



**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**

**SOCIETY .....INTERESTED PARTY**

**EX PARTE:.....NZOIA SUGAR COMPANY LIMITED**

**RULING**

**The Application**

1. Nzoia Sugar Company Limited, the *ex parte* Applicant herein, has filed an application by way of a Chamber Summons dated 17<sup>th</sup> November 2020, seeking the following orders:

1. **THAT the instant application be certified as urgent and fit to be heard ex-parte in the first instance.**
2. **THAT this Court be pleased to grant to the ex-parte applicant leave to institute Judicial Review proceedings seeking for an Order of certiorari to quash the decision by the Acting Commissioner for Co-operative Development issuing an- Agency notice 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 applicant.**
3. **THAT this Court be pleased to grant leave to the ex-parte applicant to apply for an Order of mandamus compelling the Acting Commissioner for Cooperative Development to cause to be put back all monies so far collected from the said Bank and account held by the applicant;**
4. **THAT . leave granted do operate as stay of the Agency Notice pending final determination of the judicial review proceedings.**
5. **THAT such further orders and reliefs that this Court may deem to just and expedient.**
6. **THAT costs of this application be borne by the Respondents.**

2. The grounds for the application are stated in the *ex parte* Applicant’s statutory statement dated 17<sup>th</sup> November 2020, and a verifying affidavit sworn on the same date by Ritah Mukhongo, the *ex parte* Applicant’s Company Secretary. In summary, the main grounds are that the decision by the Respondent herein to issue the agency notice was made pursuant to the exercise of the Respondent’s powers under section 35 of the Cooperatives Act without affording the *ex Parte* Applicant a hearing, and the amount claimed is disputed.

3. The *ex parte* Applicant annexed copies the impugned agency notice issued by the Respondent which is dated 3<sup>rd</sup> November 2020, and a copy of a letter dated 8<sup>th</sup> August 2019 sent by the *ex parte* Applicant to the Interested Party on the subject debt.

### **The Determination**

4. I have considered the application dated 17<sup>th</sup> November 2020 and the reasons offered in support of the urgency, and I am satisfied that the *ex parte* Applicant has demonstrated that this matter is urgent. This for reason that the impugned agency notice will have effects on the *ex parte* Applicant's operations.

5. On the orders sought by the *ex parte* Applicant for leave to commence judicial review proceedings, the applicable law is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

6. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

7. In the present application, the *ex parte* Applicant has provided evidence of the impugned agency notice and the grounds why it considers the Respondent's decision to be illegal. To this extent I find that the *ex parte* Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

8. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

**“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.”**

9. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, 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.

10. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. A similar decision was made by Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** .

11. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows:

**“As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.”**

12. It therefore follows 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.

13. In this regard, the orders given by the Respondent in the impugned agency notice require certain actions to be undertaken by the Kenya Commercial Bank, Bungoma Branch. However, the said Bank has not been joined as a party to these proceedings, and its participation is necessary to clarify the status as regards the implementation of the agency notice issued by the Respondent. In the premises the prayer for stay will need to be urged *inter partes* after the joinder of the said Bank.

### **The Orders**

14. In light of the foregoing observations and findings, the *ex parte* Applicants' Chamber Summons dated 17<sup>th</sup> November 2020 is found to be merited to the extent of the following orders:

**I. The *ex parte* Applicants' Chamber Summons application dated 17<sup>th</sup> November 2020 be and is hereby certified as urgent, and is hereby admitted for hearing *ex parte* and on a priority basis.**

II. The Kenya Commercial Bank is joined to these proceedings as the 2<sup>nd</sup> Interested Party.

III. The *ex parte* Applicant is granted leave to institute Judicial Review proceedings seeking for an Order of certiorari to quash the decision by the Acting Commissioner for Co-operative Development issuing an Agency notice to the Kenya Commercial Bank Bungoma Branch to collect Kshs 41,897,105.41 on behalf of Nzoia Sugar Investment Co-operative Society from A/C No. 1107813840 being operated by the applicant.

IV. The *ex parte* Applicant is granted leave to apply for an Order of mandamus compelling the Acting Commissioner for Cooperative Development to cause to be put back all monies so far collected from the said Bank and account held by the applicant.

V. Prayer 4 of the Chamber Summons dated 17<sup>th</sup> November 2020 seeking orders of stay of the agency notice issued by the Respondent shall be heard at an *inter partes* hearing to be held on 1<sup>st</sup> December 2020.

VI. Pending the said *inter partes* hearing and subject to the compliance by the *ex parte* Applicant with the directions granted herein, temporary orders are granted for fourteen (14) days only, staying any further implementation of the agency notice dated 3<sup>rd</sup> November 2020 issued by the Respondent, requiring the Kenya Commercial Bank Bungoma Branch to credit the amount of Khs 41,897,105.41 in the account of Nzoia Sugar Investment Co-operative Society and to debit the said amount from accounts being operated by the *ex parte* Applicant.

VII. The *ex parte* Applicant shall file and serve the Respondent and 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties with (i) the substantive Notice of Motion, (ii) the Chamber Summons dated 17<sup>th</sup> November 2020 and skeletal submissions on prayer 4 thereof, (iii) a copy of this ruling, and (v) a hearing notice, within five (5) days from today's date.

VIII. Upon being served with the said pleadings and documents, the Respondent and Interested Parties shall be required to file their responses to, and submissions on prayer 4 of the Chamber Summons dated 17<sup>th</sup> November 2020 within seven (7) days from the date of service.

IX. 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 prayer 4 of the Chamber Summons dated 17<sup>th</sup> November 2020 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. 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](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XI. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XII. 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](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 1<sup>st</sup> December 2020.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicant by electronic mail by close of business on Thursday, 19<sup>th</sup> November 2020.

XV. Parties shall be at liberty to apply.

15. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER 2020

P. NYAMWEYA

JUDGE