



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 173 OF 2012

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT CHAPTER 281 LAWS OF KENYA

THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA AND ORDER 53 CIVIL PROCEDURE RULES CHAPTER 21 LAWS OF KENYA

REPUBLIC APPLICANT

VERSUS

THE COMMISSIONER OF LANDS.....RESPONDENT

CHES PROPERTIES LTD

SHELFCO LTD..... EXPARTE APPLICANTS

INTERNATIONAL PROPERTIES LTD.....INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion dated 1st July, 2014, the *ex parte* applicants herein, **Chess Properties Ltd** and **Shelfco Ltd**, substantially seek an order that there be a stay of execution of the orders given herein on 6th June 2014 pending the hearing and determination of the Applicant’s intended appeal.
2. The said application was based on the ground that the applicant being dissatisfied with the said decision have filed a Notice of Appeal to the Court of Appeal and that the interested parties herein have started activities intended to remove the applicants’ tenants from the suit premises and that if the applicants are removed therefrom it would render the intended appeal nugatory yet the

- respondents have never been in occupation of the suit premises.
3. In opposition to the application the interested party's position was that the application was unmerited, misconceived and fatally defective; that since the judgement intended to be appealed from simply dismissed the Motion, there was no positive order granted capable of being stayed; that as no decree had been extracted, there is nothing capable of being stayed; that having rendered itself on the Motion this Court is *functus officio*; that since what the applicants seek is an injunction pending appeal the same can only be granted by the Court of Appeal; that the applicant has not offered any security for the due performance and as there is no allegation of substantial loss, the application ought not to be granted. It was further contended that as the properties in the suit premises had been demolished the application had been overtaken by events.
 4. On behalf of the Respondent it was contended that there existed no legitimate expectation which the applicants could base their application for stay on; that the applicants failed to prove that they applied for renewal of the lease; that the applicants had not satisfied the requirements for grant of the stay orders sought; that the applicants had not demonstrated that they would suffer any damages; that the applicants had not shown that they were in occupation of the suit premises.
 5. These grounds were expounded by the respective counsel for the parties in their submissions herein.
 6. I have considered the application, the supporting affidavits and annexures thereto, the grounds of opposition, the submissions and authorities relied upon.
 7. It was contended that this Court having determined the Motion herein is *functus officio* and cannot grant the orders sought in this application. With respect, this position in my view is untenable. In **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011]**, the Court of Appeal held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. This was the position in **Equity Bank Limited vs. West Link Mbo Limited [2013] KLR** in which **Musinga, JA** held that inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate and that inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.
 8. In my view 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 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.
 9. It must however be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in **Industrial & Commercial Development**

Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529, section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.

10. 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. 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. 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**.
11. 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 *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.”

12. It is therefore my view that unless the Court grants a positive order a party may not invoke the provisions of Order 42 rule 6 of the ***Civil Procedure Rules***.
13. Having so held I am of the view that this Court cannot invoke its inherent jurisdiction to grant orders of stay when the authorities hold otherwise.
14. The Respondents however seemed to have concentrated on the findings made by this Court in support of its opposition to the application. This Court unlike the Court of Appeal, in my view, cannot revisit the merits of its decision in order to determine whether or not it would be prudent to grant the order of stay since under Order 42 rule 6 aforesaid it is not a condition for grant of stay that the applicant satisfies the Court that its appeal or intended appeal has chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so.
15. Even if the Court could competently grant the orders sought the applicant would have to prove that it stood to suffer substantial loss. Where the applicant for stay of execution is in possession of the suit premises, the Courts do invariably grant the stay and the rationale for this was given in **Nyals (K) Ltd. vs. United Housing Estate Ltd. Civil Application No. 129 of 1995** where the Court of Appeal held that where the subject matter is simply a right to possess on a monthly notice is difficult to see how this can be preserved unless the *status quo* is maintained pending the determination of the appeal. See also **National Dry Cleaners Limited vs. Ezekiel Karanja Ndune Nairobi HCCA Nos. 79 & 80 of 1987[1987] KLR 565** and **Chogley vs. Bains [1955] 22**

EACA 27.

16. In this case, however, it is contended by the applicants that it was in fact their tenants who were in occupation of the suit premises rather than the applicants. The loss if any to the applicant would only be financial which loss cannot be said to amount to substantial loss. Secondly, it is clear that the said tenants had been evicted and the structures which were on the suit land demolished. In other words a stay, if it were to be granted would not necessarily lead to the reinstatement of the said tenants unless new structures are constructed. It has not been alleged that the suit property is in danger of being disposed off to third parties in order to render the success of the intended appeal nugatory. As was held in **Jaribu Holdings Ltd vs. Kenya Commercial Bank Limited Civil Application No. Nai. 314 of 2007:**

“It will not be within reason for the court to grant an order of stay of a decree which it knows and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility. Were the court to order a stay, the applicant might use the order to seek possession. An order of stay is supposed to prevent execution from taking place. Execution does not imply only the formal execution of a decree or order through the court process. A successful litigant who is bale to take over possession of suit property peaceably in pursuance of a decree or order of a court of competent jurisdiction is deemed to be executing the decree or order. Execution through the court process is normally resorted to where peaceable means fail. The respondent having obtained possession of the suit property the court opines that an order of stay if made in this matter is likely to make the applicant seek forcible re-entry, which will be undesirable and possibly lead to violence, and breakdown of law and order. It will be an improper exercise of judicial discretion to grant the application before the court even assuming the applicant’s intended appeal is arguable.”

17. Having considered the application herein it is my view that the instant application cannot succeed.

Order

18. In the premises, I find no merit in the Notice of Motion dated 1st July, 2014 and the same is dismissed with costs to the Respondents and interested party.

19. It is so ordered.

Dated at Nairobi this 11th day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiboi for the Applicant

Miss Kigera for Mr Sagana for the interested party

Cc Patricia