



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 145 OF 2018

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS,
CERTIORARI, AND PROHIBITION**

AND

**IN THE MATTER OF THE DECISION OF THE COMMISSIONER OF DOMESTIC TAXES CONTAINED IN HIS LETTERS
DATED 14TH MARCH 2018**

AND

IN THE MATTER OF SECTION 42 OF THE TAX PROCEDURES ACT 2015

and

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

SUN AFRICA HOTELS LIMITED.....1ST APPLICANT

NYALI SUN AFRICA BEACH

HOTELS&SPA LIMITED.....2ND APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE COMMISSIONER OF DOMESTIC TAXES...2ND RESPONDENT

THE BOARD OF MANAGEMENT- HOSPITAL

NYALI HOTELS INTERNATIONAL LTD.....INTERESTED PARTY

RULING

The Application

1. Sun Africa Hotels Limited and Nyali Sun Africa Beach Hotels & Spa Limited, the 1st and 2nd Applicants herein, have brought proceedings against the Kenya Revenue Authority and Commissioner of Domestic Taxes (hereinafter “the 1st and 2nd Respondents respectively”), with respect to a decision made by the said Respondents in a letter dated 14th March 2018 issuing agency notices to the Applicant’s Bank, Diamond Trust Bank. The said letter required the said Bank to pay various sums of monies from the 1st and 2nd Applicant’s accounts on account of tax due from Nyali Hotels International Limited, the Interested Party herein.

2. The 1st and 2nd Applicants filed a Chamber Summons application dated 4th April 2018, seeking leave to commence judicial review proceedings and apply for various judicial review orders of certiorari, mandamus and prohibition with respect to the said agency notices. They also sought prayers that the said leave operates as a stay of the agency notices and freezing of their accounts. The specific prayers sought were as follows:

a) That the Applicants be granted leave to apply for an order of Certiorari to remove into this honourable court and quash the decision of the 1st and 2nd Respondents contained in their letter dated 14th March, 2018 issuing an agency notice to the 1st and 2nd Applicants' Bank, Diamond Trust Bank (K) Limited.

b) That the Applicants be granted leave to apply for an order of Certiorari to remove into this honourable court and quash all the decision of the 1st and 2nd Respondents contained in their letter dated 14th March 2018 addressed to the 1st Applicant's Bankers, namely Diamond Trust (K) Limited requiring the said Diamond Trust (K) Limited to pay the Respondents the sum of Kshs 43,751,744/= from the 1st Applicant's Account No. 816030001.

c) That the Applicants be granted leave to apply for an order of Certiorari to remove into this honourable court and quash the decision of the 1st and 2nd Respondents contained in their letter dated 14th March 2018 addressed to the 2nd Applicant's Bankers, namely Diamond Trust (K) Limited requiring the said Diamond Trust (K) Limited to pay the Respondents the sum of Kshs 43,751,744/= from the 2nd Applicant's Account No. 0368798001.

d) That the Applicants be granted leave to apply for an order of Mandamus against the 1st and 2nd Respondents directing them to withdraw the agency notice contained in their letter dated 14th March 2018 and addressed to the 2nd Applicant's Bankers, namely, Diamond Trust (K) Limited demanding payment out of the 2nd Applicant's bank account No. 0368798001 and the 1st Applicant's bank Account No. 816030001.

e) That the Applicants be granted leave to apply for an order of Prohibition to restrain the 1st and 2nd Respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from in any manner whatsoever acting or continuing to act upon or enforcing or continuing to enforce or maintaining or continuing to maintain the decision taken by the 1st and 2nd Respondents or the directives contained in the 1st and 2nd Applicants' bankers, namely Diamond Trust (K) Limited demanding payment out of the 2nd Applicant's bank account No. 0368798001 and the 1st Applicant's bank Account No. 816030001.

f) That the Applicants be granted leave to apply for an order of Prohibition to restrain the 1st and 2nd Respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from taking or attempting to take any decisions or issuing or attempting to issue any or further agency notices or directives to the 2nd Applicant's Bank namely Diamond Trust (K) Limited or to the 1st Applicant's bank Diamond Trust (K) Limited.

g) That the Applicants be granted leave to apply for an order of Prohibition to restrain the 1st and 2nd Respondents whether by themselves, their servants, agents, officers, or howsoever otherwise from in any manner whatsoever interfering or attempting to interfere with the business operations of the 1st and 2nd Applicants or any of them.

h) That the granting of leave to the 1st and 2nd Applicants to institute these Judicial Review Proceedings do operate as a stay of the said decisions and the directives contained in the agency notice dated 14th March 2018 addressed to the 2nd Applicant's bankers, namely Diamond Trust (K) Limited or to any other banker of the 2nd or 1st Applicant claiming payment of the said Kshs 43,751,744/= or any part thereof.

i) That the granting of leave to the 1st and 2nd Applicants to institute these Judicial Review Proceedings do operate as a stay of the agency notice dated 14th March 2018 addressed to the 2nd Applicant's bankers, namely Diamond Trust (K) Limited.

j) That the granting of leave to the 1st and 2nd Applicants to institute these Judicial Review Proceedings do operate as a stay of the freezing by Diamond Trust (K) Limited of the 1st Applicants' bank Account No. 816030001 and the 2nd Applicants Bank Account NO. 0368798001 both held at Diamond Trust (K) Limited or any account of the Applicants held at Diamond Trust (K) Limited and the payment of any funds whatsoever out of the said Applicants' accounts or any accounts held at the said bank to the 1st and 2nd Respondents.

k) That the costs of this application be the Applicants' in any event.

l) Any further or other relief this honourable court may deem just and fit to grant.

3. The grounds for the application were set out in the said application and in a supporting statutory statement filed on 4th April 2018, and a supporting affidavit sworn on the same date by Sanjay Kishorkumar Mashru, a director of the 1st and 2nd Applicants, who attached a copy of the impugned agency notice and documents from the Registrar of Companies on the shareholding and directors of the Applicants and Interested Party.

4. In summary, the Applicants allege that the demand from the Respondents relate to taxes owed by the Interested Party, and that the 1st and 2nd Applicants are separate and distinct companies from the said Interested Party. Further, that the Applicants operate their own businesses and are neither shareholders or directors of the Interested Party, and are not concerned with its management, business activities or income. Therefore, that the said decision by the Respondents has impacted on the Applicants' business operations to their detriment, loss and damage, which cannot be reversed unless the stay orders are granted.

5. Lastly, that the Respondents have therefore acted in bad faith, abused their powers, have acted unfairly and arbitrarily, have illegally exercised their discretion, and have violated the Applicants' legitimate expectation and rules of natural justice.

6. This Court granted the prayers for leave at an *inter partes* hearing held on 10th April 2018. This Court further directed that the prayers that leave operates as a stay be canvassed after the Respondents and Interested Party had filed their responses to the Chamber Summons. The Respondents subsequently filed a replying affidavit sworn on 17th April 2018 by Asha K. Salim, a Debts Enforcement Officer of the 1st Respondent. The Interested Party's response was in a replying affidavit sworn on 2nd May 2018 by Kames Nyiha, the Advocate on record for the Interested Party.

7. The Respondents contended that the Interested Party had declared income and failed and/or neglected to remit the amount of tax declared. Thereafter, that the 1st Applicant wrote to the Respondents in a letter dated 23rd October 2017, a copy of which was attached, stating that the Interested Party, which was one of their companies, had changed its name for Nyali International Beach Hotel to Nyali Sun Africa Beach Hotel and SPA and had been taken over by the 1st Applicant. Further, that the location and business of the new business entity remained the same as that of the Interested Party. However, that after being taken over, the Interested Party could not be traced, and it was thus evident that the change of names and takeover may have been a plan to circumvent the law and evade payment of taxes by way of transfer of assets to the 1st Applicant as the holding company.

8. The Respondents averred that in such circumstances, the transferee of a business becomes liable for the taxes of the transferor under section 46 of the Tax Procedure Act, and having established the nexus between the Applicants and Interested Party, the agency notices were correctly issued to the Applicants. Lastly, that it is in the public interest to recover tax to finance growth and development of the nation, and that the Applicants also ought to first exhaust the remedies available under the Tax Appeal Tribunal Act.

9. The Interested Party on its part sought to clarify the issue of its ownership, and stated that it is incorporated in Dubai and registered as a foreign company in Kenya, and proceeded to give the details of its directors and shareholders. The Interested Party denied that it has been bought by the Applicants, and stated that it had started negotiations with the Respondents on "without prejudice" basis, to pursue an amicable settlement of the taxes and penalties claimed by the Respondent against the Interested Party.

The Determination

10. The issue of whether the leave granted should operate as a stay was canvassed by way of written submissions. Odhiambo M.T. Adala, the Advocate for the Applicants, filed submissions dated 16th April 2018, wherein he reiterated that the Respondents acted irrationally and in abuse of power by claiming the debts of a third party from the Applicants. Further, that the Applicants had disclosed their shareholding and that of the Interested Party, which showed that they are in no way related. Therefore, section 52 of the Tax Procedures Act on objections to tax decisions does not apply to them as the subject of the agency notices do not relate to the Applicants but to the Interested Party.

11. Rodgers K. Koima, the Respondents Advocate, filed written submissions dated 19th April 2018, wherein he submitted that the merits of the Applicants case as regards their relationship or otherwise with the Interested Party can only be urged during the hearing of the main suit. Further, that what is not disputed at this stage is that there is a crystalized debt due to the Respondents under section 32(1) of the Tax Procedures Act in the form of the taxes due, and what is in dispute is the party to whom the agency notices should be directed.

12. It was the Respondents' case that having established the nexus between the Applicants and Interested Party, to grant an unconditional stay would collapse the main suit. Therefore that if the Court is inclined to issue stay, then the same should be conditional upon the Applicants providing security for the full amount of tax of Kshs 43,751,744/00. In addition that the Applicants would not suffer any irreparable injury as section 47 of the Tax Procedures Act provides for refund of taxes, and they can also be adequately compensated by an award of damages.

13. The Respondents reiterated the public interest nature of its case, and cited the decision in **Alfred N. Mutua vs EACC and 4 Others (2016) e KLR** that public interest is a factor to be taken into account in an application for conservatory orders.

14. The Interested Party did not file any submissions and relied on its replying affidavit.

15. I have considered the pleadings and arguments made by the parties. The applicable law on whether leave granted to commence judicial review proceedings should operate as a stay 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.

16. 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 are laid down in the said decision and in various decisions by Kenyan Courts.

17. 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 (2012) e KLR**. 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.

18. 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.”

19. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J. held a different view 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 fully. ..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”

20. 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, that where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

21. 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.

22. 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.

23. 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.

24. 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.

25. Applying the above principles to the present application, it is this Court's position that the even though the decision by the 1st and 2nd Respondents has been implemented, it is of a continuing nature in that it requires further positive steps to be taken by the agency bank for its enforcement, as regards making payments from the Applicants' accounts. It is therefore amenable to stay.

26. This fact notwithstanding, a number of factors militate against the exercise of this Court's discretion in favour of the Applicants. Firstly, evidence has been brought by the Respondent to show a possible relationship between the 1st Applicant and Interested Party in the form of a letter to it from the 1st Applicant dated 23rd October 2017, advising on the change of name of the Interested Party to that of the 1st Applicant. The evidence by the Applicants also show a commonality in some of the directors and shareholders of the 1st and 2nd Applicants.

27. It is thus my view that an unconditional stay cannot be granted at this stage, until the nature of the relationship between the Applicants and Interested Parties is confirmed, and the issue of whether indeed there is an attempt by the Applicants and Interested Party to evade payment of taxes is also determined.

28. Secondly, the Court's discretion should be exercised sparingly where there is a demand for tax that is due and payable, as there is a public interest element involved. Taxes are the primary means by which the government is enabled to provide services to the members of the public, and it is also in the public interest that the tax administration process is not abused. The Interested Party herein has in this regard acknowledged that there is a claim being made against it by the Respondents with respect to unpaid tax.

29. In the premises, the prayers for leave to operate as a stay in the Applicants' Chamber Summons dated 4th April 2018 are granted only to the extent of the following orders:

I. That the grant of leave to the 1st and 2nd Applicants to institute these Judicial Review Proceedings shall operate as a stay of the decision contained in the agency notice dated 14th March 2018 addressed to the 2nd Applicant's bankers, namely Diamond Trust (K) Limited, claiming payment of Kshs 43,751,744/=, only on condition that the 2nd Applicant shall provide a bank guarantee of Kshs Twenty Five Million (Kshs 25,000,000/=) from a reputable local bank within 14 days from the date of this ruling, which guarantee shall also be filed in Court for approval as security.

II. The costs of the Chamber Summons dated 4th April 2018 shall be in the cause.

30. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE