



**Rana Auto Selections Ltd & 2 others v Kenya Revenue Authority & another (Judicial Review Application 9 of 2020) [2021] KEHC 323 (KLR) (18 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION 9 OF 2020  
JM MATIVO, J  
NOVEMBER 18, 2021**

**BETWEEN**

**RANA AUTO SELECTIONS LTD & 2 OTHERS ..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY & ANOTHER ..... RESPONDENT**

**RULING**

Introduction

1. A brief background of this case is necessary in order to contextualize the applicant's application dated 22<sup>nd</sup> June 2021 the subject of this ruling. Vide an application dated 5<sup>th</sup> March 2020, the applicants sought the following judicial review orders: -
  - a. An order of certiorari to remove into the High Court for purposes quashing all decisions, orders and proceedings in Criminal Cases MCCR No. 975 of 2019, MCCR No.976 of 2019 and MCCR No. 977 of 2019, against the applicants and their shareholders, directors and employees pursuant to this courts supervisory jurisdiction over the subordinate court under Article 165(6), (7) of the Constitution.
  - b. An order of prohibition to prohibit the Respondents from-
    - i. Proceeding with the prosecution of the criminal cases MCCR NO. 975 OF 2019, MCCR NO. 976 OF 2019 and MCCR NO. 977 OF 2019 pending in the Chief Magistrate's Court Mombasa.
    - ii. from demanding the tax penalties and interest claimed in the said charges amounting to Kshs. 1,800,000,000/=, the subject of active consideration of the Tax Appeals Tribunal cases NO. TAT no. 477 of 2019 Sainil Investments Ltd v KRA, Commissioner of Domestic Taxes, TAT No. 478 of 2019 Ras Holdings td v KRA,



Commissioner of Domestic Taxes, TAT No. 469 of 2019 Rana Auto Selection Ltd v KRA, Commissioner of Domestic Taxes, TAT No. 479 of 2019 Riasat Ali Main v KRA, Commissioner of Domestic Taxes pending the hearing and determination of the Tax Appeals Tribunal cases by the tax appeals tribunal.

- c. That the leave granted operates as stay of proceedings of the criminal cases MCCR No. 975 of 2019, MCCR No. 976 of 2019 and MCCR No. 977 of 2019 pending in the subordinate court at Mombasa the basis of this proceedings.
  - d. That all necessary and consequential orders and directions be given.
2. On 8<sup>th</sup> June 2021, Ogola J dismissed the applicant's judicial review application stating:

“In this matter however, the arguments for restraining the prosecution of the Ex parte Applicants have solely been based on the ongoing assessment of taxes due at the Tax Appeals Tribunal. The Tax Appeals Tribunal rendered its judgment on 12/4/2021 and dismissed the Ex parte Applicants' appeal. The net result of that judgment is that the Ex parte Applicants are to pay the tax levies as assessed by the Respondents. There is no further doubts about the amount of tax due. Therefore, the Ex parte Applicants cannot have it both ways. This Court on 6/10/2020 granted conservatory orders suspending the hearing of the said criminal cases. With the judgment of the Tax Appeals Tribunal already out, and in the absence of any appeal or stay of that judgment the Ex parte Applicants have no option but to comply. And since there is no evidence of compliance provided to this Court since the said judgment was delivered, the conservatory orders issued herein on 6/10/2020 stopping the prosecution of the Ex parte Applicants is hereby lifted, and the Criminal Cases MCCR NO. 975 of 2019, MCCR NO.976 of 2019 and MCCR NO. 977 of 2019 shall proceed to their logical conclusion.

The result is that the Notice of Motion application before this Court dated 5/3/2020 is dismissed. Parties shall bear own costs.”

The instant application

3. Vide an application dated 22<sup>nd</sup> June 2021, the subject of this ruling, the applicants seek a conservatory order staying proceedings in MCCR No. 975 of 2019, (Mombasa), Republic v Peter Maina & 2 others; MCCR No. 976 of 2019 (Mombasa), Republic v Riasat Ali Khan & 6 6 others; MCCR No. 977 of 2019 (Mombasa), Republic v Said Ali Yawa & 5 others pending appeal against decisions in the said cases. They also pray for any other order the court may grant in the circumstances as it may deem fit. Prayers (1) and (2) of the application are spent.
4. The core grounds in support of the application are that the law allows the court to grant stay of execution during the pendency of an appeal. They state that they filed a Notice of Appeal and have applied for certified proceedings. They state that they have an arguable appeal as evidenced by the draft Memorandum of Appeal annexed the supporting affidavit and as a sign of good faith, they paid the undisputed tax of Kshs. 79,000,000/=.

The Respondents Replying affidavit

5. The application is opposed. On record is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying affidavit dated 15<sup>th</sup> September 2021 sworn by a one Margaret Wanjiru Pere, a Technical Officer, appointed pursuant



to section 13 of the [Kenya Revenue Authority Act](#)<sup>1</sup> based at the Investigations and Enforcement Department of the 1<sup>st</sup> Respondent.

6. The Respondents' grounds of objection as I discern them from the said affidavit are that in dismissing the applicants' judicial review application, this court made no positive orders in favour of the Respondent capable of being executed, so, there are no orders capable of being stayed, and should this court grant the stay, it will have the effect of reviving the dismissed application. It is also the Respondents' position that upon lifting the conservatory orders, this court became functus officio. Further, the Respondents state that the application is premised on a mis-apprehension of the law, that the application is incompetent and an abuse of court process.
7. Further, the Respondents state that the application does not meet the requirements for stay, namely, substantial loss, the application must be filed without delay and provision of security. Also, the Respondents state that HCC No. E259 of 2021 is a totally different appeal whose outcome has no bearing to the intended appeal and that this court ought to decline exercising its discretion in favour of the applicants.

The applicants' advocates submissions

8. The applicants' counsel submitted that the applicants are apprehensive that during the pendency of the appeal they will be subjected to criminal prosecution contrary to their right to fair administrative action and fair hearing which will occasion a miscarriage of justice. He submitted that their grounds of appeal disclose an arguable appeal with high chances of success.
9. Counsel argued that the applicants have paid the undisputed tax of Kshs. 79,000,000/= which demonstrates good faith; and they have applied for Alternative Dispute Resolution as a sign of good faith. He argued that there is a pending appeal being Milimani HCCC E259 of 2021, Rana Auto Selection Ltd v Commissioner for Domestic Taxes & Another which stayed execution of the Tax Appeals Tribunal Ruling dated 30<sup>th</sup> September, 2020. He submitted that despite efforts to resolve the matter, the applicants with the aim of vexing, disorienting and embarrassing the applicants insist on pursuing the criminal process as a double tool for enforcement in order to curtail a fair hearing in the criminal cases thereby threatening the applicants' business.
10. Counsel submitted that a conservatory order staying proceedings pending appeal involving matters concerning criminal cases and prosecution ought to be granted. Counsel relied on Order 42 Rule 6 which provides for stay of execution and urged the this court to exercise constitutional jurisdiction under Article 23 to grant Judicial Conservatory Orders. He argued that the court was moved under Articles 165(6)(7) to exercise its Supervisory jurisdiction over subordinate Courts. He submitted that that the instant application is anchored on the Bill of Rights in the Constitution. He argued that these proceedings are sui generis and not the normal judicial review application through the [Civil Procedure Act](#). He argued that the criminal prosecution of the applicants are capable of attracting orders of stay of proceedings pending appeal.
11. He submitted that the issue of "positive orders" and "negative orders" as a consideration in granting a Stay of execution under the Civil Procedure Rules do not and should not affect the matter brought under constitutional provisions. He submitted that this court has jurisdiction to grant stay of proceedings pending hearing and determination of appeal in the Court of Appeal due to the devastating effects of a criminal trial and should the appeal be successful, it shall be rendered nugatory such that the applicants cannot be restored to their former position. To buttress his argument, he cited *Republic v Kenya Urban Roads Authority & 3 Others Ex parte Cyton Investments Management*

<sup>1</sup> Cap 469, Laws of Kenya.



*Limited*<sup>2</sup> which held that where the orders granted by the High Court in Judicial Review Proceedings are capable of being executed the same are amenable to stay execution. Counsel urged the court to grant the stay sought.

#### The Respondents' advocates submissions

12. The Respondents' counsel submitted that the affidavit in support of the application is not supported by an authority swear the affidavit on behalf of the company and cited *Ibaco Trading Company Limited v Samuel Aencha Ondora & 3 others*.<sup>3</sup> on this ground, he urged the court to find that the applicants' application is incompetent.
13. Also, counsel submitted that there are no positive orders capable of being stayed and that this court having pronounced itself, it is functus officio. He cited *R v The Commissioner for Investigations & Enforcement ex parte Wanacnchi Group of Kenya Limited*,<sup>4</sup> *Western College of Arts and Applied Sciences v Oranga & Others*<sup>5</sup> and *John Mbua Muthoni & another v Ruth Muthoni Kariuki*<sup>6</sup> in support of the proposition that no order of stay of execution can be issued where a court dismisses a judicial review application. Further, he submitted that this court is now functus officio and the stay order if granted will have the effect of indirectly reviving the dismissed application and reversing the findings of the court. In support of the foregoing, he cited *Benjamin K. Kipkulei v County Government of Mombasa* which held that to stay orders in which the court had declared the process untenable amounts to reversing the findings of the court. He also cited *Telkom Kenya Limited v John Ochanda*<sup>7</sup> which held that functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.

#### Determination

14. First, I will address the applicants' counsels' submission invoking this court's "supervisory jurisdiction" and the "overriding objective" citing sections 1A, 1B, and 3A of the *Civil Procedure Act*<sup>8</sup> and Articles 23 (3), 159 (2) and 165 (6) & (7) of the *Constitution*. The applicants' attempt to invoke this court's supervisory jurisdiction and the overriding objective is totally misguided in the circumstances of the instant application. This is because supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.<sup>9</sup> This power of superintendence is conferred by Article 165 (6) of the Constitution.

<sup>2</sup> {2018} e KLR

<sup>3</sup> {2017} e KLR.

<sup>4</sup> {2014} e KLR.

<sup>5</sup> {2017} e KLR.

<sup>6</sup> {2017} e KLR.

<sup>7</sup> {2014} e KLR.

<sup>8</sup> Cap 21, Laws of Kenya.

<sup>9</sup> *Gallagher v. Gallagher*, 212 So. 2d 281, 283 (La. Ct. App. 1968).



15. As was pointed out by *Harries, C.J. in Dalmia Jain Airways Ltd. v Sukumar Mukberjee*,<sup>10</sup> this power is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there is grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.<sup>11</sup>
16. The above being the purpose of this courts' supervisory jurisdiction, one wonders whether it has any relevancy in the instant application which seeks stay pending appeal. Clearly, citing the said jurisdiction is a misnomer. Before me is not a question of supervising a lower court or tribunal but an application for stay pending appeal. The attempt to introduce the courts supervisory jurisdiction in the instant application collapses.
17. Second, closely tied to the above is the applicants' attempt to invoke this courts' inherent powers under sections 3A of the *Civil Procedure Act* and the overriding objective of the *Civil Procedure Act* under sections 1 A and the duty of the Court under section 1B.
18. Simply put, the applicants invited this court to exercise its inherent powers and grant the orders sought. Courts derive their power from the Constitution and the statutes that regulate them. The jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Freedman C J M, citing I H Jacob *Current Legal Problems*, adopted the following definition of 'inherent jurisdiction'<sup>12</sup>
- “ . . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them...”
19. Jerold Taitz, in his book, *The Inherent Jurisdiction of the Supreme Court*<sup>13</sup> succinctly describes the inherent jurisdiction of the high court as follows: -
- “ . . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate

<sup>10</sup> AIR 1951 Cal. 193.

<sup>11</sup> See *D. N. Banerji v. P. R. Mukberjee* 1953 SC 58.

<sup>12</sup> *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, *Current Legal Problems* (1970) p 51.

<sup>13</sup> Jerold Taitz, *University of Cape Town, Juta*, 1985.



and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.”

20. I.H. Jacob in "The Inherent Jurisdiction of the Court"<sup>14</sup> quoted by Jerold Taitz (supra) states: -

“ [it] exists as a separate and independent basis of jurisdiction, apart from statute or Rules of Court ... It stands upon its own foundation, and the basis for its exercise is ... to prevent oppression or injustice in the process of litigation and to enable the court to control and regulate its own proceedings ... [it] is a necessary part of the armoury of the courts to enable them to administer justice according to law. The inherent jurisdiction of the court is a virile and viable doctrine which in the very nature of things is bound to be claimed by the superior courts of law as an indispensable adjunct to all their other powers ... it operates as a valuable weapon in the hands of the court to prevent any clogging or obstruction of the stream of justice.”

21. The inherent jurisdiction of the high court has long been acknowledged and applied by courts.<sup>15</sup> However, a court’s inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In *National Union of Metal Workers of South Africa & others v Fry’s Metal (Pty) Ltd*<sup>16</sup> it was held: -

“While it is true that this Court’s inherent power to protect and regulate its own process is not unlimited – it does not, for instance, “extend to the assumption of jurisdiction not conferred upon it by statute. . .”

22. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open licence for the court’s exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court’s order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.<sup>17</sup> As stated above, Order 42 Rule 6 provides in clear terms the court’s jurisdiction, considerations and tests/conditions for staying court judgments pending hearing and determination of appeals. The attempt to invoke this courts inherent jurisdiction on the face of such clear provisions of the law is misguided.

23. Third, the attempt to invoke the overriding objective citing sections 1B of the Civil Procedure Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes is uncalled for. Before me is an application for stay pending appeal. The application will stand or fall on tests stipulated by the law. The overriding objective will not add life to the application. Not in the circumstances of this case.

<sup>14</sup> (1970) 23 Current Legal Problems 23 at pp. 51-52.

<sup>15</sup> *Ritchie v Andrews* (1881-1882) 2 EDL 254; *Conolly v Ferguson* 1909 TS 195.

<sup>16</sup> 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

<sup>17</sup> *Se Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at p 585F-G Vieyra J and *Union Government and Fisher v West* 1918 AD 556.



24. I also note that the applicants invoke the Bill of Rights in the instant application and also cited Article 23 (3) (c) and 159 of the Constitution. Before me is not an application for conservatory orders which was dismissed. Before me is an application for stay pending appeal. Its not clear why the applicants are invoking the Bill of Rights nor have they specified which rights are being violated.
25. But one thing is clear, which is an attempt to clothe an application for stay with “Bill of Rights” as if before me is a case involving constitutional adjudication. Put differently, the deepest norms of the Constitution should determine whether the application before me involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. I have no doubt in my mind that the adjudication of the application for stay before me can safely be left to the statutory provisions.
26. Courts abhor and discourage the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the governing statute. The Court of Appeal in *Gabriel Mutava & 2 Ors. v Managing Director Kenya Ports Authority & Another*<sup>18</sup> underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the existing mechanism for redress in civil or criminal law.
27. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.<sup>19</sup> A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.<sup>20</sup> When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values.<sup>21</sup> As I have repeatedly stated, before be is an application for stay. Its resolution does not warrant interpreting the Bill of Rights.
28. I now turn to the question whether an order of stay can issue where no positive order has been granted. The applicant’s argument is that this court can issue conservatory orders where the applicant seeks to stay a criminal prosecution because if the prosecution proceeds, it is not possible for the applicant to revert to the original position should the appeal succeed.
29. Decided cases reveal that our courts have been categorical that once the High Court dismisses a Judicial Review application, thereby issuing a negative order incapable of being executed, the only remedy for an aggrieved person is to appeal. This position was articulated in *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others*<sup>22</sup> in which the applicant had appealed to the Court of Appeal against a High Court decree ensuing from a judgment in Judicial Review proceedings in which the applicant had sought orders of certiorari and mandamus but the High Court found it devoid of merit and dismissed it.
30. Upset by the decision, the applicant appealed to the Court of Appeal and also filed an application seeking an injunction pending the hearing of the appeal attracting a preliminary objection from the Respondent. The disputation was that the Court of Appeal had no jurisdiction to issue the injunction

<sup>18</sup> {2016} e KLR

<sup>19</sup> See Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014

<sup>20</sup> <http://www.yourdictionary.com/constitutional-question>

<sup>21</sup> Justice Langa in Minister of Safety & Security v Luiters, {2007} 28 ILJ 133 (CC)

<sup>22</sup> {2015} eKLR.



in Judicial Review proceedings, if it could not be granted by the High Court under the Law Reform Act<sup>23</sup> pursuant to which the only reliefs available were the orders of Mandamus, prohibition and certiorari.

31. The architecture and design of the Law Reform Act<sup>24</sup> is that this court has no powers to issue an injunction in Judicial Review proceedings. Section 8(1) (2), (3), (4) & (5) of The Law Reform Act.<sup>25</sup> It provides as follows: -

“8(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari

(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.

32. After an extensive analysis of the law and authorities, the Court of Appeal in *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others*<sup>26</sup> held that an injunction was not available under the above provisions. In *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)*,<sup>27</sup> the Court of Appeal, citing with approval the decision in *Executive Estates Ltd v Kenya Posts and Another*<sup>28</sup> stated:-

“The Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & Anor. [2005] 1 E.A. 53* where it was stated:

<sup>23</sup> Cap 26, Laws of Kenya.

<sup>24</sup> Ibid.

<sup>25</sup> Cap 26, Laws of Kenya.

<sup>26</sup> {2015} eKLR.

<sup>27</sup> {2015} eKLR

<sup>28</sup> {2005} 1 EA 53



“...The order which dismissed the suit was a negative order which is not capable of execution...”

33. In *Peter Mueria Ole Munya & 4 Others v Principal Magistrate, Narok & 6 Others*,<sup>29</sup> the court held that:-

“If a Judicial Review application is dismissed, the court does not make a positive order which is capable of being executed and which may in turn be stayed.....Accordingly the orders of stay under Order 42 Rule 6 of the Civil Procedure Rules cannot be granted by this court.....Even if the orders of stay of execution were available to the applicants, I find that they have not satisfied the conditions for grant of stay of execution under Order 42 Rule 6 (2) of the Civil Procedure Rules.”

34. In *Devani & 4 Others V Joseph Ngindan & Others*,<sup>30</sup> the Court of Appeal cited with approval *Wananchi Group Kenya Ltd v Commissioner of Investigation and Enforcement*<sup>31</sup> and stated that:-

“By dismissing the Judicial Review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”

35. In *Berkeley North Market & Others v Attorney General & Others*<sup>32</sup> the applicants Judicial Review application to prohibit a criminal prosecution was dismissed. While determining the ensuing application for stay of the dismissal pending appeal, the Court of Appeal stated that “if the appeal is allowed and the charge sheets and convictions if any are quashed, the appeal will be rendered nugatory, irrespective of the result of the criminal proceedings, the applicant will have been forced to undergo anxiety and adverse publicity that inevitably flows from being tried for a criminal offence.”(Emphasis added).

36. In *Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 4 Others*,<sup>33</sup> the Respondents had preferred charges against the applicant. He had been bonded to appear in court to answer the charges. The Court of Appeal granted a conservatory order suspending the charges. In *Nakumatt Holdings Ltd v Commissioner of Value Added Tax*,<sup>34</sup> the Court of Appeal allowing the application held that it would be oppressive and an affront to common sense for the court to turn around and say it lacks jurisdiction. This decision, in my view, has no relevancy to the facts of this case. It was proper for the court to find that a court has residual power to correct its own mistakes. I say no more.

<sup>29</sup> {2015} e KLR.

<sup>30</sup> C.A., Nairobi 136/2004.

<sup>31</sup> [2014] e KLR.

<sup>32</sup> Supra.

<sup>33</sup> Supra.

<sup>34</sup> Supra.



37. In *Njuguna Ndungu v Ethis & Anti-Corruption Commission & 3 Others*<sup>35</sup> the Court of Appeal granted conservatory orders pending the hearing and determination of a civil case.
38. Two tests emerge from the above authoritative. First, where there is a criminal trial involved, the court will be inclined to allow the stay pending appeal depending on the facts of the case. The reasoning here is simple. If the applicant is subjected to the criminal trial, in the event of the appeal succeeding, he cannot be put into his former position. In other words, the appeal would be rendered nugatory. Second, a court will not stay a negative order, in capable of being executed.
39. Before me is not a purely criminal case, but a Tax Dispute. By dismissing the applicant's judicial review application, the court did not issue a positive order. The applicants indicated that there is a pending appeal against the decision of the Tax Appeals Tribunal. The applicants have the option of pursuing the said appeal (if it is still pending) or even appealing against the decision to the Court of Appeal. Even if these proceedings relate to a different tax dispute, the proper thing for the applicants to do was to appeal against the Tax Appeal Decision and have the appeal determined on merit. The High Court found the applicant's application lacking merit. The instant application is a dangerous invitation to this court to reverse its own ruling. I decline the said invitation.
40. The upshot is that the applicants' application dated 22<sup>nd</sup> June 2021 lacks merit both in law and in substance. I dismiss it with costs to the Respondents.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021**

**JOHN M. MATIVO**

**JUDGE**

<sup>35</sup> {2015}eKLR.

