Case Number:	Judicial Review Application 269 of 2018
Date Delivered:	02 Aug 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Pauline Nyamweya
Citation:	Munir Sheikh Ahmed v Capital Markets Authority [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Judicial Review
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 269 OF 2018

IN THE MATTER OF ARTICLES 10, 47 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 4, 6, 7, 9, 11, & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

MUNIR SHEIKH AHMED.....APPLICANT

VERSUS

CAPITAL MARKETS AUTHORITY.....RESPONDENT

RULING

The Application

1. The Applicant, Munir Sheikh Ahmed, is a former Managing Director of the National Bank of Kenya, the Interested Party herein. He has brought proceedings against the Capital Markets Authority (hereinafter "the Respondent") with respect to a Notice of Enforcement Action by the said Respondent dated 3rd April 2018, which imposed the following sanctions against the Applicant:

a) A financial penalty of Kshs. 5,000,000/-.

b) Disqualification of the Applicant from holding office as a key officer of a public listed company and/or issuer, licensee or any approved institution of the Capital Markets Authority for a period of 3 years from the date of the Notification Action;

2. The Applicant consequently filed a Chamber Summons application dated 2nd July 2018, and seeks the following orders therein:

(a) **That the Court be pleased to certify this matter urgent and hear it ex-parte in the first instance and grant leave pursuant to section 9(4) of the Fair Administrative Action Act.**

(b) **That leave be granted to the Applicant to apply for an Order of Certiorari to remove and bring to this Court for purposes of quashing the following decisions by the Respondent in the Notification of Enforcement Action issued and dated 3rd April 2018 by the Capital Market's Authority, the Respondent herein;**

(i) **That the Applicant in contravention of the responsibility to ensure that the Board of the National Bank of Kenya was provided with accurate information, presented Quarterly Unaudited Financial Statements for the periods ended 30th June 2015 and 30th September 2015 which erroneously indicated that the National Bank of Kenya had earned income amounting to Kshs. 847, 920, 000.00 from the sale of assets and understated the loan provisions;**

(ii) **That the Applicant acted in contravention of Regulation B.06 of the 5th Schedule of the Capital Markets (Securities) (Public Offers, Listing and Disclosure) Regulations 2002 by failing to ensure preparation of the interim accounts for the period ended 30th June 2015 and quarterly accounts for the period ended September 2015 in accordance with the International Financial Reporting Standards (IFRS) which accounts were subsequently published and relied upon by the investing public;**

(iii) **That the Applicant acted in contravention of Article 2.1.3 of the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002 by failing to supply the board with relevant, accurate and timely information to enable the Board to discharge its duties.**

(iv) **That the Applicant contravened the provisions of Article 3.1.1 of the Capital Markets Guidelines on Corporate on Corporate Governance Practices by Public Listed Companies in Kenya, 2002 by failing to assume a primary responsibility of fostering the long-term business of the corporation consistent with his fiduciary responsibility to the shareholders.**

(c) **That leave be granted to the Applicant to apply for an Order of Certiorari to remove and bring to this Court for purposes of quashing the decision in the Notification of Enforcement Action issued by the Respondent herein, on 3rd April 2018 imposing the following sanctions;**

(i) **To disqualify the Applicant from holding office as a key officer of a public listed company for a period of three (3) years and;**

(ii) **Imposing a financial penalty of Kenya Shillings Five Million (Kshs. 5,000,000.00) against the Applicant.**

(d) **That leave be granted to the Applicant to apply for an Order of Prohibition directed against the Capital Markets Authority prohibiting the Respondent from implementing the decision in the Notification of Enforcement Action issued by the Capital Market's Authority on 3rd April 2018 disqualifying the Applicant from holding office as a key officer of a public listed company or licensed institution and from imposing any other financial or administrative penalties against the Applicant premised on the impugned investigations and proceedings against the Applicant.**

(e) **That leave be granted to the Applicant to apply for an Order of Prohibition directed against the Capital Markets Authority prohibiting the Respondent from undertaking any further proceedings against the Applicant with the Respondent as the complainant, investigator, prosecutor and adjudicator contrary to the provisions of Articles 47 and 50 of the Constitution.**

(f) **That, the leave so granted to the Applicant do operate as a stay of the decisions in the Notification of Enforcement Action issued by the Capital Market's Authority on 3rd April 2018.**

(g) **That costs of this application be provided.**

1. The application was supported by the grounds on its face, and by the Applicant's verifying affidavit and statement of facts both

dated 2nd July 2018, and the annexures thereto. The said statement and verifying affidavit detailed the proceedings leading to the said decisions, and the grounds for the orders sought. The proceedings arose from a Notice to Show Cause Letter (NTSC) dated 22nd August 2017 that the Respondent issued the Applicant setting out the allegations against the Applicant including the allegation that he had misrepresented the financial statements for the period ended 30th June 2015 and 30th September 2015 and had embezzled funds at the Interested Party.

3. In summary the grounds for the application are that the Respondent acted *ultra vires* its statutory mandate in purporting to regulate and penalize the Applicant; that the Respondent's decision was biased, partisan and flawed as the Respondent was acting as a complainant, investigator, prosecutor and adjudicator; that the Respondent did not accord the Applicant a fair hearing and to ensure a pre-determined verdict was entered, the Respondent suppressed crucial evidence; and that the delay by the Respondent in delivering its decision was calculated to ensure that the Applicant could not lodge an appeal to the Capital Markets Tribunal as the tenure of the members lapsed in March 2018.

4. This Court at an *ex parte* hearing held on 4th July 2018 granted the Applicant leave to apply for the orders sought of certiorari and prohibition, and directed that the substantive Notice of Motion be filed and served within 21 days. The Court further directed that the question whether the said leave shall operate as a stay was to be determined after an *inter partes* hearing. A substantive Notice of Motion and Further Affidavit were subsequently filed by the Applicant on 6th July 2018 and 30th July 2018 respectively. The Respondent filed a Replying Affidavit in response, that was sworn on 16th July 2018 by Abubakar Hassan Abubakar, its Head of Investigations and Enforcement, and filed in Court on 26th July 2018.

5. The *inter partes* hearing on the prayer that leave operates as a stay of the Respondent's decision was held on 30th July 2018, by way of oral submissions. During the hearing, Mr. Issa, the Applicant's counsel, submitted that the sanctions the Applicant is seeking to stay are the financial penalty and disqualification. Further, that the financial penalty was to be paid within 30 days of the Respondent's Notification of Enforcement Action.

6. The counsel informed that Court that the Applicant had lodged an appeal with the Capital Markets Tribunal, which is part of the record. Further, that the Applicant's counsel in a letter dated May 31st 2018 to the said Tribunal sought a mention date for the appeal, which letter was annexed as annexure "MSA 11" to the Applicant's verifying affidavit. They were however informed by the Tribunal in a response dated 31st May 2018 (the Applicant's annexure "MSA 12") that there was no quorum at the Tribunal, as the term of some members had expired, hence the filing of the instant judicial review application.

7. Therefore, that the instant application is not *sub-judice*, as the Tribunal is not competently seized of the appeal before it for lack of quorum, and it has made no orders on the appeal. The counsel submitted that the Applicant will apply to withdraw the appeal when the Tribunal is properly constituted, and that this application is thus properly before this Court.

8. Mr. Issa urged that the sanctions imposed on the Applicant by the Respondent of a financial penalty and disqualification go hand-in-hand, and a stay of both can thus be granted. The counsel relied on the decision by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others, (2014) e KLR,** that where what is sought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings. Further, that the said sanctions have not been implemented in terms of payment of financial penalty, and have therefore not been overtaken by events, and that as the financial penalty goes conjunctively with the disqualification both are continuing sanctions.

9. It was also contended that the financial penalty is the maximum penalty that the Respondent can impose and is not proportional, and that the disqualification is a stigma that will stain the Applicant's standing having worked on the private sector for over 20 years.

10. Mr. Githendu, the counsel for the Respondent, submitted that an order that leave will operate as a stay is discretionary, and should only be granted where it is efficacious. Further, that in the case of **Taib A. Taib vs. The Minister for Local Government & Others , Mombasa HCMCA No. 158 of 2006,** it was held that an order of stay is efficacious if it stays something that is ongoing and is being implemented, and if that thing has already happened then the order of stay will be in vain. He in this respect also referred to the decision by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another, (2012) e KLR** that court orders are not bouquet of flowers.

11. The Respondent's counsel further contended that on the sanction imposed by the Respondent on the Applicant of

disqualification, there is nothing to stay as the disqualification has already happened, and is final and on-going. There is therefore nothing to suspend pending the hearing of the instant application. The counsel relied on the decision in **George Philip M. Wekulo vs The Law Society of Kenya & Another, (2005) e KLR** where the Court refused to stay the suspension of an Advocate. Further, that an order of stay with respect to the disqualification would amount to a *de facto* revocation of the disqualification and reinstatement of the Applicant's eligibility, which should happen at the end of the trial .

12. As regards the Respondent's decision to impose a financial penalty on the Applicant, Mr. Githendu submitted that the Respondent has not taken any steps to recover the penalty, as it is upon the Applicant to pay the penalty so as to regain his rights to participate in the capital markets. Further, that the financial penalty cannot be the subject of recovery of assets from the Applicant, as the Respondent did not trace any proceeds of illegal benefits arising from fraud or embezzlement to the Applicant, and the financial penalty imposed was analogous to a fine. Therefore, an order of stay as against the Respondent as regards the financial penalty will be in vain.

13. The element of the public interest being a material factor to consider in the grant of stay was also urged by Mr. Githendu. He submitted in this respect that judicial review proceedings are public proceedings, and that the enforcement of the Respondent's decisions is in the public interest to protect the interests of shareholders. Further, that an order for stay will send conflicting signals to the capital markets as the Respondent is executing its protective role. Mr. Githendu cited the decision in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR** for this position.

14. The last ground of opposition by Mr. Githendu was that the Applicant's application is in abuse of court process, as he ought to have withdrawn the appeal at the Capital Markets Tribunal, and instead filed concurrent proceedings on the same issues and involving the same parties herein.

The Determination

1. A preliminary issue has been raised by the Respondent as to whether the Applicant's application is properly before this Court, in light of the appeal filed by the Applicant with the Capital Markets Tribunal. The reasons given by the Applicant as to why he moved this Court despite the pendency of the appeal at the Tribunal was pleaded and noted by the Court at the time of granting leave to commence the judicial review proceedings, particularly that the said remedy was not currently available to the Applicant and in the circumstances was thus not an effective remedy.

2. While it is this Court's jurisprudential policy in this regard to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute as required by section 9(2) and (3) of the Fair Administrative Action Act, and as held in various decisions (see **Republic vs National Environment Management Authority (2011) eKLR** and **Speaker of National Assembly vs Njenga Karume, (2008) KLR 425**), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Where such an alternative remedy cannot be used by an applicant as in the present case, this Court can exempt such an applicant from its application as provided by section 9(4) of the Fair Administrative Action Act.

3. On the outstanding issue as to whether the leave so granted should operate as a stay, the applicable law is Order 53 Rule 1(4) of the Civil Procedure Rules , which provides as follows:

"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."

The decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion, and that discretion must be exercised judiciously.

4. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127,** it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision and in various decisions by Kenyan Courts.

5. The first factor that is relevant is whether or not the decision or action sought to be stayed has been fully implemented, on which there are differing opinions. In **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega (supra)** it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed. A similar decision was also made in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra).** According to these decisions, it is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted.

6. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… The purpose of a stay order in judicial review proceedings is 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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

7. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows**:**

"As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.

I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect" Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. ...It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented … . But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay"

8. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (supra)** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR,** where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

9. From the above decisions, it follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature then it is still possible to suspend the implementation.

However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.

10. The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra),** where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

11. The public interest element in the grant of a stay was also the subject of the decision in **R (H). vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held that where there is a public interest element involved, the Court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal's decision was unlawful.

12. Lastly, the public interest as a relevant factor was also considered by Nyamu J. (as he then was) in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42,** wherein the learned Judge cited the decision in **R VS Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763** that the Court can refuse to order that leave granted for orders of judicial review does operate as a stay where such a stay would violate the needs of good administration.

13. Applying the above principles to the present application, it is this Court's position that the financial penalty that was imposed by the Respondent is yet to be implemented, as there was no evidence provided of payment of the same by the Applicant. In addition, taking into account the amount of penalty imposed, and the irreparable prejudice and hardship the Applicant is likely to suffer in the event of enforcement of the said penalty whether in terms of payment or recovery, *vis-à-vis* the challenge on the Respondents decision to impose the said penalty, there is need to preserve the current *status quo* until the legality of the Respondent's proceedings and decision is established.

14. On the second sanction of disqualification, I am of the view that this is a decision that was self-executing, and on which no further positive steps were needed to be taken by the Respondent in its implementation. It is therefore fully implemented, and is not of a continuing nature as no further acts need to be taken by any of the parties as regards the implementation of the sanction, save for these proceedings.

15. My finding on the staying of the sanction of disqualification is that even if this Court has jurisdiction and the discretion to suspend the sanction, a number of factors militate against the exercise of that discretion. Firstly, as noted above, this discretion should be exercised sparingly where a decision has been fully implemented, and as there is a public interest element involved, only where an applicant has made out a strong case. In the present application, leave was granted on the basis that the Applicant had an arguable case, and therefore the Applicant still needs to establish the grounds he has set out on which he challenges the Respondent's decision to disqualify him.

16. The public interest element involved in the sanction of disqualification is that unlike the first sanction of the financial penalty that will largely impact on and prejudice the Applicant as an individual, suspending the disqualification of the Applicant will also affect other members of the public, in the event that he is allowed to continue participating in the financial and capital markets, before the propriety of the allegations made by the Respondent as regards his conduct in the said markets is determined.

17. In the premises, the prayer for stay in the Applicant's Chamber Summons dated 2nd July 2018 is allowed only to the extent of the leave granted to commence judicial review proceedings shall operate as a stay of the payment and/or recovery of the financial penalty of Kshs. 5,000,000/- imposed upon the Applicant in the decision in the Notice of Enforcement Action issued by the Respondent dated 3rd April 2018. For the avoidance of doubt, the leave shall not operate as a stay of the disqualification of the Applicant that was imposed by the said decision.

18. The costs of the said Chamber Summons shall be in the cause.

19. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF AUGUST 2018

P. NYAMWEYA

JUDGE