



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 245 OF 2015

BETWEEN

REPUBLICAPPLICANT

AND

**THE CHIEF MAGISTRATES COURT THIKA
RESPONDENT**

**GITHUNGURI CONSTITUENCY RANCHING CO. LTD.....INTERESTED
PARTY**

**EX-PARTE APPLICANT: JOSEPH KAMUNYA
KINUTHIA**

RULING

1. By a Notice of Motion dated 22nd January, 2016, this Court allowed the substantive Motion herein, quashed the proceedings before the Chief Magistrate's Court, Thika in Civil Suit No. 30 of 2015 but with no order as to costs.
2. The Interested Party is back before this Court with an application dated 28th January, 2016 in which it seeks that this Court stays the said judgement and the resultant decree/orders pending an intended appeal to the Court of Appeal.
3. According to the Interested Party, it is dissatisfied with the said judgement and has preferred an appeal by filing a Notice of Appeal to the Court of Appeal and also applied for certified copies of the proceedings, decree or order. The said Respondent apart from enumerating the reasons for the intended appeal, averred that the said decision has been misinterpreted to mean that the purported elections ordered to be held in an already withdrawn suit remained valid yet the Court did not make such orders. In its view, an order of stay will not be prejudicial to any parties to the proceedings.
4. In his submissions, **Mr. Njoroge**, learned Counsel for the Interested Party reiterated the foregoing averments and emphasized that there are parties who still believe that orders granted in a withdrawn suit are valid. According to him, before the said suit was withdrawn there were other orders which affected the Interested Party hence the Applicant was taking advantage of orders which were not granted by the Court.
5. In opposition to the application, the ex parte applicant took the position that the judgement delivered herein granted no orders that are capable of being executed. Through his learned Counsel, **Prof. Wangai**, he contended that since the application was seeking to quash the

proceedings, the issues now being raised in this application are extraneous as the same are not based on the material before this Court.

6. It was contended that the order withdrawing the suit was made on 15th May, 2015 while the Interested Party was joined on 22nd May, 2015, after the said withdrawal. To learned Counsel, the effect of the grant of the orders sought herein would be to reinstate both these proceedings are the proceedings which were quashed and to do so would go against public policy hence this application is misconceived and an abuse of the Court process.
7. I have considered the application herein and the various positions urged on behalf of the parties. There is a long line of authorities where the Court of Appeal has held that where the High Court does not grant any positive order in favour of the Respondents which is capable of execution, a stay would not be an efficacious order in those circumstances. See **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**.
8. In **Kwench Limited vs. Nairobi City County & 2 Others Civil Application No. Nai. 106 of 2014**, the Court of Appeal on 10th October, 2014 expressed itself as follows:

“On the second limb on whether the success of the intended appeal would be rendered nugatory if the order sought is not granted, it is our view that this aspect has not been established. The reason for this is that, having regard to the impugned ruling before us, it is questionable whether or not there is any order capable of being stayed by this Court, save for costs. What is apparent from the ruling of the High Court under Judicial review is that, the learned judge limited his determination to the definition of an author of a nuisance within the meaning of the Public Health Act, and whether the 3rd respondent’s decision to issue an *Ex parte* Notice to the applicant as the author of the nuisance was correct, but did not go on to consider the merits of the case. He left those for determination by the magistrate’s court. In the ruling, the court did not order the applicant to do or abstain from doing any act for which a stay order would be efficacious. Considering that the learned judge only gave an opinion, after which a negative order of dismissal was issued, we find that there was nothing capable of being stayed.”

9. In my view whether a party seeks stay of execution of judgement or a mere stay of judgement, is merely a matter of semantics. It is a distinction without a difference in substance. However, there can be no general rule that where an order of certiorari is given, stay cannot be granted. Where the effect of the order is to impose certain obligations or give rise to certain rights the same may well give rise to a stay. This may for example be the case where the Court quashes a decision appointing a person to the office. To quash that order necessarily implies the removal of the appointee hence may well amount to a positive order.
10. In this case, the effect of quashing the proceedings in question was that the order staying execution of the orders dated 18th May, 2015 was quashed as well as the order halting the scheduled special extra ordinary meeting to elect the directors of the Interested Party. In effect by quashing the impugned proceedings, the ex parte applicant obtained the liberty to proceed with the said meeting. In my view the effect of the order quashing the impugned proceedings was to give rise to a positive order.
11. The next issue is whether substantial loss would be suffered if the stay is not granted. Both at the time of the hearing of the Motion and in this application, the Interested Party appreciated in principle that no orders ought to have been made in a withdrawn suit. Their quarrel however was based on the fact that the ex parte applicant was misinterpreting the decision of this Court. A similar issue arose in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No. Nai. 195 of 1997** where the Court expressed itself as follows:

“A judge is not concerned with what litigants may brag or boast as he is only concerned with dispensing justice according to law, and any boasts made by litigants ought not to perturb or even bother a Judge.”

- 12.If the Interested Party, is of the view that the ex parte applicant is misusing the orders of the Court, it ought to take appropriate measures to correct the same and to seek for stay of the judgement is not one such measure. In fact in its judgement, this Court gratuitously offered the Interested Party alternative measures which it ought to have taken to protect its interests rather than by making applications in a matter which was lifeless.
- 13.In the premises I am not satisfied that this is a matter in which I ought to exercise my discretion and grant the orders sought herein.
- 14.Consequently, this application fails and is dismissed with costs to the ex parte applicant.
- 15.Orders accordingly.

Dated at Nairobi this 10th February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Prof Wangai for the ex parte applicant

Mr. P. K Njoroge for the Interested Party

Cc Florence