



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 28 OF 2015

IN THE MATER OF AN APPLICATION BY MIDDLE TOWN FOREX BUREAU LTD FOR

JUDICIAL REVIEW UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES

MIDDLE TOWN FOREX BUREAU LTD.....APPLICANT

VERSUS

CENTRAL BANK OF KENYA.....RESPONDENT

RULING

1. This ruling determines two applications filed by the applicant **Middle Town Forex Bureau Limited** on 30th May 2016 and 7th September 2016 respectively. The application dated 30th May 2016 seeks for, among others, and principally, stay of execution against the judgment of Honourable Justice Korir delivered on 12th May 2016 whereas the application dated 7th September, 2016 seeks for reinstatement of the interim orders of stay issued on 30th May 2016.

2. In the notice of motion dated 30th May 2016 and filed in court on 31st May 2016, brought under the provisions of Order 51, Order 42 Rule 4 of the Civil Procedure Rules, Sections 3,3A of the Civil Procedure Act the applicant seeks for orders:

a. Spent

b. Spent

c. A stay of the ruling and order of the Honourable Justice Korir dated 19th May 2016 and all other consequential orders until the hearing and determination of the appeal.

d. That an order for stay of the respondent's decision to levy a penalty of kshs 500,000 against the applicant be granted pending the hearing and determination of the appeal herein.

e. That costs be in the cause hereof.

3. The application is predicated on the grounds that:

1. This court dismissed an application seeking injunctive orders dated January 28th, 2016 on May 19th 2016(sic);

2. The applicant has duly exercised her right of appeal hereof, it filed its notice of appeal on May 23rd, 2016;

3. The said appeal is arguable and has overwhelming chances of success;

4. The appeal will be rendered nugatory if a stay is not granted herein;

5. The said contempt has inconvenienced the applicant and its operations;

6. Pursuant to the leave of this court dated 29th January 2015, this court granted the applicant leave to file for Judicial Review orders;

7. Further, that the court granted an order dated 29th January 2015 for leave to operate as stay hereof;

8. That by letter dated 15th January 2016 the respondent instructed its advocates to return two(2) bankers cheques No. 028227 and 028228 for shs 65,000 each and withheld processing of trading licences;

9. That the applicant has been greatly inconvenienced and has lost huge sums of money and rent deposit in respect of Buruburu Fair Centre among other services as a result of the said act by the respondent;

10. That there is another letter the applicant wrote to the respondent seeking its authority to carry out money transfer services in conjunction with KCB Bank which was turned down by the bank citing this matter;

11. That the applicant prays for the court's intervention to prevent the respondent from undertaking any decision that is prejudicial to the applicant's business hereof; and

12. That unless the application is heard immediately, the applicant will suffer loss and damage.

4. The application is further supported by the affidavit of Stephen Gitonga Mbaabu the applicant's Chairman, sworn on 30th May 2016 wherein the deponent reiterates the grounds in support of the application as reproduced above; while annexing letters dated 5th March 2015; 15th January 2016; 19th March 2015 and two bankers cheques.

5. The respondent filed a replying affidavit sworn on 27th June 2016 by Sylvester Cheruiyot Sawe, the Manager in charge of Forex Bureau Surveillance Section of Central Bank of Kenya, deposing, among others, that- the applicant's judicial Review proceedings before this court were dismissed on 12th May 2016 as shown by copy of judgment annexed; That the application for stay herein filed by the applicant is speculative, misconceived, incompetent, bad in law and an abuse of the process of the court since there are no positive orders discernible from the judgment of the court capable of being stayed; That applicant has only had its license renewal application held in abeyance pending the payment of fines lawfully levied; and that the application to open a new outlet is also held in abeyance as such the intended appeal will not be rendered nugatory as alleged; that the applicant has not met the threshold for stay pending appeal as no substantial loss would be suffered by the applicant if orders of stay were not issued; that the issue of processing of the license for Buruburu outlet is a new issue that was never brought before the court at the leave stage and as such, that issue can only be subject of fresh Judicial Review proceedings for which leave has to be obtained and that similar issues were raised before delivery of judgment; that the applicant has not raised any doubts nor has it adduced evidence on the respondent's financial inability to refund any money paid to it should the appellate court find that the said sums were paid in error; that there is no demonstration of an arguable appeal and that the present application is completely unnecessary and a mere waste of precious Judicial time hence it should be dismissed with costs to the respondent.

6. The applicant's second application is the one dated 6th September 2016 filed under certificate of urgency urging the court to reinstate the orders issued by this court and extend them pending the hearing and determination of the notice of motion dated 30th May 2016; and that costs be in the cause.
7. The grounds upon the latter application is premised are that on 6th September, 2016 this court ordered this matter to be taken to the registry because the Notice of Appeal was not in the court file hence the orders were not extended; that the advocate for the applicant proceeded to the registry and retrieved the Notice of Appeal and filed it herein; that if stay is not granted the appeal which has overwhelming chances of success shall be rendered nugatory.
8. The latter application is supported by the affidavit sworn by Henry Kurauka Advocate sworn on 6th September 2016 which replicates the grounds set out above in support of the application while annexing the notice of Appeal dated 16th May 2016 and filed on the same day but served on 6th September 2016 upon the Respondent's advocates.
9. That latter application was equally opposed by the respondent through a replying affidavit sworn on 8th September 2016 by Eddy Owiti Advocate principally outlining the history of this matter and pointing out in his deposition that the advocate for the applicant, Mr Kurauka, had not even complied with the direction given on 28th June 2016 by Honourable Odunga J as to the processing the earlier application for stay for purposes of its hearing.
10. Further, that when the matter came up for mention on 27th July 2016 the applicant's counsel lied to the court that there were negotiations to settle the matter out of court and the court gave a mention date for 6th September 2016 by which date, there was no Notice of Appeal which was an important document hence the court referred this matter back to the registry. That as at 6th September 2016, the Notice of Appeal had never been served upon the respondent until 6th September 2016 and which is in contravention of Rule 77(1) of the Court of Appeal Rules, 2010.
11. That although the applicant claims that it has an arguable appeal, it has failed to frame any issues it feels the learned judge erred on and neither is there any draft Memorandum of Appeal annexed hence there is no Notice of Appeal on record and so the applicant is undeserving of the discretionary orders sought from this court.
12. In addition, it was deposed that there is no order capable of being stayed as the court's judgment of 12th May 2016 was a dismissal order which is essentially a negative order incapable of being stayed. It was therefore deposed that the application dated 6th September 2016 was a waste of precious judicial time and that the same should be dismissed.
13. The applicant also filed written submission dated 31st October 2016 in proposition for the application dated 30th May 2016 whereas the respondent filed its submissions dated 31st October 2016 opposing both applications dated 30th May 2016 and 7th September 2016 respectively.
14. The said submissions were highlighted orally on 1st November 2016 before me with Mr Kurauka counsel for the applicant relying wholly on the grounds in support of his client's two applications; the supporting affidavits and written submissions while Mr Owiti counsel for the respondent too relied on his client's opposing replying affidavits and written submissions while emphasizing that the judgment of Korir J dismissed the Judicial Review application on 12th May 2016 with no orders as to costs and that an order of dismissal being a negative order, was incapable of being stayed. He relied on several authorities contained in the respondent's written submissions including **Peter Mueria Ole Munya and 4 Others V Principal Magistrate Narok and 6 Others [2015] e KLR** at paragraphs 17, 18 and 20 of the authority.
15. It was also submitted by the respondent's counsel that the conditions for grant of stay of execution

pending appeal as stipulated in Order 42 Rule 6 (2) of the Civil Procedure Rules have not been fulfilled to warrant stay to issue and that there was no arguable appeal. Counsel urged the court to dismiss the applicant's two applications with costs.

Determination

16. I have carefully considered the applicant's two applications, that of 30th May 2016 and 7th September, 2016, with the first application seeking stay of execution against the judgment of Honourable Korir J delivered on 12th May, 2016 (and not 19th May, 2016 as pleaded by Mr Kurauka counsel for the applicant) and the second application seeking for the reinstatement of the interim orders of stay issued on 6th June 2016 which lapsed on 6th September 2016 when this court failing to locate any Notice of Appeal, upon which such application for stay of execution pending appeal would be anchored.

17. It is worth noting that the orders of 6th September 2016 prompted the filing of the application dated 6th September 2016 to reinstate the temporary stay which had been issued on 6th June 2016 by Honourable Odunga J maintaining status quo.

18. I have also considered the replying affidavits to both applications and both parties' written and oral submissions as supported by statutory and case law.

19. In my humble view, the issues for determination in both applications as argued together are:

- 1. Whether the applicant's application satisfies the conditions for grant of stay of execution of the judgment of Honourable Korir J delivered on 12th May 2016 pending appeal;*
- 2. What orders should this court make?*
- 3. Who should bear costs of the two applications?*

20. The starting point is that the application dated 6th September 2016 is subsumed into the application dated 30th May 2016 upon the court granting interim stay pending determination of the two applications as per this ruling.

21. On whether the applicant's application dated 30th May 2016 has satisfied the conditions for stay of execution of judgment of 12th May 2016 pending hearing and determination of the appeal, the applicant through its counsel Mr Kurauka submitted that the applicant having exercised its constitutional right to an appeal, which appeal is arguable, unless stay is granted, the appeal shall be rendered nugatory and that the applicant shall be forced to pay the shs 500,000 fine imposed by the respondent, yet it has lost huge sums of money and rent deposit in respect of Buruburu Fair Centre among other services as a result of the respondent's acts of refusal to issue or approve licences for the applicant to operate the Buruburu Branch; and to grant authority to the applicant to carry out money transfer services in conjunction with Kenya Commercial Bank because of the pendency of this matter.

22. The applicant therefore urged this court to intervene to prevent the respondent from undertaking any decision that is prejudicial to the applicant's business to avoid the losses and damage being suffered by the applicant.

23. On the part of the respondent, it is contended that the application for stay of execution before this court is misconceived and lacking in merit because the judgment of Honourable Korir J dismissed the applicant's Judicial Review proceedings with no orders as to costs. That an order of dismissal of proceedings is a negative order hence there is nothing to be executed capable of being stayed.

24. In addition, it was contended and submitted by the respondent's counsel that there is no appeal as the Notice of Appeal filed on 16th May 2016 was only served on 6th September 2016 in contravention of the provisions of Rule 77 (1) of the Court of Appeal Rules.

25. Further, that in any event the conditions for grant of stay of Execution pending appeal as stipulated under Order 42 Rule 6 (2) of the Civil Procedure Rules have not been met by the applicant's application.

26. The respondent further submitted that the applicant had failed to demonstrate that it had an arguable appeal because it never attempted to annex a draft Memorandum of Appeal for the court to appreciate the grounds of appeal contemplated in the Notice of Appeal which was served out of the stipulated period.

27. To answer the first issue, it is important to note that indeed, the judgment of Honourable Korir J delivered on 12th May 2016 dismissed the applicant's case after finding that the applicant had not demonstrated that Judicial Review orders can issue in the circumstances of its case.

28. It is the above order of dismissal of its Judicial Review application dated 2nd January 2015 that the applicant herein now seeks to challenge before the Court of Appeal and so it filed a Notice of Appeal dated 16th May 2016 on the same day, but never served it upon the respondent until 6th September 2016 contrary to Rule 77(1) of the Court of Appeal Rules.

29. Even then, service of the said order was only effected upon the respondent on 6th September, 2016 after this court failed to locate any such Notice of Appeal on record and neither did the applicant's counsel have a copy for the court's perusal when the matter came up for consideration on 6th September 2016, yet the applicant was enjoying temporary orders of stay. This was contrary to Rule 77(1) of the Appellate Jurisdiction Rules 2010 which provides that:

“77(1) an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal....”

30. When this court realized that there was no Notice of Appeal, it declined to hear an application for stay pending nothing and it returned the file to the registry and that is when the applicant's counsel hurriedly filed the application dated 9th September 2016 under certificate of urgency, annexing thereto a Notice of Appeal filed on 16th May 2016 and served upon the respondent on 6th September 2016. The applicant's counsel's hurried action was prompted by the fact that the interim orders of stay which had been extended by the court on 27th July 2016 had lapsed on 6th September, 2016 hence the need to seek orders of the court for reinstatement.

31. In the notice of motion for Judicial Review dated 28th January 2015 the ex parte applicant herein sought for:

a. Judicial Review orders of certiorari to bring into the court and quash the decision of the respondent, its servants, agents, employees or anybody else whatsoever acting on its behalf of 19th January 2015 levying a penalty of the sum of kshs 500,000; and

b. Judicial Review orders of prohibition to prohibit the respondent and others named above from cancelling the applicant's trading license and or implementing its decision of 19th January 2015 levying of penalty of shs 500,000 and recovering the same from the applicant non-interest bearing deposit held with the respondent or recovering it in any other way thereof.

32. The learned judge, Korir J, after hearing the application on merit dismissed the said application after hearing it on merits, without any order as to costs. What therefore remained after the dismissal of the

Judicial Review application was nothing since the decision of the respondent, that of levying a fine of shs 500,000 for violation of the Forex Bureau Guidelines and failure to pay such penalty that would lead to revocation of the Bureau's license had not been brought into the High Court for purposes of quashing.

33. Further, in the judgment, and in the pleadings for leave to institute the judicial review proceedings, there was no prayer touching on denial of authority by the respondent for the applicant to operate the Buruburu Centre Branch or any other branch, which issues have been brought up in this latter application for stay pending appeal and which I respectively find to be mischievous and an abuse of court process as those issues did not form the substratum of the complaint before the court as issues for determination by Hon Korir J hence this court cannot determine, at this stage, any new cause of action contemplated by the applicant.

34. Furthermore, an order for stay of execution is ordinarily an interim order which seeks to delay the performance of a positive obligation that is set out in a decree or order as a result of a judgment, or to prohibit the doing of some action. The delay of performance presupposes the existence of a situation to stay a decree called positive order, either an order that has not been complied with or has partly been complied with see **Co-operative Bank of Kenya Limited V Banking Insurance & Finance Union (K) [2015] e KLR** per. Kantai J.A., citing with approval the Court of Appeal of Uganda decision in **Mugenyi & Co- Advocates V National Insurance Corporation CA 13/1994** where it was stated:

“.....an order for stay of execution must be intended to serve a purpose.....”

35. In this case, Order 42 Rule 6(2) of the Civil Procedure Rules confers on this court jurisdiction to order for stay of execution of decree or order pending hearing and determination of an appeal and provides that:

(2) No order for stay of execution shall be made under Sub rule (1) unless substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

36. Grant of an order of stay pending appeal is a discretionary order and the three conditions espoused in Order 42 Rule 6 (2) above have to be fulfilled namely, that the applicant must demonstrate that it is likely to suffer substantial loss if stay is declined; that the application is made expeditiously and without unreasonable delay and that the applicant has given such security as may be binding upon it for the due performance of such decree or order as the court may order. In addition, the applicant must demonstrate that it has an arguable appeal and that unless stay is granted, the appeal, if successful, shall be rendered nugatory.

37. I will revert to the provisions of Order 42 Rule 6((2) of the Civil procedure later after discussing the question of whether a negative order of dismissal of the judicial review proceeding can be stayed.

38. I have already set out the nature of the Judicial Review orders of certiorari and prohibition as sought by the applicant, which orders Honourable Korir J in his judgment of 12th May 206 declined to grant.

39. The court having dismissed the applicant's application for Judicial Review orders of certiorari and prohibition, the question is whether there is any positive order for implementation in the decree of the court and therefore capable of being stayed pending appeal?

40. The answer can be found in several decisions of this court and of the Court of Appeal in **Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** citing with approval the decision in **Executive Estates Ltd V Kenya Posts and Another [2005] 1**

EA 53 stated:

“The Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in Executive Estates Limited v Kenya Posts & Anor. [2005] 1 E.A. 53 where it was stated:

“.....The order which dismissed the suit was a negative order which is not capable of execution.....”

41. In **Peter Mueria Ole Munya & 4 Others Vs Principal Magistrate, Narok & 6 Others** (supra) the court held that:

“ If a Judicial Review application is dismissed, the court does not make a positive order which is capable of being executed and which may in turn be stayed.....Accordingly the orders of stay under Order 42 Rule 6 of the Civil Procedure Rules cannot be granted by this court.....Even if the orders of stay of execution were available to the applicants, I find that they have not satisfied the conditions for grant of stay of execution under Order 42 Rule 6 (2) of the Civil Procedure Rules.”

42. In **Devani & 4 Others V Joseph Ngindan & Others CA Nairobi 136/2004** the Court of Appeal cited with approval **Wananchi Group Kenya Ltd V Commissioner of Investigation and Enforcement [2014] e KLR** that :

“ By dismissing the Judicial Review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”

43. A party who elects to approach the court by way of Judicial Review proceedings while knowing that Judicial Review proceedings do not determine the merits of the claim, takes the risk since, like in this case, once the Judicial Review prayers were dismissed, nothing remained on record to be stayed as there is no positive order capable of execution through these proceedings.(see **Peter Mueria Ole Munya** (supra) case.

44. In other words, execution by the respondent of its decision to recover the penalty levies upon the applicant does not amount to execution of decree or judgment of this court as this court did not by its judgment of 12th May 2016 decree any money due to the respondent by the applicant.

45. As correctly submitted by the respondent’s counsel, the order dismissing the Judicial Review application with no order as to costs in these proceedings did not amount to an executable decree and therefore to attempt to stay that order, even assuming that the applicant has fulfilled all the conditions for stay pending appeal, would be tantamount to establishing a new cause of action for the applicant.

46. As Judicial Review proceedings do not look into the merits of the decision of the public body but the legality of the process giving rise to the impugned decision, to stay the judgment of Honourable Korir J made on 12th May 2016 is the same as staying the decision of the respondent to levy penalties upon the applicant for violation of the Forex Bureau guidelines, when the merit of that decision was never subject of Judicial Review proceedings.

47. In the end, I am in agreement with the respondent’s counsel’s submission that there was no positive order in the dismissal order of Honourable Korir J, made on 12th May, 2016 capable of being stayed pending appeal and I would accordingly decline to grant any order of stay sought. I dismiss that prayer.

48. Assuming that I am to be found to have erred in my finding herein that there is no positive order capable of execution or being stayed pending appeal, the other question to be answered is whether

there is any arguable appeal which, if successful, would be rendered nugatory unless stay of execution is granted.

49. An arguable appeal is not necessarily one that must succeed, but that the court should, if it is satisfied that there is an arguable appeal, it should grant stay to prevent a successful appellant from becoming a holder of a barren result for reasons that they cannot realize the fruits of their success in the appeal, so that the appellant if successful, is not reduced into a pious explorer in the Judicial processes. In applications for stay pending appeal to the Court of Appeal, however, it is not in the province of this court to say whether or not the appeal is arguable. Only the Court of Appeal can establish that fact upon considering the grounds of appeal placed before it. In this case, however, the applicant has not even attempted to draft any grounds upon which it seeks to challenge the judgment of Hon Korir J.

50. The applicant after filing the Notice of Appeal on 16th May 2016 never bothered to serve that Notice of Appeal upon the respondent as can be seen from the proceedings of 6th September 2016. Furthermore, the applicant never even sought and has not sought leave of court to enlarge time within which that Notice of Appeal ought to have been served upon the respondent, as required by Rule 77(1) of the Court of Appeal Rules.

51. On the conditions for stay pending appeal and whether the applicant has satisfied those conditions, the applicant submitted that its business will be inconvenienced if the stay is not granted, as its license to operate will be revoked and that the respondent will recover its non interest bearing deposit.

52. In my humble view, although the application for stay was filed timeously, it has not been demonstrated that the applicant stands to suffer any substantial loss if the stay is not granted as the penalty of shs 500,000/- is not recoverable in these proceedings by way of execution of decree or judgment of 12th May 2016. Furthermore, it has not been shown that an alleged business inconvenience is an irreparable or substantial loss which cannot be compensated by an award of costs of damages.

53. In addition, some of the grounds that the applicant is hinging its application for stay pending appeal are new matters which were not part of the grounds upon which leave to apply for judicial review orders was premised. To allow stay on those grounds is to found a new cause of action in favour of the applicant after judgment which this court cannot do. In that regard, the issue of processing of the license for Buruburu outlet is a new issue that was never brought before the court at the leave stage and as such, that issue can only be subject of fresh Judicial Review proceedings for which leave has to be obtained.

54. Furthermore, it has not been shown that assuming the applicant's appeal is arguable, if successful, it will be rendered nugatory. It was not shown that the applicant's business is dependent on Kshs 500,000 or that the applicant's business cannot survive without Ksh 500,000 which it is being asked to pay CBK in penalties. This court takes judicial notice that Central bank of Kenya is capable of paying Kshs 500,000 to the applicant if that sum is paid to CBK by the applicant herein and the appeal if filed is successful.

55. In the end, I find that the applicant has failed to demonstrate that it is entitled to the orders of stay of execution sought in the twin applications dated 30th May 2016 and 7th September 2016 respectively. Accordingly, the two applications are dismissed, with the resultant effect that there is no order of stay of execution of the judgment of the Honourable Korir J delivered on 12th May 2016.

56. The two applications were considered as one; however, I find that the respondent is unnecessarily being dragged into these proceedings which this court finds to be frivolous. I order that the applicant shall pay costs of the application for stay pending appeal which is hereby dismissed.

Dated, signed and delivered in open court at Nairobi this 24th day of November, 2016.

R.E. ABURILI

JUDGE

In the presence of

Mr Kurauka advocate for the applicant

Mr Okoth h/b for Chacha Odera for respondent

CA: Adline