



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & AZANGALALA, JJ.A)**

**CIVIL APPEAL NO. 47 OF 2010**

**BETWEEN**

**FRIENDS OF TAIWAN & TIBET INTERNATIONAL ... APPELLANT**

**AND**

**NON- GOVERNMENTAL ORGANISATIONS CO-ORDINATION BOARD ..... RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Nairobi (Wendoh, J.) dated 8<sup>th</sup> June, 2009 In H.C. Misc. Appl. No. 1226 of 2004)*

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**JUDGMENT OF THE COURT**

1. The appellant was registered as a non-governmental organization on 18<sup>th</sup> December, 2003 under the *Non-Governmental Organizations Co-ordination Act, 1990*. However, on 19<sup>th</sup> March, 2004 the respondent informed the appellant of its decision made on 18<sup>th</sup> March, 2004 to de-register it. The said decision instigated the institution of judicial review proceedings by the appellant. The appellant sought *inter alia*, an order of *certiorari* to quash the respondent's decision and an order of *mandamus* to compel the respondent to reinstate its registration. The appellant's contention was that the respondent's decision was made in contravention of the rules of natural justice, that, it was irrational and unreasonable. In response, the respondent urged that its decision was informed by the fact that the appellant's objectives were against the Government's foreign policy.

2. Be that as it may, when the substantive motion came up for hearing on 23<sup>rd</sup> March, 2007 it was struck out on the ground that it had been brought under the wrong provisions of the law. It appears that the appellant filed an application dated 12<sup>th</sup> October, 2007 seeking review of the foregoing decision. Later on, the appellant filed yet another application dated 17<sup>th</sup> October, 2007 which is the subject of this appeal praying, *inter alia*, for stay of execution of the trial court's decision dated 23<sup>rd</sup> March, 2007 and the respondent's decision to de-register it pending the hearing and determination of the application for review. The basis of the application was that the substantive motion in the judicial review proceedings conformed with the law, thus the decision to strike it out was made on an error apparent on the face of the record; that the trial Judge ought not to have determined the application on a technicality; and that the appellant stood to suffer irreparable harm in the event the orders sought were not granted.

3. The trial court by its ruling dated 8<sup>th</sup> June, 2009 dismissed the application with costs. In doing so, it

found that the application was not only brought under the wrong provisions of law but that there was also no provision allowing review or stay of decisions of the court in judicial review. It is this decision that prompted the appeal before us wherein the appellant complains that the learned Judge erred-

*a. By relying on technicalities to dismiss the appellant's application.*

*b. By visiting the mistakes of the appellant's previous advocates on the appellant.*

*c. By failing to consider the statement of facts and the affidavit filed in support of the judicial review.*

4. With the consent of parties, the appeal was disposed of through written submissions. Mr. Walter K. M'muguna, the appellant's director, appeared for the appellant while learned counsel, Mr. K. Onyiso appeared for the respondent. It is apparent from the parties' submissions that they both proceeded on the misapprehension that the appeal before us was in respect of the trial court's decision dated 23<sup>rd</sup> March, 2007 wherein the appellant's substantive motion in the judicial review proceedings was struck out. It is eminently clear from the notice of appeal on record that the decision the appellant seeks to appeal against is the one dated **8<sup>th</sup> June, 2009** wherein the trial court declined to grant the stay orders sought. It is trite that a notice of appeal invokes the appellate jurisdiction of this Court. It also delineates the scope of the appeal before the court. See this Court's decision in *Kenya Revenue Authority -vs- Doshi Iron Mongers & Another (2016) eKLR* and *Feisai Mohamed Ali Alias Feisal Shahbal -vs- R (2015) eKLR*. As such, our jurisdiction in this appeal is restricted to the consideration of the decision dated 8<sup>th</sup> June, 2009. Consequently, the appeal turns on whether or not the trial court exercised its discretion properly in dismissing the application for stay of execution.

5. In our view, the application for stay right from the onset lacked merit. Firstly, the applicant sought stay of the decision dated 23<sup>rd</sup> March, 2007 wherein the substantive motion in the judicial review proceedings was struck out. Thus, there was nothing that was capable of enforcement to warrant the stay sought. There are numerous decisions of this Court where it has been consistently held that no order of stay of execution can be made where the High Court has only dismissed an application for judicial review. In *Devani & 4 Others -vs- Joseph Ngindari & 3 Others - Civil Appeal No. NAI 136 of 2004 (unreported)*, the High Court dismissed an application for judicial review and the applicant applied under **Rule 5 (2) (b)** of the **Court of Appeal Rules** for stay of execution of the order of the High Court. In holding that the application was incompetent, this Court stated:

***“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”***

See also *Western College of Arts and Applied Sciences (Weco) -vs- Oranga (1976) KLR 63*.

Therefore, the trial court could not issue stay execution in respect of such a negative order.

6. Secondly, the appellant also sought stay of the respondent's decision dated 18<sup>th</sup> March, 2004 which was the subject of the judicial review, and which the court had struck out. In our view, this prayer was tantamount to asking the trial court to sit on appeal of its own decision and wholly untenable at law.

7. Having expressed ourselves as herein above, we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of March, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**