REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, M'INOTI & MURGOR, JJ.A.)

CIVIL APPEAL NO. NYR 79 OF 2019

BETWEEN

BENSON MUGO MUKUNYA.....APPELLANT

AND

SAMUEL MWANGANU THUKU.....1ST RESPONDENT

ROBERT MAGANA MUIRURI.....2ND RESPONDENT

AMOS NGUGI NJOROGE.....3RD RESPONDENT

SAMUEL MONYO NJOROGE.....4TH RESPONDENT

FRANCIS KARIUKI MUHERIA.....5TH RESPONDENT

GABRIEL KABURU KAGUNYA.....6TH RESPONDENT

KAHINGA GAKERE.....7TH RESPONDENT

NANGA KIHOTI (NAIVASHA) LTD.....8TH RESPONDENT

DANIEL MWANGI KANGERE.....9TH RESPONDENT

HARON KIMANI NJOROGE.....10TH RESPONDENT

PHARES MBURU NGUGI.....11TH RESPONDENT

REGISTRAR OF COMPANIES.....12TH RESPONDENT

(Application for stay of proceedings pending the hearing and determination

of an appeal against the ruling and order of the High Court of Kenya at Nakuru

(Ngugi, J) dated 28th February 2019 in High Court Judicial Review Application No. 53 of 2013

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RULING OF THE COURT

In the motion on notice dated 23rd May 2019, the subject of this ruling, ***the applicant, Benson Mugo Mukunya*** seeks an order for stay of proceedings in ***Nakuru High Court Judicial Review Application No. 53 of 2013***. The application was provoked by a ruling by ***Ngugi, J***. dated 28th February 2019 by which the learned judge denied invitation by the applicant to strike out several applications and to set aside

orders made by the court in a judicial review application. The applicant contended that the court had no jurisdiction to entertain the applications or to make the orders in question in a judicial review application after the application had been compromised by the parties. It was also his contention that in a judicial review application, the court can only make the traditional orders of *certiorari, mandamus* and *prohibition*.

The brief background to the application is as follows. Following leadership wrangles in ***the 8th respondent, Nanga Kihoto (Naivasha) Ltd***, a limited liability company, some among its 1,764 shareholders successfully applied to the High Court in Nairobi for an order to compel the ***Registrar of Companies*** to hold the annual general meeting of the 8th respondent. Pursuant to the order of the Court, the Registrar of Companies scheduled the annual general meeting of the 8th respondent on 12th November 2013. After an unsuccessful attempt to set aside the court order directing the holding of the annual general meeting, the 8th respondent applied in the High Court in Nakuru ***(HC Misc. App. No 54 of 2013)*** for leave to take out judicial proceedings and the leave to operate as stay of the scheduled general meeting. The court granted the application as prayed and on 10th December 2013, the 8th respondent filed its substantive notice of motion for an order of *certiorari* to quash the notice calling the annual general meeting.

On 6th September 2016 the parties compromised the motion and it was marked as settled. Subsequently, they recorded various orders by consent to preserve the assets of the 8th respondent and on the conduct of elections of its office bearers, which were held on 2nd February 2018 under the supervision of the court. The applicant contested the office of secretary, but was unsuccessful. Unhappy with the outcome of the elections, he urged the court to find that the judicial review application, having been compromised, no other applications or orders could be made in it and that in any event, in a judicial review application, only the orders of *certiorari, mandamus* and *prohibition* could issue.

Ngugi J. was not impressed by the assertions, noting that the ***Constitution of Kenya, 2010*** and the ***Fair Administrative Action Act*** fundamentally changed the nature of judicial review in Kenya and extended the remedies available beyond *certiorari mandamus* and *prohibition*. In support of that view he relied on the decisions of the High Court in ***Republic v. Kiambu County Executive & 3 Others ex parte James Gacheru Kariuki [2017] eKLR*** and ***James Gacheru Kariuki & 22 Others v. Kiambu County Assembly & 3 Others [2017] eKLR.*** The learned judge was equally unimpressed by the applicant's conduct which he found to amount to approbation and reprobation, to the extent that the applicant was happy to actively participate in the proceedings, including entering into consent orders when it favoured him, and to later disown them when they did not. He according found no merit in the applicant's contentions which he dismissed with costs.

In this application for stay of proceedings the applicant reiterates his position in the trial court that once the judicial review application was compromised, no other applications or consent orders could be made in it. In his view, all the actions that took place after the compromise of the application were null and void. He adds that the jurisdiction of the trial court in a judicial review application was limited to issuing orders of *certiorari, mandamus* and *prohibition*, and nothing else. Lastly the applicant contends that parties cannot confer jurisdiction upon a court and therefore his participation in the subsequent applications and consent orders is of no moment.

The 1st to 7th respondents opposed the motion on the grounds that it was brought in bad faith and had no merit. They contended that the applicant was happy to participate in all the applications and consent orders that were filed after the compromise and only took a different view when he lost the elections. They added that the court had power in a judicial review application to make any orders to meet the ends of justice. Accordingly, these respondents urged us not to stay the proceedings as prayed by the applicant.

We have carefully considered this application. To be entitled to the order of stay of proceedings, the applicant is obliged to show that his intended appeal is arguable and that if the proceedings are not stayed, the intended appeal will be rendered nugatory if it succeeds. (See ***Githunguri v. Jimba Credit Corporation Ltd (No. 2) [1988] KLR 838).*** The purpose of the first consideration is to ensure that the intended appeal is not frivolous and that it raises even one *bona fide* issue worth of full consideration by the Court, whilst the second consideration seeks to ensure that a successful appeal is not rendered a mere pyrrhic victory by changed or intervening circumstances.

On an arguable appeal, the main issue in the intended appeal is whether under our law today, the High Court, in a judicial review application, is restricted to issuing only the traditional remedies of *certiorari, mandamus* and *prohibition*. Decisions abound that the effect of the Constitution of Kenya 2010 has been to expand the scope of judicial review. Thus, for example, in ***IEBC v. National Super Appliance Kenya & 6 Others [2017] eKLR***, this Court aptly stated:

> *"In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalised through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution."*

Subsequently, in ***Child Welfare Society of Kenya v Republic & 2 Others ex parte Child in Family Focus, Kenya*** [2017] eKLR, this Court considered recent trends and developments in judicial review in Kenya and adverted to various decisions of the High Court and this Court that emphasis judicial review's growth and dynamism rather than stagnation and constriction.

For its part the Supreme Court has unequivocally sanction that view. In ***Communications Commission of Kenya v. Royal Media Services & 5 Others [2014] eKLR*** the Supreme Court reiterated that:

> *"The Constitution of 2010 has elevated the process of judicial review to a pedestal that transcend the technicalities of the Common Law."*

In view of such clear and unequivocal pronouncements including from the Supreme Court, whose decisions, by dint of ***Article 163(7)*** of the Constitution bind all courts, the intended appeal is clearly not arguable.

In any event, even if the intended appeal was arguable, we do not see how it would be rendered nugatory if successful. Since 2016 the applicant has been an active participant in the applications and consent orders filed in the Judicial Review Application in the trial court. He cannot be heard to claim now that he is exposed to any prejudice. In addition, from his own deplorable conduct, the applicant cannot be allowed to benefit from the equitable remedy of stay of proceedings. (See ***Titus Gicharu Mwangi v. Mary Nyambura Murima & Another [2014] eKLR)***

Having failed to satisfy both the tests in an application for stay of proceedings, this application has no merit and is dismissed in in its entirety, with costs to the 1st to 7th respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

M. K. KOOME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR