



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 128 of 20

KENYA AFRICAN NATION UNION (K.A.N.U.).....APPLICANT

V E R S U S

**THE PRESIDENT OF THE REPUBLIC OF
KENYA, HIS EXCELLENCY HON. MWAI KIBAKI & SIX OTHERS.....
DEFENDANTS**

R U L I N G

THE APPLICATION

By an application brought by way of a Notice of Motion under a Certificate of Urgency, both dated 8th March, 2006, the Applicant herein sought five orders three of which are spent as the application was certified urgent, and was heard *inter-parties* (***which were the first prayers***), and the last two prayers were:-

4. THAT there be a stay of proceedings in this suit pending the hearing of an appeal by the Applicant from the Ruling given by this Court on 29-11-2005, and

5. THAT costs of this Application be in the cause.

The grounds of the application and there were eight (8) of them were set out on the face of the application, the principal ones are in our opinion that-

5. the Applicant has a good appeal with a probability of success;

6. unless there is a stay of proceedings in this suit, the Applicant shall suffer substantial loss and its appeal shall be rendered nugatory and purely academic;

7. the application has been filed without unreasonable delay;

8. the Respondents shall not suffer any prejudice by

stay of proceedings having illegally and in contravention of a court order given on 13-02-2003 taken possession of the subject matter of the property, Kenyatta International Conference Centre;

APPLICANTS CASE & SUBMISSIONS

In support of the Application, the Applicant's Counsel, Kethi D. Kilonzo of the firm of Messrs Kilonzo & Co. Advocates swore on 8-03-2006 an Affidavit which reiterated these grounds. Counsel applied orally, and was allowed by the court to withdraw paragraphs 7 and 16 of the Affidavit. We have consequently ignored those paragraphs. Expounding the grounds upon which application was based, the Applicant's Counsel, the said Kethi D. Kilonzo further deposed in her said Affidavit that:-

12. *the Applicant has a meritorious Appeal with a probability of success;*
13. *the issues determined in the Ruling given by the court on 29th November, 2005 on amendment and use of further Affidavit are novel and have never been tested by the Court of Appeal. They are fundamental to the growing jurisprudence in the field of judicial review;*
14. *.... It is important in the development of jurisprudence in the area of judicial review and administration of justice that these matters be tested by the Court of Appeal;*
15. *the Respondents are already in possession of the property subject matter of the suit, having acquired the same by force and in contravention of a Court order given on 13th February, 2003 and shall suffer no prejudice by the stay of proceedings.*

Relying upon the grounds and Affidavit in support of the Application, Miss Kilonzo submitted that the Applicant was aggrieved by this Court's Ruling declining to grant it leave to amend the Statement and the use of a Further Affidavit sworn by the Applicant's former Secretary-General, Hon. Julius Sunkuli. In its preparation for an appeal against this Court's Ruling, the Applicant had secured the typing of the record herein, and the typed record was now pending certification by the Deputy Registrar, the applicant had filed a Notice of Appeal and had it served. So far the Respondents had not raised any opposition to the intended appeal.

Counsel submitted that unless leave was granted to the use of the said Amended Statement and the use of Further Affidavit, (and for which the Applicant was appealing against this Court's declining leave) together with the decision creating the subject property into a State Corporation, under Legal Notice No. 77 of 2004, and that unless the issue of jurisdiction were pronounced upon by the Court of Appeal, then the Applicant would suffer irreparable loss.

Counsel submitted that the jurisdiction of judicial review was to enquire into the decision-making process of public authorities like the Minister, and not to question the validity and effect of the amendment, the issue was whether the person who made the decision had power to do so.

Counsel also questioned whether the decision of the Court of Appeal in **COMMISSIONER GENERAL OF KENYA REVENUE -VS- SYLVANO ONEMA O'WAKI** t/a Marenga Filling Station was correctly decided. That case decided that it is the Affidavit which is of evidential value, and not the Statutory Statement, and also questioned whether or not, compliance with that decision affects a statement where a Further Affidavit was intended to rectify the defective statement.

Counsel also submitted that the applicant intended to raise in the Court of Appeal the question whether where a party has private law remedies that party is prohibited from pursuing judicial review in respect of undoubtedly constitutional issues. In this regard Counsel also raised the question whether a court exercising its judicial review jurisdiction can also examine provisions of the Constitution of Kenya such as Section 75 of the Constitution, and also other laws such as Section 23 of the Registration of Titles Act (***Chapter 281, Laws of Kenya***).

For the record Section 75 of the Constitution is the provision which prohibits the compulsory acquisition of any private property except as provided by the Constitution and the law. Sections 23 of the Registration of Titles Act, provides that a Certificate of Title issued to any purchaser of land upon a transfer shall be taken by all courts as conclusive evidence that the person named therein as the

proprietor of the land is the absolute and indefeasible owner thereof, subject only to the encumbrances endorsed thereon and the title of the proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

All these are matters the Applicant intends to raise and test in the Court of Appeal, and on all those grounds. Counsel submitted that the Respondents will not suffer any prejudice more so because they are in possession of the subject property.

Counsel for the Applicant buttressed her argument by reference to and reliance upon *inter alia*:-

- (1) Section 84 (1) of the Constitution which recognizes the availability of other remedies, including an appeal which may be pursued simultaneously,**
- (2) Order XLI Rule 4 of the Civil Procedure Rules which by virtue of Order XLII rule 1 (1) (ee) allows an appeal from any prerogative order as a matter of right, and submitted that the Applicant had fulfilled the requirements of both provisions;**
- (3) the case of RE GLOBAL TOURS & TRAVELLS LIMITED, (H.C.C.C. No. 43 of 2000)**
- (4) the Article by – B.C. Gould, Anisminic and Judicial Review.**

We shall revert to these provisions and authorities once we have considered the submissions by Dr. Kamau Kuria, learned Counsel for the Respondents in opposition to the Applicant's Notice of Motion.

RESPONDENTS' SUBMISSIONS

Dr. Kamau Kuria, attacked the application for stay of proceedings at two levels, on its merits and the technical reasons. On the merits counsel submitted that the application for stay of proceedings was a calculated move made in bad faith, and in abuse of the process of court because:-

- (a) there was bad faith right from the date of delivery of the Court's Ruling of 29-11-2005 when the court declined to grant leave to the Applicant to amend the statement and the use of Further Affidavit,**
- (b) on that date (29-11-2005) the Court gave a hearing date for the Applicant's motion of 20-02-2003, and the Respondent's motion dated 25-02-2005;**
- (c) on the same day (29-11-2004) the Court ordered the parties to file their skeletal arguments and serve them by 28-02-2006;**
- (d) on 13-12-2005 the Applicant filed a Notice of Appeal and confirmed that the Counsel had instructions to lodge an appeal and apply for stay of proceedings;**
- (e) By 28-02-2006 to date the Applicant's Counsel has not filed any skeletal arguments;**
- (f) the Respondents filed their skeletal arguments on 24-02-2006 and their lists of Authorities, and had them served upon the Applicant's Counsel in preparation for hearing of the Applicant's Notice of Motion of 20-02-2005, and the Respondent's Motion of 25-02-2005, on 20-03-2006;**
- (g) No application for stay of proceedings was filed until 10-03-2006, that is to say ten (10) days before the hearing scheduled for 20-03-2006.**
- (h) As of now, no Application has been made to extend time within which to file skeletal arguments;**
- (i) the Applicant is thus determined to disobey court orders it considers inconvenient to it;**

(j) the stand and attitude of the Applicant comes out clearly from paragraph 14 of the Affidavit of Miss Kethi D. Kilonzo learned Counsel for the Applicant that it is important for the development of the jurisprudence in the area of judicial review and administration of justice that this matter be tested by the Court of Appeal. The Memorandum of Appeal takes this vein.

For all these grounds Dr. Kamau Kuria concluded that the whole object of the delay in hearing of the application is in order to develop jurisprudence in this area, whereas the Court's core function is to dispense justice, the development of law is incidental. The application for stay of proceedings is consequently an abuse of the process of the court not deserving of any discretion in favour of the Applicant as the process of court must be used in good faith.

The second objection taken by Dr. Kuria was based upon the nature and function of judicial review proceedings. According to the learned authors of ADMINISTRATIVE LAW by Sir William Wade and Christopher Forsyth, 9th Edition page 648:-

“A feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit; i.e by sworn statements in writing rather than orally. It is possible but exceptional, for the Court to allow cross-examination on the affidavits. [when this was allowed for special reasons in R. – Vs- Stokesley, Yorkshire, Justice ex p. Bartriam [1965] I W.L.R. 254 Lord Goddard C.J. said that it was probably “THE FIRST TIME IN RECENT HISTORY” and that no one knew of a precedent] if the case turns upon a conflict of interest, certiorari and prohibition may therefore involve difficulties. It was said of them that they afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine the de novo Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it there and then. But where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.”

The above position was equally and forcefully expressed by Devlin J. in the case of REX –vs- FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL; EXPARTE ZEREK [1951] 2 K.B.I. at page 11 where he said:-

“Orders of certiorari and prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior courts confine themselves to their limited sphere. They also afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine de novo. According, it has never been the practice to put the party who asserts that the inferior court has jurisdiction to proof of facts upon which he relies. It is recognized that the inferior court will have made a preliminary inquiry itself and the superior court is generally content to act upon the materials disclosed at the inquiry and to review in light of them the decision to assume jurisdiction..... The court is merely deciding whether there has been an excess of jurisdiction or not, and where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the Court should determine it then and there. But where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.”

Drawing upon the principles of injunction, Dr. Kamau Kuria submitted that like the harshness of an injunction, a stay of proceedings would cause the same or worse hardship to the Respondents as they would not know their fate for a long while as the matter would take several years to be determined in the Court of Appeal. Counsel relied on the dictum of the Court of Appeal in the case of MADHUPAPER INTERNATION LIMITED –VS- KERR [1985] K.L.R. 840 at page 846:-

“..... there are cases however, where it would be wrong to grant an injunction pending appeal. These would include where an appeal is frivolous or to grant it would inflict greater hardship than it would avoid....”

Reiterating paragraph 5 (h) of the Replying Affidavit of Obondo Kajumbi's Replying Affidavit sworn

on 14-03-2006 and filed on the same day, Counsel submitted that “**good administration of justice demands that judicial review proceedings of this kind be summary and disposed of expeditiously, a stay can only defeat that objective.**”

RIGHT OF APPEAL ENVISAGED BY SECTION 8 (5), LAW

REFORM ACT (CAP 26)

Besides, Dr. Kuria urged, that the right of appeal envisaged by Section 8 (5) of the Law Reform Act is one over the whole judicial review matter not merely upon an interlocutory Ruling as the Judicial review remedy concerned itself with, and is about the decision-making process and not about private remedies. The proceedings should not for instance be stayed on the ground that the Applicant wants a five (5) judge bench to revisit the **OWAKI’S** case (*supra*) decision, that in judicial review proceedings it is the Affidavit which is of evidential value, rather than the statement.

Counsel urged that the issue here to be determined by the court is whether a stay of proceedings or injunction would cause more hardship rather than it would avoid. It was therefore important for the Respondents to know where they stand in relation to the application and where all public authorities stood in the future.

It was thus highly desirable that the object of speed and effectiveness of the remedy in judicial review proceedings is not taken away and defeated by an order of stay of proceedings pending an appeal, for once a judicial review matter is determined the aggrieved party or litigant can appeal against the whole decision of the court. If the applicant succeeds in the Court of Appeal, the effect would be to admit the Amended Statement and the use of Further Affidavit and the whole matter would be end up on a happy note for the Applicant.

On the above submissions learned Counsel for the Respondents concluded that if appeals on interlocutory application are allowed prompt determination of judicial review cases would be delayed and administrative justice would be delayed for years awaiting first the decision of the Court of Appeal and secondly, and eventually the decision of this Court in the main application which would await the determination of the Court of Appeal on an Interlocutory decision referred to it by an aggrieved party.

On that note the Counsel also concluded that the application for stay was prompted by the Respondent’s Skeletal arguments, that the Applicant has no case, and that this application for stay of proceedings should be dismissed with costs.

ANALYSIS OF APPLICATION

Those were the respective arguments by the respective parties Counsel. We now express our opinion on the application for a stay, the law upon which it is based taking into account Counsel’s opposing views, and ultimately express our final opinion on the application for stay of proceedings.

The application is cited as being founded upon the provisions of section 3A of the Civil Procedure Act (**Chapter 21, Laws of Kenya**) which provision declares that nothing in the Civil Procedure Act will limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

JUDICIAL REVIEW JURISDICTION - SUI GENERIS AND APPLICATION OF CIVIL PROCEDURE RULES IS INCOMPETENT

The first point to note therefore is that judicial review is a jurisdiction which is *sui generis*, (it is neither civil nor criminal) as it was held in the case of the **COMMISSIONER OF LANDS –VS- HOTEL KUNSTE**) the provisions of the Civil Procedure Act, and the Civil Procedure Rules have no application thereto. An application for stay can only be made under the inherent power of the Court. Thus Order XLI and Order XLII (1) (ee) purporting to apply to Order LIII (prerogative orders) have no

application because the Law Reform Act upon coming to operation on 18-12-1956 abolished prerogative orders by Section 8 (1) – ***‘the High Court shall not, whether in exercise of its civil or criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari’***

RIGHT OF APPEAL

Section 8 (5) of the Law Reform Act, gives an automatic right of appeal against the judicial review orders and not on an interlocutory order to amend or to use further affidavit (“any person aggrieved by an order made in exercise of the civil jurisdiction of the High Court under this Section may appeal therefrom to the Court of Appeal.) We therefore find that there is no right of appeal in respect of an interlocutory application.

NO RIGHT FOR STAY OF PROCEEDINGS

As already observed above, Section 8 (5) of the Law Reform Act confers the right of appeal as against orders of certiorari, mandamus and prohibition. A right of appeal may be conferred by either the Constitution or an Act of Parliament.

The Law Reform Act under Section 9 (3) grants the court the discretion to adjourn to allow an appeal procedure to be exhausted. There is no such right to stay of proceedings. We therefore find that there is no power to grant stay of proceedings.

The Applicants claim that their appeal would be rendered nugatory unless a stay of proceedings is granted. This cannot however be so because the High Court has yet to pronounce itself on the substantive application beyond the leave stage. An appeal would allow the Court of Appeal to assume an original jurisdiction without the benefit of the High Court’s determination of the application on its merits. Once the High Court determined the Application on its merits the Applicant would have its right of Appeal. The intended Appeal cannot therefore be rendered nugatory.

WOULD THE APPLICANT SUFFER LOSS?

For similar reason, the Applicant cannot demonstrate that it will suffer substantial loss if the court declines to stay the proceedings. The Applicant will still have the right of appeal if it does not succeed on the substantive application, the second stage of judicial review proceedings. The Applicant will argue the same fundamental points which it is now raising prematurely. The applicant can in any event be compensated in costs. In our view, the applicant has not demonstrated that it is likely to suffer substantial loss. The applicant cannot be lamenting that the Respondents want to be heard on merits in the High Court.

CONCLUSION

The Court will grant a stay where special circumstances of the case so require for instance that there are large amounts of rent outstanding. There are no such circumstances demonstrated here.

The Court is being asked to give much more than a stay of execution. The Applicant seeks a stay of proceedings and where a party seeks to stop others from being heard, a higher standard of test is required if the proceedings are to be stopped. According to the authors of Halsbury’s Laws of England (4th Edition at page 137, paragraph 442 –

“The stay of proceedings is a serious grave and fundamental interruption in the right that a party has to conduct his litigation or the trial on the basis of substantive merits of his case and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

We cannot say in the circumstances that proceedings in respect of judicial review ought to be stayed.

We cannot say that there are circumstances beyond all reasonable doubt that proceedings in judicial review ought to be stayed because they cause no prejudice to the applicant except perhaps on the issue of costs for which the applicant can be compensated.

In **KENYA COMMERCIAL BANK LTD -VS- BENJOH AMALGAMATED & ANOTHER** (Civil Appeal No. Nai.50 of 2001) page 2, the Court of Appeal observed at page 2 :-

“The onus of satisfying us on the second condition that unless a stay is granted the intended appeal would be rendered nugatory is also upon the applicant. In our view it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and if successful, the proceedings in the superior court would be determined in accordance herewith. The hearing in the superior court might have been unnecessary for what appropriate costs can be ordered but the appeal would not have been worthless.”

These words were re-echoed in **SILVERSTEIN –VS- CHESONI [2002] I. K.L.R. 867**, at 873 paragraph 20-40.

Similarly in **R -Vs- MINISTER FOR FINANCE & OTHER** (Civil Appeal No. 93 of 2004), the Court of Appeal held-

“If a stay is not granted and the Appeal eventually succeeds, the appeal will only appear possible to have been rendered nugatory if the hearing of the main case has been concluded adversely against COTECNA both before the hearing of the appeal and before the completion of the contract. If this happened COTECNA would have its right of appeal against the judgement and the right to apply for stay of judgment at that time.”

The Applicant’s intended appeal is not likely to be rendered nugatory on the facts of this case because if a stay is not granted, the Applicant still has an opportunity to proceed with its application for Judicial Review. All the parties will place the facts in support of their case before the Court. If the Applicant is right, then its application for Judicial Review if heard before the Appeal will be successful, if it is not so successful it still has an opportunity to be heard on appeal. If the appeal is heard before the Judicial Review application, and the applicant succeeds, the application for Judicial Review will still have to be heard, perhaps years down memory lane. Either way the Applicant suffers no loss.

In conclusion we reiterate the object and purpose of judicial review, a speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. That object will be taken away and defeated by an order of stay of proceedings pending appeal, for once the judicial review is determined the aggrieved party can appeal against the whole decision of the court. This would ensure good public administration of justice. It is thus undesirable to grant a stay on this ground as well. It is desirable that the Respondents too know their fate as well as no doubt the Applicant.

We as a Court have a serious responsibility to ensure that a matter is determined within a reasonable time from its inception and a decision of the court made known within a reasonable time. A stay of proceedings would clearly defeat the object of speed and effective determination of the main application and speedy administration of justice and also defeat the principle of good public administration.

For those reasons, we decline to grant the Applicant’s application dated 8-03-2006 for stay of proceedings and dismiss the same. We order that costs abide the outcome of the main application herein.

Dated and delivered at Nairobi this 14th day of June, 2006.

Signed

.....

J.G. NYAMU

JUDGE.

Signed

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MOHAMMED K. IBRAHIM

JUDGE

Signed

.....

ANYARA EMUKULE

JUDGE.