REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 77 OF 2018

IN THE MATTER OF: AN APPLICATION BY ROCHAM ENTERPRISES LIMITED

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF MANDAMUS TO COMPEL THE RESPONDENT TO PAY TO THE APPLICANT THE DECRETAL SUM OF KSHS. 4,479,298/= WITH INTEREST AT 12% PER ANNUM UNTIL PAYMENT IN FULL ARISING FROM THE JUDGMENT DELIVERED MSA CMCC NO. 510 OF 2009

AND

IN THE MATTER OF: SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND THE LAW REFORM ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. MINISTRY OF INDUSTRY, TRADE AND COOPERATIVES

2. HON. ATTORNEY GENERAL.....RESPONDENTS

AND

ROCHAM ENTERPRISES LIMITED.....EX PARTE APPLICANT

RULING

1. The 2nd Respondent has filed an application dated 25/02/2021 seeking orders that:

a) Spent

b) Pending the hearing and determination of this Application inter-partes there be a stay of execution and/or further execution of the orders issued by Court on 5th August,2020.

c) Pending the hearing and determination of this Application inter-partes there be stay of execution and/or further execution of the orders issued by this honourable Court on 27th July,2020.

d) There be stay of execution, further execution and/or further proceedings herein pending the hearing and determination of this Application inter-partes.

e) The trial Court be pleased to review, vary and/or set aside the orders issued by this honourable Court on 5th August,2020 and 27th July,2020.

f) There be stay of execution, further execution and/or further proceedings herein pending the hearing and determination of Mombasa High Court Civil Appeal No. 100 of 2020, Ministry of Trade and Industry and the Attorney General Versus Rocham Enterprises Limited and Charles Mutuktu.

g) The costs of this Application be provided for.

2. The application is premised on the grounds set out therein and those in the affidavit sworn on 25/02/2021 by **Jesse Michael Mkok**, a Senior State Counsel in the Office of the Attorney General. The deponent avers that there is an error apparent in the face of the record, because on 21/1/2020, when this Court issued directions to the ex-parte Applicant to serve the Application dated 27/11/2019, by affixing it on the door of **Dr. Chris Kiptoo, CBS,** the said Dr. Chris Kiptoo, CBS was no longer Principal Secretary State Department for Trade, pursuant to Executive Order no. 1 of 2020 issued on 14/01/2020 transferring him from the Ministry of Industrialization, Trade and Enterprise Development to the State Department of Environment and Forestry with immediate effect, and the same was formally communicated to **Dr. Chris Kiptoo, CBS** vide letter dated 15/01/2020.

3. The deponent further avers that when the Application dated 27/11/2019 came up for hearing, **Dr. Chris Kiptoo, CBS** was a Principal Secretary in State Department of Environment and Forestry. However, by error and/or mistake this Court was not informed, and consequently, the Court delivered a ruling on 27/07/2020 in which **Dr. Chris Kiptoo, CBS** was found to be in contempt of Court and he was later on, on 5/08/2020 sentenced to serve a 60 days sentence for contempt of Court and/or in the alternative to pay a fine of Kshs. 200,000/=, yet he was not the holder of the impugned office.

4. The deponent further averred that the mistake of counsel ought not to be visited upon **Dr. Chris Kiptoo**, **CBS.**

The Response

5. The *ex-parte* Applicant opposed the Application vide Replying Affidavit sworn on 10/03/2021 by **Augustus Khisa Wafula** learned counsel for the ex-parte Applicant. The deponent avers that the instant Application is an abuse of the Court process, and the same is specifically designed to both frustrate the ex-parte Applicant and embarrass this Court, since the order of mandamus compelling the Respondents to pay the ex-parte applicants a sum of Kshs. 4,497,292 plus cost and interest at 12% per annum arising from the Judgment delivered in favor of the ex-parte Applicant on 23/05/2018 in CMCC No. 510 of 2009, still stands.

6. The deponent avers that at the time the judgment was delivered on 25/3/2019, **Dr. Chris Kiptoo**, **CBS** was the Principal Secretary in the responsible Ministry and it is **Dr. Chris Kiptoo**, **CBS** that failed to comply with the Court Order issued on 2/04/2019 compelling him to pay the ex-parte applicants the decretal sum of Kshs. 4,497,298/= plus cost and interest. Further, in the contempt proceedings, **Dr. Chris Kiptoo**, **CBS** was represented by State Counsel who religiously attended Court and informed Court that **Dr. Chris Kiptoo**, **CBS** had been informed of the Contempt proceedings which later on resulted to the Committal Order issued on 30/07/2020. Therefore, the transfer by Executive Order No. 1 of 2020 is immaterial as **Dr. Chris Kiptoo**, **CBS** was offered a chance to appear before Court before sentencing, which was to occur on 30/7/2020, but he squandered the opportunity and he is therefore the author of his own misfortune.

7. It is also averred that it was the duty of counsel to inform his client, and that his failures ought not to be visited upon the ex-parte applicants who are entitle to the fruits of their litigation.

8. In conclusion, the deponent avers that the purported Memorandum of Appeal marked JMM4 is not worth the paper it is written on as the same was filed more than two (2) years after Judgment without leave of Court to enlarge time to file Appeal out of time.

The Determination

9. I have considered the application, the affidavit both in support of and in opposition to the application.

10. What I understand the Applicant to be saying is that **Dr. Chris Kiptoo**, **CBS** was not aware of the Court orders issued vide ruling delivered on 27/07/2020 that he had been found to be in contempt of Court orders issued on 2/04/2019 compelling him to pay the ex-parte applicants the decretal sum of Kshs. 4,497,298/= plus cost and interest. The Applicant further states that by reason of not being informed of the ruling dated 27/07/2020, he was unable to get an opportunity to mitigate before a sentence to serve 60 days in prison for contempt of Court and in the alternative to pay a fine of Kshs. 200,000/= was issued. Therefore, there is an error apparent in the face of the record.

11. In my view, the issues for determination are:

a) Whether this Court's orders are amenable to review.

b) ***Whether the orders of stay pending appeal are available to the Applicant***.

Whether this Court's orders are amenable to review.

12. The applicable law on setting aside and/or review of orders under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Section 80 of the Civil Procedure Act which provides *inter alia*:-

> **"Any person who considers himself aggrieved —**
>
> **a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

Whereas Order 45 rule 1 of the Civil Procure Rules is in terms: -

> **(1) Any person considering himself aggrieved —**
>
> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

13. Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure rules give the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously. In **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** the Court held that:

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter".**

14. It is trite that Court orders are binding on the party against whom they are addressed and until set aside remain valid, and are to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced in complying with the said orders. Furthermore, once a Court order is made in a suit the same is valid unless set aside on review or on appeal. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. v Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd v County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court… Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant".**

15. In the current application, there is no doubt that **Dr. Chris Kiptoo, CBS** was the Principal Secretary in the Ministry of Industrialization, Trade and Enterprise, Development at the time the orders were issued on 2/04/2019 compelling him to pay the ex-parte applicants the decretal sum of Kshs. 4,497,298/= plus cost and interest. Therefore, I find and hold that **Dr. Chris Kiptoo, CBS** had already failed to comply with the Court Orders issued pursuant to the ruling delivered on 25/03/2019. Therefore, the argument of a transfer vide Executive Order No. 1 of 2020 is in my considered view an afterthought on the part of the Applicant, since if **Dr. Chris Kiptoo, CBS** had any difficulty in complying with this Court's orders issued on 2/04/2019, because of his transfer that was communicated vide the Executive Order No. 1 of 2020 issued on 14/01/2020, then **Dr. Chris Kiptoo, CBS** ought to have approached this Court and explained the difficulty he would encounter in complying with the Court Orders issued on 2/04/2019. **Dr. Chris Kiptoo, CBS** never approached this Court to seek for variation of the Court orders as may have been necessitated under the Executive Order No.1 of 2020 aforesaid.

16. Furthermore, it is uncontroverted evidence that, in the contempt proceedings, **Mr. Mkok,** learned counsel for the contemnor, and who religiously attended Court on 30/07/2020 competently represented **Dr. Chris Kiptoo, CBS**. He also informed the Court that **Dr. Chris Kiptoo, CBS** could not come to Court because he was attending a meeting in the office of the president. Therefore, I find and hold that the allegations by State Counsel for the Attorney General that **Dr. Chris Kiptoo, CBS** was by mistake not informed of the contempt proceedings, and therefore denied an opportunity to purge his contempt by this Court are untenable and without any iota of proof since it has already been captured in the proceedings that **Dr. Chris Kiptoo, CBS** was well aware of the contempt proceedings.

17. The Court of Appeal in ***Shimmers Plaza Limited v National Bank of Kenya Limited*** **[2015] eKLR** reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval **Lenaola J in Basil Criticos v Attorney General & 8 Others [2012] eKLR** where the learned Judge pronounced himself thus: -

> ***"….the law has changed and as it stands today knowledge supersedes, personal service…..where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."***

18. Additionally, in Shimmers Plaza case, the Court of Appeal was of the view that:

> **"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."**

19. The knowledge of a Court order on the part of a party to a suit can be inferred from knowledge of the order by the advocate appearing for the party. This is drawn from the assumption that it behooves on every advocate a duty to report back to his client what has transpired in Court and more so where the party is required to obey a Court order. In the matter before Court, counsel for **Dr. Chris Kiptoo, CBS** became aware of the Court orders issued on 2/04/2019 when the Ruling that resulted to the order was delivered in the presence of the State Counsel appearing for the Attorney General and the Application dated 27/11/2019 was also served upon Counsel on record for **Dr. Chris Kiptoo, CBS**, and the State Counsel was also present in Court when the Application for service by fixing the Application for contempt at the door of **Dr. Chris Kiptoo, CBS**, was made by counsel for the Respondent on 21/01/2020. Consequently, I find and hold that the allegations that the orders issued 27/07/2020 and 5/08/2020 are an error on the face of the record have not been proved to the required standards. Consequently, the prayer for review fails and the Court orders issued on 27/07/2020 and 5/08/2020 remain valid.

Whether the orders of stay pending appeal are available to the Applicant

20. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> ***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.***

21. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See ***Antoine Ndiaye vs. African Virtual University*** **[2015] eKLR.**

22. On the prayer for stay of execution pending the hearing and determination of the intended appeal, the Respondent averred that the appeal has been filed more than two (2) years after lapse of time without leave. Therefore, there is no valid appeal on record.

23. It is evident that the Applicant has not explained the reason for delay in filing the intended appeal. I therefore find and hold that the Applicant has not shown a good and sufficient cause for not having filed the appeal in time. Consequently, the Applicant is guilty of unreasonable delay which has not been explained. Equity dictates that he who ought to be aided by it must be vigilant. In **Jaber Mohsen Ali & Another v Priscillah Boit & Another E&L No. 200 of 2012 [2014] eKLR** the court held that w*hat is unreasonable delay is dependent on the surrounding circumstances of each case and that even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.*

24. Accordingly, I find and hold that the Application for stay pending appeal was brought after unreasonable delay which delay has not been explained at all; and which delay is prejudicial to the Respondent decree holder, as it was intended to scuttle the process of execution that had been put in motion. Consequently, the applicant's application for stay lacks merit and I dismiss it.

25. The upshot is that the Application dated 25/02/2021 lacks merit and the same is dismissed with costs.

Dated, Signed and Delivered at Mombasa this 14th day of June,

2021.

E. K. OGOLA

JUDGE

Ruing delivered via MS Teams in the presence of:

Ms. Barasa for Ex parte Applicant

Ms. Peris Court Assistant