



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**JUDICIAL REVIEW NO.144 OF 2014**

**BETWEEN**

**DR. MUSSOLINI KITHOME.....EX-PARTE APPLICANT**

**AND**

**THE ATTORNEY GENERAL.....1ST RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,**

**LIVESTOCK & FISHERIES.....2ND RESPONDENT**

**RULING**

1. On 10/4/2014, Odunga J. granted leave to the Applicant, Dr. Musollini Kithome, to institute Judicial review proceedings in the nature of mandamus, certiorari and prohibition to challenge a decision dated 27/2/2014 by the Cabinet Secretary in-charge of Agriculture, Livestock and Fisheries relating to the establishment of a Task Force on operationalisation of the Agriculture Fisheries and Food Authority (AFFA). The orders were sought and granted under **Articles 2(1), 3(i), 10(i), 2(a)-(d)** of the **Constitution** as read with **Articles 73(1) (a) (I), (iii) and (iv)** as well as **Articles 258(1) and (2)** of the same **Constitution**. And specifically also **Sections 8(2) and (9)** of the **Law Reform Act**, and **Order 53(1), (2) and 4** of the **Civil Procedure Rules**.
2. In granting the ex-parte orders aforesaid, Odunga J. asked the Applicant to serve the Chamber Summons dated 9/4/2014 and have prayer (f) thereof heard inter-partes. For avoidance of doubt prayer (f) reads as follows;

***“(f) Upon the grant of such leave, the Leave to operate as a stay staying;-***

- (i) The operations of the Task Force on implementation of the Agriculture, Fisheries and Food Authority known as the Interim Management Committee (IMC)***
- (ii) The administrative decision dated the 27th of March 2014 directing the exparte Applicant to step aside.***
- (iii) Any acts of interference with the work and operations of the ASCU.***
- (v) Any action to institute or continue any disciplinary and or criminal proceedings***

***against the Ex-parte Applicant or any of the officers or staff of ASCU”***

3. On 22/4/2014, I heard arguments in respect of the above prayer and on behalf of the Applicant, Mr. Aduda submitted as follows;
4. That the Applicant's case rests on the role of the Agricultural Sector Co-ordinating Unit (ASCU) of which he is the Co-ordinator and the Task Force known as the Interim Management Committee (IMC) in the operationalisation of the Agricultural Fisheries and Food Authority (AFFA) created under the **AFFA Act, No.13 of 2013**. It is the Applicant's case in that regard that when ASCU was created in the year 2005, it was expressly mandated to act as the secretariat and the interface between the then Ministries of Agriculture and Rural Development on one hand and non-State actors on the other hand. That later, in 2013, when AFFA was established vide Legal Notice No.4 of 2013, paragraph 9 of the 1st Schedule to Act No.13 of 2013 was deferred by the 2nd Respondent, the Cabinet Secretary in-charge of Agriculture, Livestock and Fisheries, which paragraph specifically recognised ASCU as the Interim Secretariat of AFFA. That decision is said to be unlawful by the Applicant and ought to be stayed.
5. The second limb of Mr. Aduda's Submission relates to a decision by the 2nd Respondent to order an audit review of ASCU. The said decision is contained in a letter dated 20/2/2014 by the 2nd Respondent addressed to a Mr. F. N. Njau, Head of Internal Audit, Ministry of Agriculture, Livestock and Fisheries. The complaint made in that regard is that the 2nd Respondent acted outside his mandate as ASCU is an inter-ministerial unit reporting to an Inter-ministerial Co-ordinating Committee (ICC) and not to one Ministry such as the one headed by the 2nd Respondent. As such, it is argued, only external auditors agreed upon by all stakeholders can audit ASCU's accounts and not a sole internal auditor of one Ministry.
6. It is the Applicant's case that in acting as he did, the 2nd Respondent ignored the resolutions of an inter ministerial meeting held on 13/3/2014 where it was agreed that ASCU ought *inter-alia* to be re- branded and its secretariat relocated to a neutral place to reduce the risk of “*capture by any one Sub-sector*”. That in attempting to implement the latter part of the said resolution, ASCU faced hostility from officials from the 2nd Respondent's office who carried away office equipment and files when ASCU was being relocated from Kilimo House to NSSF Building. Subsequently, that he was also asked on 27/3/2014 to step aside and hand over his duties to Mr. F. N. Njau who had initially been deployed to audit ASCU's accounts.
7. Mr. Aduda's submission in that regard is that the 2nd Respondent acted outside the law and his decision and actions ought to be stayed.
8. He relied on the following decisions to support his contentions;
  - (i) **Republic vs Cabinet Secretary for Transport and Infrastructure & 5 Others ex-parte Kenya Country Bus Owners Association & 8 Others, J.R. No.124/2014** where it was held *inter-alia* that where what is sought to be stayed is part of a continuous process, the same may be stayed at any stage of the proceedings.
  - (ii) **James Mburu Gitau T/A Jambo Merchants vs Sub-County Public Health Officer, Kiambu County J.R. Misc.Appl.No.420** of 2013 where the same point as above was made.
9. In conclusion, it was Mr. Aduda's submission that the stay order sought should be granted to ensure that public funds are used prudently as is the expectation of **Article 201** of the **Constitution**.
10. Mrs. Sirai, learned Counsel for the Respondents, made the point that in his Affidavit sworn on 22/4/2015, the 2nd Respondent has comprehensively responded to the Applicant's allegations and specifically that firstly, the role of ASCU as the Interim Secretariat for AFFA has not been taken away and that the Interim Management Committee (IMC) is akin to an Interim Board whose

- support structure is ASCU. That in that regard, by letter dated 13/3/2014, the Applicant sent to the 2nd Respondent names of three officers from ASCU to form part of the AFFA Secretariat.
11. Secondly, that the audit of ASCU accounts was necessitated by the need to secure public funds and ensure the proper running of the affairs of ASCU and was neither an arbitrary nor an unreasonable action on the part of the 2nd Respondent.
  12. Thirdly, regarding the relocation of the offices of ASCU from Kilimo House to NSSF Building, the said action was undertaken to defeat the financial audit and was done in cahoots with the Principal Secretary, Ministry of Industrialization, who had no mandate to authorise such relocation. There was therefore need to secure documents that were crucial in the audit hence the decision to report the matter to the police who then took action and the issue is wholly separate from that of the mandate of ASCU *vis-a-vis* IMC and the 2nd Respondent which is the crux of the present proceedings.
  13. Lastly, that grant of the orders sought would occasion injustice to all concerned and the prayer for a stay order should be dismissed.
  14. The Taskforce constituting the Interim Management Committee (IMC) was enjoined to these proceedings as an Interested Party and was represented by Mr. Arwa. Their case is straightforward; that whereas paragraph 9 of the Schedule to the AFFA Act recognises ASCU as the Interim Secretariat for AFFA and for 3 years only, without AFFA being in place with its own Board, then ASCU has no role at all. That the Taskforce was established to operationalise AFFA and once that was done, ASCU's mandate would then commence.
  15. Further, that the Taskforce is a mere advisory body to the 2nd Respondent and tasked with the duty to address issues such as the applicable law, property, contracts and pending Court cases relating to the many State Corporations that have been lawfully amalgamated to form AFFA. A stay order in that context would not by itself grant ASCU any of the functions of the Taskforce and would therefore be of no benefit to the Applicant.
  16. Other issues raised by Mr. Arwa were elsewhere above also raised by Mrs. Sirai and I have chosen not to repeat them for the sake of brevity.
  17. Having read all the Affidavits and annexures on record and noting the submissions summarised above, my opinion is as follows;
  18. From the outset, I have warned myself that at this stage of the Judicial Review proceedings, I should not delve too deeply into the merits or demerits of the Applicant's case so that I do not prejudice the outcome of the Notice of Motion seeking substantive orders of judicial review in the nature of Mandamus, Certiorari and Prohibition – See **James Gitau (supra)**.
  19. Having done so, as I understand it, grant or denial of an order of stay upon leave being granted to an Applicant to commence judicial review proceedings is a matter of discretion on the part of a Judge and like all discretion, while unfettered, it must be exercised judiciously – See Chesoni Ag. J. A. in **Choitram vs Nazari [1984]KLR 327 at 341**.
  20. Further, the jurisdiction to grant stay orders is “*meant to safeguard the interest of justice by ensuring that the matters complained about are held in abeyance pending meritorious determination of the Application for judicial review*” as was stated by Peter Kaluma in his book, **“Judicial Review; Law, Procedure and Practice” 2nd Edition, Law Africa** at page 84.
  21. In the instant case, and looking at the Chamber Summons dated 9/4/2014 again, the main issues complained of, and which form the basis for the judicial review proceedings, are the following;
    - (i) The decision to establish the Taskforce aforesaid.

- (ii) The decision ordering the Applicant to step aside as the Co-ordinator of ASCU.
  - (iii) The alleged interference by the 2nd Respondent in the operations of ASCU including in ordering a financial audit of ASCU.
  - (iv) The decision to file criminal complaints against the Applicant and other persons associated with ASCU.
  - (v) The issue whether ASCU offices were properly and lawfully relocated from Kilimo House to NSSF Building.
22. I have looked at the positions taken by each party and it is clear to me that at a *prima facie* level, all the actions above have been undertaken and it is unclear what can be stayed. In fact, a stay order would only have the effect of adding fuel to an already chaotic situation because the order may well be interpreted to mean that all the above actions (whatever their legality or otherwise) have been reversed and the Taskforce stopped from working, the Applicant returned to work, the financial audit stopped, criminal action stopped and ASCU allowed to relocate to NSSF. If so, what would be left to be determined when the Notice of Motion is finally heard? While it is true that a stay should be granted to ensure that the Motion is not rendered nugatory (**see Muite & Others vs Attorney-General & others Misc.98/1995**) it is also true that a stay order should not dispose of contested questions in favour of the Applicant.
23. But suppose I am wrong and in fact there is something left to be stayed in the manner suggested by the Applicant? In that case, the law as I understand it, was properly stated by Peter Kaluma at page 85 of his book when he wrote that an Applicant can only be granted a stay order if he can show that the Application is neither vexatious nor frivolous (*that he has an arguable case*) and that the substantive Motion is not rendered nugatory if successful and as a rider to that issue, the Court should act to avoid irreparable injury to the Applicant. And the last consideration is the balance of convenience between the parties.
24. Applying those principles to the instant case and without saying more than I should, I am not satisfied that the Applicant has made out a case why he or ASCU should not be the subject of criminal investigations or a financial audit. I have also seen no basis to find that there is a conflict between the work of the Taskforce and ASCU at this stage of the establishment of AFFA. While I entertain doubts as to the relationship between the 2nd Respondent and his counter-parts in other Ministries as regards oversight of ASCU, I see no prejudice caused to the Applicant and ASCU because *prima facie*, all issues relating to Agriculture, Food and Fisheries (the focus of AFFA) are within his mandate and I have seen no evidence of malice on his part.
25. As regards irreparable injury to the Applicant if no stay is granted, suffice it to say that issue was not addressed by any party and on my part, I see none at all.
26. Where should the balance of convenience tilt? The circumstances of each case should determine whether a stay should be granted or not. In this case, between ASCU and the Applicant and between the 2nd Respondent and the Taskforce, convenience should properly be rendered in favour of the latter. Should the Applicant succeed all that would have been done can be properly be undone within the law and I see no prejudice to be caused to the former in the circumstances – See **Oilcom Kenya Ltd vs Permanent Secretary, Ministry of Roads and Public Works [2008]eKLR.**
27. Lastly, I have read the decisions cited by Mr. Aduda and I am clear in my mind that while Odunga J. in both cases had a sound basis for granting orders of stay, the same cannot be said of the case before me.
28. In the event, I will decline the invitation to make any order of stay in the terms proposed in prayer (f) of the Chamber Summons dated 19/4/2014 and will instead dismiss that prayer.

29. Let costs abide the outcome of the Notice of Motion seeking judicial review proceedings.

30. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF MAY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Mr. Odhiambo holding brief for Mr. Sirai for Respondent

No appearance for Applicant

No appearance for Interested Party

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

Mention on 10/6/2014 before the Judicial Review Division for directions.

Notice to issue.

**ISAAC LENAOLA**

**JUDGE**