



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. E016 OF 2020**

**CONSTATINE MAGHANGA MWADIME.....APPLICANT**

**VERSUS**

**DIRECTORATE CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**AND**

**FAUZZIAH EMMAN MOHAMUD .....INTERESTED PARTY**

**RULING**

In an application dated 28 July 2020 to initiate judicial review proceedings, the applicant also sought for the particular order that if leave is granted, it should operate as stay; this particular prayer was framed as follows:

***“3. THAT the grant of leave to apply for orders of CERTIORARI and PROHIBITION do operate as stay of the intended and or impending arrest and prosecution of the Exparte/Applicant.”***

Leave to file the substantive motion of judicial review orders of certiorari and prohibition was indeed granted; however, as far as the prayer for stay is concerned, the court directed as follows:

***“7. Regarding the plea for stay, I note that the applicant seeks to stay an intended arrest and prosecution. The argument is that the complaint lodged at the police arises from a sale agreement pertaining to a property which was not completed. The said argument sounds attractive, but section 193A of the Criminal Procedure Code permits parallel criminal and civil proceedings. In the circumstances, it would be prudent for the question whether the leave granted will operate as stay to be determined inter partes. Consistent with the provisions of Order 53 Rule 1(4) of the Civil Procedure Rules, 2010, and in particular the proviso thereto, I direct that the question of stay shall be determined inter partes. Accordingly, I make the following orders: -***

- a. That the application dated 28<sup>th</sup> July 2020 be and is hereby certified as urgent.***
- b. That the applicant be and are (sic) hereby granted leave to institute judicial review proceedings in terms of prayers (2) (a) & (b) of the Application.***
- c. That the applicant is directed to file and serve the substantive motion within 15 days from today together with skeletal submission addressing the question of leave.***
- d. That upon being served the Respondents and the Interested Party are directed to file and serve their reply to the substantive application within fifteen (15) days from the date of service together with skeletal submissions on the question of stay.***
- e. Mention to confirm compliance and reserve a ruling date on stay and also give directions on the hearing of the substantive application shall be on 22<sup>nd</sup> September, 2020 at 11:00 am via video link.”***

The Applicant contends that he is a Director of Amani Village Limited; this is a Company which entered into an Agreement with the Interested Party for sale of a Maisonette on L.R Number 12715/100. The applicant admits that due to what he regards as “factors beyond the

control of the Company” the company could not undertake its obligations under the contract as envisaged; in other words, the company has admitted breaching its contract with the Interested Party.

As a result of this breach, the Interested Party lodged a complaint with the police seeking for refund of the purchase price. Subsequently, the Applicant has been summoned by the police and recorded statement on the Interested Party's complaint.

It is the applicant's case that his dispute with the Interested Party is purely civil in nature and, for that reason, does not warrant the intervention of the police or criminal proceedings against him.

Furthermore, the contract between the company and the Interested Party has an Arbitration Clause which the Interested Party could invoke to settle any dispute arising from the transaction. That clause reads as follows:

***“Any dispute, difference or question whatsoever which may arise between the parties including interpretation of rights and liabilities of either party shall be referred to an arbitrator under the rules of the Arbitration Act 1995 of Kenya (Act No. 4 of 1995) as amended by the Arbitration (Amendment) Act, 2009 (Act No. 11 of 2009) or other Act or Acts for the time being in force, in Kenya or any statutory modification or re-enactment/ or the time being in force, such arbitrator to be appointed by the agreement of both parties and in the absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other then on the application of any one party by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) and the decision of such arbitrator shall be final and binding on the parties hereto.”***

In a replying affidavit sworn by the Interested Party, she does not dispute having made a complainant against the Applicant to the police with respect to what is, no doubt, a commercial or business transaction between them. Basically, she has alleged that the Applicant has not honoured his part of the deal and discharged his obligations under the contract.

Desterio Omukaga, a police officer who has described himself as an Inspector of Police also swore an affidavit confirming that indeed the Interested Party lodged a complaint with police about the conduct of the Applicant. As a result of this complaint, he is undertaking investigations on whether the offence of obtaining property by false pretences contrary section 313 of the Penal Code, cap. 63 has been committed.

Following the directions given by this honourable Court, parties filed written submissions on the question of whether leave should operate as stay. The submissions, however, have largely delved into the merits or lack thereof of the main motion for the prerogative orders. The applicant insists that he cannot be investigated, arrested, charged and prosecuted for what is clearly a civil dispute. The respondents and the Interested Party, on the other hand, are of the view that there is nothing wrong in criminal and civil proceedings running side by side and, if anything, section 193A of the Criminal Procedure Code provides for such a possibility.

I will not take the course the parties have adopted and make what may appear to be conclusive remarks on the substantive motion for the simple reason that that will preempt the hearing and determination of the main motion. My concern at the moment should be whether the purpose for which leave has been granted will be rendered futile and whether the respondents will suffer any prejudice if a stay order is granted.

Order 53. Rule 1(4) of the Civil Procedure Rules expressly provides that the grant of leave to file the substantive motion can operate as stay; that rule reads as follows:

***(4) 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: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.***

In **R Vs Secretary of State for Education ex pater Avon County Council (1991) 1 ALL ER 282** an order of stay in judicial review proceedings was defined as follows:

***“An order that a decision by a decision-making body whose decisions are open to challenge by judicial review shall not take effect until the judicial review proceedings are concluded is correctly described as a stay and not as an interim injunction.”***

And in **Minister for Foreign Affairs, Trade and Industry vs Vehicles and Supplies Ltd (1991) 4 ALL ER 65** it was described as follows:

***“A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being 'breached' by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (e.g. to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled.”*** (Per Lord Oliver of Aylmerton, at page 74).

It is therefore apparent that in a proper case, the Court will grant stay.

Turning back to this case, I am satisfied that the Applicant has not only made out an arguable case, but also that if his case succeeds it will be of no consequence if he is subjected to a criminal trial in the intervening period. I am also satisfied that the respondents and the Interested Party shall not suffer any prejudice if the criminal proceedings against the applicant are held in abeyance pending the hearing and determination of his substantive motion.

The upshot is that I hereby grant the Applicant's plea that leave shall operate as stay against his arrest and prosecution pending the hearing and determination of the motion for judicial review orders of certiorari and prohibition. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 28TH MAY 2021**

**Ngaah Jairus**

**JUDGE**