



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 179 OF 2014**

**REPUBLIC .....APPLICANT**

**VERSUS**

**CABINET SECRETARY,**

**MINISTRY OF NATIONAL TREASURY .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**CAPITAL MARKETS AUTHORITY .....3<sup>RD</sup> RESPONDENT**

**AND**

**R.E.A. VIPINGO PLANTATIONS LTD.....1<sup>ST</sup> INTERESTED PARTY**

**R.E.A. TRADING LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

**EX-PARTE**

**CENTUM INVESTMENTS CO. LTD**

**RULING**

On 16<sup>th</sup> May, 2014 this Court granted leave to the ex-parte Applicant (“the Applicant”) Centum Investments Company Limited to apply for an order of mandamus directed at the 1<sup>st</sup> Respondent the Cabinet Secretary in charge of the Ministry of National Treasury compelling him to exercise his powers under **Section 35A of the Capital Markets Act, Cap. 485A (“the Act”)** and specifically appoint additional members of the Capital Markets Tribunal (“the Tribunal”) pursuant to the provisions of **Section 35A (1)(c), (d) and (e) and (2) of the Act.** The Attorney General and the Capital Markets Authority (“the Authority”) are the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

On 21<sup>st</sup> May, 2014 the Applicant again approached this Court by way of a notice of motion dated the same date brought under **Articles 22, 23 and 165 (3) (a) and (6) of the Constitution of Kenya, Sections 1B and 3A of the Civil Procedure Act, Order 53 Rules 3 and 4 of the Civil Procedure Rules, 2010, sections 8 and 9 of the Law Reform Act, Cap. 26 and Section 35A(17) of the Act** and prayed for orders as follows:

- “1. THAT this application be certified urgent and heard Ex-parte in the first instance.
2. THAT any further proceedings in respect of the TAKEOVER of REA VIPINGO PLANTATIONS LIMITED, being the subject matter of Appeal No. 2 of 2014 before the Capital Markets Tribunal be stayed pending the hearing and determination of the Application *inter partes*.
3. THAT the status quo of the proceedings in respect of the TAKEOVER of REA VIPINGO PLANTATIONS LIMITED as at the 9<sup>th</sup> day of May, 2014, being the date of the filing the Appeal, be maintained until the determination of Appeal No. 2 of 2014 before the Capital Markets Tribunal.
4. THAT costs of this Application be provided for.”

In the said notice of motion, R.E.A. Vipingo Plantations Ltd and R.E.A. Trading Ltd were brought in as the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested Party respectively.

Upon hearing the application ex-parte, I granted stay in terms of Prayer No. 2. This matter was heard inter-partes on 4<sup>th</sup> June, 2014 and hence the necessity of this ruling.

The application is supported by the grounds on its face and the supporting affidavit sworn by the Applicant's Company Secretary Mr. Fredrick Murimi.

A brief background to this matter is necessary. The Applicant and the 2<sup>nd</sup> Interested Party are interested in taking over the 1<sup>st</sup> Interested Party. The takeover process started in November, 2013. According to the Applicant, on 24<sup>th</sup> April, 2014 the 3<sup>rd</sup> Respondent approved the revised Offer Document by the 2<sup>nd</sup> Interested Party, the Applicant's competing offer and the 2<sup>nd</sup> competing offer by an entity identified as V.I.P.

The Applicant claim that the approval was done notwithstanding the fact that part of the consideration of the offer by the 2<sup>nd</sup> Interested Party was contingent upon the sale of the 1<sup>st</sup> Interested Party's property on unspecified date at a specified price. The Applicant argues that this is uncertain and predicated on assistance through the 1<sup>st</sup> Interested Party's property contrary to the provisions of the Companies Act, Cap. 486. The Applicant was aggrieved by the decision of the 3<sup>rd</sup> Respondent and appealed to the Tribunal vide **Appeal No. 2 of 2014**. The appeal was filed on 9<sup>th</sup> May, 2014.

The Applicant subsequently discovered that the Tribunal was not quorate and moved to this Court to apply for the order of mandamus already stated.

The Applicant contends that notwithstanding the filing of the appeal before the Tribunal and the existence of these proceedings, the 3<sup>rd</sup> Respondent and the interested parties had manifested the intention to proceed with the takeover bid and by an email correspondence dated 21<sup>st</sup> May, 2014 asked the Applicant to provide the shareholders circular and independent advisers circular for the takeover proceedings.

The Applicant contends that the 3<sup>rd</sup> Respondent's action was in clear contravention of **Section 35A(17) of the Act** which provides that upon any appeal being filed before the Tribunal the *status quo* of any matter or activity, which is the subject of the appeal, shall be maintained until the matter is determined.

The Applicant submits that unless the order sought is issued, the appeal before the Tribunal and these proceedings will be rendered nugatory and thereby occasion great prejudice to the Applicant. It is the Applicant's case that this Court has power to issue the said orders in exercise of its supervisory jurisdiction granted by **Article 165 of the Constitution**.

Mr. Bitu instructed by the Attorney General for the 1<sup>st</sup> and 2<sup>nd</sup> respondents informed the Court that the Attorney General was not taking any position in regard to this particular application.

Mr. Gachuhi for the 1<sup>st</sup> Interested Party also informed the Court that his client was taking a neutral position. He however added that the interests of the shareholders to make decisions on their investments without being impeded or unduly delayed by court proceedings should be respected.

The 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party strongly opposed the application.

Mr. Mungai for the 3<sup>rd</sup> Respondent contended that the Tribunal's jurisdiction is derived from **Section 35(1) of the Act** and that jurisdiction does not extend to issues arising from a takeover process including the validity of a takeover offer. The 3<sup>rd</sup> Respondent contended that the jurisdiction of the Tribunal flows from the Act and the Applicant's appeal before the Tribunal is therefore incompetent.

Still on the issue of jurisdiction, the 3<sup>rd</sup> Respondent's counsel asserted that according to **Order 53 Rule 1(4) of the Civil Procedure Rules, 2010 ("CPR")** this Court has no jurisdiction to grant stay in this matter since leave can only operate as stay where an applicant is seeking an order of prohibition or an order of certiorari. Counsel submitted that in these proceedings leave was granted to the Applicant to apply for an order of mandamus and the prayer for stay is a belated attempt at seeking an order of prohibition without first applying for leave. It was argued for the 3<sup>rd</sup> Respondent that the judicial review regime does not envisage an application like the one made by the Applicant and therefore the Court has no jurisdiction to grant such a relief.

The 3<sup>rd</sup> Respondent argued that **Section 35A(17) of the Act** does not seek to stay actions or decisions of the Authority but only acts to maintain the *status quo*. The 3<sup>rd</sup> Respondent's case is that maintenance of *status quo* in this instance means that the decision of the Authority is upheld subject to the outcome of the appeal.

On the issue giving rise to the appeal before the Tribunal, the 3<sup>rd</sup> Respondent contends that the offer by the 2<sup>nd</sup> Interested Party is proper and constitutes a good offer which is allowed under **Regulation 8(3) of the Capital Markets (Takeovers and Mergers) Regulations 2002 ("the Regulations")**. The 3<sup>rd</sup> Respondent therefore submits that the 1<sup>st</sup> Interested Party is not assisting the 2<sup>nd</sup> Interested Party in its offer and **Section 56 of the Companies Act** does not therefore apply.

The 3<sup>rd</sup> Respondent asserted that time is of essence in takeovers. It is the 3<sup>rd</sup> Respondent's case that the steps to be followed are all timed and any delay may jeopardize the takeover proceedings.

The 2<sup>nd</sup> Interested Party supported the position taken by the 3<sup>rd</sup> Respondent. Ms Otaba for the 2<sup>nd</sup> Interested Party stressed that the jurisdiction of a judicial review court flows from **sections 8 and 9 of the Law Reform Act, Cap 26**. She submitted that the jurisdiction is neither civil nor criminal in nature but a special jurisdiction. She contended that the substantive application before this Court is for an order of mandamus to compel the Minister to perform a statutory duty under the Act and is indeed a proper matter for a judicial review court. She submitted that, on the other hand, the instant application seeks to stay the takeover of the 1<sup>st</sup> Respondent and this is therefore a matter that squarely falls into the private law arena. She argued that as was held in **KANU v KIBAKI & 6 OTHERS [2005] 2KLR 435**, **"the court will not mix public law remedies with private law remedies."**

It is the 2<sup>nd</sup> Interested Party's case that the Tribunal has no jurisdiction to hear the appeal and that being so, no *status quo* can be properly maintained by it.

Ms Otaba noted that no constitutional issues have been raised and this matter can only be considered under the provisions of **sections 8 and 9 of the Law Reform Act** and **Order 53 CPR**.

The 2<sup>nd</sup> Interested Party urged the Court to impose conditions if it decides to stay the takeover proceedings. She cited **Order 53 Rule 1(3) CPR** in support of this argument.

In reply to the arguments of the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party, Mr. Oraro for the Applicant submitted that what is before this Court is a judicial review application and not an appeal from the decision of the Authority. He pointed out that judicial review remedies are now available under **Article 23 of the Constitution**. He argued that under **Article 165(6) of the Constitution** this Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. He submitted that this application is not made under the **Law Reform Act or Order 53 CPR**. He asserted that what drove the Applicant to Court is the decision by the 3<sup>rd</sup> Respondent to continue the takeover proceedings despite the existence of an appeal before the Tribunal.

He submitted that the Court can grant stay even where an applicant is applying for an order of mandamus. On the 2<sup>nd</sup> Interested Party's prayer for imposition of conditions on the leave granted and an order for provision of security if the takeover is stayed, counsel submitted that the conditions can only be imposed at the time the leave is granted.

The first issue to consider is that of jurisdiction. Jurisdiction is everything and without jurisdiction a court cannot take one further step in a matter – see **THE OWNERS OF MOTOR VESSEL “LILLIAN S” v. CALTEX OIL (KENYA) LTD [1989] KLR 1**.

Therefore the question is whether this Court has jurisdiction to entertain this application. Judicial review in the traditional sense is neither civil nor criminal in nature but a special jurisdiction governed by **sections 8 and 9 of the Law Reform Act and Order 53 CPR**. Whether **Article 23 of the Constitution** has changed the rules is, in my view, not a matter for discussion in this ruling. It is sufficient to consider the application within the traditional context. Ordinarily, where judicial review rules do not provide for the making of a particular application, an applicant can invoke the inherent jurisdiction of the Court for the Court has jurisdiction to do that which is just.

The Court of Appeal in **RYAN INVESTMENTS LTD & ANOTHER v. THE UNITED STATES OF AMERICA [1970] E.A. 675** confirmed this when it stated at Page 677 that:

**“In the case now under consideration, the Judge found that the summonses were defective and impossible to obey. In the absence of specific legislative provision, I consider that he should have set aside the summons in the exercise of his inherent jurisdiction. Strictly speaking the judge was correct in saying that no application can be made under s. 97 of the Civil Procedure Act, as it does not create jurisdiction but merely makes it clear that the inherent powers of the court are not affected by the enactment of the Act. It was apparent that the application in fact invoked the exercise of the court's inherent powers. Such an application can be made if no other remedy is available and a remedy should be provided if the interests of justice so require.”**

In my view, the inherent powers of the Court can be invoked in judicial review applications. I take it that this application seeks to invoke the inherent powers of the Court since it is an application not provided for by the rules governing judicial review proceedings.

The 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party suggested that the Applicant's intention is to stop the takeover proceedings and the remedy lies in private law. I do not think so. The Applicant has approached this Court not only seeking to protect the appeal at Tribunal but also to protect these proceedings. The Applicant has knocked on the right door and is entitled to a hearing. In my view, the application before this Court is not an application for stay as envisaged by **Order 53 Rule 1(4) CPR**. It is a different application altogether and the said provision is therefore not applicable. I therefore find that this Court has jurisdiction to entertain this application.

Does the Tribunal have jurisdiction to entertain the Applicant's appeal? The Applicant said it has and cited the decision of the Tribunal in **BOC KENYA LTD v. THE CAPITAL MARKETS AUTHORITY, Appeal No. 1 of 2006**. The 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party insisted that the Tribunal did not have jurisdiction. They argued that this Court cannot rely on a decision made by the

Tribunal. I think the question as to whether or not the Tribunal has jurisdiction is misplaced. The argument should be made before the Tribunal and it is only after the Tribunal makes its decision that any aggrieved party can approach the High Court by way of appeal or judicial review. At this stage the Court will only note that an appeal has been filed before the Tribunal.

Having said so, and after taking a cursory look at the Act, it appears to me that the Tribunal has jurisdiction to handle the appeal. In my view, it appears that the Act gives both limited and unlimited jurisdiction to the Tribunal. **Section 35** which appears to limit the jurisdiction of the Tribunal states:

**“35. (1) Any person aggrieved by any direction given by the Authority or by the Investor Compensation Fund Board -**

**(a) refusing to grant a licence;**

**(b) imposing limitations or restrictions on a licence;**

**(c) suspending or revoking a licence;**

**(cc) refusing to approve a public offer of securities;**

**(d) refusing to admit a security to the official list of a securities exchange;**

**(e) suspending trading of a security on a securities exchange; or**

**(f) requiring the removal of a security from the official list of a securities exchange,**

**may appeal to the Capital Markets Tribunal against such directions, refusal, limitations or restrictions, cancellations, suspension or removal, as the case may be, within fifteen days from the date on which the decision was communicated to such person.**

**(g) refusing to grant compensation to an investor who has suffered pecuniary loss resulting from failure of a licensed stockbroker or dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces;**

**(2) The Capital Markets Tribunal may require the Authority or the Investor Compensation Fund Board to show cause for its action or decision, and may affirm or, after affording the Authority or the Board an opportunity to be heard, set aside such action or decision.”**

On the other hand, **Section 35A** which establishes the Tribunal, at **Sub-section 4** seems to give unlimited jurisdiction to the Tribunal by stating that:

**“35A. (4) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be.”**

Without making any conclusive decision on the issue of jurisdiction, I would state that it would be unjust and unfair to brush off the Applicant’s appeal on the ground that the Tribunal has no jurisdiction to hear it. As already stated, the Tribunal should first be given a chance to address the issue of jurisdiction before this Court can step in.

Coming to the crux of the matter, I note that **Section 35A (17) of the Act** provides:

**“Upon any appeal to the Tribunal under this section the *status quo* of any matter or**

activity, which is the subject of the appeal, shall be maintained until the appeal is determined.”

In **REPUBLIC v. NATIONAL ENVIRONMENT TRIBUNAL & ANOTHER [2013] eKLR G.V. Odunga**, J explained the meaning and effect of maintenance of *status quo* as follows:

**“18. That leads me to the issue *status quo*. The word *status quo* is defined by *Blacks Law Dictionary*, 9<sup>th</sup> Edition at page 155 as “state in which” that is “the situation that currently exists”. *Ballentine’s Law Dictionary* by Jack G Handler at page 522 defines the same word as “the existing state of affairs: things as they are”. *A Concise Law Dictionary* by P G Osborn, 5<sup>th</sup> Edition at page 300 defines the word as “the state in which things are, were”. Therefore when a Court of law orders or a statute ordains that the *status quo* be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining *status quo* is meant to preserve existing state of affairs. Where for example there is a dispute between a tenant and a landlord and there is an order for maintenance of *status quo*, if the tenant is in occupation it means he retains the occupation. If on the other hand he is not in occupation it means he remains out unless the order is for the maintenance of *status quo ante*. *Status quo* must therefore be interpreted with respect to existing factual scenario and in this case with respect to the purpose of what is intended which is the hearing of the appeal by the Tribunal. At the conclusion of the Appeal, the Tribunal is empowered to inter alia, confirm, set aside or vary the order or decision granting the EIA licence. If it were to set aside the order granting the licence, it would mean that the project in question would not be carried on or not carried on in the same manner in which it was being undertaken. For the project to continue while the appeal is being determined would defeat the whole idea behind the maintenance of *status quo*.”**

I agree with the learned Judge’s opinion. I am not persuaded by the submission by the 3<sup>rd</sup> Respondent that maintenance of *status quo* means that its decision can be implemented as the decision of the Tribunal is awaited. My understanding of maintenance of *status quo* in reference to the takeover proceedings is that the decision of the 3<sup>rd</sup> Respondent remains in force but that decision cannot be implemented pending the hearing and determination of the appeal filed by the Applicant at the Tribunal. That is to say that the decision of the Tribunal remains in limbo awaiting the determination of the appeal. Any other interpretation would defeat the intention of Parliament.

The Applicant’s counsel asserted that even after the appeal had been filed, the 3<sup>rd</sup> Respondent continued with the takeover process and the evidence of that continuation is an email communication to the Applicant asking for the shareholders circular and independent advisers circular for the takeover proceedings. This statement was not rebutted. In continuing with the takeover process after the appeal had been filed, the 3<sup>rd</sup> Respondent was acting in contravention of the clear provisions of the Act.

It is indeed in the interests of the shareholders and all the parties herein that the takeover process be completed within the statutory timeframe. However, Parliament in its wisdom provided for an appeal mechanism whose effect is to stop further action pending the hearing and determination of any appeal filed by an aggrieved party. The law ought to be complied with.

Even if Parliament had not provided for maintenance of *status quo*, I find that this is a case that requires the stay of the takeover process least the Applicant’s appeal is rendered nugatory. The Applicant’s grievances need to be addressed before the process can go ahead.

In **VANIA INVESTMENTS POOL LIMITED v CAPITAL MARKETS AUTHORITY, Misc. Civil Application No. 139 of 2014 (unreported)**, Majanja, J observed that the first port of call for those aggrieved by the decisions of the 3<sup>rd</sup> Respondent is the Tribunal. This is what the Applicant has done. The Applicant is entitled to the protection of the law. This application should therefore succeed.

This Court was urged by counsel for the 2<sup>nd</sup> Interested Party to order the Applicant to provide security for costs and an undertaking for damages. Mr. Oraro opposed the application on the ground that the imposition of conditions can only be done at the leave stage. My view in respect of **Order 53 Rule 1(3) CPR** is that conditions as to costs and security can be imposed on an applicant at any time before the matter is heard and determined-see **REPUBLIC v. KENYA REVENUE AUTHORITY & 2 OTHERS EX-PARTE ERAD SUPPLIERS AND GENERAL LIMITED, Nairobi High Court JR Misc. Case No. 87 of 2013** (unreported).

If the Applicant's application was premised on **Order 53 CPR** then I would say that Ms Otaba's application for provision of security is not misplaced. However, the Applicant's application is not premised on **Order 53 CPR**. It is not related to the grant of leave to commence judicial review proceedings. The provision of **Order 53 CPR** cited by Ms Otaba is therefore not applicable.

The question as to whether conditions should be imposed still remains unanswered. The requirement for maintenance of the *status quo* once an appeal is filed is statutory. It is not discretionary. I do not think that conditions can be imposed on what is decreed by statute if the statute itself does not provide that conditions can be imposed. Such an order would amount to putting hurdles on the intentions of Parliament. For this reason, Ms Otaba's application fails.

In summary, the Applicant's application dated 21<sup>st</sup> May, 2014 succeeds and the same is allowed in terms of Prayer No. 3. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of June, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**