



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 474 OF 2014

BRYAN YONGO.....APPLICANT

VERSUS

CHIEF LICENCING OFFICER.....1ST RESPONDENT

CRIMINAL INVESTIGATION DEPARTMENT.....2ND RESPONDENT

DIRECTOR OF PULIC PROSECUTION.....3RD RESPONDENT

THE CHIEF MAGISTRATE COURT –KIBERA.....4TH RESPONDENT

RULING

Introduction

1. By a Chamber Summons dated 19th December, 2014, the applicant herein, **Bryan Yongo** applied for leave to apply for certiorari to quash the decisions of the OCS Spring Valley and the Criminal Investigation through the Inspector General of Police to charge him in Kibera Criminal Case No. 5023 of 2014; leave to apply for certiorari to quash the decision of the Chief Licensing Officer, Central Firearms Bureau dated 11th August, 2014 revoking the firearm license of the Applicant; and leave to apply for an order prohibiting the 4th Respondent from hearing or continuing to hear the aforesaid criminal case. As is the norm in such applications, the applicant also sought directions that the grant of the leave operates as a stay of the said case.

Applicants' Case

2. According to the applicant he filed Miscellaneous Application No. 268 of 2014 against the Attorney General and Others seeking judicial review directed at the Respondent's intended action to revoke his firearm licence. He contended that this Court granted orders maintaining the status quo which orders were extended from time to time. However during the currency of the said orders the 1st Respondent vide a letter dated 11th August, 2014 purported to revoke his firearm licence No. 8903 and proceeded to charge him in the aforesaid criminal case with the offence of being found in possession of a firearm pistol without a firearm certificate inforce at the time.
3. According to the applicant this action on the part of the 1st respondent was in disobedience of the said court order. According to him, he has held a firearm since 26th July, 2012 and has always complied with all the conditions pertaining thereto hence the 1st Respondent's decision was not only malicious but in gross violation of the applicant's Constitutional rights. The said action, it was contended exposes the applicant and his family to serious security risk since the applicant has

testified in various parliamentary committees which committees recommended police protection for the applicant. Further the applicant is engaged in the business of supplying security guards hence requires the firearm for his own protection.

Respondent's Case

4. The Respondent opposed the application through a replying affidavit sworn by Chief Inspector **Michael Lemayian** on 13th January, 2015.
5. According to the deponent, the criminal case the subject of these proceedings arose from a complaint by the interested party in which it was alleged that the ex parte applicant had threatened to kill the interested party.
6. According to him, based on information received from the interested party, the police on 8th November, 2014 arrested the ex parte applicant near the interested party's compound with a loaded pistol and a magazine charged with 11 rounds of ammunition.
7. On examination by the ballistics experts it was discovered that the earlier recovered cartridge which was an exhibit in criminal case no. 5029 of 2014 was fired from the same pistol which was recovered from the applicant and which was meant to be an exhibit in the criminal case.
8. It was contended that there was evidence of the commission of criminal offence by the applicant by misusing his licensed gun and that the decision to charge the ex parte applicant was based on sufficiency of evidence. Despite the applicant having been directed to surrender the firearm, the ammunitions and the firearms certificate the ex parte applicant declined hence leading to the revocation of the forearm certificate. According to him by the time of the revocation of the firearm certificate, there was no order in force. It was contended that the applicant ought not to be allowed to use the court orders to continue committing offences and that his rights must be balanced as against the rights of others.

Interested Party's Case

9. According to the interested party, who is the complainant in the said criminal case, prior to falling apart with the ex parte applicant they were close acquaintances.
10. He deposed that on various dates he received information by way of text messages both from the applicant and the applicant's wife with threats on his life and true to the applicant's threats on the evening of 8th November, 2014 the ex parte applicants and his accomplices went to the interested party's apartment and lay in wait for the interested party before the ex parte applicant was arrested after the interested party reported the ex parte applicant's machinations to the police.
11. Consequently the applicant was charged in the said criminal case with three counts.
12. It was therefore the interested party's case that the application seeking to prohibit the hearing of the said criminal case ought not to be entertained by the Court.

Determination

13. On 29th December, 2014 when this matter came for inter partes hearing of the application for leave and determination whether the leave would operate as a stay there being no objection to the grant of leave and having considered the application, I granted leave to commence judicial review proceedings as sought herein. However pursuant to the proviso to Order 53 rule 1 of the ***Civil Procedure Rules*** I directed that the issue of whether the grant of leave would operate as a stay of the proceedings would be heard inter partes. It is that inter partes hearing which is the subject of this ruling.
14. Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a *prima facie* case has been made out and ought not to be granted as a matter of course. See **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR.**
15. Therefore as leave had been granted in these proceedings and as no application has been made to set aside the said leave, it is my view that it would be an exercise in futility for this Court to

- embark on an investigation at this stage whether or not the applicants' case is arguable since to arrive at a decision in the negative would impact negatively on the leave already granted. Consequently I do not intend to embark on that futile, absurd and potentially embarrassing exercise. I will therefore ignore the issues raised herein which go to the merits of the orders intended to be sought in the substantive Motion.
16. However the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.
 17. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. 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. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**
 18. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.
 19. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.
 20. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“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. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.
22. In this case it is not contended that the subject criminal proceedings are likely to be heard and determined before these proceedings are concluded. In effect there is no probability as opposed to a possibility that the applicant's liberty is likely to be placed at risk in any foreseeable future. This Court takes into account the fact that an application for stay of proceedings can be made at any stage of the proceedings in a judicial review application as the determination of an application for stay must necessarily depend on the prevailing circumstances and where the circumstances

change, the court is perfectly entitled to grant stay. In other words a decision made with respect to stay is not necessarily caught up by the doctrine of *res judicata* though the same may amount to an abuse of the process of the court if made with the intention of overturning an earlier decision or as a means of haranguing the court. Accordingly I decline to direct that the grant of leave herein shall operate as a stay of Kibera Criminal Case No. 5023 of 2014.

23. The other decision sought to be stayed was the 1st Respondent's decision dated 11th August, 2014 revoking the Applicant's firearm licence. As was stated in **George Philip M Wekulo vs. The Law Society of Kenya & Another** (supra) where the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. If a decision has already been made by the 1st Respondent revoking the Applicant's firearm licence there is really nothing pending to be stayed. As was appreciated in **Taib A. Taib vs. The Minister for Local Government & Others** (supra) "**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.**"
24. In this case the applicant contends that the 1st Respondent's action was contrary to an existing Court Order. If that position is found to be correct the Court would be entitled not only to take appropriate action against the said Respondent but also to declare that action null and void as any action taken in breach of an existing Court order cannot acquire any legal validity. However the Respondents' position was that the applicant's firearm was required for investigations into an alleged commission of another criminal offence apart from the one the subject of these proceedings. As I held in High Court Miscellaneous Application No. 268 of 2014 which was between the same parties:

"That the police are empowered under section 60 of the *National Police Service Act* to take possession of anything suspected to have been used in the commission of an offence is not in doubt. That power is clearly different from the power to revoke a firearms licence and where the police are investigating the commission of a criminal offence relating to the use of firearms, I do not see the reason why the Court should prohibit the police from taking possession of the firearm in question for the sole purpose of conducting their investigations. For the Court to issue a blanket order prohibiting the police from doing so would amount to unduly interfering with the investigatory powers of the police and that is not the function of a judicial review court."

25. Therefore if the police require the applicant's firearm for the purposes of investigation, this Court cannot give an order whose effect would be to bar the police from conducting their statutory and constitutional mandate unless the said action was being undertaken in breach of the law or in circumstances which amount to abuse of such power.
26. It is contended that the applicant was arrested in circumstances which raised suspicion as to the applicant's bona fides. Whereas that is not an issue before this Court, the Court must state that where a Court directs that the leave do operate as a stay of the *proceedings in question*, that stay is limited to particular proceedings being challenged in that matter and is not to be interpreted to mean that the stay refers to future wrong doings as well. So that the stay that was granted by the Court ought not to be interpreted to cover commission of alleged future offences.
27. At this stage without going into the merits of this particular case I wish to remind the parties that a *firearm is not a toy. It is a very lethal weapon and as such ought not to be brandished anyhow as if it were a swagger stick or a flywhisk. Those who are privileged to be licensed to hold firearms must exercise utmost responsibility and must guard against careless use of the firearm. Therefore firearm licences ought to be granted only in situations where it is necessary to do so and where the strict conditions for its grant are fulfilled. A firearm in my view is not a symbol of power and ought not to be issued to those who simply want to use the same to intimidate other members of*

society or to throw their weights around. Where a grantee or licensee of firearm certificate abuses the privilege the same ought to be speedily withdrawn before the society is exposed to the perils and vagaries of firearm abuse. However before the said action is taken the due process must be adhered to. As was held by the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77:**

“We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court’s decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed.....The courts must continue to give justice to all and sundry irrespective of their status or former status.”

28.This Court in the above case prohibited the revocation of the applicant’s license unless the due process was adhered to. That case was in respect of an earlier attempt to revoke the applicant’s license. The present case seems to have been provoked by the decision made on 11th August, 2014 hence section 5(7) of the ***Firearms Act***, Cap 114 of the Laws of Kenya provides:

(7) A firearm certificate may be revoked by a licensing officer if—

(a) the licensing officer is satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfitted to be entrusted with a firearm; or

(b) the holder fails to comply with a notice under subsection (5) requiring him to deliver up the firearm certificate.”“

29.Subsection (5) aforesaid provides:

A licensing officer may at any time by notice in writing vary the conditions subject to which a firearm certificate is held, except such of them as may be prescribed, and may by the notice require the holder to deliver up the firearm certificate to him within fourteen days from the date of the notice for the purpose of amending the conditions specified therein.

30.It is therefore clear that section 5(5) of the said Act is only applicable where the conditions are sought to be varied. Whereas the letter dated 11th July 2014, did not expressly state the reason for requiring the applicant to surrender his firearm certificate, it is contended which contention is not controverted that the applicant did not surrender the said certificate hence the discretionary powers under section 5(7)(b) of the Act could be invoked.

31.To grant the order that the leave granted herein operates as a stay would have the effect of rendering part of the pending criminal proceedings superfluous.

32.Accordingly I decline to grant the directions that the leave granted herein shall operate as a stay as sought in the Chamber Summons dated 19th December, 2014.

Dated at Nairobi this day 22nd of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

The Applicant, Mr Bryan Yongo in person

Mr Ndege for the 1st, 2nd and 3rd Respondents

Mr Munene for the 4th Respondent

Mr Wamwayi for the Interested Party

Cc Patricia