



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. E063 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

AG. COMMISSIONER FOR

CO-OPERATIVE DEVELOPMENT.....RESPONDENT

AND

NZOIA SUGAR INVESTMENT

COOPERATIVE SOCIETY1ST INTERESTED PARTY

KENYA COMMERCIAL BANK.....2ND INTERESTED PARTY

EX PARTE:

NZOIA SUGAR COMPANY LIMITED

RULING NO 2

1. On 18th November 2020, this Court delivered a ruling in which it granted Nzoia Sugar Company Limited, the *ex parte* Applicant herein, leave to commence judicial review proceedings against the Respondent, and directed that Prayer 4 of the *ex parte* Applicant’s Chamber Summons dated 17th November 2020 seeking orders of stay of the agency notice issued by the Respondent be heard *inter partes*. In this regard, the Court noted that the impugned agency notice required certain actions to be undertaken by the Kenya Commercial Bank, Bungoma Branch, and joined the Bank as an Interested party to these proceedings, as its participation is necessary to clarify the status as regards the implementation of the agency notice issued by the Respondent.

2. The Court further directed the parties to file and serve their respective submissions on prayer 4 of the Chamber Summons dated 17th November 2020. This ruling is on the prayer for stay, and the parties’ respective cases in this regard are summarised in the following sections.

The Arguments

3. The *ex-parte* Applicant filed written submissions dated 23rd November 2020 in support of the prayer for stay, and relied on Order 53 Rule 1(4) of the Civil Procedure Rules and the principles of law governing a decision whether or not to grant a stay pursuant to leave. The case of **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127** was cited for the submission that the purpose of a stay in an application for leave to commence judicial review proceedings is to preserve the *status quo* pending the final determination of the claim for judicial review. The decisions in **Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMISCA. No. 158 of 2006** and **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** were also cited for the submission that the main factor to be considered in an application for stay is whether or not the decision or action sought to be stayed has been fully implemented.

4. The *ex-parte* Applicant submitted that in the instant case, on 3rd November, 2020, the Respondent herein invoked the provisions of Section 35 of the Cooperative Societies Act and issued an Agency Notice appointing the 2nd Interested Party as an agent of the 1st Interested Party. Further, that the mandate of the 2nd Interested Party as per the Agency appointment entails debiting the account of the *ex parte* Applicant, being Account No. 1107813840, or any other account held with the 2nd Interested Party, with Kshs 41,897,105.41 and credit the same to the 1st Interested Party's account being what is alleged to be the amounts deducted from the employees of the *ex parte* Applicant but not remitted to the 1st Interested Party, as well as the 2nd Interested Party's agency costs. Therefore, that the decision has already been made, of which the *ex parte* Applicant is contesting its validity, and now at the stage of implementation/enforcement.

5. According to the *ex parte* Applicant, section 35 of the Co-operative Societies Act provides that an Agent appointed to recover a debt owed to a society shall pay the amount specified in the notice issued out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for the employer or are due from him to the employer. Therefore, that under the aforesaid section, the enforcement of the Agency Notice is a continuance process to be effected within a period of twelve months. Furthermore, that by the time of filing the application for leave, and even by the time of filing its submissions, the 2nd Interested Party was yet to enforce the Agency Notice, and that the money held by the *ex parte* Applicant with the 2nd Interested Party is still intact.

6. In conclusion, the *ex parte* Applicant submitted that the Agency Notice dated 3rd November, 2020 is a ripe for stay of its enforcement, and that having contested the validity of the said Agency Notice, it is in the interest of justice for this Court to suspend its implementation/enforcement by way of a stay pending the hearing and determination of the judicial review proceedings.

7. The 1st Interested Party filed a Replying Affidavit sworn on 26th November 2020 by Dismas Masinde, the 1st Interested Party's Chairman. He deponed that the Respondent was justified to issue Agency Notice to Kenya Commercial Bank, Bungoma Branch to attach the *ex parte* Applicant's money in their account No. 1107813840, towards settling the debt they owed to it, and that the *ex parte* applicant was duly notified before the Respondent issued the Agency Notice to the 2nd interested party. The 1st Interested Party annexed correspondence and documents on the remittances due from the *ex parte* Applicant.

8. The 1st Interested Party's position is that the orders sought for leave to operate as stay cannot be granted for the reasons that the 2nd interested party has already deducted some monies from the *ex parte* Applicant's account hence the agency notice has been implemented. Further, that the *ex parte* Applicant has acknowledged that the 2nd Interested party has already collected monies from their account and credited the 1st Interested Party's account in the prayer in its substantive notice of motion dated 23/11/ 2020.

9. According to the 1st Interested Party, it will be unfair and irregular for this court to issue orders of stay of the agency notice as the *ex parte* Applicant is not denying it money but is disputing the figures owed, and as the agency notice has been fully implemented.

10. The Respondent and 2nd Interested Party did not file any response or submissions on the prayer for stay.

The Determination

11. I have considered the arguments by the parties, and I am guided by the exposition on the purpose of a stay in **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, where it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

12. It has in this regard been held 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. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

13. In the present application, the status of implementation is contested, with the 1st Interested Party stating that it is complete, while the *ex parte* Applicant states that it is of a continuing nature, and cites section 35(4) of the Cooperatives Societies Act in support. The said section provided as follows:

(4) The agent shall pay the amount specified in the notice issued under subsection (3) out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for the employer or are due from him to the employer.

14. Although none of the parties provided evidence to show the status of payment or non-payment they alleged, the applicable law supports the argument that implementation of an agency notice is of a continuing nature. In addition, as noted in **Kenya Com Rabbit Consortium Limited v Commissioner For Co-operatives [2017] eKLR**, if the stay is not granted, it may render the *ex parte* Applicant's application nugatory if successful. This Court will therefore exercise its discretion in favour of the *ex parte* Applicant for these reasons.

The Disposition

15. In the premises, I hereby make the following orders:

I. The leave granted herein on 18th November 2020 to commence judicial review proceedings in shall operate as a stay of any further implementation and enforcement of the Agency notice dated 3rd November 2020 issued by the Respondent to the Kenya Commercial Bank Bungoma Branch to collect Khs 41,897,105.41 on behalf of Nzoia Sugar Investment Co-operative Society from A/C No. 1107813840 being operated by the *ex parte* Applicant, pending the hearing and determination of the *ex parte* Applicant's substantive Notice of Motion, or until, further orders of this Court.

II. The Respondent and Interested Parties are granted leave to file and serve their responses to the *ex parte* Applicant's substantive Notice of Motion dated 23rd November 2020 within twenty-one (21) days of today's date.

III. The *ex parte* Applicant shall file and serve the Respondent and Interested Parties with submissions on the substantive Notice of Motion dated 23rd November 2020 within twenty-one (21) days of service, or upon default thereof.

IV. The Respondent and Interested Parties are granted leave to file and serve their reply submissions to the *ex parte* Applicant's substantive Notice of Motion dated 23rd November 2020 within twenty-one (21) days of service by the *ex parte* Applicant.

V. The *ex parte* Applicant's Notice of Motion dated 23rd November 2020 shall be heard by email on 15th April 2021.

VI. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's Notice of Motion dated 23rd November 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

VIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

IX. The parties shall also be required to file and send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 15th April 2021.

XI. Parties shall be at liberty to apply.

16. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondent's and Interested Parties' Advocates on record.

P. NYAMWEYA

JUDGE