REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 251 OF 2018

IN THE MATTER OF AN APPLICATION BY SOLOMON MUYEKA ALUBALA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST CAPITAL MARKETS AUTHORITY

and

IN THE MATTER OF ARTICLE 47 AND 50 OF THE CONSTITUTION OF KENYA

and

IN THE MATTER OF THE CAPITAL MARKETS ACT CHAPTER 485A LAWS OF KENYA AND REGULATIONS MADE THEREUNDER

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

AND

IN THE MATTER THE DECISION, AND/OR ACTIONS OR DIRECTIONS (THE DECISION) OF THE CAPITAL MARKETS AUTHORITY MADE AGAINST THE APPLICANT AND CONTAINED IN THE NOTIFICATION OF ENFORCEMENT ACTION DATED 3RD APRIL 2018

BETWEEN

SOLOMON MUYEKA ALUBALA.....APPLICANT

VERSUS

CAPITAL MARKETS AUTHORITY.....RESPONDENT

AND

NATIONAL BANK OF KENYA LTD.....INTERESTED PARTY

RULING

The Application

1. The Applicant, Solomon Muyeka Alubala, previously worked as Head of Treasury of the National Bank of Kenya, the Interested Party herein. He has brought proceedings against the Capital Markets Authority (hereinafter "the Respondent") with respect to a decision made by the said Respondent on 3rd April 2018 pursuant to sections 11(3)(cc), 11(1)(d), 11(3)(w) and 25A of the Capital Markets Act, which decision was as follows:

a) The disqualification of the Applicant from holding office as a key officer of a public listed company and/or issuer, Licensee or any approved institution of the Capital Markets Authority for a period of 10 years; and

b) The imposition of a financial penalty of Kshs. 104,800,000/- being twice the amount of benefit that, purportedly, directly accrued to the Applicant.

2. The said Applicant consequently filed a Chamber Summons application dated 20th June 2018, and seeks the following orders therein:

(a) **The application be certified urgent and be heard ex-parte in the first instance.**

(b) **The Applicant be granted leave to apply for:**

An order of Certiorari to remove to this Court to be quashed the purported decision, and/or actions or directions of the Respondent contained in the Notification of Enforcement Action dated 3rd April 2018 purporting to disqualify the Applicant from holding office as a key officer of a public listed company and/or issuer, Licensee or any approved institution of the 1st Respondent for a period of Ten (10) years from the date of the Notification; and purporting to impose a financial penalty amounting to Kshs.104,800,000/- being twice the amount of benefit that, allegedly, directly accrued to the Applicant.

(c) **That the grant of leave herein does operate as a stay to stay the decision and/or actions or directions of the Respondent conveyed to the Applicant in the letter dated 3rd April 2018, purporting to disqualify the Applicant from holding office as a key officer of a public listed company and/or issuer, Licensee or any approved institution of the 1st Respondent for a period of Ten (10) years from the date of the Notification; and purporting to impose a financial penalty amounting to Kshs.104,800,000/- being twice the amount of benefit that, allegedly, directly accrued to the Applicant pending hearing and determination of the application for judicial review.**

(d) **Costs.**

3. The application was supported by the grounds on its face, and by the Applicant's verifying affidavit and statement of facts both dated 20th June 2018, and the annexures thereto. The said statement and verifying affidavit detailed the proceedings leading to the said decisions, and the grounds for the orders. The said proceedings arose from with a Notice to Show Cause dated 22nd August 2017 and issued by the Respondent to the Applicant under section 26 of the Capital Markets Act, wherein it was purported that the Respondent had conducted an inquiry into the affairs of the Interested Party which had revealed a potential embezzlement of funds.

4. A summary of the grounds for the application are that the administrative action that was taken by the Respondent against the Applicant was outside the Respondent's lawful jurisdiction and in abuse of power. Further, having accused the Applicant, investigated the case against the Applicant, formulated the charge against the Applicant, and prosecuted the Applicant, and sat in jury to decide the Applicant's fate, there was a real likelihood that the Respondent, as decision-maker, would be improperly influenced and biased against the Applicant. Therefore, that the Respondent violated the rules of natural justice that dictate that one shall not be a judge in his own cause. Lastly, that the Respondent refused, despite repeated requests, to provide the Applicant with key documents and/or information on which the Respondent relied in making the adverse impugned decision.

5. This Court (Mativo J.) at an *ex parte* hearing granted the order sought for leave to apply for an order of certiorari, and directed that the substantive Notice of Motion be filed and served within 21 days. The Court further directed that the question whether the said leave shall operate as a stay was to be determined after an *inter partes* hearing. The substantive Notice of Motion dated 4th July 2018 was subsequently filed by the Applicant on the said date. The Respondent filed a Replying Affidavit in response, that was sworn on 15th July 2018 by Abubakar Hassan Abubakar, its Head of Investigations and Enforcement.

6. The *inter partes* hearing on the prayer that leave operates as a stay of the Respondent's decision was held on 23rd July 2018 by way of oral submissions. Mr. Chacha Odera and Mrs Omondi, the counsel for the Interested Party, indicated that they are not affected by the decision and would not participate in the hearing.

7. During the hearing, Mr. Abok, the Applicant's counsel, submitted that the Applicant was the victim of an unfair process which flouted the provisions of the Constitution, Fair Administrative Action Act and Capital Markets Authority Act. The counsel relied on the decision in **Republic vs Cabinet Secretary Ministry of Mining ex parte China Road & Bridge Corporation, Malindi ELC JR 1 of 2018** which restated the principles that inform the exercise of the Court's discretion leave to operate as a stay of a decision and in which the decisions in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** and **Taib A. Taib vs. The Minister for Local Government & Others, Mombasa HCMCA. No. 158 of 2006** were cited.

8. According to Mr. Obok, the Applicant's application is not frivolous and failure to grant stay will not render the application nugatory, as the implementation of the Respondent's decision is not complete. He referred the Court to annexure 'AHA 17' to the Respondent's Replying Affidavit which indicated the further action that had been taken by the Respondent being letters dated 26th April 2018 and 21st May 2018 to the Director of Public Prosecution and the Asset Recovery Agency respectively, to take further action on the Applicant.

9. The Applicant's counsel insisted that despite these annexures, the decision of the Respondent has not been implemented as he has not received any communication from the Asset Recovery Agency and as there is no evidence that the Director of Public Prosecution has acted, and the impugned decision can therefore be stayed. Further, that if stay is not granted, the said offices will proceed to act. Mr. Obok also submitted that he had disclosed that the Applicant had filed an appeal at the Capital Markets Tribunal which currently has no Chairperson, and is also established under Rules made under an Act that is non-existent. In addition, that the section 35A of the Capital Markets Act provides that an appeal filed at the Capital Markets Tribunal shall operate as a stay.

10. Mr. Githendu, the counsel for the Respondent, submitted that the grant of leave to operate on stay is discretionary. Further, that it was laid down in the case of **Taib A. Taib vs. The Minister for Local Government & Others, (supra)** that leave would operate a stay if it is shown that the stay in efficacious – that is, it is able to prevent an ongoing action and not if what is sought to be stopped has already happened. However, that in the present case whatever the Applicant is seeking to stop has already happened.

11. Mr. Githendu in this respect contended that on the decision by the Respondent on the Applicant's disqualification, there is nothing to stay as the disqualification occurred the moment the Respondent informed the Applicant and the whole world of the same through a press release. Further, that an order of stay with respect to the disqualification would amount to a *de facto* revocation of the disqualification and reinstatement of the Applicant's eligibility, which should happen at the end of the trial .

12. As regards the Respondent's decision to impose a financial penalty on the Applicant, Mr. Githendu referred the Court to the Respondent's letter dated 21st May 2018 to the Asset Recovery Agency in annexure 'AHA 17' to the Respondent's Replying Affidavit, requesting the said Authority to trace and confiscate the assets belonging to the Applicant. He submitted that the issue of enforcement of the financial penalty is now beyond the hand of the Respondent, and the Applicant should not seek the orders of stay as against the Asset Recovery Agency and any other agency the Respondent has requested for assistance in enforcement of the decision, as such an order of stay as against the Respondent will be in vain. Mr. Gitendu cited the decision in to the decision in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR** for this position.

13. The element of the public interest being a material factor to consider in the grant of stay was also urged by Mr. Githendu. He submitted in this respect that judicial review proceedings are public proceedings, and they carry an element of public interest, and that the enforcement of the Respondent's decisions is in the public interest to protect the interests of shareholders. Further, that an order for stay will send conflicting signals to the capital market.

14. Lastly, Mr. Githendu contended that the Applicant is engaged in forum shopping as he has already filed an appeal at the Capital Markets Tribunal on the same issues and involving the same parties herein, and states that he has filed the instant application because the said Tribunal has no chairperson. However, that he had not demonstrated any formal communication with the Secretary of the tribunal on the composition of the tribunal. He ought to have been patient to obtained accurate information on the composition of the tribunal.

The Determination

15. A preliminary issue has been raised by the Respondent as to whether the Applicant's application is properly before this Court, in light of the appeal filed by the Applicant with the Capital Markets Tribunal. The reasons given by the Applicant as to why he moved this Court despite the pendency of the appeal at the Tribunal was pleaded and noted by the Court at the time of granting leave to commence the judicial review proceedings, particularly that the said remedy was not currently available to the Applicant and in the circumstances was thus not an effective remedy.

16. While it is this Court's jurisprudential policy in this regard to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute as required by section 9(2) and (3) of the Fair Administrative Action Act, and as held in various decisions (see **Republic vs National Environment Management Authority (2011) eKLR** and **Speaker of National Assembly vs Njenga Karume, (2008) KLR 425**), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Where such an alternative remedy cannot be used by an applicant as in the present case, this Court can exempt such an applicant from its application as provided by section 9(4) of the Fair Administrative Action Act.

17. On the outstanding issue as to whether the leave so granted should operate as a stay, the applicable law is Order 53 Rule 1(4) of the Civil Procedure Rules , which provides as follows:

> **"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."**

The decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

18. 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.

19. The first factor that is relevant is whether or not the decision or action sought to be stayed has been fully implemented, on which there are differing opinions. In **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega (2005) e KLR** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. A similar decision was also made in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra).** According to these decisions, 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.

20. 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. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa (Supra)** expressed himself on this factor as follows:

> **"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."

21. 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.

I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. ..It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented … . But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay"

22. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others,(2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR,** where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

23. From the above decisions, it 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. However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.

24. The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra),** where the learned judge held that 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.

25. The public interest element in the grant of a stay was also the subject of the decision in **R (H). vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held that where there is a public interest element involved, the Court strike 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.

26. Lastly, the public interest as a relevant factor was also considered by Nyamu J. (as he then was) in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42,** wherein the learned Judge cited the decision in **R VS Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763** 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.

27. Applying the above principles to the present application, it is this Court's position that the financial penalty that was imposed by the Respondent is yet to be implemented, as there was no evidence provided of payment of the same by the Applicant. In this respect, the letter dated 21st May 2018 by the Respondent to the Asset Recovery Agency in annexure 'AHA 17' to the Respondent's Replying Affidavit seeking to recover the Applicant's assets in enforcement, is only evidence that the implementation is ongoing and is not yet complete, and is therefore amenable to suspension. It is also incumbent upon the Respondent, having initiated such recovery, to inform third parties that may be affected by any stay orders granted by this Court.

28. In addition, taking into account the amount of penalty imposed, and the irreparable prejudice and hardship the Applicant is likely to suffer in the event of enforcement of the said penalty whether in terms of payment or recovery, *vis-à-vis* the challenge on the Respondents decision to impose the said penalty, there is need to preserve the current *status quo* until the legality of the Respondent's proceedings and decision is established.

29. On the second sanction of disqualification, I am of the view that this is a decision that was self-executing, and on which no further positive steps were needed to be taken by the Respondent in its implementation. It is therefore fully implemented, and is not of a continuing nature as no further acts need to be taken by any of the parties as regards the implementation of the sanction, save for these proceedings.

30. My finding on the staying of the sanction of disqualification is that even if this Court has jurisdiction and the discretion to suspend the sanction, a number of factors militate against the exercise of that discretion. Firstly, as noted above, this discretion should be exercised sparingly where a decision has been fully implemented, and as there is a public interest element involved, only where an applicant has made out a strong case. In the present application, leave was granted on the basis that the Applicant had an arguable case, and therefore the Applicant still needs to establish the grounds he has set out on which he challenges the Respondent's decision to disqualify him.

31. The public interest element involved in the sanction of disqualification is that unlike the first sanction of the financial penalty that will largely impact on and prejudice the Applicant as an individual, suspending the disqualification of the Applicant will also affect other members of the public, in the event that he is allowed to continue participating in the financial and capital markets, before the propriety of the allegations made by the Respondent as regards his conduct in the said markets is determined.

32. In the premises, the prayer for stay in the Applicant's Chamber Summons dated 20th June 2018 is allowed only to the extent of the leave granted to commence judicial review proceedings shall operate as a stay of the payment and/or recovery of the financial penalty of Kshs 104,800,000/- imposed upon the Applicant in the decision in the Notification of Enforcement Act issued by the Respondent dated 3rd April 2018. For the avoidance of doubt, the leave shall not operate as a stay of the disqualification of the Applicant that was imposed by the said decision.

33. The costs of the said Chamber Summons shall be in the cause.

34. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF AUGUST 2018

P. NYAMWEYA

JUDGE