



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 19 OF 2019

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI
AND PROHIBITION**

AND

IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF: THE ARBITRARY CESSATION ORDER ISSUED BY THE COUNTY COMMISSIONER KWALE
COUNTY**

BETWEEN

SKYDIVE DIANI CLUB.....EX PARTE APPLICANT

AND

1. MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT

2. COUNTY COMMISSIONER KWALE COUNTY.....RESPONDENTS

RULING

1. On 15th April, 2019 the Ex parte Applicant herein was, vide his application by way of Chamber Summons dated 15th April, 2019 given the leave to commence Judicial Review proceedings herein within 21 days. The Court also directed that the said leave would not operate as stay of the decision made by the Respondent to close the business of the Applicant.

2. On 16th April, 2019, the following day, the Ex parte Applicant filed a Notice of Motion seeking inter alia orders allowing the Ex parte Applicant to immediately resume business operations namely leisure sport skydiving while in observance of such conditions as the Court may give in the interim pending the hearing of the said application inter partes. In essence this is the application before the Court.

3. The Applicant seeks the following orders:

(i) That this Application be certified urgent and be heard *ex parte* in the first instance.

(ii) That pending the hearing of this Application, an Order does issue allowing the Ex-Parte Applicant to immediately resume business operations namely leisure sport skydiving while in observance of such conditions as this Honourable Court may issue.

(iii) That pending the hearing of the substantive Judicial Review motion filed herein and dated 15th April, 2019, an Order does issue allowing the Ex-Parte Applicant to immediately resume business operations namely leisure sport skydiving while in observance of such conditions as this Honourable Court may issue.

(iv) That the Respondent be commanded by this Honourable Court to submit, file and serve within 72 hours, any reasons or grounds for their letter dated 10th March, 2019 addressed to the Ex-Parte Applicant to cease operations.

(v) That this matter be mentioned on Thursday, 18th April, 2019 for directions and to confirm compliance with this Honourable

Court's Orders by all parties.

(vi) That the costs of this Application be costs in the cause.

4. The application is premised on the grounds set out therein and is supported with affidavit sworn by **Gary Lincoln** on 16th April, 2019.
5. The Applicant's case is that their business has been arbitrarily suspended by the government of Kenya through the Respondent on the 10th of March, 2019 who issued an illegal letter instructing the Applicant to cease operations until "further notice" with no sound explanation whatsoever of the reasons thereof or any indication at all of any breach in law or other reason for the said order. The Applicant states that it has severally and actively requested for a proper explanation of the said directive and/or an indication of any compliance measures that the office of the county commissioner requires, but besides confirming receipt of the requests, no response whatsoever has been forthcoming. The Ex-Parte Applicant states that it has operated peacefully and in full compliance with the laws of Kenya and all by laws of the County and Country for the last six years. No indictment whatsoever and or notice of delay or failure to comply or abide with any law has ever issued against it by any authority in any manner or form and that the Ex-Parte Applicant is a law abiding entity in all respects. The Ex-Parte Applicant now finds itself in an extremely difficult and volatile situation for the following reasons:
- a) The Ex-parte Applicant has a staff of 559 individuals on full employment with no other source of income. The total payslip of the employees of the Ex-parte Applicant is the sum of Kshs. 9,500,000.
 - b) The Respondent has thus far, illegally suspended the Ex-Parte Applicants business for a total of 5 weeks with no explanation, any disclosed grounds or compliance items that the Ex-Parte Applicant has failed to, or is supposed to comply with or any such other communication of breach of any law, by-law or regulation whatsoever.
 - c) For the period of 5 weeks the Ex-Parte Applicant has had to pay its employees plus related expenses from its saved resources, but its resources have now truthfully and honestly been depleted and it cannot further sustain the employees salaries for any more than 3 days from the date hereof.
 - d) The Ex-Parte Applicant has a total membership of 2952 members who have a refundable membership fee of USD 300 per member, which sum, in the event of the club's incapacity to provide the contracted services is refundable in whole to the members.
 - e) In the event that the Ex-Parte Applicant cannot resume business within 3 days hereof, and shuts down, refunds for the sum of **USD 885,600** fall due from it to its members. The Ex-Parte Applicant cannot and does not have the financial might or capacity or ability to obtain financing for the same.
 - f) Thus far, 120 members who have been unable to access the skydive activities that they joined the club for have demanded and obtained refunds totalling the sum of USD 36,000 as at 14th April, 2019 and the amount keeps growing everyday with 16 further demands having been made between the 15th April, 2019 and 16th April, 2019.
 - g) That as at 16th April, 2019, a total of 162 applications for membership have been pending, which the Ex Parte Applicant cannot accept or process due to the Respondents illegal directive, thereby losing, as of midnight 15th April 2019 a sum of USD 48,600.

6. The Ex parte Applicant states that it is fully and properly licensed. The regulatory and licensing authority, being the Kenya Civil Aviation Authority (KCAA) has found absolutely no fault with the Applicant's business and operations and indeed has issued a letter of no objection dated 3rd April, 2019, confirming compliance and allowing the Applicant to continue with skydive operations over Diani beach. (attached to supporting affidavit and marked **GL-4** is a copy of KCAA letter dated 3rd April, 2019 giving their full approval to proceed with usual operation).

7. The Ex parte Applicant states that it is imperative that an order does issue to safeguard the Applicant's members club from total destruction and collapse, the livelihoods of its employees and their families from utter jeopardy, its members from arbitrary denial of a right to engage in free and legal sport, as well as to restrain the 1st and 2nd Respondent from illegally attempting to gain via threats and extortion. The Ex parte Applicant states that it would be profoundly sad for an entity that has brought back a dwindling tourist industry to Kenya's renown and award winning beaches and created employment to hundreds of Kenyans to be sacrificed at the alter of extortionist and selfish personal gain by selfish individuals. The Ex parte Applicant states that no fathomable prejudice can possibly be suffered by the Respondents or any other party if the Orders sought herein are granted. The Ex-Parte Applicant has legally been in operation for 6 years with full compliance with the law and with no indictment whatsoever.

The Response

8. The application is opposed vide Grounds of Opposition dated and filed herein by the 1st Respondent on 17th April, 2019 and a Replying Affidavit sworn by **Inspector Wesly Lagat** on 24th April, 2019. The 1st Respondent's case is that the application is misconceived, frivolous, vexatious and an abuse of the process of the court. That the Applicant is guilty of material non-disclosure having failed to disclose to this Court that it has been illegally training members of foreign Armed Forces within Kenya and exposing Kenya to serious security risk. That members of the Zambian Defence Forces have been clandestinely using the Applicant's Club as a training facility and the Applicant failed, refused and/or neglected to bring this to attention of the National Security Council, Ministry of Defence, Ministry of foreign affairs, Minister of Interior and Coordination of National Government in contravention of the law and procedure. That only after a fatal accident involving a member of the Zambian Defence force at the Applicant's facility did it come to the fore that the Applicant was using its facility in training members of the Zambian Defence Force in the practice of military exercises contrary to section 65 of the Penal Code. The Respondents state that training, drilling and/or engaging in the practice of military exercises without permission is an offence under Section 65 of the Penal

Code, and that there are ongoing investigation which may be frustrated by grant of the orders sought. Further, the Applicant has allegedly contravened section 14(4) of the National Security Council Act by disclosing confidential information without authorization and there is risk of further contravention if the orders sought are granted.

Submissions

9. Parties made oral submissions in Court on 25th April, 2019. Mr. Gitonga for the Applicant submitted that the Replying Affidavit by the 1st Respondent is mainly about a discussion about an incident that happened during conduct of Applicant's skydiving operations. One of the guests had a fatal accident. He was a Zambian Military Officer. It is the 1st Respondent's contention that the letter dated 10th March, 2019, (page 62 of bundle) communicating the decision of the government to stop operations of the Applicant does not give the reasons for the action. It just mentions serious security related lapses. The Ex parte Applicant enquired about those lapses but there were no explanations. Mr. Gitonga submitted that the Applicant has not hidden any aspects of their operations. The KDF and Zambia Military in fact had a meeting at the site. The Applicant has operated in Kenya for 6 years and has never been at loggerheads with the law. Counsel submitted that the Kenya Civil Aviation Authority (KCCA) has actually issued a statement after the incident. The letter is dated 3rd April, 2019 (page 26). So the regulating authority has no problem with the Ex parte Applicant. There is no prejudice whatsoever if the Applicant resumes its business. The Ex parte Applicant has committed to cooperate with the Respondents and to provide a list of those who will be skydiving within a period of 24 hours. Mr. Gitonga submitted that if the orders sought herein are not granted the Applicant cannot survive the next 24 hours. They have 597 employees and pay salary of more than Kshs. 9.0 million per month. The Skydive is a membership entity and members have a right to associate. If the orders prayed for are not granted members will withdraw their membership at serious costs to the Ex parte Applicant.

10. Mr. Nguyo Wachira for the 1st Respondent submitted that the office of the DCI opened an Inquest File No. 3 of 2019 over this case. The DCI visited the Applicant's enterprises at the Sky Dive Diani for purposes of investigations and to confirm a report of an incident about a foreign security officer at the club. The incident was reported vide OB/62/19/2/2019. That fourteen (14) Zambian military officers had checked in at Diani Beach Club on 12th February, 2019 and were to check out on 4th May, 2019. The Military Officers were attending a course of sky-diving conducted by a Mr. Gary Lincoln, an officer of the Ex parte Applicant. The counsel submitted that the 14 Zambia Airforce Paratroopers had travelled to Kenya on tourist visas yet their intention was to "train". This crucial fact ought to have been disclosed by the Ex parte Applicant to the Kenyan authorities. It was submitted that the investigations revealed that, during a "training" session on 19th February, 2019 one military officer by name **DAVID PUMULO** holder of a Zambian passport No. ZN282945 lost his life allegedly when his parachute malfunctioned. The Directorate of Criminal Investigations, Diani Police Station Kwale County is investigating the circumstances of the death of the said foreign security Officer. The Ex parte Applicant knew that the trainees were Zambian/foreign military men on Kenyan soil and proceeded to conduct the training without informing Kenyan Government authorities. Mr. Nguyo submitted that in the era of terrorism, this was a very serious security lapse leading to the consideration of termination of the sky-diving training to identify the extent of these trainings in relation to the security risk that had been created. The 14 military men were led by a **Lieutenant Colonel INAMBWAE MAYBIN MUTENEKO** who indicated that the Zambian Government had paid money to the Ex parte Applicant's Mr. Gary Lincoln to train the Zambian Airforce men. The Zambian Air Force Commander was aware of this training but these facts were never disclosed to the Kenyan Security Agencies. The Ex parte Applicant hid this information from the Government and/or security agencies. This deliberate act of omission is a serious security breach which must be investigated while the facility remains closed.

Determination

11. I have carefully considered the application before the Court. The application appears to be seeking the orders of stay which were prayed for, but were not granted in its Chamber Summons dated 15th April, 2019. Hon. Lady Justice Njoki Mwangi specifically, upon granting the leave, directed that the said leave would not operate as stay of the decision made by the Respondents regarding the resumption of business by the Applicant. Under Order 53, where a Court declines to grant an order allowing the leave to operate as stay, the Applicant can still urge the issue of stay inter partes within the said Chamber Summons or within the substantive motion for Judicial Review orders. That did not happen in this matter. What happened is that instead, the Ex parte Applicant filed this current application on 16th April, 2019, despite having filed the substantive Notice of Motion for Judicial Review orders on 15th April, 2019. An application for Judicial Review orders is a special kind of application the grant of which depends on different considerations from other applications. The grant of Judicial Review orders is also fairly discretionary on the Court. The Judicial Review orders are also grantable under Article 47 of the constitution or under the Fair Administration Actions Act. Therefore, a party seeking Judicial Review orders against excessive executive authority is always better off staying the course of Judicial Review. In this case, the Application dated 16th April, 2019 although is stated to be brought under Order 53, is not the application for which the leave was sought vide Chamber Summons dated 15th April, 2019. The effect is that this application is an ordinary application not within the realm of Judicial Review, and for which no leave was sought. The application is indeed an attempt by the Ex parte Applicant to circumvent the denial of the stay which was requested in the Chamber Summons dated 15th April, 2019. The Ex parte Applicant, having not been granted stay, ought to have pursued the issue of stay in the said Chamber Summons inter partes. To file a completely separate application for orders which for all intent and purposes, if granted, amount to granting the said stay, is not proper. In my view the Applicant has two options: to pursue the issue of stay in the Chamber Summons dated 15th April, 2019; or alternatively, having already filed the substantive Notice of Motion on 15th April, 2019, have the said Notice of Motion heard and determined. That is the motion for which the leave of this Court was granted on 15th April, 2019. Accordingly, the Notice of Motion herein dated 16th April, 2019 is dismissed. There shall be no orders on costs.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 6th day of May, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Gitonga for Ex parte Applicant

Mr. Mkok holding brief Mr. Wachira for Respondent

Mr. Kaunda Court Assistant