REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO.341 OF 2014

REPUBLIC…….……..APPLICANT

VERSUS

NAIROBI CITY COUNTY GOVERNMENT…….....…1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT EXECUTIVE COMMITTEE

MEMBERS, ROADS PUBLIC WORKS & TRANSPORT……..…….2ND RESPONDENT

AND

TRIPLE S SERVICES CO. LTD…….…….....……..INTERESTED PARTY

EX PARTE:

NUCLEAR INVESTMENTS LIMITED …….....…...….1ST APPLICANT

ZIPPORAH WANGARI KIMANI T/A JAMAA GROCERS…..…..……..…2ND APPLICANT

RULING

Applicants' Case

1. On 3rd March, 2015, this Court delivered a judgement in this matter by which the Applicant's Notice of Motion dated 11th September, 2014 was dismissed. The said application was seeking the following orders:

1. **THAT by way of Judicial Review, an order of certiorari do issue, to remove to this Honourable Court for purposes of being quashed, and to quash, the 1st and 2nd Respondents' decision to allocate an unauthorized loading zone to the Interested Party as expressed in the 2nd Respondent's letter dated 14th August 2014 for being ultra vires and unconstitutional.**
2. **THAT by way of Judicial Review, an order of prohibition do issue, prohibiting the**

Respondents from deliberating, acting upon, taking any proceedings, issuing any directive or directives, or doing anything in any manner effecting and/or enforcing any aspect of the decision contained in the letter dated 14th August 2014.

3. **THAT by way of Judicial Review, an order of mandamus do issue, compelling the Respondents to annul and revoke the allocation of the 2 loading zones that are Passenger picking and dropping of bays to the Interested Party outside the 2nd Applicant's shop on L. R. No.209/136/18.**
4. **THAT the costs be to the Applicants in any event.**

2. The applicant, being aggrieved by the said decision has moved this Court by way of a Notice of Motion dated 4th March, 2015 expressed to be brought under the Court's inherent power, Orders 42, rule 6(1), 43 rule(1)(aa) and 51 rule 1 of the Civil Procedure Rules seeking the following orders:

1. **This motion be certified as urgent, and heard *Ex parte* in the first instance owing to its extreme urgency.**
2. **Pending the hearing and determination of this motion, there be a stay of execution of the order of costs to the Interested Party as against the *Ex parte* Applicants, and a stay of execution of the 1st Respondent's decision of the 2nd Respondent's letter dated 14th August 2014 subject of the stay order herein.**
3. **There be a stay of execution of the order of costs to the Interested Party as against the *Ex parte* Applicants, and a stay of execution of the 1st Respondent's decision of the 2nd Respondent's letter dated 14th August 2014 subject of the stay order herein pending the hearing and determination of the *Ex parte* Applicants' appeal.**
4. **Costs of this motion be in the cause.**

3. The said application is supported by an affidavit sworn by **John Mugo Munia**, a director of the ex parte applicant herein on 4th March, 2015.
4. According to the deponent, on March 3rd 2015 this court dismissed with costs to the Interested Party the *Ex parte* Applicant's Notice of Motion for judicial review orders dated 11th September 2014 and the *Ex parte* Applicants have since filed a notice of Appeal on the said decision, granting the court jurisdiction to intervene to grant a stay of execution pending appeal. According to him, he averred before this court that the Interested Party had lied and misled this court that it was a PSV operator with NTSA authority to ply the routes that the applicant ply. It was deposed that even from the replying affidavit of **Stephen Mwangi Karitu** sworn on 5th November 2014 purported on behalf of the Interested Party herein, there was no evidence that the Interested Party is registered as such PSV provider, as there is no Memorandum and Articles of Association of the Interested Party showing the Interested Party has demonstrated authority to conduct PSV operations as alleged. Further, there was no list of the alleged members of the Interested Party contrary to the allegations that it is a PSV operator such as would lend credence to the Interested Party's alleged membership "ownership" of 38 vehicles. The deponent however noted that there were only 5 Road Service Licenses allegedly issued to the Interested Party copies of which were produced by the said deponent yet the allegation is made the Interested Party has 38 vehicles. To the deponent the said allegation is not credible.
5. According to him, the said Road Service Licenses indicate the said services should be for Nairobi Kiambu route while the applicant operates from Nairobi, Nakuru and Nanyuki. However, the Interested Party has ventured to question the acts of the Respondents herein on the allocation of the loading zones, yet there is no capacity to so do hence has not demonstrated the legal basis for operating PSV vehicles to Nyahururu under current licences when they operate to Kiambu and Nairobi CBD from Tom Mboya Street.
6. The deponent disclosed that he was aware that the Interested Party was originally operating its said buses plying Kiambu and Nairobi City Center from Race Course Road and they became dissatisfied with the said picking bay and have every intention to disrupt the applicant's business in the manner complained of in these proceedings which ought not be permitted. To the deponent, he is not aware of any bus of the Interested Party plying the Nairobi-Nyahurur route, and there is

no evidence, averment of whatever kind in reference to the alleged plying of the route alleged from Nyahururu and Nairobi.

7. It was contended that Notice of Motion has been made almost immediately thereafter and as envisaged under the applicable principles, most expeditiously before the status quo on the ground changes.
8. It was the applicants' case that the allocation of the 2 loading zones subject of the said proceedings that are intended to be passenger picking and dropping off bays to the Interested Party will be most injurious outside the 2nd Applicant's shop on L.R. No. 209/136/18, as her livelihood is threatened by the conversion of what was otherwise a normal business into a bus picking bay.
9. Additionally, since the 2nd *Ex parte* Applicant had applied prior to the Interested Party for the said Loading Zone, pending the determination of the appeal, the 2nd *Ex parte* Applicant will suffer irreparably if the Interested Party moves in to the said 2 loading zones, thereby depriving the 2nd *Ex parte* Applicant of a chance to demonstrate her first-in-rank priority to the same. Further, the applicants' business will suffer immensely due to the disruption of the big buses that the Interested Party intends to bring to Mwimbi road so that where 2 Toyota PSV vans occupy, one bus will hence occupy, creating a traffic gridlock most onerous and is injurious to the applicant.
10. It was averred that it is therefore imperative that there be a stay of execution of the award of costs to the Interested Party as against the *Ex parte* Applicant since the 1st Respondent was the primary author of the acts complained of and filed no response at all in spite of asking for time and never having appeared to defend the claim.
11. The applicants believed that the Interested Party might move anytime to have the costs taxed absent a stay, in enforcement of the cited order, and injustice will be visited on the *Ex parte* Applicants'/Appellants unless this court intervenes as herein sought.
12. It was disclosed that the Interested Party has since the grant of stay in the Judicial Review Proceedings been in business elsewhere and hence no injury will be visited on them, as opposed to the inception of a manifestly injurious status quo absent the court's intervention.
13. Based on legal counsel's advice the deponent believed that access to justice under Article 48 of the Constitution envisages the hearing of all the parties to ventilate their grievances and the Ex parte Applicants (especially the 2nd Ex parte Applicant) stand to be most injured absent this court's intervention.
14. It was disclosed that on March 4th 2015, officers of the 1st Respondent visited the premises of the 2nd Applicant and "surveyed" the 2 loading zones with an apparent view to allocate them to the Interested Party hence the urgency and the very real threat of effecting what is sought to be stayed herein. While reiterating the applicants' position that they were not against any competition it was averred that the bad faith of the Interested Party ought to be curtailed.
15. The applicants added the Appeal is lodged partly on the ground that they contest to bearing costs instead of the 1st Respondent who authored the confusion. In their view, the application is neither an abuse of the court process nor is it brought in bad faith and that they stand to suffer irreparable loss yet their intended appeal has a great likelihood of success.
16. On the validity of the Notice of Appeal the applicants exhibited a copy of what they believed was a valid Notice of Appeal.
17. They however denied that their application for stay the execution of costs was an afterthought as this application was filed almost immediately the judgment herein was issued. The applicants reasserted that they had 1st in rank priority to the loading bay over the Interested Party, which right they are entitled to exercise and would wish to canvas at the Appeal level and it is not true that the application herein is brought with malice.
18. They denied that the Interested Party had already suffered immense loss following the stay order and averred that it has been in business elsewhere before the Judgment which business it continues to carry on after the stay order herein was issued.

Interested Party's Case

19. In opposition to the application, the interested party herein, **Triple S Services Co. Ltd**, filed a replying affidavit sworn by **Stephen Mwangi Karitu,** its **chairman on 4th June, 2015**.
20. According to him, the application is incompetent as it is brought principally to circumvent and

evade to pay costs awarded to the interested party against the Applicants by this honourable court hence is an abuse of court process being made in bad faith.

21. It was contended that there is no irreparable loss that the 1st and 2nd Applicants stand to suffer by obeying the order as to costs made against them as their intended appeal had no likelihood of success. According to the interested party, it was already in business before this instant application was filed, and resumed business immediately the ruling was delivered on the 3rd March 2015 hence this application is overtaken by events and the orders issued herein should be vacated as they were obtained through misrepresentation of facts.
22. The interested party averred that the copy of the purported Notice of Appeal exhibited is not filed in any court nor received in any registry, but is just a draft, does not really show their interest and intention to expeditiously file an appeal, and as far as the interested party is concerned they really do not have any interests that they intend to safe guard through the Court of Appeal, but their main intention is deny the interested party costs that were awarded by the competent court.
23. It was the interested party's position that the move by the Applicants to seek stay for execution of the costs awarded by a competent court is an afterthought and is unfair since they are the ones who brought the interested party to court seeking to revoke two loading bays that were procedurally allocated to it and amounts to an unfair practice. To the extent that their main ground to the intended appeal is based on costs, and not on the main issues that brought then to this court, it was averred that it is an abuse of court process that should not be tolerated as this application is brought with malice and bad faith.
24. The interested party disclosed that its members had already suffered immense loss following the prior stay that was issued by this court and it is therefore prudent that the Applicants accept the challenges that are there in the market, and honour the court's order and continue with their business as usual in a free market.

Determinations

25. I have considered the foregoing.
26. There is no doubt 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 of execution. I gather support for this position from the decision of the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572**, where the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. In that case the High Court ordered the University to "*convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling*." The Court of Appeal noted that there was no prayer before the Court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the University acting in obedience to the said order. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted.
27. However it is clear that all that this Court did in the judgement against which the Applicant intend to appeal was to dismiss the Applicant's application for judicial review with costs. The law since the decision in **Western College of Arts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, is clear that unless the Court granted a positive order stay of execution is not capable of being granted since there would be nothing in those circumstances to be stayed. There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for judicial review, the superior court does not grant any positive order in favour of the Respondents which is capable of execution save for the issue of costs. 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.**
28. To dispel the notion that the above thinking was only sound before the current Constitution was promulgated 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 *Exparte* 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."

29. In this case the applicant is seeking *inter alia* "*a stay of execution of the order of costs to the Interested Party as against the Ex parte Applicants, and* ***a stay of execution of the 1st Respondent's decision of the 2nd Respondent's letter dated 14th August 2014*** *subject of the stay order herein pending the hearing and determination of the Ex parte Applicants' appeal."* It is clear that the second part of the prayer for stay sought is not directed at a decision of this Court but at a decision made by the 1st Respondent. That decision is therefore not the subject of the intended appeal since the Court of Appeal has no jurisdiction to entertain an appeal from a decision of the 1st respondent. The intended appeal as far as this Court is concerned is directed at the decision disallowing the applicant's judicial review application. The issue whether a Court would competently grant an order of stay as opposed to an injunction pending an appeal where an application for injunction has been dismissed was dealt with by the Court of Appeal in **Umoja Service Station Ltd & 5 Others vs. Hezy John Ltd Civil Application No. Nai. 39 of 2006,** where it stated that a prayer seeking for the stay of an order dismissing an injunction application is futile as the grant of the same would not in any way advance the applicants' cause. In other words what the Court meant was that the grant of an order of stay would only have the effect of maintaining the status quo and since the applicant was denied what it did not have in the first place when it came to court a stay would only have the effect of maintaining the same status quo which would be of no use to the applicant.

30. In **The Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007,** the Court of Appeal expressed itself as follows:

"It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2)(b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for 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 the Court of Appeal has no jurisdiction to entertain it...Where the superior court merely upheld the preliminary objection and as a consequence stuck out the application for judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs. Moreover since the order of stay is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by Rule 5(2)(b), the Court

has no jurisdiction to grant such an order since the orders sought do not relate to what the superior court decided."

31. Similarly, in **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010**, **Makhandia, J** (as he then was) held:

"The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."

32. Where therefore the application for stay is directed to a decision against which the intended appeal is not directed a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score. See **Muhamed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**
33. The only order therefore that can competently be the subject of stay of execution is the order for costs. However, even if this Court was of the view that the Court could in the circumstances of this case grant the order of stay sought the Court would be obliged to consider the grounds upon which such an order ought to be granted. In an application for stay pending appeal to the Court of Appeal one of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. I have considered the affidavit in support of the application herein and there is no allegation that if the costs due to the interested party are paid the ex parte applicant stands to suffer substantial loss. That allegation in any case would have been premature at this stage taking into account the fact that those very costs are yet to be ascertained by taxation or otherwise.
34. Apart from proof of substantial loss the applicant is enjoined to provide security. Once again the applicant has not dealt with the issue in the supporting affidavit. There is therefore absolutely no offer of security coming from the applicant in satisfaction of the said requirement in absence of which no stay can be granted. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the supplicant for stay. See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997.**
35. The importance of complying with the said requirement in my view was reflected in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** where it was held that:

"**to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and**

normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

36. In the premises, I find no merit in the Notice of Motion dated 14th February, 2014 and the same is dismissed with costs to the Respondent.
37. It is so ordered.

Dated at Nairobi this 19th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Chelang'a for Mr Kinyanjui for the Applicant

Mr Anzala for Mr Kiarie for the interested party

Cc Patricia