



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL MISC APPLICATION NO. 168 OF 2015 (JR)

**IN THE MATTER OF AN APPLICATION BY DOUGLAS M. BARASA,
COLLINS WAFULA MAKUNJA AND RICHARD WAMALWA MAKHINO
FOR ORDERS OF MANDAMUS, PROHIBITION AND CERTIORARI**

AND

**IN THE MATTER OF EXTENSION OF THE TERM OF THE MANAGING
DIRECTOR OF NZOIA SUGAR COMPANY MR SAUL WASILWA**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY AGRICULTURE,

LIVESTOCK AND FISHERIES.....1ST RESPONDENT

JOASH WAMANGOLI,

CHAIRMAN NZOIA SUGAR COMPANY.....2ND RESPONDENT

THE BOARD OF DIRECTORS

NZOIA SUGAR COMPANY.....3RD RESPONDENT

SAUL WASILWA.....INTERESTED PARTY

EX PARTE: DOUGLAS M. BARASA, COLLINS WAFULA MAKUNJA

AND RICHARD WAMALWA MAKHINO

RULING

The Case

1. The applicants in these proceedings who allege that they are farmers have instituted these proceedings seek orders of certiorari to quash the 1st Respondent's decision made on 4th May, 2015 extending the Interested Party's term as the Managing Director (MD) of Nzoia Sugar Company (hereinafter referred to as "the Company"). They further seek an order of prohibition prohibiting the said Respondent from renewing the said Interested Party's term as well as an order of mandamus compelling the said Respondent to withdraw and cancel the said extension.
2. The grounds upon which the application is based are that the 1st Respondent had no power both under the ***State Corporations Act***, Cap 446, Laws of Kenya and the Constitution to extend the term of the current MD, **Mr Saul Wasilwa**, the Interested Party herein, having served the maximum 2 term period. It was further contended that in the absence of Board, the performance of the Interested Party could not have been evaluated on 9th January, 2015 as was alleged. To the applicants the purported extension of Interested Party's term was consequently irregular and an abuse of the process and that the 1st Respondent's actions were *ultra vires*.
3. According to the applicant, if the application succeeds, whatever may have been done in the meantime would be incapable of being undone since the illegal period served by the Interested Party would be incapable of being reversed. On the other hand, it was contended that the absence of the Interested Party in the office would not cause serious prejudice since the Board has the power to appoint someone to act in his place. The Court was therefore urged to direct that the grant of leave does operate as a stay.
4. In opposing the application, the 1st Respondent contended the letter sought to be quashed was not the appointing letter but was just an advice. Therefore the PS did not extend the Interested Party's term and that the appointment was made by the Board.
5. It was contended that the applicants delayed in bringing this application as the appointment was made on 4th May 2015 while these proceedings were instituted 23 days later hence the Court was urged not to direct that the leave operates as a stay.
6. On behalf of the 2nd Respondent, it was contended that the appointment of the Interested Party was complete and therefore there is nothing capable of being stayed. It was contended that the letter dated 4th May 2015 simply advised the Board on what to do and that the appointment was effected by the Board which duly extended the Interested Party's appointment for 6 months.
7. It was contended that if the Court was at the conclusion of these proceedings to find that the appointment was proper that decision would be problematic as the Company would have been without the Managing Director. The Court was therefore urged to take into consideration the public interest and not to grant the stay but rather to direct that the hearing of the application be fast-tracked.
8. On behalf of the Interested Party apart from dwelling on the merits of the grounds upon which the application was instituted, it was submitted that the PS had not made the appointment but that the appointment had been made by the Board. It was submitted that since the Board had exercised its power in appointing the Interested Party, the latter had acquired a vested right of employment on 15th May, 2015. It was however contended that even if the Court were to find that the appointment was irregular such a finding would not have retrospective effect. It was averred that if the application succeeds, the applicants would be vindicated.
9. In a rejoinder the applicants contended since the limitation provides that the application be made within 6 months and as these proceedings were instituted barely a month after the decision, the applicants had moved to Court speedily.
10. It was submitted that the Court ought to distinguish cases where the matter complained of is complete and where the matter is in the process of being completed which is the case in the instant case.

11. To the applicant the Interested Party can be compensated if at the end of the day the application did not succeed.

Determination

12. On 28th May, 2015, I granted to the applicants leave to apply for the said orders. I also granted a temporary order restraining the Respondents from extending the Interested Party's term pending inter partes hearing of that limb of the application. It is thus that particular limb which is the subject of this ruling pursuant to the proviso to Order 53 rule 1 of the ***Civil Procedure Rules***

13. 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.**

14. 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.

15. 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.

16. 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 the Court were to grant a stay in such circumstances it would amount to in effect granting the orders in the Motion before the same is heard. It is only in cases where either the decision has not been implemented or where implementation is incomplete that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

17. 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.

18. 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.

19. 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.”

20. 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, rather than the possibility, of a determination being made in the challenged proceedings, is high. 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.

21. In this case what is being challenged is the extension of the term of the Interested Party by six months. Unless a determination is made one way or another within the said period, there is a risk that these proceedings may well be rendered an academic exercise. However that is not the only issue for consideration. 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.

22. As already stated hereinabove the stage at which the proceedings being challenged have reached is a factor for consideration in determining whether to grant the stay. Similarly the conduct of the applicant prior to the commencement of the proceedings is also to be considered.

23. In this case, there is a letter dated 15th May, 2015 signed by the 2nd Respondent, the Chairman of the Company in which it is indicated that in a Board meeting held on the same date the Board resolved to extend the Interested Party's contract by Six (6) months with effect from 20th May, 2015. These proceedings were instituted on 28th May, 2015 when the application for leave was filed. The applicants seek a stay against the Respondent from inter alia extending or renewing the extension of the Interested Party's term of office as Managing Director of the Company. Although the applicants contend that the said appointment can only take effect on gazettelement, a contention which is strenuously challenged by the Respondent, on the face of the record, the Board whether rightfully or not, seemed to have extended the Interested Party's term before these proceedings were instituted. The issue whether the gazettelement was required will however await the determination of the substantive Motion. Whereas that does not bar the Court from quashing the said extension if found to have been unlawful, a stay in the manner sought would amount to undoing what in fact has been done.

24. In this case, apart from the protagonists there are third parties involved or affected by the running of the Company. In such matters as these the Court, in considering the nature of the orders to grant ought to take into account the principle of proportionality and see where the scales of justice lie. With the advent of the overriding objective it is clear that the Court must swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it. Thus, one of the principal aims of the overriding objective is to approach the exercise of power or discretion under any proviso or rule, with a sense of balance or proportionality. The law is now 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 ends of justice. In so deciding the Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Kenya Pipeline Company Limited vs. Stanley Munga Githunguri Civil Application No. Nai. 300 of 2010 [2011] eKLR** and **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

25. In the circumstances of this case, it is my view that the course of justice will be better served by maintaining the *status quo* and instead fast-tracking the determination of the Motion.

26. In the premises I decline to direct that the grant of leave herein shall operate as a stay of the proceedings in question. I make no order as to costs.

Dated at Nairobi this 29th day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Saende for the Applicants

Mr Wekesa for the Interested Party and for Mr Kiarie for 2nd and 3rd Respondents

Mr Munene for 1st Respondent

Cc Patricia