



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 8 OF 2018

**IN THE MATTER OF AN APPLICATION BY SIRIKWA ELDORET HOTEL LIMITED FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF THE DECISION AND ACTS OF THE COMMISSIONER OF DOMESTIC TAXES TAKEN AND DONE
ON THE 13TH SEPTEMBER 2018 RESPECTIVELY**

AND

**IN THE MATTER OF THE ATTACHMENT BY KEYSIAN AUCTIONEERS ON 13TH SEPTEMBER 2018 OF THE PROPERTY
OF SIRIKIWA ELDORET HOTEL**

AND

IN THE MATTER OF SECTION 41 OF THE TAX PROCEDURES ACT 2015 LAWS OF KENYA

REPUBLICAPPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY1ST RESPONDENT

THE COMMISSIONER OF DOMESTIC TAXES2ND RESPONDENT

KEYSIAN AUCTIONEERS.....3RD RESPONDENT

AND

M/S SIRIKIWA ELDORET HOTEL LIMITEDEX-PARTE APPLICANT

RULING

By Notice of Motion dated 11th July, 2019 the applicant seeks the following orders;

1. That the application be certified as urgent and service be dispensed with in the first instance.
2. That the court be pleased to grant a stay of execution of the proclamation notice issued by the 3rd respondent on 13th September, 2018 herein pending hearing and determination of this application inter-parties.
3. That the court be pleased to grant a stay of execution of the proclamation notice issued by the 3rd respondent on 13th September, 2018 pending the hearing and determination of the appeal.
4. That the court be pleased to grant stay of execution of costs arising from the ruling delivered on 25/6/2019 by Hon Justice S.M Githinji pending the hearing and determination of this application inter-parties and subsequently the appeal.
5. That costs of this application be provided for.

The application is supported by the affidavit of Samuel Kiptala Chemilil and is premised on grounds that;

- a) By judgment of this Honourable court, the ex-parte applicant's application was dismissed on 25/6/2019 on the basis that this court lacked the requisite jurisdiction to hear and determine the matter.
- b) The effect of the said ruling was that the respondents could proceed to enforce the proclamation notice and order dated 13th September, 2018 addressed to M/S Hotel Sirikwa Limited the ex-parte applicant.
- c) None of the goods and chattels purportedly secured and left at the ex-parte applicant's premises are owned by the Hotel Sirikwa Limited as they are all owned by the ex-parte applicant.
- d) The ex-parte applicant is likely to suffer substantial loss as by proclaiming and distraining the ex-parte applicant's property, the 1st, 2nd and 3rd respondents seek to illegally and without any colour of right or lawful justification make the ex-parte applicant pay the debts of another company namely Hotel Sirikwa Limited which will cripple the business operations of the ex-parte applicant.
- e) Furthermore, the ex-parte applicant which is a company registered in Kenya pursuant to Certificate No. C147309 and PIN No. PO51332303J is a completely different and distinct company from Hotel Sirikwa Limited whose KRA PIN NO. is shown as PO51120983V.
- f) Being dissatisfied with the judgment by Honorable Justice S.M Githinji, the ex-parte applicant herein has since appealed to the Eldoret Court of Appeal against the decision in its entirety.
- g) That there is a likelihood that the respondents shall move to levy distress for the alleged tax arrears owed by M/s Hotel Sirikwa Limited as against the ex-parte applicant.
- h) That unless stay is granted, the ex-parte applicant's appeal will be rendered nugatory in the event the appeal succeeds.
- i) That this application has been made in the interest of justice, without unreasonable delay and in good faith.
- j) That the ex-parte applicant is ready and willing to provide for any security to the court which the court may deem fit to order for due performance of the order as may be ultimately be binding to it.

The respondents opposed the said application and filed grounds of opposition dated 16/9/2020.

The parties sought to canvas the motion by way of written submissions and the applicant filed submissions as well as the respondents. The applicant submitted that the issues for determination by the court were whether or not this court is functus officio pursuant to *Section 8(3) of the Law Reform Act*; whether or not the stay orders are being sought in vacuum; whether the stay orders can issue as sought and lastly whether stay of execution of costs can issue.

On the issue of this court being functus officio the applicant submitted that this court has inherent jurisdiction to grant stay orders as sought in the interest of justice. The applicant further cited the case of ***Wangui Kathryn Kimani V Disciplinary Tribunal of the Law Society of Kenya & Another [2017]*** where the court held that stay may be granted in the interest of justice and upon the court exercising its inherent jurisdiction which is not provided in the law.

On the issue of whether or not stay orders are being sought in vacuum the applicant submitted that it is seeking stay of the proclamation notice dated 13/9/2018 following the dismissal of the cause by the ruling delivered on 25/6/2019. The applicant has further submitted that the reason for seeking stay is that the ex-parte applicant is aggrieved with the said decision and are seeking to avoid execution of the said order by the respondents who want to recover the sum of Kshs. 18,250,615.00. It was the applicant's contention that the moment that this Honourable court found that there was a transfer of tax liabilities and thereafter dismissed the case and found no unreasonableness on part of the respondents, it gave the respondents the green-light to act on the orders and the proclamation notice both dated 13/9/2018. The ex-parte applicant submitted that the implication of the ruling with respect to the said proclamation notice and order is what forms the basis of its appeal.

In granting orders of stay, the ex-parte applicant further called upon this court to exercise its inherent jurisdiction not provided for under the law but in order to do justice. The ex-parte applicant cited the case of ***Evans Kaleka Sogomi V District Land Registrar & 6 Others [2017] eKLR*** to buttress its submissions on the issue.

The ex-parte applicant submitted that this matter was dismissed with costs to the respondents and to that extent the order was termed a positive order. The applicant was also apprehensive that should the respondents move to execution of costs, the ex-parte applicant will stand to suffer substantial loss. They relied on the following cases ***Raymond M Omboga V Austine Pyan Maranga, Kwench Limited Vs Nairobi City County & 2 Others and Hon. Peter Anyang' Nyong'o & 2 Others V. The Minister for Finance & Another***, on the issue.

The respondents submitted that the issues for determination are whether this court issued positive orders capable of being executed and whether the applicant will suffer substantial loss in the event the orders are not granted.

The respondents submit that there is no positive order capable of being stayed in this dispute. They submitted that the only thing that was done by this court was to dismiss the applicant's judicial review application. The Respondents assert that the Ruling did not order any of the parties to do anything or refrain from doing anything and accordingly there is nothing which is capable of being stayed. The respondents

relied on the following cases to buttress their submissions; *Peter Mueria Ole Munya & 4 Others Vs. Principal Magistrate, Narok & 6 Others [2015] eKLR, Republic V Kenya Urban Roads Authority & 3 Others Ex-parte Cytonn Investment Management Limited [2018] eKLR*, on the issue.

The respondents further argued that, *Section 8* of the *Law Reform Act Cap 26* of the *Laws of Kenya* states the following concerning judicial review orders,

“(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection 5 of this section,”

“(5) Any person aggrieved by an order made in exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.”

The respondents submitted that *Section 8(3)* of the *Law Reform Act* is applicable in this particular case, because to grant stay in this matter, is to reverse the dismissal of the prayer of prohibition and mandamus, thereby reversing the ruling of 25/6/2019. The respondents further submitted that upon delivery of the said ruling this court became functus officio.

The respondents further contended that this present application cannot be sustained even in the Court of Appeal because the Court of Appeal in numerous decisions has determined that in Judicial Review, orders made under *Order 53* of the *Civil Procedure Rules*, the Superior Court cannot issue orders of stay or injunction on application such as the present one. The Court of Appeal cannot also issue orders which the superior court was not allowed in law to issue. The respondents cited the case of *Stanbic Bank V KRA [2009] eKLR*.

The respondents also contended that the applicant has not demonstrated that they will suffer any hardship if the order of stay as sought is not granted. The respondents cited the case of *Coastal Bottlers Limited Vs. The Commissioner Domestic Taxes [2009] eKLR* on the issue. It was further the respondents' contention that pending the hearing and determination of the intended appeal granting the sought orders will only cause greater hardship to the applicant because it would mean that the amount of taxes demanded would continue to accrue interest and penalties until payment in full is made. The respondents therefore prayed that the applicant's notice of motion application be dismissed in its entirety with costs to the respondents.

ANALYSIS AND DETERMINATION

It is not in dispute that the Applicant's suit for Judicial Review was dismissed by this court's ruling dated 25th June, 2019. Dismissal of the application amounted to a negative order which did not require any parties to do or refrain from doing anything.

In *Devani & 4 Others V. Joseph Ngindari & 3 Others, CA NO. NAI 136 OF 2004*, the High Court dismissed an application for judicial review and the applicant applied under *rule 5(2)(b)* for stay of execution of the order of the High Court. In holding that the application was incompetent, the Court stated:

“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”

Subsequently in *Exclusive Estates Ltd V. Kenya Posts And*

Telecommunications Corporation & Another (2005) 1 EA 53 the Court expressed itself as follows on the issue at hand:

“The stay of execution envisaged by rule 5(2) (b) of the rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act:

“means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order.”

The order which dismissed the suit was a negative order which is not capable of being executed.”

Judicial review is *sui generis* and the decline of the court to issue the orders of *certiorari*, *mandamus* or prohibition results in a negative order incapable of either stay or execution. As such, the motion before me is devoid of merit as there is nothing to stay in my ruling. I neither ordered nor directed anyone to do or not do anything. In view of the foregoing, I find no merit in the application and I hereby dismiss it with costs to the Respondents.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 24th Day of May, 2021

In the presence of:-

Mr. Tororei for the Applicant

Mr. Lemiso for the respondent absent

Ms Gladys – Court Assistant