REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

JUDICIAL REVIEW MISC. APPL NO. 60 OF 2020

IN THE MATTER OF AN APPLICATION BY SWIFT ENERGY DISTRIBUTORS LIMITED FOR LEAVE TO APPLY FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE ENERGY ACT

AND

IN THE MATTER OF THE PETROLEUM ACT

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF ARTICLES 22, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

SWIFT ENERGY DISTRIBUTORS GAS LIMITED.....APPLICANT

VERSUS

THE ENERGY AND PETROLEUM REGULATORY AUTHORITY.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

AND

ABDI ALI MOHAMED.....INTERESTED PARTY

RULING

1. The Exparte/Applicant herein filed a Notice of Motion dated 1/07/2020 expressed to be brought under Order 53 Rule 1 and 2 of the Civil Procedure Rules and section 3A and 63(e) of the Civil Procedure Act seeking the following reliefs:

(1) Spent

(2) That this Honourable Court be pleased to confirm, clarify and/or interpret the import of Order No.4 (stay) granted in respect to the Application dated 29th June, 2020 on the 30/06/2020 to the extent that prayers No.5 and 6 therein were deemed to have been allowed in the interim pending the determination of the substantive notice of motion herein.

(3) That this Honourable court be pleased to order the OCS Mlolongo police station to assist in the enforcement of the order hereinabove.

(4) That this Honourable court be pleased to give such further orders as it shall deem fit and just in the circumstances of this case.

(5) That the costs of this application be provided for.

2. The application is supported by the grounds on the face thereof plus the supporting affidavit of the Applicant's learned counsel Thomas Mbaria Kuria sworn on even date. The Applicant's case *inter alia* is that it had approached this court vide their application dated 29/06/2020 wherein the leave granted to file for judicial review orders was to act as stay pending the determination of the substantive notice of motion. It was the Applicant's case that the said order of stay was duly served upon the 1st Respondent but it has failed or neglected to comply with the same claiming that they need clarification of the same. It was further the Applicant's case that the effect of the stay order was to revert the status to the position the parties were before the sealing of its premises by the 1st Respondent. It was finally the applicant's case that the 1st respondent has no intention at all to obey the court orders unless this court directs that the OCS Mlolongo police station is directed to oversee the enforcement of the court order once the same has been clarified by this court.

3. The application was strenuously opposed by the 1st Respondent. A replying affidavit was deponed by Winny Cheptoo who is the 1st Respondent's enforcement and surveillance officer and who raised several grounds of objections inter alia: that the order of stay granted on 30/06/2020 was found to be ambiguous since the action sought to be stayed had already taken place on 25/06/2020; that the Applicant's directors had earlier been arraigned vide **Mavoko Criminal Case No. 995 of 2019** for conducting illegal cross-filling of LPG cylinders contrary to the law and that several other petitions had been lodged against the 1st Respondent such as **Nairobi Petition No. 28 of 2020** wherein the Applicant had been involved in breaching the regulations; that as a result of the Applicants unruly behavior, the 1st Respondent has since effectively revoked the applicant's licence on 2/07/2020; that the Applicant is no longer a licensed LPG dealer and hence any orders of stay have been overtaken by events.

4. Learned counsels presented oral submissions. Mr. Kuria for the Applicant submitted that upon the grant of stay orders the Applicant deemed that the prayers that had been sought had been granted and which the 1st Respondent ought to comply. Learned Counsel decried the conduct of the Respondent in proceeding to cancel the Applicant's licence on 2/07/2020 yet this case was still pending and ongoing with orders of stay in place. It was contended that the failure by the 1st Respondent to unseal the premises amounts to contempt of court and that the cancellation of the licence goes further to confirm that the 1st Respondent is out to cripple the Applicant to great suffering. According to counsel, the order of stay had put the parties to the position they were before the impugned decision. It was further submitted that this court should stamp its authority by ordering the 1st Respondent to obey the stay orders by unsealing the premises. Reliance was placed in **Republic –vs- N.H.I.F Fund Management Board [2019] eKLR** where it was held that decision making process having been made, the court has a duty to rewrite history be intervening in putting the parties in the position they were before the impugned decision. It was counsel's contention that prayer No. 6 of the Applicant's application dated 29/06/2020 was deemed to have been granted once the leave to file the judicial review remedies was ordered to act as a stay and hence this court should stamp its authority by directing the 1st Respondent to comply with the court order.

Mr. Kenyatta for the interested party submitted that his client is not opposed to the applicant's application dated 1/07/2020. Learned counsel submitted that events leading to these proceedings started on 25/06/2020 when the 1st Respondent sealed the applicants premises which was then a temporary measure as the Applicant and interested party were required to present themselves at Mlolongo police station to aid in investigations. According to counsel, the sealing was not a final decision since investigations were still ongoing. It was the counsel's submissions that the 1st Respondent should have moved to this court to seek clarity but not choose whether or not to obey the court order as the same amounts to an affront to the dignity of this court. It was further the counsel's submissions that the impugned decision was an ongoing one capable of being stayed as can be seen in the fact that the 1st Respondent had advised the Applicants lawyers to come to court for clarification of the orders only for the 1st Respondent to purport to revoke the Applicants licence instead of waiting for clarification. Learned counsel sought reliance in the case of **Republic –vs- Kenya School of Law & 2 others Ex Parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR** where the court ordered the status quo ante of the parties. Learned counsel urged this court to restore the parties to the status before sealing of the premises so as to strike a blow to the rule of law and to reinstate the applicant pending determination of the substantive motion.

Mr. Njoroge for the 1st Respondent submitted that a decision to seal the applicants premise was made on 25/06/2020 and that the applicants licence was cancelled on the 2/07/2020. As far as he was concerned the decision was not a continuing process since by the time the applicant approached the court it was already out of the premises. Learned counsel pointed out that a stay order in Judicial Review is meant to stop a decision making process from being implemented and that once the implementation is done an order of stay cannot issue. It was submitted that the order of stay had been overtaken by events since the applicant currently does not hold an LPG licence and that even if they went to the premises they cannot operate business. It was finally submitted that the stay order cannot be used to reverse what has taken place and that the court should only issue orders that can be obeyed and further that the applicant is at liberty to challenge the revocation of its licence. Learned counsel penned off his submissions by maintaining that the 1st Respondent was not in contempt as the decision had already been made.

5. I have considered the rival affidavits plus the submissions of learned counsels. It is not in dispute that the Applicant's premises were sealed on the 25/06/2020 by the 1st Respondent who directed the Applicant's officers to present themselves at Mlolongo police station to aid in investigations. It is also not in dispute that upon the Exparte Applicant moving to this court on the 30/06/2020 leave was granted to the

Applicant to file for Judicial Review remedies indicated in the chamber summons dated 29/06/2020 and that such leave was to operate as a stay of the impugned decision making process. It is also not in dispute that the Applicant vide prayer No.6 of the chamber summons dated 29/06/2020 had sought for interim conservatory orders of stay pending hearing and determination of the application. It is also not in dispute that the 1st Respondent was served with the orders of stay. It is also not in dispute that the 1st Respondent despite having been served with the said orders of stay proceeded to cancel the Applicant's business licence on the 2/07/2020. Having arrived at these deductions I find the following issues necessary for determination namely:

(i) Whether the 1st Respondent's decision making process was an ongoing process.

(ii) Whether the order of stay granted on 30/06/2020 placed the parties in the position they were (status quo ante) prior to the action.

(iii) What orders may be granted by the Court?

6. As regards the first issue, it is noted that the 1st Respondent engaged the Exparte Applicant leading to the sealing of the Applicants premises on the 25/06/2020 forcing the Applicant to move to this court for redress. As far as the 1st Respondent is concerned the decision was made on the 25/06/2020 whereas the Applicant maintains that the decision making was an ongoing process which went on until the 2/07/2020 when the 1st Respondent cancelled the Applicant's licence. Indeed, Judicial Review is concerned with the decision making process and not the merits of the decision. These parameters were set out by the Court of Appeal in the case of **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Limited – Civil appeal No. 158 of 2001** where it was held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself; that court would concern itself with such issues as to whether the decisions makers had the jurisdiction, whether the persons affected by the decisions were heard before it was made and whether in making the decisions the decision maker took into account relevant matters or did take into account irrelevant matters ..... the court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision."

The Above position was restated in the Ugandan case of **Pastoli –vs- Kabale District Local Government Council and Others [2008] 2 EA 380** where the court cited with approval the cases of **Council of Civil Unions –vs- Minister for the Civil Service [1985] AC Z and an application by Bukoba Gymkhana Club [1983] EA 478** and held:

"In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality. It is, for example illegality, where a Chief Administrative Officer of a District interdicts a public servant on the directions of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural justice or to act with procedural fairness towards one to be affected by the decisions. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative investment by which such authority exercises jurisdiction to make a decision."

The 1st Respondent's enforcement and surveillance officer Winny Cheptoo in her replying affidavit confirmed that the 1st Respondent had sealed the applicant's premises and that on 2/07/2020 the 1st Respondent cancelled the applicants licence to deal in LPG cylinders. I have perused the notice of licence revocation dated 2/07/2020 which confirms that the first time the 1st Respondent's decision making process began on the 25/06/2020 and ended on the 2/07/2020. This lends credence to the Applicant's claim that the decision was an ongoing process. It is clear that upon the 1st Respondent visiting the Applicant's premises on the 25/06/2020 it started the process by first sealing the premises. The applicant vide its affidavit in support of the chamber summons dated 29/06/2020 averred that upon the sealing of the premises they were advised to proceed to Mlolongo police station to aid in further investigations. It would appear to me that these investigations were part and parcel of the ongoing decision making process which finally culminated in the cancellation of the licence on 2/07/2020. Hence the sealing of the applicant's premises was an ongoing process as confirmed by the 1st Respondent's enforcement and surveillance officer when she averred that the premises were sealed to facilitate investigations. The Applicant had rushed to this court on the 30/06/2020 seeking to stay the aforesaid continuing process and hence such process is amenable to be stayed at any stage of the proceedings. The converse is the case where the decision is complete. It is my finding that the impugned decision was not complete as at the time the Exparte applicant moved to court for redress.

7. As regards the second issue, it is noted that the applicant was granted leave to file for judicial review remedies and that such leave was to act as stay pending the determination of the substantive notice of motion. The applicable law on whether the leave so granted should operate as a stay is order 53 Rule 1(4) of the Civil Procedure Rules which provides as follows:

"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs operate as a stay of the proceedings in question until the determination of the application or until the judge orders otherwise."

From the above provision, it is clear that the decision whether or not to grant a stay pursuant to leave is exercise of judicial discretion which must be exercised judiciously. The key factor for consideration is whether or not the decision or action sought to be stayed has been fully implemented. An order of stay can be granted where the decision has not been implemented or where the same is a continuing process.

However, where the decision is complete the court cannot stay the same. The purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review. The guiding principles regarding the issue of stay were laid down in the case of R(H) –vs- Ashworth Special Hospital Authority [2003] I WLR 127 where Dyson L. J held as follows:

> "***As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court of administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made, thus the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings and any decision taken will cease to have effect; it is suspended for the time being.***
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> ***I now turn to the third situation, which occurs where the decision has not only been made, but is has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event and it is impossible to suspend a piece of history. It overlooks the fact that a successful judicial review challenge does is a very real sense rewrite history..... It is therefore difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decisions has been fully implemented..... But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay."***

From the above decision it follows that where the action or decision is yet to be implemented a stay order can be granted as well as where the decision or action is a continuing process. However, if the implementation is complete then a discretion to order stay should be exercised sparingly and being guided by the need to dispose of the matter within a limited time frame.

8. The ex-parte Applicant's application dated 29/06/2020 was filed in this court on the 30/06/2020. Upon perusal of the same I granted leave to apply for judicial review orders and further ordered that the said leave do operate as stay of proceedings pending the determination of the substantive notice of motion. The applicants supporting affidavit had disclosed the fact that the 1st Respondent's decision making process was still ongoing. The order for stay was in tandem with the Applicant's prayer No. 6 in the chamber summons dated 29/06/2020 as follows:

> "***THAT pending the hearing and determination of this application this court be pleased to issue interim conservatory orders of stay staying the Respondents decision to seal and or close the applicant's liquefied Petroleum gas refilling plant located at Sham Petrol Station off Mombasa Road within Machakos county by directing it to remove any seals that might interfere with the normal operations within the plant."***

Having established that the 1st Respondent's action or decision was an ongoing process, the order of stay issued on the 30/06/2020 had the effect of placing the parties herein to the position they were (status quo ante) prior to the action complained of. Hence the order aforesaid was not ambiguous at all as contended by the 1st Respondent. The 1st Respondent upon being served was under a duty to obey it and if it had any queries then it should have come to court to seek clarifications but not to disobey it. An order by a court remains to be so and have force until the same is set aside on review or appeal. In the case of **Commercial Bank of Africa –vs- Ndirangu [1990 – 1994] EA 69 t**he court held as follows:

> ***"It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the court's ..... To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court."***

Again in the case of **Martin Nyaga Wambora & 4 Others –vs- Speaker of the Senate & 6 others [2014] eKLR** it was held:

> "***We cannot over emphasize the fact that the court orders once issued must be obeyed by those against whom they are directed unless or until they are either discharged or set aside. More so because once a court order is issued, it binds all and sundry the mighty and the lowly equally, and the County Assembly and the Senate are no exception. The developing trend in our country where parties to litigation appear to be choosing which court orders to obey or disobey must be estopped in order to build the public confidence in the rule of law."***

The issue of disobedience of court orders was also stressed by Odunga – J in **Republic –vs- Kenya School of Law & 2 others Exparte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR** when he held as follows:

> "***Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the court."***

Learned counsel in his affidavit gave a chronology of events as he went about serving the court order upon the 1st respondent's officials who were not ready to comply with the same. Ordinarily, it was supposed to be the 1st respondent moving to court to seek clarification of the court order if they felt that they needed some clarification but instead they left the ball to the Applicant to come back to court to seek clarification. The 1st Respondent's officers appear to have scoffed at the court order on the ground that as far as their actions were concerned they were home and dry and did not see the need to come back to court to seek clarifications. They were clearly evading the order forcing the Applicant's counsel to come back to court for clarification. It was improper for the 1st Respondent to reject or dismiss the order offhand.

Be that as it may, the parties have now presented their respective standpoints. It is instructive that none of the parties herein has urged me to set aside, vary or discharge the said court order and hence the same is still in force. The said order of stay was in tandem with prayer No. 6 of the Applicant's chamber summons dated 29/06/2020 and which is deemed to have been granted. The effect of the same was to stop the 1st Respondents decision making process which began on 25/06/2020 and ended on the 2/07/2020. It was agreed by both learned counsels that the issue of the cancellation of the applicants licence be canvassed elsewhere in another suit. It is my considered view that the grant of stay in terms of prayer No. 6 of the chamber summons dated 29/06/2020 had the effect of placing the parties in the position they were (status quo ante) prior to the action. This is the status quo needed to be preserved pending the final determination of the claim for judicial review. If this is not preserved, then the entire proceedings would become academic in nature. The dictates of fairness demands that a party should not be allowed to steal a match from the other. The status quo order having been sustained, the next course of action is the determination of the substantive notice of motion. As earlier directed the same is scheduled for mention for directions on the 20/07/2020 which is about a week away. The same will be disposed of within the shortest time possible and hence no prejudice will be suffered by the 1st respondent and that there will be minimal effect on the public interest element. I am persuaded by the decision in the case of **R (H) Vs Ashworth Special Hospital Authority (Supra**) that this is a fit case for granting stay pending determination of the substantive motion. Even though counsel for the 1st Respondent maintains that the decision had already been made, the special circumstances of the case does warrant a grant of stay as long as the Judicial Review proceedings are fast tracked. Learned counsel for the 1st respondent has also claimed that the applicant's licence has already been cancelled and that matter is already overtaken by events. That assertion is not correct as parties have confirmed that the issue of the cancellation of licence will be addressed in another suit. That being the position, the 1st respondent ought to hold its horses and ventilate its case in the substantive motion due to be adjudicated upon.

9. As regards the last issue and in view of the foregoing observations, I allow the Applicant's application dated 1/07/2020 in the following terms:

> ***(a) The order made on 30/06/2020 that leave was to operate as a stay automatically meant that prayer No. 6 in the chamber summons dated 29/06/2020 was deemed to have been allowed pending the determination of the substantive notice of motion.***
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> ***(b) The OCS Mlolongo police station is hereby ordered to assist in the enforcement of the Order herein above.***
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> ***(c) Mention on 20/07/2020 for directions on the disposal of the substantive notice of motion.***
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> ***(d) Each party to meet their own costs.***

It is so ordered.

Dated and delivered at Machakos this 14th day of July, 2020.

D. K. Kemei

Judge