



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 404 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 14<sup>TH</sup> 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.....1<sup>ST</sup> APPLICANT**

**NYALI SUN AFRICA BEACH**

**HOTELS & SPA LIMITED.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF DOMESTIC TAXES.....2<sup>ND</sup> RESPONDENT**

**THE BOARD OF MANAGEMENT- HOSPITAL**

**NYALI HOTELS INTERNATIONAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Application**

1. The Applicants herein, Abraham Wesley Oyugi and Ali Happi Guyo, are both minors suing through their fathers and next friends, and are students at Hospital Hill High School. They have brought proceedings against the Principal of the Hospital Hill High School, the Hospital Hill High School, the Board of Management of the said School and the Attorney General (hereinafter “the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively”), with respect to a decision made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in a letter dated on 2<sup>nd</sup> October 2018. The said letter

suspended the 1<sup>st</sup> and 2<sup>nd</sup> Applicants pending the hearing and determination of Criminal No. 1658 of 2018.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants filed a Chamber Summons application dated 4<sup>th</sup> October 2018 seeking leave to commence judicial review proceedings and apply for judicial review orders of certiorari, prohibition and mandamus with respect to the said suspension. The grounds for the application in summary were that the decision by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to suspend the Applicants indefinitely pending the conclusion of a criminal case, and without giving them an opportunity to be heard, is unreasonable and in breach of procedure.

3. Further, that it is illegal for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to institute disciplinary proceedings against the Applicants when they are already facing a criminal case; to suspend them without giving reasons for the action, and that the decision contravenes the Applicants' rights to fair administrative action and education.

4. This Court granted the prayers for leave *ex parte* on 4<sup>th</sup> October 2018. This Court further directed that prayer 5 of the said Chamber Summons application be heard *inter partes* on 18<sup>th</sup> October 2018. The said prayer 5 sought orders that the leave so granted do operate as a stay restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from continuing with the suspension of the Applicants, pending the hearing and determination of the application.

5. The *inter partes* hearing on the prayer that leave operates as a stay of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's continued suspension of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants was duly held on 18<sup>th</sup> October 2018. Mr. Hassan, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, made both oral and written submissions. The Respondents did not attend the hearing, despite the Applicants' counsel filing an affidavit evidencing service of the hearing notice on the Respondents.

6. The Applicant's counsel relied on the grounds for the application and various judicial decisions, including the decisions **in James Mburu Gitau t/a Jambo Merchant vs Sub County Public Health Officer Kiambu County (2013) e KLR** and **Republic vs Principal SSS & 2 Others ex parte AMO & 4 Others (2016) e KLR**, to urge that it had met the principles for grant of the order that the leave operates as a stay.

7. According to the Applicants' counsel, the said principles are that the stay will prevent acts which will destroy the subject matter of the proceedings or render nugatory the substantive Notice of Motion or any judgment or order; that the judicial review has a high degree of success; and that the suffering of those affected cannot be adequately compensated in damages.

#### **The Determination**

8. 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.

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

10. The main 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) eKLR**. 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.

11. 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.”

12. 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”

13. 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.

14. From the above decisions, it follows that where 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.

15. Applying the above principles to the present application, it is this Court’s position that the decision by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is complete as it was self-executing, and on which no further positive steps were needed to be taken by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in its implementation, save for awaiting the decision in the pending Criminal Case against the Applicants.

16. In addition, granting a stay at this stage when the strength of the Applicants and 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respective cases is not known, may result in a undesirable situation where the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, after being reinstated back to school, are suspended once again if this Court finds no merit in their substantive judicial review application. There will thus be prejudice caused to both the Applicants and 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in such an event.

17. In my view, the more appropriate course of action in the present proceedings is not to stay the implementation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ decision, but to dispose of the substantive Notice of Motion expeditiously, and determine the legality or otherwise of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ decisions with finality, so that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants are also certain of their future options in the shortest time possible. This will also effectively address the concerns raised about the indefinite nature of the Applicant’s suspension, and on the Applicants’ substantive application being rendered nugatory.

18. In the premises, prayer 5 of the Chamber Summons dated 4<sup>th</sup> October 2018 that the leave granted do operate as a stay restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from continuing with the suspension of the Applicants pending the hearing and determination of the application, is denied.

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

20. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER 2018**

**P. NYAMWEYA**

**JUDGE**