REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 51 OF 2013

REPUBLIC ..... APPLICANT

VERSUS

THE COMMISSIONER FOR INVESTIGATIONS &

ENFORCEMENT..... RESPONDENT

'EX-PARTE' WANANCHI GROUP KENYA LIMITED

RULING

Introduction

1. On 7th February, 2014, this Court delivered a judgement in this matter by which the Applicant's Motion dated 26th February, 2013 was dismissed. The said application was seeking orders of certiorari quashing the Respondent's decision requiring the Applicant to pay to the Respondent a sum of Kshs 124,866,992.80 and an order prohibiting the Respondent from levying VAT on certain specified goods.
2. The applicant, being aggrieved by the said decision has moved this Court by way of a Notice of Motion dated 14th February, 2014 expressed

to be brought under the Court's inherent jurisdiction seeking the following orders:

> **1. THAT this application be heard *ex-parte* in the first instance.**
>
> **2. THAT the enforcement and/or execution of the Agency Notice dated 7th March 2013 be stayed pending the hearing and determination of the intended appeal from the judgment dated 7th February 2014.**
>
> **3. THAT the cost of this application be provided for.**

3. The said application is supported by an affidavit sworn by **Wambui Maina**, the Applicant's Legal Officer on 14th February, 2014.
4. According to the deponent, there was no dispute that the *ex-parte* Applicant applied for and was granted remission by the Minister for Finance in respect of its investment network infrastructure and in particular the decoders/set top boxes, the coaxial cables, lashing wires and drop cables. According to her, the applications to the Minister made by the *ex-parte* Applicant and the letters

by the Minister granting the remission for the specific items were disclosed to the court and exhibited to the verifying affidavit sworn by **Richard Bell**. Apart from this, the Respondent's replying affidavit has also exhibited the remissions granted by the Minister for the specific items.

5. She further deposed that there was no dispute that the VAT demand related solely to the items granted remission by the Minister and that the issue in dispute was whether the Respondent had jurisdiction or exceeded its jurisdiction in demanding VAT for the items that had been granted remission by the Minister.
6. She therefore deposed that the court thus fell into error when at paragraph 47 of the judgment, the court proceeded on the basis that there was no evidence that the STB's and decoders were the subject of the Minister's remission and believed that this fundamental error led the court to arrive at the wrong conclusion on the facts and decision to dismiss the Notice of Motion although the court did correctly find at paragraph 43 of the judgment that the items that were the subject of the minister's remission, VAT was not claimable by the Respondent and that the amount already paid and what is being claimed for the items granted remission was illegal.
7. It was therefore deposed that this is a proper case for the granting of the orders for stay of execution pending appeal since if the stay is not granted, the Respondent will proceed to enforce the Agency Notice despite the judgment and render the intended appeal nugatory.
8. Whereas the error committed by the court is one which could have been corrected by the court reviewing its own decision, she was advised by her legal adviser that the court lacks the jurisdiction to do so.
9. She was therefore of the view that it is in the interest of justice that the orders for stay of execution of the Agency Notice be granted pending the hearing and determination of the Appeal.

Respondent's Case

10. In opposition to the application, the Respondent filed a replying affidavit sworn by **Kamau Kamau**, a Revenue Officer within the Domestic Taxes Department – Large Taxpayers Office of the Respondent on 6th March, 2014.
11. According to him, the Applicant's application is without merit and that the Honourable Court was not properly guided in issuing an interim stay of its orders.
12. In his view, the prayers sought in the Applicant's Notice of Motion cannot issue in law and are not available to the Applicant due to the fact that this Honourable Court has no jurisdiction to grant the prayers sought pursuant to section 9 and 8 of the ***Law Reform Act***, Cap 26 of the Laws of Kenya and that the prayer for stay is in form of an injunction, and cannot be granted as under Section 3(2)(a) of the ***Kenya Revenue Authority Act***, Cap 469, as read with Section 16(1)(i) of the ***Government Proceedings Act***, Cap 40 of the Laws of Kenya.
13. According to him, all that this Honourable Court did after granting the leave to apply for Judicial Review application in this matter was to dismiss the application with costs to the Respondent and therefore other than an order of costs, this Honourable Court's Order did not direct any action which could be executed by either party.
14. It was deposed that the Orders of stay now sought do not relate to what this Court ordered to be done or not to be done since the Court did not order the Respondent to collect the disputed amounts, nor did it order the Applicant to pay the money, although by dismissing the Judicial Review Application, parties reverted back to the position where the taxes demanded were found to be due and owing.
15. It was further deposed that the Applicant has not produced any substantive evidence in its supporting affidavit to substantiate the allegations that they have made in that affidavit.
16. According to the deponent, the type of taxes that the Applicant owes is on VAT. VAT Refunds and other refunds which come about due to certain exemptions given under revenue laws can and are processed through the Ministry of Finance, National Treasury after an application by a tax payer. Therefore the granting of a stay to the Applicant until the determination of their intended Appeal is bound to cause greater hardship to the Applicant because it would mean that the amount of taxes demanded would continue to accrue interest and penalties until payment in full. The Court was therefore urged to save the Applicant from financial destabilization because if they fail in the intended appeal, the interest and penalties on the principal tax which must be collected as mandated by law will be a much heavier financial burden for them to bear. On the other hand the

early payment of the taxes due will arrest the penalties and interest, and the Respondent would make good any refunds if at all the Appeal succeeds. In the alterative, the amount would be used to offset other present or future taxes which may have accrued, since the Applicant is going concern.

17. The Respondent's position however was that the Court should dismiss this application with costs to the Respondents, because the intended Appeal is frivolous and lacking in merit.

Applicant's Submissions

18. On behalf of the Applicant it was submitted that since the Court was conscious of the fact that an order of prohibition could issue in this case as the agency notice had not been fully implemented, the applicant seeking the preservation of that *status quo* pending the hearing and determination of the appeal. It was submitted based on **Ujagar Singh vs. Runda Cofee Estates Ltd [1966] EA 263** that the High Court has inherent powers to order a stay of execution in the exercise of its inherent jurisdiction. With respect to whether stay can be granted, it was submitted based on **Butt vs. Rent Restriction Tribunal [1982] KLR 417** that the general principle in granting or refusing a stay is that if there is no other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed. It was further submitted that pursuant to the decisions in **Madhupaper International Limited vs. Kerr [1985] 840** and **Erinford Propeties Ltd vs. Cheshire County Council [1974] 2 All ER 448** that where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant an application for injunction pending appeal against the dismissal. It was therefore submitted that the Respondent's submission that the Court lacks jurisdiction to grant the orders sought herein have no force of law.
19. On the contention that to grant the orders sought herein would amount to granting orders of injunction against the Government it was submitted that the Court of Appeal in **Commissioner of Lands vs. Kunste Hotel Ltd [E&L] 249** held that when dealing with application for prerogative orders the Court is not exercising a civil jurisdiction and neither is the application an action hence the ***Government Proceedings Act*** would not apply. It was further submitted that in **R vs. Secretary of State for Education and Science, ex parte Avon County Council [1991] 1 All ER 282**, it was held that though the courts had no jurisdiction to grant an injunction against officers of the Crown, they did have jurisdiction to grant a stay of the implementation of the decision.
20. According to the Applicant the Respondent intends to proceed with a decision which the Court has found to be illegal and that it would be against public policy to allow the Respondent to proceed in that manner. In support of this submission the Applicant relied on **Mapis Investment (K) Ltd vs. Kenya Railways Corporation Civil Appeal No. 14 of 2005**.
21. It was therefore submitted that the enforcement of the payment of such a colossal amount cannot be said that no hardship can result from it. Based on **Butt vs. Rent Restriction Tribunal** (supra) it was submitted that a stay ought not to be refused simply because a better remedy may become available to the applicant at the end of the proceedings.

Respondent's Submissions

22. On behalf of the Respondent it was submitted that on the authority of **Western College of Arts and Applied Sciences (Weco) vs. Oranga [1976] 63**, **Stanbic Bank vs. KRA Civil Application Nai. No. 294 of 2007** and **David Thiongo T/A Welcome Stores vs. Market Fancy Emporium [2007] eKLR**, the Court having dismissed the Applicant's judicial review application there is nothing left to be stayed since the prevailing status quo is that the demand in issue was not quashed, nor was it prohibited.
23. It was further submitted that the orders of stay now sought do not relate to what the Court ordered to be done or not to be done since the Court did not order the Respondent to collect the disputed, nor did it order the applicant to pay the money, although by dismissing the judicial review application, parties reverted back to the position where the taxes demanded were found to be due and owing. In support of this submission the Respondent cited **Western College of Arts and Applied Sciences (Weco) vs. Oranga** (supra), **Stanbic Bank vs. KRA** (supra) and **David Thiongo T/A Welcome Stores vs. Market Fancy Emporium** (supra), **Mombasa Seaport Duty Free Ltd vs. Kenya Ports uthority Civil Application No. Nai. 242 of 2006**, **Metro**

Pharmaceuticals Limited vs. Kenya Revenue Authority Civil Application No. 131 of 2012.

24. It was further submitted that pursuant to the provisions of section 8 and 9 of the ***Law Reform Act***, Cap 26 of the Laws of Kenya the Court has no jurisdiction to grant the orders sought since under those provisions the order is final save for an appeal. To grant the order of stay sought would amount to reversal of the decision made herein. It was submitted that since the judicial review is a special jurisdiction, ***Civil Procedure Rules*** do not apply hence stay applications under the ***Civil Procedure Rules*** are not contemplated by Order 53 of the ***Civil Procedure Rules***. In support of this submission the respondent relied on C**ommissioner of Lnds vs. Kunste Hotel Ltd Nakuru Civil Appeal No. 234 of 1995** and **R vs. District Social Development Officer Machakos & Another [2005] eKLR**.
25. It was further submitted that under Section 3(2)(a) of the ***Kenya Revenue Authority Act*** as read with section 16 of the ***Government Proceedings Act***, the orders sought herein cannot be granted against the Respondent and support for this submission was sought in **Muigua T/A Kariuki Muigua & Co. Advocates Civil Case No. 243 of 2012** amongst other decisions.
26. According to the Respondent where a party has statutory right of action, the Court will not usually prevent that right being exercised except that the Court may interfere if there is no basis on which the right can be exercised or if it is being exercised oppressively and the respondent relied on **Morris & Co. Ltd vs. Kenya Commercial Bank & Others [2003] 2 EA 605** and **Nyaga vs. Housing Finance Co. Ltd of Kenya Civil Appeal No. 134 of 1987**.
27. It was submitted that the Court of Appeal is likely to find that the applicant's appeal is lacking in merit. According to the Respondent, on the authority of **Coastal Bottlers Limited vs. The Commissioner of Domestic Taxes Civil Application No. Nai. 91 of 2008**, the grant of the stay sought is bound to cause greater hardship to the applicant since the amount of taxes due would continue to accrue interests and penalties. It was submitted that the applicant has not demonstrated that it will suffer any hardship if the intended appeal succeeds and the stay is not granted. To the Respondent, if the appeal succeeds the Applicant would be entitled to either a refund or set off.

Applicant's Rejoinder

28. In reply to the Respondent's Submissions the Applicant contended that the decision in **Western College of Arts and Applied Sciences** was concerned with the jurisdiction of the High Court to grant injunction in its appellate capacity and not the inherent powers of this Court. According to the Applicant the said decision was reversed by way of amendment introduced by Legal Notice No. 14 of 1984 and has never been followed either by the High Court or the Court of Appeal.
29. It was submitted that the Applicant has shown that there are compelling reasons to grant the stay and that the Applicant will be obligated to comply with any condition imposed by the Court and in any case the Respondent is secured by the agency notice and all that is being asked is the stay of its implementation.

Determinations

30. I have considered the foregoing.
31. It was contended by the Respondent that under the Kenya Revenue Authority Act as read with the ***Government Proceedings Act***, the stay sought cannot be granted. However the preamble to the ***Government Proceedings Act***, Cap 40 provides that it is "*An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters*". It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. As already appreciated by the Respondent herein judicial review are neither civil not criminal proceedings Section 3(2)(a) of the ***Kenya Revenue Authority Act***, Cap 469, as read with Section 16(1)(i) of the ***Government Proceedings Act***, Cap 40 of the Laws of Kenya are inapplicable.
32. It was further contended that by virtue of sections 8 and 9 of the ***Law Reform Act***, Cap 26 Laws of Kenya, once the Court finally determines the application for judicial review, the only option

available is that of appeal and the Court cannot revisit the said matter by way of a stay of the decision as that would amount to reversal of the final decision. With respect, this position in my view is nolonger tenable. In **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011],** the Court held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the ***Civil Procedure Act*** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the ***Civil Procedure Act*** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

33. It is therefore my view that where the orders granted by the High Court be it in judicial review proceedings or civil proceedings are capable of being executed, the same are amenable to stay of execution. I gather support for this position from the decision of the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572**, where the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. In that case the High Court ordered the University to "*convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling*." The Court of Appeal noted that there was no prayer before the Court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the University acting in obedience to the said order. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted.
34. However it is clear that all that this Court did in the judgement against which the Applicant intend to appeal was to dismiss the Applicant's application for judicial review. There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for judicial review, the superior court does not grant any positive order in favour of the Respondents which is capable of execution. See **Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004**, **Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006** and **William Wambugu Wahome vs. The Registrar of Trade Unions & Others Civil Application No. Nai. 308 of 2005.**
35. In this case the applicant is seeking that "*the enforcement and/or execution of the Agency Notice dated 7th March 2013 be stayed pending the hearing and determination of the intended appeal from the judgment dated 7th February 2014."* It is clear that the said agency notice was not granted by this Court and it is obviously not the decision against which the intended appeal is directed. The intended appeal as far as this Court is concerned is directed at the decision disallowing the applicant's judicial review application. The issue whether a Court would competently grant an order of stay as opposed to an injunction pending an appeal where an application for injunction has been dismissed was dealt with by the Court of Appeal in **Umoja Service Station Ltd & 5 Others vs. Hezy John Ltd Civil Application No. Nai. 39 of 2006,** where it stated that a prayer seeking for the stay of an order dismissing an injunction application is futile as the grant of the same would not in any way advance the applicants' cause. In other words what the Court meant was that the grant of an order of stay would only have the effect of maintaining the status quo and since the applicant was denied what it did not have in the first place when it came to court a stay would only have the effect of maintaining the same status quo which would be of no use to the applicant.
36. In **The Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007,** the Court of Appeal expressed itself as follows:

"It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2)(b). It is

apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and the Court of Appeal has no jurisdiction to entertain it...Where the superior court merely upheld the preliminary objection and as a consequence stuck out the application for judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs. Moreover since the order of stay is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by Rule 5(2)(b), the Court has no jurisdiction to grant such an order since the orders sought do not relate to what the superior court decided."

37. Similarly, in **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010**, **Makhandia, J** (as he then was) held:

"The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."

38. Where therefore the application for stay is directed to a decision against which the intended appeal is not directed a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score. See **Muhamed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**
39. However, even if this Court was of the view that the Court could in the circumstances of this case grant the order of stay sought the Court would be obliged to consider the grounds upon which such an order ought to be granted. In an application for stay pending appeal to the Court of Appeal there is no requirement that the Court considers the chances of success of the intended appeal. That is a requirement where the Court of Appeal is considering an application under Rule 5(2)(b) of the Court of Appeal Rules since the intended appeal would be heard by the Court of Appeal. One of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. I have considered the affidavit in support of the application herein and the allusion to the likely consequences of the denial of stay appears in paragraph 13 of the supporting affidavit in which it is deposed as follows:

"THAT if the stay is not granted, the Respondent will proceed to enforce the Agency Notice despite the judgement and render the intended appeal nugatory."

40. Whereas the applicant's fears may well be real the applicant has not in the said affidavit expounded on how the enforcement of the said Notice would occasion the applicant substantial loss. The issue seems to have been dealt with in the submission of counsel. In my view the issue of substantial loss is such a crucial issue in such applications that it ought to come out clearly in the supporting affidavit rather than to be dealt with in the submissions.
41. Apart from proof of substantial loss the applicant is enjoined to provide security. Once again the applicant has not dealt with the issue in the supporting affidavit. There is therefore absolutely no offer of security coming from the applicant in satisfaction of the said requirement in absence of which no stay can be granted. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the supplicant for stay. See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997.**
42. The importance of complying with the said requirement in my view was reflected in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** where it was held that:

> "**to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".**

43. It is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410.**
44. In this case, there is no allegation at all that the respondent will be unable to repay the decretal sum if the same is paid over to the respondent.
45. In the premises, I find no merit in the Notice of Motion dated 14th February, 2014 and the same is dismissed with costs to the Respondent.
46. It is so ordered.

Dated at Nairobi this 30th day of June 2014

G V ODUNGA

JUDGE

In the presence of:

Miss Mutisya for Mr Gachuhi for the Applicant

Mr Wanderi for the Respondent

Cc Kevin