intentional about not giving any grace period before implementation - as well as withholding the requested information to make sure that there would be no remedy to their arbitrary decision. Therefore, that the respondent's claim of the applicant being guilty of laches, and reliance on inflexibility of time is just an excuse to escape judicial review - just like they evaded parliamentary scrutiny.

17. It was the applicant's submission that the Fair Administrative Actions Act effectively modifies the *Law Reform Act*, and order 53 of the *Civil Procedure Rules* - on flexibility in the application of the law to the circumstances of a particular case - with the sole intention of achieving substantive justice for the parties, and especially where no prejudice is shown to be occasioned to either party in a case. The case of *Republic v Public Procurement Administrative Review Board ex parte Syner-Chemie* was relied upon.

18. Consequently, the applicant implores that this court adopts a time flexible approach in the interest of justice, in allowing leave to operate as stay, as the same is not prejudicial to any party; and further that the respondent fully participated in the delay of the institution of this matter by failing to respond to the applicant's letter.

19. The applicant beseeched this court to deliver justice without undue regard for procedural technicalities; which would only encourage administrative bodies like the Respondent to continue making arbitrary decisions, knowing they can always cause delay and evade judicial review. That this administration of justice will not be prejudicial in any way to either party to this application.

Respondent's Case

20. In opposing the application, and in particular, on the issue of leave operating as stay, therespondent in their grounds of opposition dated June 19, 2022, opposed the stay stating that the Application has not met the threshold for grant of leave to operate as stay.

21. Additionally, on leave to operate as stay, the respondent filed their replying affidavit dated June 22, 2022, averring that the application has not met the threshold for the grant of leave to operate as stay because: (a) the applicant has not demonstrated that it will suffer or has suffered irreparable damage because of the implementation of the Circular; (b) Grant of leave to operate as stay would not be efficacious since the Circular has already been implemented by the fund managers in capital markets in Kenya. In fact, no stakeholder has challenged the validity or implementation of the Circular and this is the first time since September 2020 that the respondent has received a formal objection to its implementation; (c) Without prejudice to the foregoing, the applicant has not demonstrated

exceptional circumstances for the temporary reversal of the Circular through leave operating as Stay; (d) If leave were to operate as stay, it would be against the interest of the public. The Present judicial review proceedings are public proceedings and they carry an element of public interest and the implementation of the Circular is in the interest of the investing public. Furthermore, the order for Stay will send conflicting signals to the capital markets wherein the Circular was positively received and implemented. (e) It is unmerited because the applicant is guilty of laches as averred above; and (f) The applicant has displayed blatant dishonesty by alleging that the Respondent did not undertake appropriate consultations contrary to what the respondenthas demonstrated.

22. The respondent filed its' skeletal submissions dated June 4, 2022 where it submitted that the remedies of judicial review being sought - including the operation of leave to operate as stay - should not be made available to the applicantwho has been indolent.

23. That the circular was published in September 2019 and was supposed to be effective as at January 15, 2020. That this case was filed 2 years and 9 months after publication of the Circular, and that theapplicant has not made an attempt to explain to the court why it took an inordinately long period to institute the present proceedings. That indolent litigants, like the applicant herein, should not be availed the remedies of judicial review. *Republic v Mwangi Nguyai & 3 others ex-parte Haru Nguyai*; and *Rosaline Tubei & 8 others v Patrick K Cheruiyot & 3 others* [2014] eKLR) cases were relied upon.

24. Further that the application for *certiorari* is time barred since it's being made 2 years 9 months after publication of the Circular which is way out of the 6 months' period mandatorily provided for by section 9(3) of the *Law Reform Act*, and order 53 rule 2 of the Civil Procedure Rules. Also, that since the applicant is disqualified from judicial review remedies - because of inordinate delay and indolence - the respondent further submitted that stay, as a result of leave, should also not be availed to it.

25. It was therespondents submission that theapplicant has not met the criteria for grant of leave to operate as stay. That firstly, the applicant has not demonstrated that implementation of the Circular will occasion irreparable harm. It is urged that the respondent has provided the rationale for the Circular and also shown how the applicant as a unit holder/investor will benefit from implementation of the Circular. The cases of *Republic v National Transport & Safety Authority & 10 others* [2014] eKLR; and, *Republic v County Assembly of Kisii Committee of Powers & Priviledges & 4 others ex parte Karen Nyamoita Magara* [2020] eKLR were relied upon.

26. Secondly, that the grant of the order for leave to operate as stay will not be efficacious. The respondent submits that it is trite law that the court should only order for leave to operate as stay, if it will be efficacious. The case of *James Opiyo Wandayi v Kenya National Assembly & 2 others* [2016] eKLR was relied on.

27. Further, the respondent asserted that in the present case, fund managers have implemented the valuation, performance measurement, and reporting provisions of the Circular. That the applicant has not demonstrated that implementation is still ongoing; since it has not produced neither the letter dated September 29, 2021, nor contents of the said letter showing it was sent to industry players asking them to comply with the impugned regulations.

28. The respondent maintains that it has received market wide cooperation from the licensed fund managers by them implementing the provisions of the Circular, and further, engaged licensed fund managers in order to improve the quality of the performance measurement and reporting. That this is illustrated by it sharing tools (like templates) in the email of April 19, 2022.

29. Thirdly, that the grant of an order for leave to operate as stay would be against public interest, and that public interest and judicial review proceedings are intertwined. Reliance was placed on the case of *Munir Sheikh Ahmed v Capital Markets Authority* [2018] eKLR.

30. The respondent posited that the Circular is meant to promote good administration in capital markets by eliminating the erstwhile incomparability and inconsistency of information presented in the performance measurement report, which presented information asymmetry to the investors. Furthermore, that the publication and implementation of the Circular promotes fair trade practices in consumer transactions in capital markets which in turn leads to enhanced protection of investor interests and confidence.

31. Resultantly, the respondent contended that grant of an order of leave to operate as stay would violate the needs of good administration and be incompatible with the public interest since it will send conflicting signals to the capital markets wherein the Circular was positively received and implemented and therefore urged this court to dismiss the prayer for leave to operate as stay.

32. The respondent also posited that if the Stay is granted as a result of this belated challenge to the Circular, it would undermine the orderliness already established by the implementation of the Circular since 2020. That an order for Stay would disorganize the operations of market players like fund managers leading to uncertainty. The cases of *Republic vs Mwangi Nguyai & 3 others ex-parte Haru Nguyai*; and, *Rosaline Tubei & 8 others v Patrick K. Cheruiyot & 3 others* [2014] eKLR were relied on.

33. The respondent asserts that the Circular is valid and legal since there was reasonable public participation accorded to the public by the respondent prior to its publication. The respondent maintained that they have furnished proof of extensive and appropriate consultations it held with stakeholders on diverse dates. That thus, the respondent met the standard set for appropriate level of public participation by courts which is a standard of reasonable opportunity. The case of *Constitution v Parliament of Kenya & 5 others* [2013] eKLR was relied on.

34. In sum, the respondent's position is that the entire application for judicial review orders is a nonstarter because its propriety is severely vitiated by laches and also that the threshold for leave to operate as stay has not been met. On the other hand, that public participation underlies publication of the Circular. In the end, the respondent prays for the honourable court to dismiss the prayer for leave to operate as stay.

Issue for Determination

35. At this stage, and as per the courts earlier directions, the only issue for determination is: Whether the *ex-parte* applicant has achieved the legal threshold for the grant of an order staying the impugned decision pending the hearing and determination of the substantive motion.

Analysis and Determination

36. The decision whether or not to grant a stay pursuant to leave is an exercise of judicial discretion, and that discretion must be exercised judiciously. The applicable law on whether leave so granted should operate as a stay is order 53 rule 1(4) of the *Civil Procedure Rules*, which provides that; "The grant of leave under this rule to apply for an order of prohibition 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."

37. Notably, this court in the case of *Republic v Director of Public Prosecutions & 2 others ex Parte Jayesh Umedlal Shanghavi Victoria Commercial Bank Limited (Interested Party)* (2022) eKLR cited with

authority the case of *Taib A Taib v The Minister for Local Government & others* Mombasa HCMISCA No 158 of 2006 where Maraga J (as he then was) observed that:

> " ...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...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 is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the 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 people think. It 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 a 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. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the *ex parte* applicant's case is deserving of a stay order. The *ex-parte* applicant seeks:
>
> > " That the grant of leave do operate as a stay stopping each and all the Respondents from restraining the applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councillor in the Municipal Council of Mombasa."
>
> Can I grant this prayer in view of the scope and purpose of the stay order as stated above" I think not. Not as it is framed. To grant it as prayed would be compelling the respondents to reinstate the *ex-parte* applicant to his position as Mayor before hearing them. Even in the cases cited by Mr Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the *ex parte* applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the respondents jointly and severally from nominating or causing to be nominated another councillor or to hold the elections or elect the Mayor of Mombasa."

38. A similar position has been taken by Odunga J in *Republic v Cabinet Secretary for Transport & Infrastructure & 4 others ex parte Kenya Country Bus Owners Association and 8 others* (2014) eKLR, and in *James Opiyo Wandayi v Kenya National Assembly & 2 others* (2016) eKLR where the learned judge held that it is only where the decision in question is complete that the court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

39. Additionally, this court is guided by the observations in the case of *R v Richard Kerich & 5 others* [2013] eKLR where it was stated that once the court has granted leave, as in this case, the question of whether the application is arguable becomes moot as that is the basis upon which leave was granted.

The relevant consideration then becomes one centred on whether the substantive motion would be rendered nugatory if stay is not granted. In the words of Odunga J in the above case; ''In my view, it is only when 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 of the applicant's case notwithstanding.''

40. Further, another aspect for consideration in the exercise of discretion, on whether or not to grant a stay in judicial review proceedings, is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J in *R v Capital Markets Authority ex parte Joseph Mumo Kivai & another* (2012) eKLR), where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

41. The public interest aspect, in the grant of a stay, was also the subject of the decision in *R (H) v Ashworth Special Hospital Authority* [2003] 1 WLR 127, where Dyson LJ held that "where there is a public interest element involved, the court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal's decision was unlawful"

42. Notably, and as a matter of public interest, the court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration. This was the consideration by Nyamu J. (as he then was) in *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 42, wherein the learned Judge cited the decision in *R v Monopolies and Mergers Commission ex parte Argyll Group PLC* [1986] 1 WLR 763.

43. Furthermore, this court is guided by the observations in the case of *Munir Sheikh Ahmed v Capital Markets Authority* [2018] eKLR, where it was stated that "From the above decisions, it follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the court is sure that the judicial review application can be disposed of in the shortest of time possible."

Disposition

44. Focusing back on the instant case, it is clear that the implementation of the respondent's impugned decision/circular is still ongoing as positive actions are need to be taken by the parties for circular to be fully complied with – in particular the regulated still needs to take steps in complying with the decision/circular. To my mind, the circular/decision is not self-executing.

45. It then follows that this court has jurisdiction and the discretion to stay the decision/circular but that discretion has to be exercised judiciously. The discretion should also be exercised sparingly where a decision has been fully implemented by some members of the public (stakeholders), and/or implementation is still ongoing.

46. Additionally, where there is a public interest element involved, only where an applicant has made out a strong case can discretion lean on their favour. In the instant case, staying the impugned decision/circular will not only affect the applicant, but also other members of the public (market players), including the ones that have wholly embraced and implemented the decision/circular, thus possibly presenting challenges to good administration in capital markets.

47. Where public interest is involved, the court must strike a balance between the rights of an individual and the public interest element involved. Gleaned from the record, there has been a notable delay in the presentation of the judicial review application herein. The argument by the applicant that the failure by the respondent to reply to their inquiry led to the delay is not satisfactory. Such failure would, to the contrary, be the catalyst to a prompt institution of a judicial review application as failure to give reasons for an administrative action is fertile ground for judicial review. In the intervening period during the delay, there has been implementation of the circular and as rightly put by the applicant, if the Stay is granted as a result of this belated challenge to the Circular, it would undermine the orderliness already established by the implementation of the Circular since 2020. Such Stay would disorganize the operations of market players like fund managers leading to uncertainty. Balancing the scales, the public interest in the matter leans in favour of upholding the public interest as against the individual rights of the applicant.

48. The other mainstay of the plea that the leave granted operates as a stay is that the outcome of the substantive motion should not be rendered nugatory. It has not been demonstrated that in absence of stay, the substantive motion would be rendered nugatory or that the respondent would suffer irreparable harm. The standard set in *Republic v Kerich & 5 others* (*supra*) has not been achieved.

Orders

49. To that end, and flowing from the above discussion, the prayer for leave to operate as stay in the applicant's chamber summons dated May 27, 2022 is unmerited and therefore dismissed.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022.

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A.K. NDUNGU

JUDGE