REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 647 OF 2016

BETWEEN

REPUBLIC……….…………………………......……………..APPLICANT

AND

NATIONAL ASSEMBLY……….….………………..………1ST RESPONDENT

ATTORNEY GENERAL….…………………….…......…..2ND RESPONDENT

EX PARTE: COALITION FOR REFORM AND DEMOCRACY (CORD)

RULING

Introduction

1. On 21st December, 2016, I granted to the applicant leave to commence judicial review proceedings in the manner sought in the Chamber Summons dated 21st December 2016. Pursuant to the proviso to Order 53 rule 1(4) of the ***Civil Procedure Rule***s, I however directed that the issue of leave operating as a stay be heard inter partes on 22nd December, 2016 at 8.30 am.

2. By 9.45 am when the Court session commenced, only the applicant and the 2nd Respondents were represented and considering the difficulties in effecting personal service on the 1st Respondent due to the inaccessibility of the National Assembly, the Court was satisfied that based on evidence of service on the 1st Respondent by email, and the urgency of the matter, the matter ought to proceed, the absence of the 1st Respondent notwithstanding.

3. This ruling is limited to the directions in the nature of stay.

4. Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a *prima facie* case has been made out and ought not to be granted as a matter of course. See **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR.**

5. Therefore this Court at this stage does not deal with the strength of the applicant's case. However

where an issue of jurisdiction arises, I agree with the 2nd Respondent's position that the Court must deal with it since if the Court has no jurisdiction to entertain the matter, even stay which is consequential to grant of leave must fall by the wayside.

6. In this case, it is contended that the Court has no jurisdiction because the prayers being sought are declaratory in nature hence do not fall within the purview of judicial review. This argument however fails to appreciate the provisions of the ***Fair Administrative Action Act*** which is expressed to apply to all state and non-state agencies, including any person whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates. It cannot be doubted that the actions relating to the manner in which elections are to be conducted will affect the legal rights or interests of the members of the applicant. Accordingly the Act is very much relevant. Under the same Act, section 2 defines an administrative action to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates while "administrator' means a person who takes administrative action or who makes an administrative decision. Section 9(1) of the Act provides that:

Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

7. Section 11 which erroneously refers to a non-existent section 8(1) instead of section 9(1) provides for remedies that the Court may grant and gives the Court the power to grant any order that is just and equitable and gives examples some of which are order declaring the rights of the parties in respect of any matter to which the administrative action relates; restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant; and granting a temporary interdict or other temporary relief.

8. It is therefore clear that remedies under that Act which I find relevant to these proceedings are wide enough to enable the Court grant declaratory and injunctive orders. In the premises the objection based as it is on jurisdiction cannot be sustained. It is therefore my view that nothing turns on the issue whether the applicant fashions his remedies as stay or injunction since the Court's powers are inclusive and the Court may grant any suitable temporary relief. That is in tandem with Article 23(3) of the Constitution.

9. Our circumstances are reflective of what **Lord Denning** appreciated **O'Reilly vs. Mackman [1982] 3 WLR 604, 623** when he expressed himself as follows:

"Just as the pick and shovel is nolonger suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public

duty."

10. However the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.

11. The purpose of stay was restated by **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the Lord Justice held that:

"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review…Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect." [Underlining mine].

12. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review proceedings nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

13. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…In judicial review applications 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 and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited…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. It is however not appropriate to compel a public body to act…A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

14. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those

proceedings. It must be shown that the probability, rather than the possibility, of a determination being made in the challenged proceedings, is high and that the same would render the judicial review proceedings futile that the stay ought to be granted. It follows that the stage at which the said proceedings under challenge have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

15. In matters of this nature, it was held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** that the exercise of the discretion involves:

"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."

16. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a deadwood. I associate myself with the holding of Court of Appeal in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore…parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."

17. It is generally agreed that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."

18. The question that the Court must decide is therefore whether the refusal to grant stay or conservatory orders would destroy the subject matter of the proceedings and foist upon the Court a situation of complete helplessness so that even if the applicant succeeds there would be no return to the *status quo*.

19. In this case the matter before me is not an ordinary application that the leave granted ought to operate as a stay. What is sought is an order suspending the proceedings of Legislative Assembly, an organ that, just as this Court, has delegated sovereign authority by the people of this Country. That notwithstanding, this Court when called upon and where circumstances merit, has the power to suspend proceedings before the Legislative Assembly where it is shown that the Assembly intends to proceed in a manner that threatens the supreme law of the land. In that I am supported by the decision of the South African Constitutional Court in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** where the

Court held that:

"When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…".

20. Our own Supreme Court has had to deal with the issue in **Speaker of National Assembly vs. Attorney General and 3 Others (2013) eKLR** in the following terms:

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."

21. The Court went on to state as follows:

"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the

Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

22. The reason for taking such a view is no far-fetched. **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** reasoned as follows:

"**To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament speaking constitutionally. This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice giving too much weight to temporary convenience and too little to constitutional principle. The law's delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."**

23. **Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708 properly captured the shortcomings of the Legislature as hereunder:

"Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."

24. Since Parliament must operate under the Constitution, where its actions threaten the Constitution itself this Court when called upon to do so must protect the Constitution by barring Parliament from doing so. That power must however be exercised with restraint where Parliament is exercising its legislative as opposed to quasi-judicial powers and is yet to make a decision. But the power exists.

25. To exercise it however, it must be clear to the Court that the action contemplated is patently unconstitutional and that the product of the Parliamentary transaction if successful is likely to render any challenge to it impotent and stillborn. For example if Parliament was to set out to enact a legislation introducing detention without trial, for the Court to stay away and say that it will intervene after the enactment would be a dereliction of the Court's constitutional mandate. Such inaction would amount to abetting the mutilation of the Constitution. In my view the Court would then be compelled to step in for to fail to do so would result into the enactment of legislation whose ramifications could be real, immediate and potentially irreversible.

26. Where however the action may still be cured notwithstanding the Parliamentary action, the Court ought not to interfere at the time of the legislative process but to await the product.

27. Article 2(4) of our Constitution which provides as follows:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

28. It is therefore clear that where it is shown the Parliament intends to proceed in a manner that

threatens the Constitution of this country, the Court not only has the powers but the obligation to protect the Constitution.

29. It therefore follows that it matters not whether the proceedings being challenged proceed or not. If at the end of the day they turn out to have been unconstitutional the Court will not hesitate to strike them down.

30. Even if Parliament proceeds to pass the contentious laws, this Court can stay their implementation pending the determination of their Constitutionality so long as the applicant meets the threshold for their suspension. It is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

"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."

31. Further, the Court is empowered to nullify the said amendments altogether in the long run. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 others [2014] eKLR** where it was held that:

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

32. I have considered the positions adopted by the various parties herein and whereas this Court must protect against a situation in which what is proposed to be done will be fait accompli unless halted, in this case, I do not see what will bar this Court from reversing the decisions to be taken by Parliament if the same are illegal or unconstitutional. The applicant may still fashion its remedies in such a way that the implementation of the said amendment may not only be suspended but may be nullified altogether. At this stage however, the said amendments are yet to be passed. This Court cannot foretell whether they will in fact see the light of the day.

33. Having considered the issues raised before me in this application at this stage I do not find any compelling reason why Parliament ought to be stopped from proceeding with the debate. Thereafter, depending on what it decides this Court will be at liberty to scrutinise its process to see whether it did actually comply with the law and the Constitution.

34. In the premises I decline to direct that the grant of leave herein shall operate as a stay of the parliamentary proceedings, at least not at this stage of the proceedings.

35. The costs will be in the cause. Orders accordingly.

Dated at Nairobi this 22nd day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Hon James Orengo, SC with Mr Paul Mwangi, Mr Antony Oluoch and Hon. Maanzu for the applicant

Mr Mutinda for the 2nd Respondent

CA Gitonga

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