REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION MISCELLANEOUS

CIVIL APPLICATION NO. 394 OF 2016

REPUBLIC.....APPLICANT

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

EQUITY BANK KENYA LIMITED.....2ND RESPONDENT

NAIROBI CITY COUNCIL.....3RD RESPONDENT

AND

COUNTY CLOCK (KENYA) LIMITED.....INTERESTED PARTY

CYTONN INVESTMENTS MANAGEMENT LIMITED.....EX-PARTE APPLICANT

RULING

1. It is convenient to start by setting out the facts. They are not in dispute. By an application dated 15th September 2016 expressed under the provisions of Order 53 Rule (3) of the Civil Procedure Rules, 2010, Sections 7, 8 & 9 of the Fair Administrative Action Act[1] and all enabling provisions of the law, the applicant sought Judicial Review orders of *certiorari and prohibition* as more particular prayed in the said application.

2. On **20th** November 2017, the court dismissed the said application. Aggrieved by the said decision, the applicant preferred an appeal in the Court of Appeal. In the instant application, the applicant invokes the provisions of section 3A of the Civil Procedure Act[2] and seeks an injunction to restrain the second Respondent, by themselves, their agents, officers, servants, and or employees from pulling down, damaging, tampering with, demolishing, knocking down, wasting, alienating or in any way interfering with the beatification works and clock located upon the roundabout at Hospital Road, Mara Road and Elgon Road, Upper Hill area, Nairobi, pending the hearing and determination of its appeal.

3. The core ground is that should the Respondents interfere with the subject matter, the appeal will be rendered nugatory, and, that, this court has inherent jurisdiction to grant the orders sought to safeguard the subject matter pending the hearing and determination of its appeal No. **152** of 2018 in the Court of appeal.

The first Respondent's grounds of opposition.

4. The first Respondent filed grounds of opposition on 20th February 2018 stating that:- (a) this court is *functus officio*; (b) there is no positive order capable of being stayed; (c) the application is an abuse of court process and lacks merit.

The Second Respondent's grounds of opposition.

5. The second Respondent filed grounds of opposition on 15th December 2017 stating that:- (a) the application is mischievous, frivolous, and an abuse of the court process; (b) the orders sought have the effect of reviving the dismissed Judicial Review application; (c) that the applicant has not demonstrated the nature of the substantive loss it will suffer in the event the orders are not granted; (d) that the application lacks merit.

The Third Respondent's grounds of opposition.

6. The third Respondent filed grounds of opposition on 29th May 2018 stating that:- (a) the application is incompetent, fatally defective and offends sections 8 and 9 of the Law Reform Act,[3] (b) that the application is a gross abuse of process and is meant to subvert the course of justice.

7. Upon carefully analyzing the facts presented by the parties as disclosed in the affidavits, the grounds of opposition and the rival submissions, I find that only one issue presents itself for determination, namely, whether this court can grant an order of an injunction in the circumstances of this case.

8. The applicant's counsel argued that the orders sought are in the nature of conservatory orders seeking to preserve the subject matter pending the hearing and determination of the appeal.[4] He argued that the High Court has jurisdiction to hear, determine and grant interlocutory injunctive reliefs and/or conservatory orders. He further argued that this court has residual power where a mistake is shown to have been committed to correct it. To buttress his argument, counsel cited *Republic vs Attorney General & 4 Others ex parte Diamond Hashim Lalji*.[5]He also cited *Berkely North Market & Others vs Attorney General & Others****[6]*** and argued that the court has in the past issued stay borders following dismissal of a Judicial Review application, hence a negative order can be stayed in appropriate cases.[7] He submitted that the applicant's appeal raises serious and arguable points of law.

9. The application is strenuously opposed. Counsel for the first Respondent submitted that this court is *functus officio*.[8] He cited the principle of finality as captured in *Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others*.[9] He also argued that this application is barred by dint of section 8 (3) of the Law Reform Act[10] which provides that:-

> " *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 there from conferred by section (5) of the section."*

10. Counsel submitted that the only available avenue for the applicant is an appeal as provided under section 8 (5) which provides that "*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."*Citing *Biren Amrital Shah & Another vs Republic & 3 Others*[11]counsel argued that in exercising its special jurisdiction under the Law Reform Act,[12] the High Court has no jurisdiction to review its previous order.

11. Counsel also cited the Court of Appeal decision in *Cortec Mining Kenya Limited vs Cabinet Secretary, Attorney General & 8 Others*[13] and submitted that no positive orders can emanate from a judgment where the court declined to grant the orders sought by an applicant and that granting the orders is similar to reviving the case.[14]He reiterated that there is a long chain of authorities by the Court of Appeal upholding the position that where the High Court has dismissed an application for Judicial Review, the superior court does not grant any positive order in favor of the Respondent which is capable of execution.[15]He concluded by arguing that in Judicial Review proceedings, the a court is allowed to issue prerogative orders and nothing more.

12. The second Respondent's counsel also argued that this court became *functus officio* upon delivering the judgment.[16] To buttress his argument, he cited sections 8 (3) and (5) of the Law Reform Act[17]and argued that the only recourse available to the applicant is an appeal. He relied on *Ryan Investments Ltd & Another vs The United States of America****[18]*** and *Equity Bank Ltd vs West Link Mbo Ltd****[19]*** where the courts held that section 3A of the Civil Procedure Act[20]is not a provision that confers jurisdiction on the court but simply reserves jurisdiction which is inherent in every court. He added that superior courts have inherent jurisdiction to correct their own mistakes where a mistake is shown to have been committed as recognized by the Court of Appeal in *Nakumatt Holdings Ltd vs Commissioner of Value Added Tax*.[21]

13. Counsel argued that there are no positive orders in favour of the applicant capable of being executed[22]and that the applicant has not demonstrated the nature of substantial loss it will suffer if the orders are not granted.

14. The third Respondent's counsel argued that an order of injunction falls outside the ambit of the reliefs available under section 8 of the Law Reform Act.[23] He submitted that the court is *functus officio* by virtue of section 8 (3) & (5) of the Law Reform Act,[24]hence, the only remedy available to the applicant is to appeal and that the court's residual power can only be exercised where a court is correcting its mistakes.[25] Citing *Republic vs Kenya Wildlife Services & 2 Others*[26] he argued that there is no positive order capable of being enforced.

Determination.

15. The crux of the applicant's counsel's argument as I understood is three-fold, *first* the orders sought are in the nature of conservatory orders seeking to preserve the subject matter pending the hearing and determination of the appeal; *second,* that the High Court has jurisdiction to hear, determine and grant interlocutory injunctive reliefs and/or conservatory orders, *third,* this court has residual power where a mistake is shown to have been committed to correct it. Counsel placed reliance on several decision among them *Republic vs Attorney General & 4 Others ex parte Diamond Hashim Lalji,*[27] *Berkely North Market & Others vs Attorney General & Others,****[28]*** *Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 4 Others*[29] and *Nakumatt Holding Ltd vs Commissioner of Value Added Tax*[30] and argued that the court has in the past issued stay borders following dismissal of a Judicial Review application, hence a negative order can be stayed in appropriate cases.[31]

16. I have in several decisions stated that that a case is only an authority for what it decides. This position was ably captured in *State of Orissa vs. Sudhansu Sekhar Misra* [32]as follows:-

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it..., every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there*

are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)

17. The ratio of any decision must be understood in the background of the facts of the particular case.[33] A case is only an authority for what it actually decides, and not what logically follows from it.[34]A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[35]Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[36]Therefore, in deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[37] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[38]

18. With the above legal propositions in mind, I proceed to examine the authorities relied upon by the applicant's advocate in detail to appreciate their relevancy (if any) and their precedential value to the facts and circumstances of this case. In the *Berkeley North Market & Others vs Attorney General & Others*[39]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).*

19. Similarly, in *Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 4 Others*,[40] 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.

20. In *Nakumatt Holdings Ltd vs Commissioner of Value Added Tax,**[41]*** the High Court decision was erroneous. It put the appellant in the predicament he found himself in. 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.

21. Also relied by the applicants counsel is the case of *Njuguna Ndungu vs Ethis & Anti-Corruption Commission & 3 Others*[42]where the Court of Appeal granted conservatory orders pending the hearing and determination of a civil case. Like the above cases, this case also involved a criminal prosecution.

22. The applicant also placed reliance on *Republic vs Attorney General & 4 Others ex parte Diamond Hashim Lalji*[43] in which the High Court discussing the nature of the courts' inherent jurisdiction observed that *"the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. It is therefore my view that where the orders granted by the High Court be it in judicial review proceedings or civil proceedings are capable of being executed, the same are amenable to stay execution."* Here, the test is different. The focus was on orders capable of being executed. In the instant case, the court never made any orders capable of being executed.

23. Three 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.

24. *Second,* a court will exercise inherent powers to correct its own mistake. The rationale behind this is simple. A litigant ought not to suffer or be disadvantaged on account of a mistake by the court. As **Lord Cairns** bluntly put it:-[44]

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

25. *Third,* a court will not stay a negative order, in capable of being executed.

26. From the facts presented in this case and considering the authorities cited by the applicants counsel, I find that the applicant does not satisfy any of the above tests A common thread appears to run in the decisions where the Court of Appeal granted conservatory orders. *First,* where the appeal would be rendered nugatory, the Court of Appeal granted the orders. The conservatory orders were granted in cases involving criminal prosecution. If the orders were declined, and the applicant was subjected to the criminal trial, in the event of succeeding in the appeal, the substratum of the appeal would have been rendered nugatory due to the nature of the case.

27. To reinforce my argument, I add that similar facts as presented in this case arose in *Republic vs. Kenya Wild Services & 2 Others**[45]***where the High Court dismissed Judicial Review proceedings. The applicant, aggrieved by the decision, gave notice of appeal and applied to the Court of Appeal under rule 5(2) (b) seeking an injunction order to restrain the Respondent from signing any lease of the disputed property pending the determination of the intended appeal. The Court of Appeal rendered itself thus:-

"The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, … the application for injunction or stay is apparently extraneous to the orders made by the superior court."

28. The approach taken by courts appears to be that the most important factor for consideration in granting conservatory orders appears to be whether the appeal, if successful, would be rendered nugatory. However, the nugatory test that the courts consider in an application for

conservatory orders goes to the subject matter of the case and not the merits of the appeal. In other words, the appeal, if successful, is worthless because the appellant cannot be put into his former position. The cases relied by the applicant are of such a nature that if the conservatory orders were not granted, the appeal would be rendered nugatory because they involved criminal prosecution and the successful party would not be put in his former position. The instant case does not involve a criminal prosecution.

29. My argument is further fortified by the fact that an examination of decided cases both in the High Court and the Court of Appeal reveals 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 eloquently captured in *Cortec Mining Kenya Limited vs Cabinet Secretary, Attorney General & 8 others.*[46] In the said case, the applicant appealed to the Court of Appeal against the decree ensuing from the judgment of the High Court in Judicial Review proceedings in which the applicant had sought orders of *certiorari* and *mandamus*. The High Court had held that the applicant's application for Judicial Review was devoid of merit and dismissed it.

30. Aggrieved by the decision, the applicant Appealed against the High Court judgment. He also filed an application seeking an injunction pending the hearing of the appeal attracting a preliminary objection from the Respondent. The contention was that the Court of Appeal had no jurisdiction to issue the injunction in Judicial Review proceedings, if it could not be granted by the High Court under the Law Reform Act[47] pursuant to which the only reliefs available were the orders of *Mandamus, prohibition* and *certiorari.* The architecture and design of the Law Reform Act[48] is that this Court has no powers to issue an injunction in Judicial Review proceedings as discussed below.

31. The other fundamental ground why this application must fall is matter of law. Section 8(1) (2), (3), (4) & (5) of The Law Reform Act. [49] 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 vs Cabinet Secretary, Attorney General & 8 others.*[50] held that an injunction was not available under the above provisions. It stated as follows:-

> *34.Can this court grant an order of injunction in a judicial review matter such as this one? For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place.*
>
> *The High Court could only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies. But even more compelling is the fact that subsection (3) of Section 3 of the Appellate Jurisdiction Act requires this court –*
>
> ***"in the hearing of an appeal in exercise of the jurisdiction conferred by the said Act to apply the law applicable to the case in the High Court."***
>
> *It is plain to see that in judicial review, the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.*
>
> ***35.*** *As is apparent, judicial review being sui generis in which the only orders available are certiorari, mandamus & prohibition, the notice of motion in judicial review having been dismissed, there is nothing that can be stayed under rule 5 (2) (b). Mr. Ngatia was quite correct when he postulated this to be the reason why an order of stay was not sought.*
>
> *36. In the instant case, the High Court was not legally empowered to grant the remedy of injunction. The law governing judicial review as set out in Section 8 of the Law Reform Act did not then as now permit the Court to grant an injunction. It is as plain as daylight that, an order of injunction which the High Court was not by law empowered to grant is not available on appeal from this Court.*
>
> ***37.*** *Moreover, if we were to grant the injunction sought, what implications would this have? First, it would boil down to this, that although the High Court declined to issue in the notice of motion by the applicant any of the public law remedies stipulated in*

Section 8 of the Law Reform Act, an injunction as a private law remedy by this court would in effect, (notwithstanding that the impugned decision made in the judicial review proceedings which is now the subject of the said appeal) revive the litigation that is already determined, in a context in which such injunction would not serve as a conservatory there being nothing to be conserved after dismissal of the judicial review proceedings. Secondly, such injunction would not serve to prevent the appeal from becoming nugatory as success in the appeal would not be turned into Pyrrhic victory if injunction is not granted for the simple reason that revocation of the 1st respondent's mining licence took effect on 5th August 2013 under the provisions of the Mining Act, Cap 306 of the Laws of Kenya. Thirdly, to restrain the 1st respondent by injunction in the manner sought in the motion would also be tantamount to going against an express provision of the law (to wit Section 8 of the Law Reform Act, Cap 26) without interrogating the matter as a public law issue. Fourthly, it would be an error not least because it would violate Section 3(3) of the Appellate Jurisdiction Act. There would be no legal justification for us to grant the injunction in judicial review proceedings. In the ***Bluesea case*** *(supra) this Court emphasized fairness and the rule of law thus –….*

38. Mustafa JA in Western College of Arts and Applied Sciences v. Oranga [1976] KLR 63 put the position succinctly thus -

"the temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this Court has no jurisdiction to entertain it."

39. *Read in the context of Section 8 of the Law Reform Act, the statement would hold true now as it did then.*

40. In ***Republic v. Kenya Wild Services & 2 Others*** *(Civil Application No.12 of 2007 – unreported) the High Court dismissed judicial review proceedings. The applicant, aggrieved by the decision, gave notice of appeal and applied to this court under rule 5(2) (b) seeking an injunction order to restrain KWS from signing any lease of the disputed property pending the determination of the intended appeal. This Court held-*

"The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court."

41. *In light of what we have stated above, it is plain to see that the application for injunction is misplaced/ The preliminary objection by the Mr. Ngatia has merit. Accordingly, we uphold it and consequently strike out the applicant's notice of motion …...*

33. More important is the wording of Section 8 (3) of the Law Reform Acts[51] which reads that:-

"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."*

34. The use of the word *shall* in the above provision is worth noting. It appears three times in the above provision. According to *Black's Law Dictionary*, the term *"shall"* is defined as follows:-

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

35. The definition continues as follows:-*"but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense." So "shall" does not always mean "shall." "Shall sometimes means "may*."

36. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions[52] keeping in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[53] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

37. The Court has a duty to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

38. In a recent decision of this Court I observed[54] that the word *"shall"* when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[55] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[56]Regard must be had to the long established principles of statutory

interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance. The following guidelines laid down by Wessels JA. are useful:-

> *"…. Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but as useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction…**[57]** - Standard Bank Ltd v Van Rhyn (1925 AD 266).*

39. It is my view that by dint of the above section, this court cannot entertain this application. The only remedy available to the applicant to pursue an appeal. My finding is fortified by the above Court of Appeal decision. In fact, there is a long chain of Court of Appeal decisions upholding the same position. In *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)*,[58] the Court of Appeal, citing with approval the decision in *Executive Estates Ltd vs Kenya Posts and Another**[59]* 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:*
>
> *"……The order which dismissed the suit was a negative order which is not capable of execution….."*

40. In ***Peter*** *Mueria Ole Munya & 4 Others Vs Principal Magistrate, Narok & 6 Others,**[60]* 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."*

41. In *Devani & 4 Others V Joseph Ngindan & Others,**[61]* the Court of Appeal cited with approval *Wananchi Group Kenya Ltd vs Commissioner of Investigation and Enforcement**[62]* 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."*

42. It is also important to mention that the applicant prays for an injunction pending the hearing of the appeal as opposed to a stay order. Identifying the difference between the two terms, namely, an injunction and stay order is important. An Injunction is defined in law as **a court order or writ that requires a person to perform or to refrain from performing a particular act**.

43. A Stay Order is defined as **a court order halting or suspending a judicial proceeding either fully or temporarily**. Such orders are issued in order to suspend or stop a legal action until a certain condition is fulfilled or a particular event occurs. The court can lift the suspension later on and re-commence the legal proceeding. In general, however, there are two types of Stay Orders: a Stay of Execution and a Stay of Proceedings. A **Stay of Execution** is a Stay Order issued by court suspending or delaying the enforcement of a judgment against a person.

44. The distinction between injunctions, and order of stay and conservatory orders was addressed with sufficient clarity by the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others**[63]* in the following words:-

> *{85}These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.*
>
> ***[86]*** *"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. (Emphasis added).*
>
> ***87]*** *The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:*
>
> *(i) the appeal or intended appeal is arguable and not frivolous; and that*
>
> *(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.*

[88] *These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:*

> *(iii) that it is in the public interest that the order of stay be granted.*

[89] *This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.*

45. In view of my analysis herein above, the conclusion becomes irresistible that the application before me is bad in law, misconceived and incompetent and lacks merit. The upshot is that the application dated **1st** December 2017 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated, Delivered at Nairobi this **8th** day of **October** 2018

John M. Mativo

Judge

---

[1] Act No. 4 of 2015.

[2] Cap 21, Laws of Kenya.

[3] Cap 26, Laws of Kenya.

[4] Counsel cited *Alfred N. Mutua vs Ethics & Anti-Corruption Commission* (EACC) & 4 Others {2016} eKLR.

[5] {2014}eKLR.

[6] {2005}2 EA.

[7] Counsel also *cited Njuguna S. Ndungu vs Ethics & Anti-Corruption Commission & 3 Others* {2015}eKLR.

[8] Counsel referred to the definition of *fanctus officio in The Black's Law Dictionary*, 9th Edition which is "having performed his or her office, without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

[9] {2013}eKLR.

[10] Cap 26, Laws of Kenya.

[11] {2013}eKLR.

[12] Cap 26, Laws of Kenya.

[13] {2015}eKLR.

[14] Citing *Devani & 4 Others vs Joseph Ngindan & Others*, C.A. 136 of 2004, citing *Wananchi Group Kenya Ltd vs Commissioner of Investigations and Enforcement* {2014}eKLR.

[15] Citing *Yagnesh Devani & Others vs Joseph Ngindari & 3 Others*, Civil Application No. Nai. 136 of 2004, *Mombasa Seaport Duty Free Limited vs Kenya Ports Authority*, Civil Application No. Nai. 242 of 2006 and *William Wambugu Wahome vs The Registrar of Trade Unions & Others* Civil Application No. Nai. 308 of 2005.

[16] Citing the Canadian case of *Chandler vs Alberta Association of Architects* {1989} 2 S.C.R 848.

[17] Cap 26, Laws of Kenya.

[18] {1970} E.A. 675.

[19] {2013}eKLR.

[20] Cap 21, Laws of Kenya.

[21] {2011}eKLR.

[22] Citing *Middle Town Forex Bureau Ltd vs Central Bank of Kenya* {2016}eKLR, *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* {2015}eKLR & *Executive Estates Ltd vs Kenya Posts and Another* {2005}1EA 53.

[23] Cap 26, Laws of Kenya.

[24] Cap 26, Laws of Kenya.

[25] Citing *Nakumatt Holdings Ltd vs Commissioner of Value Added Tax*, supra.

[26] Civil Application No. 12 of 2007.

[27] {2014}eKLR.

[28] {2005}2 EA.

[29] {2016} eKLR.

[30] Supra

[31] Counsel also *cited Njuguna S. Ndungu vs Ethics & Anti-Corruption Commission & 3 Others* {2015}eKLR.

[32] MANU/SC/0047/1967

[33] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986

[34] Ibid

[35] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[36] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats vs University of Delhi & Anr*. (Citing Lord Denning).

[37] Ibid.

[38] Ibid.

[39] Supra.

[40] Supra.

[41] Supra.

[42] {2015}eKLR.

[43] {2014}eKLR.

[44] In *Roger Vs Comptoir D' Escompts De Paris,* {1871} LR 3 PC 465.

[45] Civil Application No.12 of 2007 – unreported.

[46]{2015} eKLR.

[47] Cap 26, Laws of Kenya.

[48] Ibid.

[49] Cap 26, Laws of Kenya.

[50]{2015} eKLR.

[51] Cap 26, Laws of Kenya.

[52] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[53] Ibid.

[54] *Republic vs Principal Secretary, Ministry of Interior and Others Ex parte Simon Wainaina Mwaura* Miscellaneous Application NO. 40 OF 2011.

[55] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[56] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[57] *Sutter vs Scheepers* 1932 AD 165, at 173 - 174.

[58] {2015} eKLR

[59] {2005} 1 EA 53

[60] {2015} e KLR.

[61] C.A., Nairobi 136/2004.

[62] [2014] e KLR.

[63] {2014} eKLR**.**