REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL APPLIC NO 215 OF 2018

KENYA MEDICAL RESEARCH INSTITUTE.....APPLICANT

VERSUS

SUPER CLEAN SHINE LIMITED.....1ST RESPONDENT

CHIEF MAGISTRATES COURT,

MILIMANI COMMERCIAL COURTS.....2ND RESPONDENT

THE HON. THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

In an application dated 29 May 2018, the applicant sought for leave to file a substantive motion for judicial review orders of certiorari and prohibition; the prayers for the orders were framed as follows:

> ***"2. That leave be granted to the applicant herein to apply for an order of certiorari to remove and bring to this honourable court for the purposes of quashing, stopping and terminating the proceedings and/or the effect or enforcement of the court orders of 31st December 2015 and 4th May, 2018 or any other order emanating from Milimani Commercial Courts CMCC No. 7887 of 2015 Superclean Shine Limited v Kenya Medical Research Institute.***
>
> ***2. That leave be granted to the applicant herein to apply for an order of prohibition prohibiting the Chief Magistrates Court, Milimani, 2nd respondent herein or any other court within the jurisdiction of this Honourable Court from proceeding with, conducting the trial, hearing of the suit and/or applications, presiding over or in any other manner dealing and dispensing with the case laid before it in the Civil proceedings in Milimani Commercial Courts CMCC No. 7887 of 2015 Superclean Shine Limited v Kenya Medical Research Institute."***

The record shows that the application was mentioned on several occasions before court partly because parties were negotiating an out of court settlement. It would appear, the negotiations never came to fruition. Meanwhile, on 16 May 2019 the 1st respondent filed a motion dated 15 May 2019 in which it prayed for the orders that:

> ***"1. The applicant's application dated 29th May 2018 be dismissed with costs:***
>
> ***(i) For having been overtaken by events***

(ii) For want of prosecution

(iii) For being frivolous, vexatious and being an abuse of the process of court.

2. Costs of this application be provided for."

The court directed that this particular application be disposed of first. There does not appear to have been any response to this application by the applicant or any other party, for that matter. However, the applicant filed written submissions in opposition to the applicant's application.

A supplementary affidavit sworn in support of the 1st respondent's motion shows that the proceedings against which the judicial review orders were sought were concluded on 29 April 2019; this fact has not only been conceded by the applicant, but it has also stated in submissions filed on its behalf that that it has indeed filed an appeal against the judgment determining the dispute in Milimani Commercial Courts Civil Suit No. 7887 of 2015. To quote the applicant, this is what it said in its submissions**:**

> ***"Your Lordship, we submit that the matter herein has not been overtaken by events as alleged by the 1st Respondent in the application dated 15th October 2019. Indeed the matter herein is closely related to Milimani Chief Magistrates Civil case Number. 7887 of 2015 and Milimani Civil Appeal Number 287 of 2019. The subordinate court matter though determined, was stayed pursuant to an order of stay that was granted in Milimani High Court civil appeal number 287/2019 on the 17th of July 2019 and which proceedings are still on going. In the said appeal the applicant herein Super-clean Shine Limited still maintains that the respondent KEMRI had no right to terminate the alleged contract with it. The said appeal is still pending and the decision therein would definitely affect the proceedings herein as well as the proceedings in the subordinate court."***

If the proceedings in the magistrate's court, against which the applicant sought to challenge have been determined and a judgment delivered, I would agree with the 1st respondent that indeed the application for leave to file the substantive motion against those proceedings has been overtaken by events. But more importantly, by filing an appeal against the judgment entered in those proceedings, the applicant acknowledged that, from the very beginning, there was available to it a remedy that was equally convenient, beneficial and effective not just against the final judgment but against any or all of the impugned orders that may have been made in those proceedings.

In **R vs Peterkin, ex parte Soni, 18 (1972) Imm AR 253** Lord Widgery CJ said of this appellate course as follows:

> ***"Where parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the complaint complains this court should in my judgment as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this Court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when and adequate jurisdiction exists elsewhere."***

In the applicant's case, it complained of *ex parte* orders and injunction orders having been issued against. It is not apparent from its submissions the particular rules in the Civil Procedure Rules under which those orders were made; nonetheless, whichever rule or rules they were made, section 75 of the Civil Procedure Act, cap. 21 states in express terms that appeals shall lie from orders, whether made by a subordinate court or by this Court, made under the Civil Procedure Act or Rules. Depending the rule upon which the order has been made, the appeal will lie either as a matter or right or with leave of the court making the order.

It follows that besides the application for leave to file a substantive suit for judicial review orders having been overtaken by events, it is the sort of application that would not be granted because, in light of the provisions of the Civil Procedure Act and the Rules made thereunder, the appellate route was equally, if not more, convenient, beneficial and effective than the invocation of judicial review jurisdiction.

I would therefore allow the 1st respondent's motion dated 15 May 2019 and, in the same vein, reject the applicant's application dated 29 May 2018. The 1st respondent will have costs.

Signed, dated and delivered on 2nd July 2021

Ngaah Jairus

JUDGE