



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 223 OF 2014

REPUBLICAPPLICANT

VERSUS

KENYA VISION 2030 DELIVERY BOARD.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

THE COMMISSION ON

ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

EX-PARTE.....ENG. JUDAH ABEKAH

RULING

1. The notice of motion application dated 14th April, 2015 was brought by the Interested Party, the Commission on Administrative Justice pursuant to sections 1A, 3 and 3A of the Civil Procedure Act, the Inherent Jurisdiction of the Court and Order 51 of the Civil Procedure Rules.
2. The Applicant's main prayer is for an order staying the judgment delivered by this Court on 26th February, 2015 and **“particularly, the pronouncement contained therein that public bodies have no obligation to implement the reports, findings and recommendations of the Commission on Administrative Justice pending Appeal against the Judgement and the Consequential Decree.”**

The Applicant also prays for the costs of the suit.

3. The application is supported by the grounds on its face and the supporting affidavit sworn by the Applicant's Chairperson Mr Otiende Amollo on 14th April, 2015.
4. From the papers filed in Court, the Applicant's case is that in the judgment delivered on 26th February, 2015, this Court while dismissing the case of the ex parte Applicant (Eng. Judah Abekah) made a finding that public bodies, have no obligation to implement the reports, findings and recommendations of the Interested Party/Applicant. It is the Applicant's case that it intends to appeal the decision and has already filed a Notice of Appeal.
5. The Applicant asserts that it is a constitutional commission entrusted with wide mandate under Articles 59(2)(h) & (i) and 252 of the Constitution and sections 8, 26, 27, 28 and 29 of the Commission on Administrative Justice Act (CAJA), and this include the power to investigate any conduct in state affairs or any act or omission in public administration in any sphere of

Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair, or unresponsive official conduct. That in exercise of its constitutional mandate, the Applicant is currently handling over 70,000 complaints and inquiries involving government agencies or public bodies.

6. The Applicant contends that unless the Court stays its judgment and particularly the pronouncement that public bodies have no obligation to implement its reports, findings and recommendations, the people of Kenya stand to suffer very substantial and irredeemable loss since its operations are likely to be crippled and the resolution of the pending complaints and inquiries may be adversely affected.
7. It is the Applicant's assertion that the application has been brought without undue delay and the Court should therefore exercise its inherent jurisdiction and grant the order sought.
8. The ex-parte Applicant, Judah Abeka supported the application.
9. The 1st Respondent, Kenya Vision 2030 Delivery Board opposed the application through grounds of opposition dated 21st April, 2015 to wit:

“1. The applicant has not met the test for agent of an order for stay of execution pending appeal.

2. The applicant has not established that there is sufficient cause to stay the judgment and orders of the court of 26th February 2015.

3. The applicant has not shown that unless the order of stay of execution is granted, it will suffer substantial loss.

4. The applicant has not established that the intended appeal is arguable.

5. The application has been brought without undue delay.

6. More grounds to be adduced during the hearing.”

11. The 2nd Respondent, the Attorney General, just like in the substantive proceedings, did not participate in the application.

12. The parties herein cited various authorities in support of their positions. Counsel for the Kenya Vision 2030 Delivery Board provided a persuasive decision from the United States of America on the principles to guide a court when exercising the power of stay pending appeal. At page 14 in **Nken v Holder, Attorney General, 556 U.S. (2009)** the Court stated:

“A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case....

The fact that issuance of a stay is left to the court's discretion does not mean that no legal standard governs that discretion..... A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgement is to be guided by sound legal principles....those legal principles have been distilled into consideration of four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”

[Citations omitted]

13. The Kenyan Court of Appeal distilled the principles applicable to grant of stay pending appeal in **Stanley Kangethe Kinyanjui v Tony Ketter & 2 others [2013] eKLR** which was quoted with

approval by the same Court in **Printing Industries Limited & another v Bank of Baroda Kenya Limited [2014] eKLR** as follows:

“The jurisdiction of this Court to grant relief sought under rule 5(2) (b) of this Court’s Rules is not in dispute and the principles governing the same are well settled. In STANLEY KANGETHE KINYANJUI v TONY KETTER & 2 OTHERS [2013] eKLR, this Court set out the guiding principles as follows:

“(i) In dealing with rule 5 (2) (b) (applications) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court. See RUBEN & 9 OTHERS v NDERITU & ANOTHER [1989] KLR 365.

(ii). The discretion of this Court under rule 5(2) (b) to grant stay or injunction is wide and unfettered, provided it is just to do so.

(iii) The Court becomes seized of the matter only after the notice of appeal has been filed under rule 75. HALAI & ANOTHER v THORNTON & TURPIN (1963) LTD [1990] KLR 365.

(iv) In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. DAVID MORTON SILVERSTEIN v ATSANGO CHESONI, Civil Application No. NAI 189 of 2001.

(v) An applicant must satisfy the Court on both the twin principles.

(vi) On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. DAMJI PRAGJI MANDAVIA v SARA LEE HOUSEHOLD & BODYCARE (K) LTD, Civil Application No. NAI 345 of 2004.

(viii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. JOSEPH GITAHU GACHAU & ANOTHER v PIONEER HOLDINGS (A) LTD & 2 OTHERS, Civil Application No. 124 of 2008.

(viii) In considering an application brought under rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. DAMJI PRAGJI (supra).

(ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. RELIANCE BANK LTD v NORFLAKE INVESTMENTS LTD [2002] 1 E.A. 27 at page 232.

(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. INTERNATIONAL LABORATORY FOR RESEARCH ON ANIMAL DISEASES v KINYUA, [1990] KLR 403.”

14. In matters touching on public interest, the Court must consider the impact of the decision on the public interest. This was clearly stated by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR when the Court opined that:

“[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by *injunctions, orders of stay, conservatory orders* and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

[86] “*Conservatory orders*” bear a more decided *public-law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*.

[87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

[89] This third condition is dictated by the *expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution*. This Court has already ruled that election petitions are both *disputes in personam* and *disputes in rem*. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the *public interest*.”

15. Looking at the arguments of the parties, I find that they are not contesting the principles governing the grant of stay pending appeal. I will therefore proceed directly to apply the principles enunciated above to the facts of this case.

16. In a situation where the application for stay is made before the Court whose decision is the subject of the intended appeal, the question as to whether the applicant has an arguable appeal is a dicey one. The Court is put in an awkward situation when it is invited to make a finding as to the chances of success of an appeal against its judgement. In my view, the best Court to make a decision on the question of the arguability of an appeal is the Court that will hear the appeal. The best thing for the Court hearing the application for stay is to consider whether an applicant has met

the other conditions for grant of stay and where this has been done, the Court should then grant stay without commenting on the question as to whether an applicant has an arguable appeal.

17. In stating so, I find support in the stance taken by G.V. Odunga, J in **Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji [2014] eKLR** who stated at paragraph 42 of his ruling that:

“It was however argued that since the applicants have not shown that their appeal is arguable this Court ought not to grant the orders sought. On this issue I agree with the applicants’ view that under Order 42 rule 6 aforesaid it is not a condition for grant of stay that the applicant satisfies the Court that its appeal or intended appeal has chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so.”

18. The next question is whether the appeal is likely to be rendered nugatory if stay is not granted. In considering this question, the Court must also put into consideration the likely adverse effects of stay on the other parties. Is stay likely to affect any other party adversely? I do not see how stay of the Court’s judgment in this case is likely to negatively affect any of the parties in this matter. The ex-parte Applicant’s application for orders of judicial review was dismissed in the judgement delivered on 26th February, 2015. As such, even if the pronouncements which the Applicant seeks to stay are suspended, there will be nothing for the ex- parte Applicant to execute against the Kenya Vision 2030 Delivery Board. Grant of stay will therefore not affect the Kenya Vision 2030 Delivery Board or any other party in any way.

19. Will the appeal be rendered nugatory if stay is not granted? The Applicant indicates that it is handling over 70,000 complaints and any recommendations it makes in respect of these cases are not likely to be implemented by the government agencies and public bodies as a result of the court’s pronouncements in this judgement. This argument is untenable. In my opinion, there are various reasons why the appeal will not be rendered nugatory if stay is not granted.

20. Firstly, the Applicant has not tabled before the Court any single matter where any public body or government agency has refused to adopt its recommendations on the strength of the judgment of this Court. There are therefore no facts to back the Applicant’s fears that its recommendations are likely to be spurned as a direct result of the judgment of this Court.

21. Secondly, if the Applicant’s intended appeal succeeds, the Applicant only needs to show any government agency that an order of mandamus is available against it for the government agency to comply. In seeking the order of stay, the Applicant seems to imply that the Court of Appeal will take forever before determining the appeal. I do not think that is the case.

22. Thirdly, I find this application to be so speculative. There is nothing to show that government agencies will refuse to implement the recommendations of the Applicant on the strength of the judgment herein. There is no evidence that all the 70,000 complaints allegedly investigated by the Applicant will result in adverse recommendations against government agencies.

23. As for the ex-parte Applicant herein, the appeal will not be rendered nugatory as a successful outcome will result in the issuance of an order of mandamus against the Kenya Vision 2030 Delivery Board.

24. The end result is that a successful appeal will not be rendered nugatory if the judgement of this Court is not stayed. This finding also takes care of the public interest element as the outcome of the appeal will not be rendered nugatory by failure to grant stay.

25. Having found that the appeal will not be rendered useless if the judgement is not stayed, I need not address the Kenya Vision 2030 Delivery Board's contention that stay is not available since there is no positive order that can be enforced against the ex-parte Applicant or the Applicant/Interested Party.

22. The application dated 14th April, 2015 is therefore dismissed. Each party will meet own costs of the application.

Dated, signed and delivered at Nairobi this 18th day of June , 2015

W. KORIR,

JUDGE OF THE HIGH COURT