



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.486 OF 2013

BETWEEN

NAIROBI METROPOLITAN PSV SACCOS

UNION LIMITED.....1ST PETITIONER

MT. KENYA MATATU OWNERS

ASSOCIATION.....2ND PETITIONER

CHANIA TRAVELLERS CO-OPERATIVE SAVINGS

AND CREDIT SOCIETY LIMITED.....3RD PETITIONER

INDIMA (NJE) COOPERATIVE SAVINGS

AND CREDIT SOCIETY LIMITED.....4TH PETITIONER

KUKENA SAVINGS AND CREDIT COOPERATIVE

SOCIETY LIMITED.....5TH PETITIONER

THIKA ROAD TRANSPORTERS

SACCO LIMITED.....6TH PETITIONER

THIKA TRAVELLERS CHOICE

SACCO LTD.....7TH PETITIONER

RUNA TRAVELLERS CHOICE

SACCO LTD.....8TH PETITIONER

NARUGI DEVELOPMENT

SACCO LTD.....9TH PETITIONER

KANGEMA TRAVELLERS CO-OPERATIVE

SAVING AND CREDIT SOCIETY.....10TH PETITIONER

NANYUKI EXPRESS CABS

SERVICES SACCO.....11TH PETITIONER

NUCLEAR INVESTMENTS LTD.....12TH PETITIONER

MURANG'A SHUTTLE

SERVICES LTD.....13TH PETITIONER

NAMUKIKA SACCO LIMITED.....14TH PETITIONER

NAMUKIKA SACCO LTD.....15TH PETITIONER

NENO SACCO LTD.....16TH PETITIONER

MERU NISSAN OPERATORS SACCO

SOCIETY LIMITED.....17TH PETITIONER

MTN SACCO LTD.....18TH PETITIONER

**NTK TRAVEL SERVICES MULTIPURPOSE COOPERATIVE SOCIETY
LIMITED.....19TH PETITIONER**

KIAMBU MARAFIKI MATATU SACCO LTD

(KIAMBU SACCO LTD).....20TH PETITIONER

KAKA TRAVELLERS COOPERATIVE SAVINGS AND CREDIT COOPERATIVE SOCIETY

LIMITED.....21ST PETITIONER

KAMUNA SAACO LTD.....22ND PETITIONER

**MWIKI PSV SAVINGS AND CREDIT COOPERATIVE SOCIETY
LIMITED.....23RD PETITIONER**

**EASTLEIGH ROUTE SAVINGS AND CREDIT COOPERATIVE SOCIETY
LIMITED.....24TH PETITIONER**

NGUMBA TRAVELLERS SAVINGS AND CREDIT COOPERATIVE

SOCIETY LIMITED.....25TH PETITIONER

**DANDORA USAFIRI TRAVELLIERS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LIMITED.....26TH PETITIONER**

AND

COUNTY OF NAIROBI GOVERNMENT.....1ST RESPONDENT

NAIROBI CITY COUNTY BOARD.....2ND RESPONDENT

RULING

Introduction

1. The Petitioners filed the Notice of Motion application dated 18th December 2013 on 19th December 2013. The Application is supported by the Affidavit sworn by Michael Kariuki, the Chairman of Mt. Kenya Matatu Owners Association, the 2nd Petitioner herein on 18th December 2013. The Applicants/Petitioners seek the following orders;

“(a)

(b) That there be a stay of execution of the contents of Paragraph 6.1 of the Schedule to the Nairobi County Government Finance Act, 2013 until the hearing and determination of this application, or as the Court may direct.

(c) That there be a stay of execution of the contents of Paragraph 6.1 of the Schedule to the Nairobi County Government Finance Act, 2013 until the hearing and determination of the Applicant's intended Appeal, or until such specified as this Court may Order.

(d) That the costs of this Application be provided for.”

2. On 19th December 2013, Mr. Kinyanjui for the Petitioners appeared before me *ex-parte* seeking prayer (b) of the Application. The Court acceded to his prayers and granted him the said prayer pending hearing *inter-partes*. It therefore follows that prayer (b) having been granted all there remains of that Application is prayers (c) and (d).

3. In response to that application, the 1st and 2nd Respondents filed Grounds of Opposition dated 6th January 2014. The grounds are as follows;

“1) In a judgment delivered on 18th December 2013, this Honourable Court already determined that Schedule 6.1 of the Nairobi City County Finance Act 2013 (“the impugned legal provision”) is Constitutional. The Court is functus officio on enforceability of the impugned legal provision;

2) The Petitioner's Application is a surreptitious attempt to have this Honourable review, on unknown grounds, its judgment herein delivered on 18th December 2013;

3) In dismissing the Petition herein, there is no positive order that this Honorable court made capable of execution;

4) It is trite law as repeatedly held in, inter alia, the following Court of Appeal decisions, that a dismissal order, being a negative order, is incapable of stay of execution, neither can implementation of an impugned decision be stayed where a Court dismisses a suit challenging the decision, to wit;

a) F & S Scientific Limited versus Kenya Revenue Authority & Another, Civil Application No. Nai.26 of 2012 [2013] eKLR;

b) Shimmers Plaza Limited vers National Bank of Kenya Ltd. Civil Application No. Nai.38 of 2013; and

c) Republic versus Kenya Wildlife Services & 2 Others, Civil Application No.Nai

5) ***The balance of convenience tilts in favour of dismissing the Application.***”

4. The 1st and 2nd Respondents also filed a Notice of Motion Application dated 19th December 2013 seeking *inter-alia* a stay, setting aside and variation of the *Ex-parte* orders made by this court on 19th December 2013. In reply to that Application, the Petitioners filed a Replying Affidavit sworn by Michael Kariuki on 9th January 2014. Prof. Ojienda for the Respondents appeared before me on 2nd January 2013 for *inter-partes* hearing where I directed that the two Applications be heard on 13th January 2014.
5. The Application arises from the decision of this Court on the constitutionality of Paragraph 6.1 of the Nairobi County Finance Act of 2013 which has authorized the Nairobi City County to charge Ksh.300 as parking fees and whether in doing so, it had violated the Petitioner's fundamental rights and freedoms.

The Petitioners' case

6. I have read the Replying Affidavit sworn by Michael Kariuki. He outlines the steps the parties herein have undertaken to resolve this matter in an expeditious and amicable manner. He also in essence summarized the grounds of the intended appeal and concluded by making proposals on the resolution of the matter by calling for reconciliation among the parties.
7. Mr Kinyanjui presented the Petitioner's case. He contends that this Court has unfettered discretion anchored in statute and case law to issue orders for stay of its own judgment and that does not amount to sitting on an appeal of its own judgment. Relying on **Section 34** of the **Civil Procedure Act**, he claimed that this Court should take judicial notice of its residual power before an appeal is filed against its decisions. He submitted that there are three basic principles the Court should consider before granting stay pending appeal. First, there must be a preferred appeal, signified by the filing of a competent Notice of Appeal, second, the application must be made timeously and lastly there must be reasonable basis to stay execution, and upon which conditions may be imposed, in default or in breach of which the appeal would be rendered nugatory.

Respondents' submission

8. Prof. Ojienda presented the 1st and 2nd Respondent's case. In addition to the Grounds of Opposition reproduced elsewhere above, Prof. Ojienda submitted that this Court having dismissed the Petition and held Schedule 6.1 of the Nairobi City County Finance Act 2013 to be constitutional, it is *functus officio* and cannot reopen the determination of the issues sought by the parties. He claimed that the Court cannot stay implementation of a law that it has found to be constitutional thus bringing to finality the litigation between the parties herein. He relied on the Court of Appeal case of **James Mwashori Mwakio v Kenya Commercial Bank Ltd, NRB Civil Application No.11 of 2008** in support of that proposition.
9. It was his further submission that a dismissal order is a negative order and it is trite law that a negative order is incapable of execution thus cannot be stayed. He relied on the case of **F & S Scientific Limited v Kenya Revenue Authority & Another, Civil Application No. Nai. 260 of 2012** and also **Shimmers Plaza Limited v National Bank of Kenya Ltd, Nairobi CA (Appli) No. 38 of 2013** in making that point.
10. It was Prof. Ojienda's further submission that the 1st and 2nd Respondents cannot collect parking charges in arrears. And that granting the orders of stay sought by the Petitioners will only aid to occasion further revenue loss to the 1st and 2nd Respondents which revenue if lost will never be recovered. That the merits or otherwise of the Petitioner's appeal was for the Court of Appeal to

determine and he thus urged the Court to dismiss the Petitioners' Notice of Motion.

Findings

11. From the parties pleadings and submissions before me, I am of the view that there is one issue for determination in this ruling i.e. whether the Petitioners are entitled to an order of stay pending appeal.

12. I must state that I agree with Mr. Kinyanjui that this court has unfettered discretion to issue the orders of stay of its own judgment pending appeal subject to what I will say later in this judgment. To my mind, **Order 42 Rule 6(1)** of the **Civil Procedure Rules 2010** bears this out. It therefore follows that Mr. Ojienda's submission that this Court is *functus officio* is misplaced and does not have support of the law.

13. I will now turn to deal with the issue raised by Mr. Kinyanjui and what actually appears to be the only substantive ground that he relies on, that there is the possibility of the intended appeal being rendered nugatory if stay is not granted at this stage. In **Kenya Power and Lightning Company Ltd v Khan Nassir Rustam, Civil Appeal No. 111 of 2012** the Court of Appeal stated as follows in regard to the jurisdiction of this Court in considering whether to grant a stay of execution pending appeal;

“Whether or not an appeal would be rendered nugatory is not a consideration in an application for stay of execution pending appeal before the High Court. That standard is only considered by Court of Appeal.”

I am duly guided and I will only add that looking at the grounds relied upon by the Petitioners, they are actually grounds of appeal as they deal with substantive issues to be raised in the appeal yet to be filed. This Court cannot therefore pronounce its finding in that regard and for obvious reasons.

14. The conditions to be satisfied by an applicant before the High Court can exercise its discretion in granting a stay are as stated under **Order 42** of the **Civil Procedure Rules 2010**. **Rule 6** of **Order 42** provides as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless-

(a) The Court is satisfied that 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.”

15. Those conditions were also clearly set out by the Court of Appeal in the case of **Halai & Another - Vs- Thornton & Turpin (1963) Ltd [1990] KLR** as follows;

“In Rasiklal Somabhai Patel v Parklands Properties Ltd the Court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI Rule 4(2) of the Civil Procedure Rules under which the Applicant had to satisfy the

Court of two matters application is granted, which prima facie means that if the appeal succeeds, the Respondent would not be in a position to make full restitution. Secondly, the Applicant had to give such security as the Court may order. Those are the requirements under Order XLI Rule 4(2) of the Civil Procedure Rules but that order mainly governs applications before the superior Court and not those to this Court,. Although in sub-rule (1) of the same Rule reference is made to the Court to which the appeal is preferred.

16. I am duly guided and turning to the matter before me, I recall that the Petitioners supported their Application on the grounds inter-alia that they had a good and arguable appeal and that they will suffer substantial loss as Paragraph 6.1 of the Schedule to the Nairobi County Finance Act could be implemented anytime and that the Petitioners and other members of the public have already purchased seasonal tickets which were expiring on 31st December 2013. On the other hand, the Respondents have claimed that Schedule 6.1 of the Nairobi County Finance Act was to be implemented in November 2013 and thus the Respondents have been occasioned loss of revenue from 1st November 2013 and granting a stay would occasion further revenue loss to them which revenue they will never be able to recover.
17. As can be seen therefore the situation is really delicate for the above reasons because substantial loss seems to be imminent on the part of each party whether the stay order is granted or not. I am however aware that a negative order in execution cannot be stayed. This has been repeatedly held by the Court of Appeal and in ***F & S Scientific Limited v Kenya Revenue Authority (supra)*** the Court expressed itself as follows;

“We reiterate that the Applicant sought in the High Court, the orders of certiorari, prohibition and mandamus. All the High Court did after hearing the arguments was to dismiss the motion with no orders as to costs. Asking for “stay of implementation” of a decision by the Respondent is tantamount to asking for either stay of execution or an injunction. To begin with, in law, it is not possible to grant an order of stay of “execution” or “implementation” where the action has been dismissed. This is the view of this Court as expressed in many decisions. For instance in the case of Republic vs Kenya Wildlife Services & 2 Others, Civil Application No. Nai.12 of 2007 the Court said in part: “the Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive order made by the Superior Court which can be the subject matter of the Application for injunction or stay ...”

In the present case, what I did was to dismiss the Petition dated 30/10/2013 and that Schedule 6.1 of the Nairobi Finance Act 2013 was held to be constitutional. What is there to stay? The Petitioners have not sought a stay of the judgment but seek stay of the “implementation” of Schedule 6.1 aforesaid. I issued no such order or decree in those terms and clearly, the application seeks what was not given or denied by Court.

18. Despite all that I have said above however, I recall that in my Ruling of 19th December 2013, while granting the Petitioners stay pending inter-partes hearing, I expressed myself as follows;

“I have read the Application dated 18/12/2013 together with the Supporting Affidavit. I am also aware that this matter involves the powers of devolved Governments and their Assemblies. The Law in that regard is both new and also contested. Such law will only be settled in higher Courts than this one”

19. I reiterate those views and having held elsewhere above that this Court is seized with residual powers to grant stay orders in appropriate cases, Mr. Kinyanjui begged this Court to grant his clients a conditional stay order to enable appropriate orders be sought at the Court of Appeal.

Despite my reservations about the Petitioner's Application and for reasons of fairness and balance noting the fact that the Respondents are being otherwise denied the fruits of a judgment they obtained a month ago, I will determine the Application before me by acceding to Mr. Kinyanjui's request and extending the orders of stay of the implementation of Schedule 6.1 of the Nairobi

Finance Act, 2013 for seven (7) days only to enable appropriate orders to be obtained at the Court of Appeal. Upon expiry of those 7 days, whether or not such orders will have been obtained, this Court will become *functus officio* and all proceedings shall continue at the Court of Appeal.

20.The Petitioners' Application dated 18th December 2013 and the 1st and 2nd Respondents' Application dated 19th December 2013 are jointly determined in the above terms.

21.Each Party will bear its costs.

22.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 28TH DAY OF JANUARY, 2014

ISAAC LENAOLAJUDGE

In the presence of:

Irene – Court clerk

Mr. Kinyanjui for Petitioners

Mr. Okoth holding brief for Prof. Ojienda for 1st and 2nd Respondents

Order

Ruling duly delivered.

Proceedings to be supplied.

ISAAC LENAOLA

JUDGE