REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO. 292 OF 2016

In the matter of an application for Judicial Review Orders of Prohibition, Certiorari and Declaratory Orders.

and

In the matter of Wananchi Group Holdings Limited, Wananchi Programming Limited and Wananchi Satellite Limited.

and

In the matter of Articles 10, 47, 20 (1), 20 (2), 20 (4), 23 (1), 21 (3) of the Constitution of the Republic of Kenya.

and

In the matter of The Tax Procedures Act No. 29 of 2015

and

In the matter of the Fair Administrative Action Act, No. 4 of 2015

BETWEEN

Republic..Applicant

versus

Kenya Revenue Authority..1st Respondent

Wananchi Nominees Limited..2nd Respondent

International Consulting Marketing Services Limited......3rd Respondent

East Coast Telecoms Limited...4th Respondent

and

Richard Bell..*Ex parte* Applicant

RULING

1. The background relevant to this ruling is that on **8th** March 2018, the Court allowed the second, third and fourth Respondents application enjoining them to these proceedings. The *ex parte* applicant fiercely opposed the said application. Additionally, he asked the Court to strike off several paragraphs in applicants affidavit. The Court agreed and expunged the paragraphs but nevertheless allowed the application on condition that the second, third and fourth Respondents would file affidavits without making disclosures with regard to certain matters relating to orders made on **15th** March 2017 in HCC **84** of 2017.

2. Aggrieved by the said order/Ruling, the *ex parte* applicant filed the application the subject of this ruling seeking to stay the said order/ruling pending the hearing and determination of his intended appeal against the said ruling in the Court of appeal.

3. In support of the application is the supporting Affidavit of **Mr. Richard Bell,** the ***ex parte*** applicant. He avers that the second, third and fourth Respondents applied to be enjoined in these proceedings as Respondents, that he opposed the application and successfully sought to have paragraphs **6** to **37** of the supporting affidavit struck off, but the Court nevertheless allowed them to be enjoined on condition that they should not rely on the said paragraphs.

4. **Mr. Bell** also averred that he is aggrieved by the said ruling and intends to appeal on grounds that having struck off the said paragraphs, the Court failed to appreciate that the remaining grounds were not sufficient to form sufficient basis to allow the application and that if this application is not allowed, the appeal will be rendered an academic exercise.

First Respondent's Response to the application.

5. On record in opposition to the application is the Replying affidavit of **Mr. Philip Munyao**, a supervisor within the first Respondents Large Taxpayers Office in the Domestic Taxes dated **26th** March 2018. He averred that his duties include carrying out compliance checks and audits to ensure accuracy of self assessments made by taxpayers and compliance with legal requirements.

6. He averred *inter alia* that the dispute herein arose from the decision of the first Respondent to appoint the *ex parte* applicant as a tax representative of Wananchi Group Holdings Ltd, Wanacnhi Prgramming Ltd and Wananchi Satellite Limited which decision the *ex parte* applicant challenges in these Judicial Review proceedings. Further, he averred that the ruling sought to be stayed in this application allowed the second, third and fourth Respondents to be enjoined in these proceedings and to file an affidavit(s) which does not touch on the facts of the other suits pending before the Court. He further averred that should they defy the sad Court order, the applicant has the option of applying for the same to be expunged from the record. Also, he averred that the applicant has not demonstrated any ground(s) to demonstrate that the intended appeal will be successful.

Second, Third and Fourth Respondents Replying Affidavit.

7. **Mr. Joe Kamau**, the Chairman of the Board of Directors of the second Respondent on behalf of the second, third and fourth Respondents swore the Replying Affidavit dated **10th** April 2018. He averred *inter alia* that the Court determined that the second, third and fourth Respondents had demonstrated that they deserve to be heard in opposition to the substantive motion, and that the Court directed that Replying Affidavits to be filed must be limited to reasons why the second, third and fourth Respondents are persuaded that the *ex parte* applicant was correctly appointed as tax representative of Wananchi Group Limited (See paragraph **47** of the Ruling). He also averred that the right to appeal does not confer any right to stay execution and that the applicant has not satisfied the conditions for granting stay. Also, he averred that the intended appal has n possibility of success.

Applicants supplementary affidavit.

8. The *ex parte* applicant filed the supplementary Affidavit dated **23rd** May 2018 stating that any information the second and third Respondents have can be transmitted through the first Respondent, and, that the he will suffer substantial harm if these proceedings are not stayed.

Issues for determination.

9. I find that only one issue falls for determination, that is, whether or not the applicant has demonstrated any grounds for the Court to grant the stay sought.

10. **Miss Omondi**, counsel for the *ex parte* applicant submitted cited that the application meets the test for stay as laid down in Kenya *Power & Lighting Co Ltd vs Esther Wanjiru Wokabi.*[1] The tests in her submission are that the appeal is arguable. To buttress her point she argued that having struck off the offending paragraphs, the remaining paragraphs were not sufficient to warrant granting the orders. Further, she argued that if the stay is refused, the appeal will be rendered nugatory.[2] Further, she submitted that court resources will be used un necessarily by having parallel court proceedings, hence the need to stay this case.[3] She also argued that the applicant will abide by any conditions this Court may impose as a price for stay.

11. **Mr. Nyaga,** the first Respondent's counsel argued that under Order **53** of the Civil Procedure Rules, 2010, the court may enjoin a party who has an interest in a matter or has sufficient information to assist the Court in arriving at a fair determination. Further, he argued that the power to enjoin a party is discretionary and that a Court will not normally interfere with the exercise of Court's discretionary powers. He also argued that the intended appeal has no chances of success. Further, he argued that it is not sufficient to state that a party has an arguable appeal, but he must demonstrate that the appeal is not frivolous. On the alleged offending affidavit, he argued that the Court can expunge them, and that public interest tilts in favour of expeditious disposal of cases.

12. **Mr. Muiyuri** for the second, third and fourth Respondents adopted **Mr. Nyaga's** submissions and added that that the enjoined parties will abide by the Court orders while filing the affidavits.

13. In her rejoinder, **Miss Omondi** submitted that the applicant "fears" that the Respondents will "infringe the Court Order" restricting them on the contents of the affidavit to be filed.

14. The application before me is expressed under Order **42** Rule **6** of the Civil Procedure Rules, 2010 which provides that:-

(1) *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

(2) *No order of stay shall be made under sub rule (1) unless-*

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

(b) 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

15. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending filing and or hearing and determination of an appeal. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal*[4] had this to say:-

i. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.*

ii. *The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.*

iii. *A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.*

iv. *The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

16. Order **1** Rule **10 (2)** of the Civil Procedure Rules, 2010 provides that the court *may* at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

17. The use of the word *may* in the above provision is worth noting. Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory. The word *"may"* used in the above grants the Court discretion to determine whether or not to enjoin a party. A proper construction of the above Rule leaves me with no doubt that the use of the word *"may"* entails exercise of judicial discretion. However, a discretion vested in a court or tribunal is not a power to be exercised arbitrarily or capriciously. It must be exercised judicially and judiciously. As was held in *Mbogo & Another vs. Shah,[5]* an appellate Court will not ordinarily interfere with the exercise of discretion by the trial judge unless it is shown that the trial judge misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion, thereby occasioning an injustice. The applicant has not mentioned even in the slightest manner that the learned judge improperly exercised her discretion is allowing the said application.

18. It is also important to mention that Order **53** Rule **6** of the Civil Procedure Rules, 2010 provides that a person who desires to be heard in opposition to an application filed under the said rule and who appears to the High Court to be a proper person to be heard *shall* be heard. The applicant has not demonstrated that the second, third and fourth Respondents are not proper persons to be heard in these proceedings.

19. Whether or not to grant the stay sought is a matter of judicial discretion. This position was appreciated in the case of *Global Tours and Travels Ltd***[6]** where it was held that:-

"........Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously."

20. The order being appealed against specifically requires the second to fourth Respondents to limit the contents of their affidavits to specific matters. The *ex parte* applicant fears that the Respondents having been enjoined may not comply with the said order. No reasons have been given for the said apprehension. In any event, mere apprehension however powerful, is not a ground to for the Court to grant an order of stay. A party cannot be given the luxury of choosing a Respondent in Court proceedings. The fear that an Interested Party by bring adverse evidence is not a ground to warrant the stay sought. In any event, the Court order is very clear and limits the second, third and fourth Respondents on the contents of their affidavits. The Respondents have clearly stated that they will comply with the Court order. The

applicant's apprehension in my view lack basis and cannot be a valid ground to grant the orders sought.

21. It is also a requirement that the applicant demonstrates his appeal if successful will be rendered nugatory. In *Hassan Guyo Wakalo vs Straman EA Ltd*[7]the Court stated as follows:-

"*In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.*

22. It is clear from the wording of Order **42** Rule **6 (1)**, for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a)** *Substantial loss may result to the applicant unless the order is made;* ***(b)*** *The application has been made without undue delay;* ***(c)*** *such security as to costs has been given by the applicant.*

23. The corner stone of the jurisdiction of the court under Order **42** of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[8]What constitutes substantial loss was broadly discussed in *James Wangalwa & Another vs Agnes Naliaka Cheseto*[9] where it was held *inter alia* that:-

"*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, a question that was aptly discussed in the case of* ***Silverstein vs. Chesoni***,[10]

24. In ***Winfred Nyawira Maina vs Peterson Onyiego Gichana***,[11]**the Court held that:-**

"The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him

25. In view of my analysis herein above, the conclusion becomes irresistible that the applicant has not satisfied any of the grounds for granting the orders of stay pending appeal. In particular, the applicant has not demonstrated sufficient grounds to warrant the Court to grant the stay sought. In particular, it has not been demonstrated that the applicant has an arguable appeal. Further, it has not been demonstrated that the applicant will suffer substantial loss if the stay is not granted nor has it been demonstrated that the intended appeal if successful will be rendered nugatory.

26. The upshot is that the application dated **15th** March 2018 lacks merit. I hereby dismiss it with costs to the Respondents.

Orders accordingly

Signed, Dated, Delivered at Nairobi this 11th day of September 2018

John M. Mativo

Judge

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[1] {2014} eKLR.

[2] Counsel cited *Selestica Limited vs Gold Rock Development Ltd* {2015}eKLR.

[3] Citing *John Odongo vs Joyce Irungu Mhatia* {2015}eKLR.

[4] Civil App No. NAI 6 of 1979, Madan JA, Miller JA and Porter JA.

[5] *{1968} EA 93.*

[6] WC No. 43 of 200 (UR).

[7] {2013}eKLR

[8] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K) Ltd vs Commissioner of Investigations & Enforcement

[9] HC Misc No. 42 of 2012 OR {2012} eKLR, Gikonyo J.

[10] {2002} 1 KLR 867

[11] **{2015} eKLR**