REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW, CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 132 OF 2014 CONSOLIDATED WITH PETITION NO. 129 OF 2014

IN THE MATTER OF ARTICLES 22, 23,159,258 AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE VIOLATION OF ARTICLES 10, 29, 35 AND 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE VIOLATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT, CAP 514 LAWS OF KENYA

THE FACTORIES AND OTHER PLACES OF WORK ACT AND THE FACTORIES AND OTHER PLACES OF WORK (FIRE RISK REDUCTION) RULES

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

JOANINAH WANJIKU MAINA.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

AND

TRATTORIA LIMITED.....INTERESTED PARTY/APPLICANT

RULING

1. In the judgment rendered on 21st July 2017, this court, differently constituted, found that the consolidated petitions had merit and allowed them in the following terms:-

a. ***An order of prohibition*** *be and is hereby issued permanently prohibiting the Director of Public Prosecutions and or the Inspector General of Police from summoning, interrogating, arresting, investigating, instituting or continuing with any criminal prosecution against the petitioner or her agents in connection with or relating to Complaints lodged by Trattoria Limited or its Director or Agent or managing Director, and one* ***Gaetano Ruffo*** *touching on or Relating to any offences allegedly arising from or connected with the alleged malicious damage to the interested party's property at Land Reference Number 209/2362, Town House, Nairobi.*

b. ***A Declaration*** *be and is hereby issued declaring that the County Government of Nairobi has violated the petitioners rights under article* ***35*** *of the constitution.*

c. ***An order of Mandamus*** *be and is hereby issued compelling the County Government of Nairobi to produce to the court and serve the petitioner with copies of all the documents relating to the application for approval and the approval for the installation of commercial L.P.G. gas cylinder, cold room storage, water tanks and smoke extractor including all building plans, approvals and*

*minutes of meetings relating to the approval process for the fire exit and fire assembly points for Town House located at **L.R. No. 209/2362**, Nairobi, within **30** days from the date of this judgment.*

d. ***An Order of certiorari** be and is hereby issued to bring to this court to be quashed the approvals granted by the County Government of Nairobi for installation of water tanks, smoke extractor, L.P.G Gas cylinder and cold storage installed at the fire exit and fire assembly point at Town House, Nairobi on **L.R. No. 209/2362**, Nairobi.*

*e. **That** the Respondents do pay the costs of this petition to the petitioner.*

2. Aggrieved by the said judgment and orders, the applicant herein (Trattoria Limited), who was the interested party in the said petitions, immediately filed a Notice of Appeal and an application dated 21st July 2012 which is the subject of this ruling. In the said application, which is expressed to have been filed pursuant to Section 1A, 1B, and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, the applicant sought the following orders:-

a) This application be certified as urgent.

b) Pending the hearing and determination of this application, this Honourable court be (sic) restrain the petitioner by herself, agents, employees or proxies from removing, and or in any way whatsoever destroying the interested party's water tanks, smoke extractor, LPG gas Cylinder and Cold storage.

c) Pending the hearing and determination of this application from the Honourable Court be pleased to stay its judgment delivered on 21st July 2017.

d) That this Honourable Court be pleased to stay its Judgment delivered on 21st July 2017, pending the hearing and determination of the interested party's Appeal from the judgment and orders of the Hon. Justice John Mativo, delivered on 21st July 2017.

e) The costs of this application be in the cause.

3. The application is premised on the grounds, *inter alia*, that the net effect of the order appealed against is that the said water tanks, smoke extractor, LPG Gas Cylinder and Cold Room Storage (hereinafter **"the equipment"**) necessary for the operation of Interested Party's hotel business, are in place without approvals and that the interested party intends to appeal against the said decision. The applicant's further ground is that it is apprehensive that despite the fact that it has the duly approved plans and valid clearance certificates from all the relevant authorities, the petitioner/respondent will proceed and remove and/or damage its equipment thereby prejudicing its appeal. The Interested Party's case is that it had invested heavily in its hotel business and was apprehensive that the execution of the orders appealed against could have the net effect of paralyzing its said business whose operations are solely dependent on the existence of the said equipment.

4. The application is supported by the affidavit of **Gaetano Ruffo**, the interest party's Managing Director who repeats the grounds stated in the body of the application and reiterates that the intended appeal has high chances of success. He further states that it was prejudicial for this court to proceed and quash the approvals before the same were presented to court within the time prescribed by the court in the impugned judgment. He attached copies of documents that he described as the approved plans and certificate of occupation to his affidavit as annexure "**GR-2"**.

5. The petitioner/respondent opposed the application through her replying affidavit sworn on 24th October 2017 wherein she deposes that she is the owner of *Land Reference Number 209/2362, Town House, Nairobi* (hereinafter **"the suit premises"**) in which the Interested Party is one of her 40 tenants. She states that the suit premises has 2 fire assembly points and one fire exit and that neither the interested party nor any of the respondents had denied that the interested party's gas cylinder and cold room storage had blocked the fire exit on the ground floor and that similarly, it had not been denied that the four water tanks and smoke extractor were on the fire exit and assembly points of the suit premises thereby blocking the said exit points and potentially hampering escape from the suit building in the event of an emergency.

6. The petitioner maintained that the court had found that interested party had placed its said equipment on the fire exit and assembly points contrary to the law and that therefore an order of stay of the court's judgment would be tantamount to maintaining a status quo that could pose a hazard/ risk not only to the occupants of the suit premises but also to members of the public at large.

7. It was the petitioners case that public health and safety could not be traded at the expense of the applicant's profits and that the interested party could still restore its equipment to the said fire exit and assembly points should it be successful in the intended appeal.

8. On 26th July 2017 this court granted the applicant interim orders of stay pending the hearing and determination of this application after which the parties agreed to canvass the application by way of written submissions which they highlighted during the hearing when counsel for the 1st, 2nd and 3rd respondents informed the court that they did not oppose the instant application.

INTERESTED PARTY/APPLICANT'S SUBMISSIONS

9. Counsel for the interested party submitted that this court has the discretion to allow the application as long as certain conditions are met, namely; that the applicant establishes that there is sufficient cause to order stay and that secondly; substantial loss would ensure if the stay was not granted. Counsel relied on the decision of Tuiyott J in the case of **Imperial Bank Limited (in Receivership) & 2 Others vs Alnashir Popat & 17 Others [2017] e KLR** wherein it was held:

"When the High Court considers an application to stay proceedings in its trial jurisdiction its discretion is fettered by two important conditions. That there is sufficient cause to order stay, that is, that Substantial loss would ensue from a refusal to grant stay. Secondly, that the application is brought without delay. As the Trial Court, the High Court need not consider whether or not the Appeal against decision is arguable. Indeed it is a most embarrassing prospect for The court to re-evaluate and comment on the correctness or otherwise of a decision it has made and it the subject of Appeal. This Court therefore agrees with the argument that, at least when it sits as trial court resolving an application for stay of execution or proceedings pending appeal, the merit or otherwise of an intended Appeal is an extraneous consideration".

10. On the issue of sufficient cause counsel submitted that the interested party had an unfettered right to go to the Court of Appeal to have his appeal heard and that irrespective of the outcome of the appeal, the subject matter ought to be preserved should he win the appeal.

Counsel reiterated that the interested party's business was wholly dependent on the availability of water tanks, cooking gas, smoke extractor and cold room storage and that the quashing of the approval for the said items would translate into the closing down of the entire business that employs at least 80 people on permanent basis, thereby rendering the intended appeal nugatory.

11. While citing the decision in **Tropical Commodities Supplies Ltd & Others vs International Credit Bank Ltd (in liquidation) [2004]2 EA 331** Counsel submitted that all the safety measures were in place and that the court needed to note that substantial loss may result as opposed to mere speculation and apprehension. He further argued that the petitioner will not suffer any prejudice should the orders of stay sought be granted considering that there was already an order of temporary stay pending the hearing and determination of this application and further that there had been no complaints from the occupants of the suit premises regarding their occupation since the interim stay orders were granted.

PETITIONERS SUBMISSIONS

12. Miss Kilonzo, learned counsel for the petitioner, submitted that the interested party's equipment, whose approval was the subject of the judgment delivered on 21st July 2017, are not placed on the interested party's section/portion of the rented premises, but were placed at the fire exit and fire assembly points of the suit premises thereby posing real danger to the occupants of the suit building and the public in general should a fire incident occur during the pendency of the appeal because the tenants evacuation would be inhibited by the said equipment.

13. Counsel referred to the experts reports that had earlier been filed in court which showed that the equipment was not only a safety risk but also a breach of statutory safety requirements. She further stated that this court had in its own judgment found that the equipment were a risk to public safety and that their approvals were a breach of law in which case, allowing the application would be akin to allowing the interested party to operate in breach of the law.

14. Counsel submitted that the 1strespondent was found to have breached the petitioners right to information under Article 35 of the Constitution thereby prompting the court to issue orders of mandamus compelling 1st respondent to file and serve documents relating to the application for approval and approvals of the installation of the equipment within 30 days from the date of the impugned judgment which days had already lapsed way back in August 2017 yet the same had not been filed in court. Counsel argued that the interested party would not suffer any loss should the 1st respondent comply with the court order relating to the said approvals. Counsel took issue with the interested party's production of new documents that did not form part of the case during the hearing of the petition while arguing that this was not an application to set aside or review a judgment upon discovery of new information.

15. Counsel urged the court to conclude that the reason the 1st respondent had not availed the approvals in court as ordered by the court on 21st July 2017 was because the said approvals did not exist and added that if the interested party was satisfied that it had a right to do business in the fire exit and assembly points, then it could still obtain the approvals as required by the law.

16. The petitioner's case was that the impugned judgment was directed to the 1st respondent and required no action from the Interested Party. Counsel urged the court to consider the application in a holistic manner and balance the applicant's commercial interests with the interests of the other tenants and the general public and their right to a safe building.

ANALYSIS AND DETERMINATION

17. Upon careful consideration of the instant application and the petitioners response and upon considering the parties respective submissions, I note that the main issue for determination is whether the applicant is entitled to the orders of stay of execution sought.

18. The present application was expressed to have been brought under Order 42 Rule 6 of the Civil Procedure rules which deals with applications for stay of execution pending appeal. The relief is discretionary but as has been severally been stated, the discretion must be exercised judicially, which means, judiciously and upon defined principles of law and not capriciously or whimsically. For the above reasons, an application for stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether or not sufficient cause has been shown, the court should be guided by the three conditions and prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules which are as follows:

a) The application is brought without undue delay;

b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and

c) 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.

Application timely

19. As I have already noted in this ruling the impugned judgment that is the subject of the intended appeal was delivered on 21st July 2017 which is the same date that the instant application was filed and on that score, I find that the application was presented to court timeously and therefore fulfils the first condition for grant of order of stay.

Security

20. The Applicant did not offer or propose to give any security for the due performance of the decree herein. Security is normally offered as a sign of good faith that the Applicant is ready and willing to commit to giving security. My reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security the applicant should give as may ultimately be binding on the applicant. In this regard I find that whether or not this court will order for security will depend on if it ultimately finds that the instant application is merited.

Substantial loss

21. Of the three prerequisites to the granting of orders of stay of execution, substantial loss occurring can be said to be the most critical consideration as it has the effect of giving a pointer on whether or not the intended appeal, if successful, will be rendered nugatory should the stay sought be denied. In the case of ***Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018*** the Court of Appeal stated that:

> ***"It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay"***

22. In the case of ***Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001***, (unreported) the court observed as follows;

> ***"Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay".***

23. In ***Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63***, it was held as follows;

> ***"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars… where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."***

24. The question which arises from the above cited cases is whether the Applicant has discharged the onus of establishing that it will suffer substantial loss if the stay sought is not granted. As was stated in ***Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto:***

> ***''The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...''***

25. Guided by the above cited case, I am of the view that the Applicant needed to show that its business will be totally ruined in relation to the appeal unless the impugned judgment is stayed pending the appeal. At this point it would be important to revisit the exact orders that the applicant seeks to stay. As a starting point, it is worthy to note that the orders in question were specifically directed to the 1st respondent, the County Government of Nairobi, and not the applicant herein. The applicant has not shown, for example, how it stands to suffer if the 1st respondent complies with the court order by *producing to the court and serving the petitioner with copies of all the documents relating to the application for approval and the approval for the installation of commercial L.P.G. gas cylinder, cold room storage, water tanks and smoke extractor including all building plans, approvals and minutes of meetings relating to the approval process for the fire exit and fire assembly points for Town House located at* ***L.R. No. 209/2362****, Nairobi, within* ***30*** *days from the date of the impugned judgment.*

26. In fact, in as much as the applicant complains that the court went ahead to quash the approvals in relation to its equipment before the expiry of the 30 days it had granted to the 1st respondent to submit and serve the said approvals, the applicant is silent on whether or not the 1st respondent complied with the said order within the 30 days or at all so as to justify its claim that the order quashing the said approvals should be stayed. This court notes that to date, almost one year after the judgment was delivered, the 1st respondent has not submitted the said approvals to court and further, even assuming that the said approvals could not be traced within the 30 days period granted by the court, the applicant has not demonstrated that the same were subsequently issued to it so as to correct the safety requirement which this court had found to be wanting in view of the fact that the applicant's equipment are placed at the fire exit and assembly points of the suit premises.

27. The applicant argued that its entire business would come to a halt if the approvals relating to the equipment, which are critical to its operations, are quashed. This court notes that nowhere in the impugned judgment did the court stop the applicant from carrying on its business. The dispute before the court revolved around the fact that the equipment is placed at the fire exit and assembly points of the suit premises without approval thereby posing danger to the occupants of the suit building and the public at large in the event of a fire or any

other emergency. The applicant has not shown that there is no other place, in the suit premises, where it can place its equipment without endangering the lives of the other occupants so as to justify its position that the status quo should be maintained pending its intended appeal. Furthermore the applicant has not demonstrated that there is no other place that it can conduct its business other than in the suit premises. As I have already stated in this ruling, it is now almost one year since the impugned judgment was delivered and my humble view is that the one year is sufficient period for any prudent businessman to make good its position regarding the approvals or to seek alternative ways of conducting its business in a safer environment without endangering the lives of other people.

28. I find the applicant's argument that the status quo in the building should be maintained because none of its occupants has complained to be not only naïve and simplistic but also untenable since the requirement for the fire exit and assembly points is a mandatory statutory requirement whose real benefit can only actualize in the event of a fire and it would therefore be foolhardy to wait for a disaster to happen before safety precautions are put in place.

29. In the impugned judgment that is the subject of the intended appeal, this court found, as a fact, that it was not disputed that the 1st respondent had issued notices to the petitioner to remove the interested party's equipment from the fire escape and fire assembly points. The court also found that it was further not disputed that the National Environment Management Authority among other government and private agencies recommended the removal of the equipment from the fire exit and assembly points while citing the numerous statutory requirements relating to the safety of the occupants of the suit building. This court cannot lose sight of the fact that the petitioner filed the petitions, whose outcome is the subject of this application, following threats of prosecution from the respondents for failing to remove the said equipment from the fire exit and assembly points for lack of the requisite approvals. At the time, the interested party claimed that it had the requisite approvals from the 1st respondent to place the said equipment at the fire exit and assembly points and this is what prompted the petitioner to seek orders to be supplied with the proof of the said approvals and maintain that if such approvals existed, then they ought to be quashed because they were issued contrary to the laws governing safety and occupation of buildings.

30. I therefore find that the applicant cannot take solace or cover under its claim that this court prematurely quashed the said approvals before the expiry of the 30 days period that had been granted to the 1st respondent to avail them in court because to date, the 1st respondent has not demonstrated that it indeed has the approvals. This court cannot help but read mischief in the 1st respondent's position that it does not oppose the instant application yet it is the party that holds the key to the big question regarding the existence, or lack thereof, of the all-important approvals that are the subject of these entire proceedings. My take is that if indeed the said approvals existed, nothing would have been easier than for the 1st respondent to avail them in court, even after the 30 days period granted in the impugned judgment so as to bring the issue of their existence to rest.

31. The applicant's case was that it had invested heavily in its hotel business whose operations would be greatly affected unless the orders quashing the approvals were stayed. My finding is that an individual's business gains or profits cannot supersede the health and safety of the public at large. As is stated in ***Black's Law Dictionary, 9th Edn***. "public interest" is the general welfare of the public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

32. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Supreme Court held that in the context of the Constitution of Kenya 2010, an additional condition that the stay of execution be in the public interest needs to be included in the prerequisites listed under Order 42 Rule 6 of the Civil Procedure Rules before the order is granted. I find that in as much as this court is under an obligation to protect the business interests of a party, the court owes a much bigger responsibility to the protect the public interests and therefore, after weighing the public interest to health and safety vis a viz the applicant's business interests, I come to the irresistible conclusion that the public interest far outweighs and cannot be compromised at that alter of an individual's business interests. In making this finding, I am guided by the decision in the case of **Konway vs. Limmer [1968] 1 All ER 874** wherein it was held that there is the public interest that harm shall not be caused to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

33. This court takes judicial notice of the fact that numerous disasters and tragedies have recently been reported in various parts of the country which tragedies could easily have been avoided or mitigated if proper safety measures were put in place by various investors and enforced by the safety regulation agencies. It is for the above reason that I find that this court would be abdicating its responsibility to the public if it allowed a potentially dangerous status quo to persist on the basis that an appeal is pending. In any event, no material in the nature of an expert's report was placed before this court to counter the petitioner's position that the placing of applicant's equipment at the fire exit and fire assembly points did not pose any danger to the occupants of the suit building and the public at large.

34. My humble view is that in the instant case, public safety cannot be negotiable as the damage including loss of life and property that could occur in the event of a fire or any other emergency in the suit building given that the fire exit and assembly points are blocked, can be of catastrophic and monumental proportions incapable of remedy by way of damages. Therefore I find it ironical that the applicant, who stands to be the biggest loser or casualty in the event of a fire in the suit premises is the one seeking to perpetuate the status quo that has been found to be dangerous.

35. Having regard to the above factors, findings and observations, I reiterate that it goes without saying that granting the orders sought by the applicant in the instant application would result in maintaining a status quo that presents real potential danger not only to the occupants of the suit premises, but also the public in general whose escape and evacuation would be hampered by the interested party's said equipment in the event of an emergency.

36. In the end, I find that the application dated 21st July 2017 lacks merit and I hereby dismiss it with costs to the petitioner/respondent herein. Consequently, the interim orders of stay pending appeal earlier granted by this court are hereby vacated.

Dated, signed and delivered in court at Nairobi this 11th day of June 2018

W.A. OKWANY

JUDGE

In the presence of

Otieno for the interested party/applicant.

Miss Awuor holding brief for Miss Kethi Kilonzo for the petitioner

Miss Spira holding brief for Miss Obuo for the 3rd respondent

C.A. Kombo