



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. E067 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER ENFORCEMENT

AND INVESTIGATIONS.....2ND RESPONDENT

COMMISSIONER OF DOMESTIC TAXES.....3RD RESPONDENT

EX PARTE APPLICANT:.....JONATHAN ADRIAN JACKSON

RULING

1. On 3rd December 2020, this Court granted the *ex parte* Applicant herein leave to commence judicial review proceedings and directed that prayer (d) of his Chamber Summons application dated 1st December 2020, seeking orders that the leave operates as a stay of the Departure Prohibition Order dated 5th November 2020 issued against the *ex parte* Applicant by the Respondents be canvassed *inter partes*. The Court further directed the parties to file their responses and submissions on the prayer for stay.

2. The *ex parte* Applicant has since filed a substantive Notice of Motion dated 7th December 2020 and submissions dated 21st December 2020 on the prayer for stay, while the Respondents filed a replying affidavit and reply submissions both dated 15th January 2021.

The Arguments

3. The *ex-parte* Applicant relied on the decisions in various cases on the factors to consider in an application for stay pending the hearing of a judicial review application, including **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127** and **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006**. According to the Applicant, in the instant case, the decision of the Respondent is currently being implemented as the Departure Prohibition Order was shared with the Director of Immigration Services, and this means that the *ex parte* Applicant is restrained from moving out of the county is as long as the order is in place.

4. Further, that the said Departure Prohibition Order was issued on the basis of alleged tax arrears which have been challenged in **Income Tax Appeal Case Number E021 of 2020**, which appeal is yet to heard and determined and therefore the court is yet to make a determination on whether the alleged tax arrears are due or not. In the circumstances, the continued implementation of the Departure Prohibition Order against the Applicant pending the hearing and determination of the income tax appeal will render the Applicant's substantive application to quash and prohibit the Departure Prohibition Order nugatory.

5. Reference was made to the holding in **Taib A. Taib vs. The Minister for Local Government & Others** that in judicial review applications the Court should always ensure that the 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. The *ex parte* Applicant in addition urged the Court to be guided by the decisions in **Hassan Adan Bare vs Kenya Revenue Authority & Another [2020] eKLR**, where the Court suspended the implementation of Departure Prohibition order pending the hearing and determination of the petition and directed the Applicant therein to give seven (7) days' written notice to Kenya Revenue Authority before leaving; and in **Seyed Hassan Dashti Khavidaki vs Kenya Revenue Authority & Another [2018] e KLR** wherein the court while granting conservatory orders pending the hearing of the main petition found that the Petitioner's fundamental rights and freedoms that are at stake of being violated.

6. The Respondent on the other hand submitted that section 45 of the Tax Procedures Act, mandates the Respondents to issue Departure Prohibition Order when they reasonably believe that a person may leave Kenya without paying taxes that is or will become payable by a company in which he is a controlling member, and requires in mandatory terms that such Departure Prohibition Order to remain in force unless and until the person named therein pays in full the tax payable, or makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member.

7. In addition, that section 45(9) provides that no proceedings, criminal or civil, may be instituted or maintained against the Government, the Director, the Commissioner, an officer authorised to act under this section, or a custom, immigration, police, or any other person for anything lawfully done under the section

8. According to the Respondent, it is not in dispute that Space Investments Limited, owes taxes amounting to Kshs. 823,770,478. pursuant to a judgement in TAT No. 175 of 2016, and no stay has been granted in the appeal was preferred being HCITA E021 OF 2020, there is absolutely no stay. Further, that it is also an undisputed fact that the Applicant is a controlling member of Space Investment Limited, and has to date not paid the aforesaid taxes and/or made any satisfactory arrangement to the Respondents for the same, and therefore his departure from Kenya exposes the Respondents and the public at large to massive loss of the much needed revenue.

9. Lastly, the Respondent submitted that the Tax Procedures Act, is self-contained, and the *ex parte* Applicant has not exhausting the locally availed remedies under section 45(9), and as required by section 9(2) of the Fair Administrative Actions Act. Reliance was in this respect placed on the decision in **Speaker of National Assembly vs Karume (1992) KLR 21.**

The Determination

10. 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, and to ensure that a party who is eventually successful in his or her challenge is not denied the full benefit of the success.

11. 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. 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.

12. These positions were also explained in 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 not contested, and the Respondent does not dispute that there is the Departure Prohibition Order has been effected and is continuing. This is therefore a decision that is amenable to stay as it is of a continuing nature, as it will take effect if and when the *ex parte* Applicant intends to travel out of the Country. However, in addition to the status of implementation of a decision, a number of other principles have also been held to affect the exercise of a Court's discretion to grant a stay, particularly in cases where the stay will affect third parties and the general public. These principles include balancing the interests of an applicant with the wider public interest, and requiring undertakings as to damages where the stay will prevent a third party from benefiting from a decision (see **R vs Inspectorate of Pollution, ex parte Greenpeace Ltd [1994] 1 WLR 570.**)

14. In addition, it was held in **R (H). vs Ashworth Special Hospital Authority (supra)** that where granting a stay has the effect of depriving an individual of his or her liberty, the Court has to be satisfied that the public body has acted unlawfully, and that there is cogent evidence of the risks that would result if the individual were to be released as held. Lastly, it is also well established that permission to apply for judicial review and for stay may be refused if there is an adequate alternative remedy that is available, as exemplified by section 9 of the Fair Administrative Action Act.

15. This Court considered the element of public interest in an application for stay in the case of **Republic vs Kenya Airports Authority & another Exparte Irene Elizabeth Wanjiku Kisangi; Abel Gogo & another (Interested Parties) [2019] eKLR** and cited the case of **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another.** where Majanja J held as follows:

“...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. There is thus need to preserve the current *status quo* until the legality or otherwise of the 1st Respondent's proceedings and decision is established.”

16. This element of public interest was also the subject of the decision in **R (H) vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held;

“Where there is a public interest element involved, the Court strikes 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.”

17. This was also the position in the case of **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42,** wherein Justice Nyamu (as he then was) cited the decision in **R VS Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763** (as he then

was) in that 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.

18. In the instant application, there is already a judgment in favour of the Respondent that has not been stayed or set aside. Furthermore, the judgment is for the payment of taxes by a company in which the *ex parte* Applicant is a Director, which is an issue of public interest, as taxes are utilized for the provision of public services. Therefore, while the Respondent's decision is likely to affect the *ex parte* Applicant's constitutional right to freedom of movement, this is a case where both the Respondent's accrued right, and the risk that would result to both the Respondent and public if the subject tax liability is upheld, justifies a decision to limit the *ex parte* Applicant's right of movement.

19. These factors distinguish the instant application from the decisions in **Hassan Adan Bare vs Kenya Revenue Authority & Another (supra)** and **Syed Hassan Dashti Khavidaki vs Kenya Revenue Authority & Another (supra)**. It is in this regard notable that the basis for the decision in **Hassan Adan Bare vs Kenya Revenue Authority & Another (supra)** was as follows:

“...in the instant case there is admission that no demand notice has been issued; the tax due is yet to be known or determined; that no security has been demanded as the tax due is still unknown; that the Respondents have not demonstrated that the Applicant is a flight risk or has no known place of residence and that once the DPO is suspended he will run away.”

20. Likewise, in **Syed Hassan Dashti Khavidaki vs Kenya Revenue Authority & Another, (supra)**, the Court noted that the Petitioner's true relationship with the company against whom the tax demand had been made was not clear, since the documents attached to the application did not show him one of the directors or controlling members of the company. These cases are distinguishable since in the instant application it is not in dispute that there is a tax judgment against Space Investments Limited for Kshs. 823,770,478/=, and that the *ex parte* Applicant is a controlling director of the said company.

21. Lastly, the *ex parte* Applicant also has the opportunity of securing his right of movement under section 45(7) of the Tax Procedures Act, and to mitigate any prejudice he may suffer as a result of the Departure Prohibition Order. Section 45 (7) provides as follows:

(7) The Commissioner shall revoke a departure prohibition order if—

(a) the person named in the order pays in full the tax payable or that will become payable by that person or by a company in which that person is a controlling member; or

(b) the person named in the order makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member.

22. These provisions obviate the need for this Court to require any security for the tax demanded in the judgment, which would have been the alternative option given the sums involved in the judgment entered on behalf of the Respondents.

23. It is thus the finding of this Court arising from the foregoing factors that the stay sought by the *ex parte* Applicant is not merited in the instant application.

The Disposition

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

I. Prayer (d) of the *ex parte* Applicant's Chamber Summons application dated 1st December 2020, seeking orders that the leave granted herein operates as a stay of the Departure Prohibition Order dated 5th November 2020 issued against the *ex parte* Applicant by the Respondents is hereby declined.

II. The *ex parte* Applicants shall file and serve the Respondents with submissions on the substantive Notice of Motion dated 7th December 2020 within fourteen (14) days of today's date.

III. The Respondent and Interested Party are granted leave to file and serve their reply submissions to the *ex parte* Applicant's substantive Notice of Motion dated 7th December 2020 within fourteen (14) days of service by the *ex parte* Applicants.

IV. The *ex parte* Applicants' Notice of Motion dated 7th December 2020 shall be heard virtually on 26th May 2021.

V. 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 7th December 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

VI. 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.

VII. 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.

VIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

IX. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on 26th May 2021 and shall send the parties an electronic link for the hearing.

X. Parties shall be at liberty to apply.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL 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* Applicants', Respondent's and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE