



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO.27 OF 2012**

REPUBLIC.....APPLICANT

**-VERSUS-**

INSPECTOR GENERAL OF POLICE & OTHERS.....RESPONDENT

**RULING**

1. By chamber summons dated 13<sup>th</sup> November, 2017, the *ex parte* applicant **Rev. Dr. William Charles Fryda** sought the following orders:-

*i. THAT the application be certified as urgent and be heard at once.*

*ii. THAT the subject (ex parte applicant) be granted leave to apply for an order of prohibition against the respondent the Inspector General of Police whether by himself or through the Director of Criminal Investigations Department or any other police officer from harassing, arresting, confining, questioning, intimidating or in any other manner exasperating the subject (ex parte applicant) or investigating, freezing or in any other manner interfering with the 2<sup>nd</sup> Interested Party's bank account numbers [particulars withheld] and the subject's bank account numbers [particulars withheld] all held at Prime Bank Limited in relation to matters that are already the subject of Nakuru HCCC. No.224 of 2010 and Nakuru ELC No.238 of 2012.*

*iii. THAT a grant of leave under prayer (2) above do operate as a stay and/or temporary restraint of the respondent's activities adumbrated therein pending the hearing and final determination of the substantive motion seeking similar relief to be filed hereafter within such time as the court may direct.*

*iv. THAT provision be made for the costs of the application.*

2. The chamber summons was filed under certificate of urgency on 14<sup>th</sup> November, 2017. Upon my consideration of the same I granted prayers 1 and 2 and directed that the chamber summons be served for *inter-partes* hearing on the prayer for stay.

3. The background to the Judicial Review application as I garnered from the statement and verifying affidavit of the applicant is an on-going land dispute pitting the applicant against the 1<sup>st</sup> and 2<sup>nd</sup> interested parties which dispute was the subject of protracted suits being Nakuru HCC. No.224 of 2010 and Nakuru

ELC No.238 of 2012. The applicant is aggrieved that the 1<sup>st</sup> interested party had used the police (respondent) to harass, intimidate and investigate him in matters that were civil in nature. He is particularly aggrieved by the actions of one **No.62155 Cpl. Nehemiah Ndirangu** who has obtained court orders to investigate and freeze his accounts numbers [particulars withheld] domiciled at Prime Bank Ltd. He wants the court to prohibit the action of the respondent and issue a stay order pending the hearing and determination of the Judicial Review application.

4. The application is opposed by the respondent. **No.62155 Cpl. Nehemiah Ndirangu** of the Directorate of Criminal Investigation Headquarters has sworn a replying affidavit. He deposes that he was assigned the investigation of the accounts by the Director of Criminal Investigation following receipt of a complaint made by **Wambugu & Co. Advocates** acting for the 1<sup>st</sup> interested party (**Assumption Sisters of Nairobi**). That he subsequently obtained orders vide Misc. Application No.3605/2017 from the Chief Magistrate's (C.M's) Court, Nairobi and that the investigation of the accounts was on going.

5. The 1<sup>st</sup> interested party also filed a replying affidavit sworn by **Sister Bernadette Munya**. She deposed that she had the authority of 2<sup>nd</sup> interested party to swear the replying affidavit. The gist of her averments is that the suits between the parties being Civil Suit No.224 of 2010 and Nakuru ELC No.238 of 2012 had been determined by the ELC Court and wherein the *ex parte* applicant's claim was dismissed. In respect of the accounts in question, she deposes that the *ex parte* applicant had been ordered to surrender the same to St. Mary's Hospital (2<sup>nd</sup> Interested Party).

6. I heard oral submissions of respective counsel on the issue of stay only. **Mr. Keke** learned counsel for the applicant submitted that the applicant had an arguable case deserving of stay. He argued that the applicant was not a party to the proceedings before the Chief Magistrate's Court in Nairobi that granted the respondent orders to investigate the accounts in question, and; that the applicant only got to learn of the said orders through an email. He further submitted that the freezing of the accounts was malicious and an abuse of statutory power by the respondent and intended to aid a party in a civil litigation. He asked the court to grant the stay as there were no unusual circumstances to militate against the stay.

7. **Mr. Kirui** learned counsel for the respondent submitted that the applicant had come to court with unclean hands. He drew the attention of the court to an order of 23<sup>rd</sup> November 2017 issued by **Munyao J.** of the ELC Court which order he submitted seemed to have frozen the accounts in question. He submitted that the application ought to have been filed in the ELC Court that had been dealing with the land dispute. He further submitted that the police had no interest in the case and were only doing their statutory duty. He prayed that the stay order be denied.

8. **Mr. Lagat** learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties relied on the affidavit sworn by **Sister Bernadette Munyao** and the list of authorities filed. He submitted that the applicant had no arguable case before court arguing that the court cannot injunct the National Police Service from conducting their statutory duties. He further submitted that the police acted pursuant to orders obtained from the court and which order had neither been appealed nor set aside. He argued that there were no issues pending before the ELC Court as both HCC. No.224/2010 and ELC No.235/2012 had been determined and a decree issued. He prayed that both the chamber summons and the Judicial Review application be dismissed.

9. The principles for grant of stay in Judicial Review proceedings were aptly stated by **Odunga J** in **James Mburu Gitau t/a Jambo Merchant Vs. Sub County Health Officer Kiambu**. In summary, they are:-

*i. That the court ought not delve into the merits of the main application.*

*ii. To prevent the application from being rendered nugatory by the acts of the respondent during pendency of the application.*

*iii. To prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made.*

**See also George Philip M. Wekulo Vs. LSK & Another (2005) eKLR.**

10. In the instant application, the applicant's grievance is that the respondent has maliciously and in abuse of its statutory power allowed itself to be used to aid a party in a purely civil dispute. The court has however been shown that the police obtained a court order vide CM's C.C.'s Misc. Application No.3605/2017 allowing it to investigate and preserve (5) Bank accounts domiciled in Prime Bank and held in the name of St. Mary's Mission Hospital, St. Mary's Mission Hospital Charitable Trust and William Charles Fryda. It is deponed by No.62155 Cpl. Nehemiah Ndirangu that the said orders were served upon the Bank on 9<sup>th</sup> November 2017.

11. The applicant has submitted that they were not made aware of the proceedings in the CM's Court and only learnt of the order through an email by the Bank. If that be the case, then it would appear to this court that notwithstanding the availability of judicial review, it was open to the applicant to apply to that court for the setting aside of the *ex parte* Order, seek a review or appeal the Order. It is important to recollect at this stage that the judicial review jurisdiction does not extend to the merits of the decision. The issue whether or not the police have acted outside the law, without jurisdiction or in excess of jurisdiction as to warrant stay of their actions has not been made clear to the court. Further the court makes an observation that no allegation of procedural impropriety has been made against the subordinate court that issued the Order either.

12. It became apparent to this court from the rival affidavits and submissions of the parties that save for the respondent in the present chamber summons, the parties have been litigating in the Land and Environment Court and that a judgment was issued by **Munyao J** on 28<sup>th</sup> September 2017. The said judgment was not attached to the pleadings herein. However the decree attached deals with the issue of accounts at paragraph 6 in the following terms:-

***“THAT in respect of accounts, Dr. William Fryda to provide details of all accounts forthwith and to surrender the same to St. Mary's Mission Hospital (the company) and if found necessary submit to an audit as directed in this judgment.”***

13. It is clear on the material before this court that the said accounts which the applicant claims have been frozen through the action of by the police are in fact intrinsically linked to the suits that have been determined by the ELC. To that extent the procedural course would be for the applicant to seek relief or relevant orders in the said court. Whereas this court is seized of judicial review jurisdiction over the criminal justice process, I would hesitate to grant the stay order sought purely on the basis that the effect of such an order would, in the circumstances of this case conflict with the orders already granted by the court in HCC. No.224/2010 as consolidated with ELC No.235/2012. These I consider, are unusual circumstances which militate against the grant of stay.

14. For the above reasons, I decline to grant the order of stay. Costs shall abide the substantive motion.

Orders accordingly.

***Ruling delivered, dated and signed in open court This 14<sup>th</sup> day of December 2017***

**R. LAGAT KORIR**

**JUDGE**

In the presence of:

C/A Emojong

N/A for applicant

Mr. Kirui for respondent

Mr. Langat holding brief for Ms. Wambugu for 1<sup>st</sup> interested party and 2<sup>nd</sup> interested party



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