



**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
[PERMOHONAN SEMAKAN KEHAKIMAN NO: WA-25-222-
08/2020]**

Dalam perkara keputusan yang diperolehi dan/atau dibuat pada 11.6.2020 dan 20.7.2020, atau mana-mana tarikh setelah itu, oleh Responden-Responden atau mana-mana satu dari mereka untuk menetapkan keanggotaan panel, pengerusi bagi panel, tidak menyemak kembali keputusan Pendaftar untuk menetapkan pendengaran bagi Kes Rayuan Mai No: 14000-041-0048-2019 di Mahkamah Rayuan Syariah Wilayah Persekutuan Kuala Lumpur dan tidak memberi maklumbalas kepada surat-surat Peguamcara Pemohon bertarikh 17.7.2020 dan 6.8.2020

Dan

Dalam perkara Mahkamah Rayuan Syariah Wilayah Persekutuan Kuala Lumpur Kes Rayuan Mal No: 14000- 041-0048-2019

Dan

Dalam perkara Artikel 5, 7 dan 8 Perlembagaan Persekutuan



Dan

Dalam perkara Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan), 1993 *inter alia* s. 41, 42, 54, 55 dan 56

Dan

Dalam perkara suatu deklaras di bawah s. 41 Akta Spesifik Relif, 1950 dan satu permohonan untuk semakan kehakiman di bawah s. 25 dan untuk relif di bawah perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 selaras dengan Aturan 53 dan Aturan 92 Kaedah-Kaedah Mahkamah, 2012

ANTARA

HISHAM HALIM

(NO. K/P: 820216-10-6079)

... PEMOHON

DAN

1. MAYA AHMAD FUAAD

(NO. K/P: 820720-71-5156)

**2. KETUA HAKIM SYARIE MAHKAMAH SYARIAH
WILAYAH-WILAYAH PERSEKUTUAN**

**3. KETUA PENGARAH JABATAN KEHAKIMAN SYARIAH
MALAYSIA**



**4. KETUA PENDAFTAR MAHKAMAH RAYUAN SYARIAH
WILAYAH-WILAYAH PERSEKUTUAN**

5. KERAJAAN MALAYSIA

**... RESPONDEN-
RESPONDEN**

Judgment (Enclosure 53)

Introduction

[1] This is an application by the Applicant by way of Notice of Application (Enclosure 53) dated 3.12.2020 for a stay of all proceedings in the Federal Territory of Kuala Lumpur Syariah Court of Appeal particularly known as Syariah Court of Appeal case no: 14000-041-0048-2019 (including and not limited to the First Respondent’s appeal) (the Syariah proceedings pending the final disposal of the hearing of the judicial review in this court).

[2] The grounds of this application are as follows: -

- i) On or about 7.8.2020, the Applicant applied to the Kuala Lumpur High Court (Special Powers Division) for leave to apply for judicial review (the “**Application**”). On 25.8.2020, after hearing the parties, the Court decided to allow the Application;
- ii) Despite various discrepancy and/or non-compliance of the law in the course of the proceeding relating to the First Respondent’s Syariah Court of Appeal especially after 18.2.2020, in which the Applicant believes that the Respondents in this case are aware, the Applicant was informed that the Syariah Court of Appeal had already fixed a further hearing date for the appeal on 16.12.2020;

iii) The Applicant worried that if the Syariah Court of Appeal decides the Appeal in the Syariah Court before the disposal of the judicial review, any part of the proceedings would be rendered nugatory and academic or adversely affected and hence it is in the interest of justice to preserve:

- The status quo of the proceedings of the First Respondent's Syariah Appeal pending the hearing and determination of the existing judicial review proceedings filed and pursued by the Applicant; and
- The integrity of the proceedings of the judicial review in the Kuala Lumpur High Court.

iv) There are merits in the proceedings of the judicial review before this Honourable Court *inter alia* in which the interpretation of the provisions and/or various legal issues which had been submitted have to be determined by this Court;

v) Thus, there is an exceptional circumstance which warrants a stay of proceedings in the First Respondent's Syariah Appeal pending the disposal of the judicial review;

vi) The balance of convenience and/or justice lies in favour of a stay prayed for to be granted by this Honourable Court; and

vii) Damages are not an adequate remedy.

[3] After considering the Application, the written submissions and the oral submissions of the parties, I decided to dismiss Enclosure 53. This judgment contains the full reasons for the dismissal.



Background Facts

[4] The background of the Application, based on the Applicant's Affidavit, the Applicant's and the First Respondent's written submissions are largely undisputed and can be summarised as follows:

- a) On 7.8.2020, the Applicant applied for leave for judicial review against the Respondents;
- b) On 25.8.2020, the Applicant amended the Application orally and the court granted leave for substantive judicial review (the "Leave Order"). The Leave Order was served on each of the Respondents;
- c) On 23.9.2020, the First Respondent filed an application for committal against the Applicant in the Syariah Court of Appeal alleging that the Applicant had purportedly committed contempt against the Syariah Court in filing the judicial review proceeding herein;
- d) On 5.11.2020, the First Respondent's Syariah solicitors then filed an application seeking an order from the Syariah Court of Appeal to issue a Notice to show cause against the Applicant for filing the judicial review proceedings herein;
- e) The First Respondent's Syariah Committal Application was served on the Applicant on 7.12.2020. The Applicant has since been directed by the Syariah Court of Appeal to file his reply;
- f) Given that the substantive judicial review pertains to the legality of the Syariah Appeal it was thus imperative for the Applicant to seek a stay of the same as well as all other

Syariah proceedings between the Applicant and the First Respondent.

- g) On 3.12.2020, the Applicant filed this application for a stay of proceeding (Enclosure 53) and after hearing submissions of counsel for all parties, this court on 14.12.2020 granted an ad *interim* stay of any and all of the Syariah proceedings between the Applicant and the First Respondent (the “ad *Interim* Stay Order”), in particular the Syariah Appeal in which the decision was to be delivered the next day on 15.12.2020, until the hearing and disposal of Enclosure 53; and
- h) On 15.12.2020, the Syariah Court of Appeal proceeded to deliver its decision in the Syariah Appeal.

Contention of the parties

[5] In brief, the Applicant’s contention are as follows: -

- a) The stay is necessary to aid and assist the Applicant’s attempt to gain access to justice. In this regard the First Respondent has already embarked on efforts to intimidate the Applicant from proceeding with the substantive judicial review and to interfere with the due administration of justice in these proceedings by filing contempt proceedings against the Applicant in the Syariah Courts;
- b) The said contempt proceedings fall within the scope of Enclosure 53 and the ad *Interim* Stay Order; and
- c) A stay is therefore necessary to ensure that the First Respondent’s attempts to obstruct the Applicant’s access



to civil court and to interfere with the due administration of justice in the proceedings herein are not successful.

[6] On the other hand, the Attorney General's Chambers (**the "AGC"**) on behalf of the Second to the Fifth Respondent and the learned counsel for the First Respondent raised a similar objections. The objections were premised on the following grounds:-

- a) The civil court has no jurisdiction to order for a stay of proceedings of the Syariah Court;
- b) No stay order can be granted against the Respondents;
- c) The application is an abuse of court's process;
- d) There was delay in the filing of the Application; and
- e) The Application has become academic.

Decision of the Court

[7] Having perused the Application and the cause papers, it is clear that the subject matter and/or dispute between the Applicant and the First Respondent falls within the purview of the Syariah Court.

[8] Therefore, I am of the view that the Syariah Court has the jurisdiction to hear and determine the dispute and/or the Application in accordance with the prescribed procedure under the law.

[9] Article 121(1A) of the Federal Constitution (**the "FC"**) states as follows:-

Article 121. Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

[10] The above Article 121(1A) of the FC clearly protects the Syariah Court's proceeding from the Civil Court's interference.

[11] Further, the Federal Court in the case of *Subashini Rajasingam v. Saravanan Thangathoray & other appeal* [2007] 3 MLRA 81; [2008] 2 CLJ 1; [2008] 2 MLJ 147 at 171 held that:

“Thus, the civil court cannot be moved to injunct a validly obtained order of a Syariah Court of competent jurisdiction. The injunction obtained by the wife, although addressed to the husband, was in effect a stay of proceedings of the husband's applications in the Syariah High Court and this amounts to an interference by the High Court of the husband's exercise of his right as a Muslim to pursue his remedies in the Syariah High Court. Obviously, the law does not permit such an interference”

[12] Based on the above, clearly the Federal Court has held that the civil court cannot be moved to interfere with the Syariah Court's proceeding.

[13] it is my view, if this court were to grant the stay order it will serve as a bad precedent as it would bring the Syariah Court's system into chaos when a civil court is able to interfere at any stage of the Syariah Court's proceeding.

[14] Based on the above, I am of the view that this court is not the right forum to hear and/or to grant this Application.

[15] Further, I am of the opinion that if the Syariah Court proceeding keep being injunct in the Civil Court, it will deter the Syariah Court judges from performing its function under the law and would cause delay and/or embarrass the proceeding between the parties at the Syariah Court which would eventually denied justice to the parties before the Syariah Court.

[16] Therefore, I am of the view the Applicant should have filed this Application before the Syariah Appeal Court as this court has no jurisdiction to interfere and/or to grant stay of proceedings in the Syariah Appeal Court.

[17] Further, I find that this Application is an abuse of process of the court. This is because the Applicant is exploiting the Civil Court to intrude into the Syariah Court's jurisdiction and impede the Syariah Court's proceeding which clearly goes against Article 121 (1A) of the FC.

[18] The principles of stay of proceeding has been discussed in a plethora of cases. In *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 MLRA 104; [2013] 3 CLJ 47; [2013] 4 MLJ 213, Mohd Zawawi Salieh JCA (now FCJ) speaking for the Court of Appeal held that: -

“[22] Now, what factors or principles will, and should, guide the courts in applications for a stay of an order granted by a court. These factors or principles have been reiterated in very many of cases decided by our courts. The factors or principles so enumerated are inexhaustive, and not all of them are applicable to every case. Each has its own peculiar principle.

Some of the principles to be considered in the motions may be stated as follows:

(a) the courts have an unimpeded discretion to grant or refuse stay. In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically (see *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 MLJ 116; *Leong Poh Shee v. Ng kat Chong* [1966] 1 MLJ 86);

(b) an unsuccessful party applying for a stay must show ‘special circumstances’. What will constitute ‘special circumstances’ will no doubt vary from case to case. The fact that an appeal would be rendered nugatory if stay was refused is the most common one (see *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1 and *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)* [1976] 1 MLJ 131). The application is not granted as a matter of routine and it is not an automatic or mechanical relief slavishly followed after filing an appeal. In every matter or suit before a court of law, whether in its original or appellate stage of proceedings, the court will consider the competing rights of both parties including the applicant and respondent to justice;

(c) there is a need to preserve the res or preservation of the subject matter of litigation. The courts have an obligation to protect the res for the purpose of ensuring that the appeal, if successful, will not be rendered nugatory (see *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 WLR 749). But where it is shown by affidavit evidence, say by the respondent, that the rest will not be destroyed or there is in fact no res, an application may not be granted;



(d) where an application is an abuse of the court process, then the stay of proceedings will not be granted. A typical example of abuse of court process is where a suit is duplicated or where a party employs improper and perverse procedure to obtain an advantage undeservedly;

(e) it is important to stress that initiation of a suit in a court of law demands the suit will be heard expeditiously and completed without any inhibition midway. Therefore, where an application for stay of proceedings is intended to merely stop or suspend the proceedings; it will be refused. Some applicants, on seeing the weakness of their client's case, would resort to application for stay and thereby waste the time of the other party and the court. The party simply cannot resort to the interlocutory of stay proceedings on having the slightest disagreement with any ruling of a trial judge. Courts are enjoined not to encourage such unwholesome practice; and

(f) an applicant for stay of proceedings must come with clean hands because what he is asking is an equitable relief. Equity will not assist the unclean. That is why the court has to look into the antecedents of the parties.”

(emphasis added)

[19] Based on the above authority, it is clear that the Applicant has failed to establish special circumstances to warrant this court to grant stay in this Application.

[20] I am also of the view that the bona fide of this Application is in doubt. The Applicant did not come to this court with clean hands

and tainted with bad faith. This is evident when this Application for stay was made at eleventh hour, a few days before the Syariah Appeal Court is set to deliver its decision ie, 15.12.2020.

[21] The Court of Appeal in *International Construction & Civil Engineering Sdn Bhd v. Jittra Sdn Bhd & Ors* [2018] MLRAU 317; [2018] 1 LNS 1252 held: -

“[15] It is now well established that the court will not exercise its inherent jurisdiction to stay a proceeding unless there are extremely compelling reasons to do so and not merely on the grounds of what is often referred to as ‘interest of justice’, etc. The strict rule in vogue is that once an action is filed, it must proceed expeditiously. The threshold to seek a stay of proceedings is very high in cases before the trial court. Very importantly, **if the bona fide of the application is in doubt, a stay application must be dismissed in limine.**”

(emphasis added)

[22] I also find that the Applicant did not explain the delay in filing this Application despite the facts that the Applicant had filed the application for judicial review on 7.8.2020.

[23] In *SCP Assets Sdn Bhd v. Perbadanan Pengurusan Megan Avenue (1)* [2017] MLRHU 1848; [2017] MLJU 1081, S. Nantha Balan J (now JCA) held that: -

“Clearly, **there has been considerable delay on the part of the defendant in filing the application for stay of proceedings.** But, according to learned counsel for the defendant, delay should not be ground for dismissing the

stay application. I disagree. **In my view, delay is definitely an important factor to be considered in an application for stay of proceedings. Indeed, delay could in certain circumstances even be fatal to an application for stay of proceedings. The other important factor is the overall conduct of the defendant. The defendant's conduct is relevant in terms of whether they have approached this court with 'clean hands'.**

(emphasis added)

[24] Taking into consideration that the Applicant had filed the application for judicial review on 7.8.2020, calculation wise, the Applicant's stay Application was filed approximately 3 month and 27 days after the filing of the said judicial review.

[25] In *MCAT GEN Sdn Bhd v. Celcom (Malaysia) Bhd (No. 2)* [2007] 1 MLRH 199; [2007] 10 CLJ 375; [2007] 8 MLJ 107, Abdul Malik ishak J (as he then was) held: -

“[21] That would constitute an inordinate and contumelious delay. That **delay was certainly fatal** (*Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297). In **seeking the court's discretion in granting the stay, the plaintiff should have filed enclosure 35 promptly and should not sleep on its rights** (*Haji Wan Habib Syed Mohamed v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198). **No explanation was forthcoming to this day for the delay in filing end 35. One can only conclude that the stay application was filed mala fide and simply a tactical play....**”

(emphasis added)



[26] In our present case, the Applicant is all aware of his own judicial review application even before the hearing and/or decision fixed by the Syariah Appeal Court.

[27] I am of the view, if the Applicant's Application is genuine, the Applicant should have filed the stay Application as soon as the leave of judicial review was granted and not to delay it until the last minute before the Syariah Appeal Court fixed the date for decision.

[28] Therefore, the conduct of the Applicant clearly shows that the Applicant did not approach this court with "clean hands" and the delay in the filing of the Application is not reasonable and/or bona fide and had caused prejudiced to the Respondents particularly the First Respondent.

[29] More importantly, I am of the opinion that should this court refused to grant the stay application, there is no serious prejudice caused to the Applicant.

[30] This is because the Syariah Court has the power to stay its own proceeding. The Syariah Court may give any interlocutory order as it thinks fit upon application by parties including an order for stay.

[31] Section 187 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 states as follows: -

"Section 187 Mode of application

(1) Where by this Act an application in the course of any proceedings whether before or after judgment, is expressly or by implication authorized to be made to the Court, such application shall be made in Form MS 49 and shall, unless the court otherwise directs, be heard in chambers before a judge.



(2) Every application shall state the nature of the order applied for in general terms and the grounds of the application.

(3) An application under this Chapter may be made *ex parte* unless the Court otherwise directs or otherwise provided in this Chapter.”

[32] Having perused the cause papers filed in this Application, I find that there is no evidence that the Applicant has ever applied to the Syariah Appeal Court for a stay of proceeding. By coming to the civil court to injunct the Syariah Appeal Court from continuing with its proceeding, I am of the view that it is a blatant abuse of this court’s process.

[33] Further, I am also of the view that the Application has become academic since the Syariah Appeal Court has delivered its decision on 15.12.2020. Therefore, I agree with the submissions of the Respondents that there is nothing for this court to stay.

Conclusion

[34] Premised on the aforesaid reasons, I dismissed the Applicant’s Application for stay (Enclosure 53). A global cost of RM5,000.00 is to be paid by the Applicant to the First Respondent subject to allocator except the Second to the Fifth Respondent where the Applicant is to pay costs in the sum of RM5,000.00 without allocator.

Dated: 5 NOVEMBER 2021

(AHMAD KAMAL MD SHAHID)

Judge

High Court Kuala Lumpur

Counsel

For the applicant - Malik Imtiaz Sarwar, Nizam Bashir, K Shanmuga, Lim Yvonne & Kee Hui Yee; M/s Nizam Bashir & Associates

Peguambela dan Peguamcara,
C3-5-13, No. 1, Jalan Dutamas 1,
Solaris Dutamas,
50480 Kuala Lumpur.
(Ruj. No: NB/L/5974/2020/rr)

For the first respondent - Abd Shukor Ahmad & Mohd Rafie Mohd Shafie; M/s Shukor Baijit & Partners

Peguambela dan Peguamcara,
No. 14, 2nd Floor, Wisma Shukor Baijit,
Jalan 13/48A, Sentul Raya Boulevard,
Off Jalan Sentul,
51000 Kuala Lumpur.

For the second to the fifth respondent - Mazlifah Ayob, Peguam Kanan Persekutuan, Bahagian Guaman, Jabatan Peguam Negara

No. 45, Persiaran Perdana,
Presint 4,
Pusat Pentadbiran Kerajaan Persekutuan,
62100 Putrajaya.

Case(s) referred to:

Subashini Rajasingam v. Saravanan Thangathoray & other appeal
[2007] 3 MLRA 81; [2008] 2 CLJ 1; [2008] 2 MLJ 147

Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 MLRA 104; [2013] 3 CLJ 47; [2013] 4 MLJ 213



[2021] 1 LNS 1890

Legal Network Series

International Construction & Civil Engineering Sdn Bhd v. Jittra Sdn Bhd & Ors [2018] MLRAU 317; [2018] 1 LNS 1252

SCP Assets Sdn Bhd v. Perbadanan Pengurusan Megan Avenue (1) [2017] MLRHU 1848; [2017] MLJU 1081

MCAT GEN Sdn Bhd v. Celcom (Malaysia) Bhd (No. 2) [2007] 1 MLRH 199; [2007] 10 CLJ 375; [2007] 8 MLJ 107

Legislation referred to:

Syariah Court Civil Procedure (Federal Territories) Act 1998, s. 187

Federal Constitution, art. 121(1A)