



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO 227 OF 2011

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER OF STATE FOR PLANNING NATIONAL

DEVELOPMENT & VISION 20302ND RESPONDENT

VISION DELIVERY BOARD3RD RESPONDENT

PAUL CHRISTOPHER MUGO KIBATIINTERESTED PARTY

EX-PARTE

CONSUMERS FEDERATION OF KENYA (COFEK) suing thro' its officials namely

STEPHEN MUTORO

EPHRAIM GITHINJU KANAKE

HENRY MESHACK OCHIENG

RULING

The main prayer in the applicant's notice of motion dated 13th May, 2013 is for an order of stay of taxation of the Bill of Costs and/or execution for costs pending the hearing and determination of the application. Consumers Federation of Kenya (COFEK), the ex-parte applicant in the substantive judicial review proceedings is the applicant herein. The application is brought under Order 41 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules (CPR) and Section 3A of the Civil Procedure Act.

According to the grounds in support of the application, the respondents had commenced execution process in pursuit of the costs awarded to them in the ruling delivered on 26th September, 2012. The applicant indicates that it has appealed against the decision to award costs to the respondents.

The applicant states that on 12th April, 2013 a party and party bill of costs for Kshs.351,907/= was served

on its advocate by the advocate for the 3rd respondent and it is likely that the Interested Party would follow suit with a similar bill of costs. The applicant contends that the matter was filed in public interest and it stands to suffer irreparable loss and damage if stay is not granted.

The application is also supported by an affidavit sworn on 13th May, 2013 by counsel for the applicant Mr. Henry Kurauka. Through the said affidavit the grounds in support of the application are reiterated with an addition that the intended appeal is arguable and has overwhelming chances of success.

When the matter came up for hearing Ms Cheruiyot for the Attorney General and the Minister of State for Planning, National Development and Vision 2030 (the 1st and 2nd respondents) indicated that the application would not affect the 1st and 2nd respondents and she left the matter for the Court's decision. This is wise counsel as the 1st and 2nd respondents were not awarded any costs.

The Vision Delivery Board (the 3rd respondent) and Paul Christopher Mugo Kibati (the Interested Party) opposed the application. The 3rd respondent filed grounds of opposition dated 17th May, 2013.

In summary, the 3rd respondent and the Interested Party argue that an order of stay cannot issue since there is no decree capable of being executed and/or enforced. The decision of the Court of Appeal in **WESTERN COLLEGE OF ARTS AND APPLIED SCIENCES v ORANGA AND OTHER [1976] KLR 63** is cited in support of this proposition.

The application is also opposed on the ground that the applicant does not meet the test for the grant of an order of stay of execution in that (a) no sufficient cause has been shown for the grant of an order of stay of execution, (b) the applicant has not demonstrated that it will suffer irreparable loss if stay is not granted, and (c) the applicant has not offered any security. Further, the 3rd respondent and Interested Party argue that the orders sought should not be granted as the applicant is guilty of inordinate delay.

The decision of the Court of Appeal in **HALAI & ANOTHER v THORTON & TURPIN (1963) LTD [1990] KLR 365** is cited in support of the arguments of the 3rd respondent and the Interested Party. In that case it was held that:

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

The question would then be whether the applicant has established grounds for the grant of an order of stay of execution.

The background to this application is that in a ruling delivered on 26th September, 2012 this Court set aside the leave granted to the applicant on 21st September, 2011 to commence judicial review proceedings. In the same ruling the 3rd Respondent and the Interested Party were awarded costs against the applicant. It is the order of costs that the applicant seeks to stay pending appeal.

The conditions for the grant of stay of execution pending appeal are as set out in the already cited case of **HALAI & ANOTHER V THORTON & TURPIN**. Has the applicant met them?

The applicant has indicated that it has filed a notice of appeal against the ruling of this Court. There is no evidence that the applicant took any other step after filing the notice of appeal. This application was only filed after the 3rd respondent filed its bill of costs. One can only say it is meant to delay the taxation of costs.

P. J. Ransley, J was faced with a similar application in **ROYAL MEDIA SERVICES v TELKOM KENYA LIMITED & 13 OTHERS [2006] eKLR** and he correctly opined that:

“I accept the delay in making this application is unreasonable. The reason given that it was necessitated by the presentation of the Bill of Costs for taxation is not a sufficient reason.

Indeed what is before me is an application not to stay execution of any order of this court emanating from the Ruling of Lady Justice Mugo, of which there is none capable of execution, but to stay the taxing officer from taxing the Bills of Costs and the parties enforcing the consequent sums due on taxation.

In my view this application is misconceived as the remedy of the Applicant is to appeal against the sum taxed if it is dissatisfied with their quantum under Rule 11 of the Advocates Remuneration Order 1993 and then, if it so wishes, to seek a stay pending the determination of that reference.”

That advice is befitting in the case before me. The applicant’s application is a knee-jerk reaction to the 3rd respondent’s bill of costs. The applicant has not offered any reason as to why the application for stay was not filed immediately after this Court delivered its ruling. I find that the applicant did not bring the application without undue delay.

One of the conditions for the grant of an order of stay is that an applicant should provide security. The applicant herein has not offered any security for the 3rd respondent’s costs.

For the reasons aforesaid, this application is dismissed with costs to the 3rd respondent and the Interested Party.

Dated, signed and delivered at Nairobi this 30th day of April, 2014

W. KORIR,

JUDGE OF THE HIGH COURT