



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 517 OF 2016

IN THE MATTER OF: An Application by the applicant for

judicial review by way of an order of CERTIORARI,

PROHIBITION and DECLARATION pursuant to

Order 53 of the Civil Procedure Rules, 2010

AND

IN THE MATTER OF: The Constitution of Kenya, 2010

AND

IN THE MATTER OF: The Commission on Administrative

Justice Act, Cap 102A, Laws of Kenya

AND

IN THE MATTER OF: The Fair Administrative Action Act, 2015

BETWEEN

REPUBLIC.....APPLICANT

- VERSUS-

COMMISSION ON ADMINISTRATIVE JUSTICE.....RESPONDENT

EX-PARTE

YUSUF MAHAMED FAZUL

RULING

1. On 25th May, 2017, I dismissed the application dated 14th November, 2016 with costs to the Respondent. By the said application, the ex parte applicant herein sought an order staying the

implementation of the Investigations Report published by the Respondent relating to the Applicant pending the hearing and determination of this suit. He further seeks leave to amend the Notice of Motion filed herein to include appropriate reliefs to quash the Investigation Report released by the Respondent.

2. The applicant, being aggrieved by the said decision has now moved this Court vide a Notice of Motion dated 31st May, 2017 seeking the following orders:

1. **This Application be certified urgent and the same be heard *ex parte* in the first instance.**
2. **Pending the hearing and determination of this Application *inter partes* this Honourable Court be pleased to grant an interim order staying the hearing of the main motion in *Misc. Civil Application Number 517 of 2016: Republic vs. Commission on Administrative Justice ex parte Yusuf Fazul Mahamed*.**
3. **Pending the hearing and determination of this Application *inter partes* this Honourable Court be pleased to grant an order staying the implementation of the Investigations Report published by the Respondent relating to the *ex parte* Applicant.**

In the alternative to order no 3 above,

4. **Pending the hearing and determination of this Application *inter partes* this Honourable Court be pleased to grant a temporary interdict or other temporary relief, pursuant to Section 11 (1) (i) of the Fair Administrative Action Act 2015, staying the implementation of the Investigation Report published by the Respondent relating to the *ex parte* Applicant.**
5. **That there be a stay of proceedings in *Misc. Civil Application Number 517 of 2016: Republic vs. Commission on Administrative Justice ex parte Yusuf Fazul Mahamed* pending the hearing and determination of the intended Appeal against the Ruling and Orders made herein by Hon. Justice G.V Odunga in the Ruling delivered on 25th May, 2017.**
6. **This Honourable Court be pleased to grant an order staying the implementation of the Investigations Report published by the Respondent relating to the *ex parte* Applicant pending the hearing and determination of the intended Appeal.**
7. **This Honourable Court be pleased to grant a temporary interdict or other temporary relief, pursuant to Section 11 (1) (i) of the Fair Administrative Action Act 2015, staying the implementation of the Investigation Report published by the Respondent relating to the *ex parte* Applicant pending the hearing and determination of the intended Appeal.**
8. **The costs of this Application be provided for.**

3. According to the applicant, by this Court decision he was deprived of his rightful entitlement to seek reliefs under the Constitution and *Fair Administrative Action Act*. Being dissatisfied with the said decision he instructed his Advocate on record, to file a Notice of Appeal, being part of his appeal to the Court of Appeal.

4. Based on legal advice, the applicant contended that the intended appeal is arguable, with a high probability of success as it raises *bona fide* issues worthy of consideration by the Court of Appeal.

5. To the applicant as the matter is set down for directions if the proceedings are not stayed, this Court will hear and make a determination and issue orders, notwithstanding the intended appeal and he will suffer great prejudice. It was therefore his view that unless this Court stays the implementation of the investigation report pending the determination of this Application, he will suffer irreparable harm. To him, this Court has jurisdiction to stay the implementation of the said report, and has done so in the past. He further contended that this Court has discretion in the discharge of its duty, and in the interests of justice, to grant the Orders sought in the instant Application.

6. To the applicant, he will suffer irreparable damage and may be occasioned a grievous miscarriage of justice if the prayers sought herein are denied. On the other hand the Respondent will not suffer any loss or prejudice if the Orders sought are granted.

7. It was the applicant's case that the application has been made timeously and without unreasonable delay.

Respondent's Case

8. In opposition to the application the Respondent filed the following grounds:

- 1. THAT the Application dated 31st May 2017 is misconceived, frivolous and vexatious.**
- 2. THAT the Orders being sought are against parties who are strangers to this suit.**
- 3. THAT the Application is bad in law and an abuse of the Court Process.**

Determination

9. When this matter came up for hearing the applicant argued only the limb seeking stay of proceedings.

10. I have considered the foregoing.

11. What an intending appellant is required to demonstrate at this juncture is an arguable appeal which means one which is not frivolous, and that unless the order of stay were granted, the intended appeal if successful, would be rendered nugatory. Both requirements have to be proved. It is however not the law that a stay of proceedings cannot be granted but each case must depend on its own facts. See **Silverstein vs. Chesoni [2002] 1 EA 296.**

12. In **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999, Otieno-Onyango, J** (as he then was) held that where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay of execution should be granted. In **Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664**, the Court of Appeal held that in an application for stay of proceeding pending appeal where the Judgement entered in an application for striking out a defence it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.

13. In this case the applicant is appealing against the decision declining to allow him to amend his application and seek other reliefs after leave has been granted. If by time the appeal is heard and in the event that it is successful, these proceedings would have been determined, a very likely event, it would mean that the proceedings herein would have been futile since the hearing would have to commence *de novo*. Scarce judicial time would have been wasted in hearing these proceedings. Whereas ordinarily if the only effect of the appeal succeeding is the reversal of the judgement, the Court would not grant a stay, in this case the success of the appeal would mean a fresh start.

14. In my view the circumstances of this case merit the grant of the stay of these proceedings pending the intended appeal. However as the appeal is yet to be filed to issue a blanket stay of proceedings would lead to injustice in the event that no such appeal is filed.

15. It is 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.**

16. In the premises the order which commends itself to me and which I hereby issue is that there shall be a stay of proceedings in this matter pending the filing and determination of the intended appeal on condition that the said appeal is lodged within 30 days from the date of this decision.

17. Costs will be in the cause.

18. Orders accordingly.

Dated at Nairobi this 31st day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Akinyi Onon for Mr Chahale for the Respondent

CA Mwangi