REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 82 OF 2018

IN THE MATTER OF ACTUAL BREACH AND/OR CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 159, 165, 10, 20, 22, 23, 27, 43, 49, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL FOR AND ON BEHALF OF MOHAN GALOT (HEREINAFTER REFERED TO AS THE SUBJECT) FOR ORDERS JUDICIAL REVIEW BY WAY OF PROHIBITION AND CERTIORARI AGAINST THE DIRECTOR OF PUBLIC PROSECUTIONS, THE INSPECTOR GENERAL OF POLICE AND THE DIRECTOR CID, OFFICER IN CHARGE OF MUTHAIGA POLICE STATION

AND

IN THE MATER BETWEEN

THE HON. THE ATTORNEY GENERAL……..APPLICANT

VERSUS

THE CHIEF MAGISTRATE,

MILIMANI LAW COURTS…….....…….1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE…....…2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS..3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....…..4TH RESPONDENT

EX PARTE..…….....…..…….……MOHAN GALOT

RULING

Introduction

1. On 11th December, 2017, I heard the application ex parte and granted the applicant leave to commence judicial review proceedings.

2. However, pursuant to the proviso to Order 53 rule 1(4) of the ***Civil Procedure Rules***, I directed that the direction whether leave ought to operate as a stay pending the hearing and determination of the substantive Motion be heard inter partes.

3. It is that limb of the application that falls for determination in this ruling.

4. In the premises I intend to deal only with those averments and submissions which are relevant to the prayer for stay.

Applicants' Case

5. I have considered the verifying affidavit sworn in support of the Chamber Summons for leave and stay and save for the averments justifying the grant of the substantive reliefs, there is no averment therein that supports the prayer that pending the determination of the said Motion the leave granted herein ought to operate as a stay.

6. There was however a further affidavit sworn in support of the said application but the only paragraph that alluded to the prayer for stay were paragraphs 23, 24 and 25 which were crafted in the following terms:

> ***23. That unless there is stay of proceedings including the taking of plea in criminal case No. 276 of 2018, the ends of justice will be defied and the deponent will be exposed to illegitimate and unfair proceedings.***
>
> ***24. It is mete and just that stay be granted pending the resolution of the matters raised herein.***
>
> ***25. That unless stay is granted, the continued prosecution of the matter will inevitably result in extreme prejudice to the deponent with the further consequences of constituting abuse of due process I total abuse of the deponent (sic) rights.***

7. In his oral address to the Court, **Mr Wandugi**, learned counsel for the applicant, who appeared with **Mr Kanyunge**, submitted that since the 3rd and 4th Respondents have not opposed the application, there is no reason why the stay should not be allowed since the interested party herein has no locus opposing the same. According to learned counsel, if the challenged criminal proceedings are allowed to proceed there will be an abuse of the process since the documents in question have been found not to be fraudulent.

8. The Court was urged to stay the criminal proceedings the subject of this application just like the related criminal proceedings were stayed.

9. It was further submitted that to permit the criminal proceedings to proceed would expose the applicant to a stigma.

The 1st Respondent's Case

10. The 1st Respondent largely left the matter in the hands of the Court. According to his learned counsel, **Mr Munene**, instead of dealing with the issue of stay the Court should instead fast-track the hearing and determination of the substantive motion.

Interested Party's Case

11. The grant of stay was however opposed by the interested party trough his learned counsel **Mr Kenyatta** who appeared with **Mr Kaka**. Though the replying affidavit did not specifically address the issue of stay as opposed to the merits of the applicant's case, it was learned counsel's submissions, that the applicant has instituted several legal proceedings aimed at stalling his prosecution before the subordinate court all of which have not succeeded.

12. It was further submitted that the applicant has not placed before the Court any material on the basis of which a stay can be granted.

Determinations

13. I have considered the application, the affidavits filed herein and the submissions made by the parties and this is the view I form of the issues raised.

14. In my view, the mere fact that the application discloses a *prima facie* case does not necessarily qualify the matter to a grant of stay. The Court despite a finding that the applicants has established a *prima facie* case must proceed to address its mind on whether or not to direct the leave so granted to operate as a stay of the proceedings in question. Stay of proceedings or the questioned decision being discretionary ought only to be granted where the same is necessary and not as a matter of course. That discretion, like any other judicial discretion must therefore be exercised judicially and not capriciously or whimsically.

15. However, Order 53 rule 1(4) of the ***Civil Procedure Rules*** provides:

> ***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.***

16. In my view, even where the Court grants orders of stay under the aforesaid provision, it has wide powers to do so on such terms as are just including the period for which the stay is to last.

17. This Court has similarly held that as opposed to the grant of leave which a party is entitled once a *prima facie* case disclosing grounds for judicial review are established, the grant of direction that the leave operate as a stay is an exercise of judicial discretion which must be based on the prevailing circumstances. It may be granted at any stage of the proceedings and may similarly be varied, set aside or vacated all together depending on the circumstances of the case. It follows that an application for stay of the proceedings or decision in question can be made at any stage of the proceedings in a judicial review application as the determination of an application for stay must necessarily depend on the prevailing circumstances and where the circumstances change, the court is perfectly entitled to grant stay. In other words a decision made with respect to stay is not necessarily caught up by the doctrine of *res judicata* though the same may amount to an abuse of the process of the court if made with the intention of overturning an earlier decision or as a means of haranguing the court.

18. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of

implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

19. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

20. As this Court held in Miscellaneous Application No. 363 of 2013 - **In Re: Meridian Medical Centre**;

> **"....it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."**

21. Maraga, J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* 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 though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited…The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."**

22. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability as opposed to the possibility of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.

23. In making a determination whether or not to grant the stay, the Court must place the respective cases of the parties before it in a legal scale. It must balance the competing interests in order to arrive at a just decision. Where the Court has found that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation. In my view the Court must have the power to guard against actions by some of the parties to the suit which are geared towards the dissipation of the subject matter before it before a determination is made one way or the other with respect to the rivalling issues placed before it. In other words, the Court must be in a position to ensure that whatever decision it finally arrives at, the proceedings before it are not seen to have been a circus.

24. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** this involves:

> **"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."**

25. It therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

26. As stated hereinabove this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell. I associate myself with the holding of Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore… parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."

27. I therefore agree that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."

28. In this application, apart from the issue of the subject criminal proceedings exposing the applicant to stigma, there is no other compelling reason advanced by the applicant why the criminal proceedings ought to be stayed at this stage. It is not contended that there is likelihood that the challenged criminal proceedings may be determined before these proceedings are determined. In fact, it is averred that even the plea has not been taken and the matter is yet to be fixed for hearing. It is also disclosed that the applicant has in fact applied for the stay of the plea-taking in the said proceedings which applications are yet to be heard and determined.

29. It is upon the applicants who seek to stop the criminal proceedings to prove that unless the leave operates as stay of the proceedings in question, there is an imminent threat of the impugned proceedings being undertaken and determined before the judicial review proceedings and or an occurrence of an event that would render the outcome of the latter nugatory. In this case, the bulk of the applicant's case is that he has a good case hence ought not to be subjected to the criminal process. That however is a ground for granting leave as opposed to stay.

30. In my view, the applicant ought to show that the **probability** other than mere **possibility** of the apprehended event occurring, exists. In this case the interested party have countered the said allegation by stating that in light of the fact that the prosecution intends to line up 10 witnesses there is no likelihood of the criminal case, in which the applicant herein is yet to take plea, being determined before these proceedings. Therefore since in this case as the applicant is yet to plead to the criminal charges, leave alone the commencement of the trial, I am not prepared to hold that at this stage these proceeding are in imminent danger of being rendered nugatory.

31. The grant of stay being an exercise of judicial discretion, every case must be considered on the basis of its peculiar circumstances taking into account the stage at which the challenged proceedings have reached which stage may inform the Court on the probability of the same being determined before the judicial review proceedings.

32. It is however contended by the applicant that the taking of the plea and/or commencement of the criminal proceedings is likely to stigmatise him. That the institution of criminal proceedings invariably has the potential of causing the accused person anxiety and sometimes agony cannot be farfetched. That however is not, without more, a basis for blocking a criminal trial, otherwise no criminal case would be proceeded with and parties would simply block the same by simply coming to this Court.

33. The issue of adverse publicity was dealt with in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** as hereunder**:**

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial."

34. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

35. As was held in **Jago vs. District Court (NSW) 106**:

"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law."

36. It has not been alleged that there is a risk that as a result of the adverse publicity to be generated by the intended prosecution of the applicant, the applicants' right to fair trial is threatened. In fact no allegation has been made against the trial Court along those lines and in these proceedings no orders are expressly sought against the trial Court, which Court is in fact yet to commence the criminal proceedings against the applicant.

37. I have said enough to show that the orders sought in these proceedings in so far as they relate to stay are, at least at this stage of the proceedings, unmerited.

Order

38. In the result the said prayer is disallowed. The costs will be in the cause.

39. It is so ordered.

Dated at Nairobi this 13th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Machina for Mr Wandugi for the applicant

Mr Munene for the Respondent

Mr Kaka for the interested party

CA Ooko