



**Nyakamba v Director of Criminal Investigations & another (Anti-Corruption and Economic Crime Petition 5 of 2022) [2023] KEHC 1161 (KLR)
(Anti-Corruption and Economic Crimes) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 5 OF 2022**

EN MAINA, J

FEBRUARY 23, 2023

BETWEEN

DANIEL MIRERA NYAKAMBA PETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

RULING

1. The Applicant herein is a former Kenya Revenue Authority employee, charged with corruption and economic crimes in Nairobi Chief Magistrates Court Anti-Corruption Case No. E056/2020 Republic versus Daniel Mirera Nyakamba & another (ACC No. E056/2020), which proceedings are currently pending before the trial court.
2. The Applicant challenges the decision of the 1st and 2nd Respondents to investigate and charge him in ACC No. E056/2020 and has filed a Petition dated November 3, 2022. Simultaneously with the Petition he filed an application under articles 10, 19, 47, 50, 157(5)(c), 157(11), 159(2), and 165 of the [Constitution](#) by which he seeks orders as follows:-

“1) Spent

2. Spent

3. That pending the hearing and determination of this Petition, this Court be pleased to issue stay orders staying the proceedings in Nairobi Chief Magistrate's Court Anti-Corruption case number E056/2020 Republic v Daniel Mirera Nyakamba & another;



4. That the honourable court be pleased to issue an order in Nairobi Chief Magistrate's Court Anti-Corruption case number E056/2020 Republic v Daniel Mirera Nyakamba & another withdrawing and/or terminating the charges preferred against the Applicant therein.
 5. That the cost of this application be awarded to the Applicant.”
3. The gist of the application as can be discerned from the grounds on its face thereof and also in the supporting affidavit is that the petitioner/applicant could not have possibly committed the offence with which he was charged because at the material time he was at the University of Nairobi preparing for his end of semester exams; that he had also by then resigned from his employment and could not therefore access the itax system; that the Directorate of Criminal Investigations carried out investigations and confirmed his position and that his prosecution is an affront to and a violation of his Constitutional rights and this court ought therefore to grant him the order sought. That he stands to suffer great prejudice should the order not be granted but that the grant of Orders sought will not prejudice the Respondent in any way but will allow fair administration of Justice and the rule of law.
 4. The 1st and 2nd Respondents have vehemently opposed the Application through a replying affidavit sworn by interested party Norbert Kioko on December 15, 2022. The Respondents aver the 1st Respondent undertook investigations in respect of various actions and omissions by the Applicant which constituted criminal offences under the *Tax Procedures Act* and the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003; that, upon completion of investigations, the 1st Respondent forwarded the inquiry file to the 2nd Respondent; That the 2nd Respondent's review of the file and the evidence led to the following findings:
 1. The Taxpayer in question Konrad Science Limited was registered for Income Tax, VAT and PAYE obligation.
 2. The said taxpayer understated their production and turnover leading to tax losses and the principal taxes payable by the company as captured in the charge sheet which is composed of Corporate tax, Excise Tax and VAT.
 3. The said taxpayer was made aware of the findings through the demands by Kenya Revenue Authority and granted an opportunity to raise their objections once the assessments were raised, this was never done and the taxpayer had an outstanding tax liability of Kshs. 20,342/=.
 4. That the directors of the said company namely Fredrick Mwanza Makau of Kenya Revenue Authority PIN No. A003697947P and Irene Nthenya Mutindi of Kenya Revenue Authority No. A003794759N had outstanding tax liabilities of Kshs. 9, 750.99 and 117,797.00 respectively.
 5. That despite the outstanding tax liabilities the Petitioner/Applicant proceeded and approved and issued a Tax Compliance Certificate Serial Number KRASON2837992018 to Konrad Science Limited.
 6. That in order to approve and issue the compliance certificate, the Applicant received a bribe of Kshs. 7,000/-.
 5. The Respondents aver that upon independent perusal and review of the submitted inquiry file, the 2nd Respondent was satisfied that the evidence contained therein was sufficient to sustain the proposed charges against the petitioner/ applicant. That it is on this basis therefore that the petitioner/applicant



was arraigned before the Chief Magistrates court on January 19, 2022 and so far, two prosecution witnesses have been heard and it is scheduled for directions on February 21, 2023. The respondents aver that the Director of Public Prosecution considered the evidence on record in its totality, the public interest, and the interests of the administration of justice and the need to prevent and avoid abuse of the legal process when he gave the directions to charge the Applicant/Petitioner herein and that all the counts in the charge sheet are supported by the available evidence.

6. The application was heard through written submissions.

Analysis and determination

7. This being an application for a conservatory order pending hearing and determination of the petition the issue for determination is whether that order for stay of the criminal case should issue.

8. The applicant has challenged the decisions of the 1st and 2nd respondents to investigate and charge him in Nairobi Chief Magistrate's Court Anti-Corruption case number E056/2020 Republic v Daniel Mirera Nyakamba & another. The applicant alleges that the respondents were partisan, abused their constitutional and statutory mandate by illegally arresting and charging the applicant at the behest of the Kenya Revenue Authority, in violation of article 157 of the Constitution. He urges the court to grant stay orders barring the Chief Magistrates court in ACC E056 /2020 from continuing the proceedings.

9. It is now trite that the powers exercised by the 1st and 2nd Respondent a are not absolute as the same may be limited by the court in appropriate cases. However, stay of proceedings in a criminal trial is a discretionary power which may only be exercised sparingly and only in the clearest of cases. Such discretion will ordinarily be exercised where the Applicant has shown that the proceedings constitute an abuse of court process and that it is in the interest of justice that the proceedings are stayed. The court must also consider the public interest when considering whether to grant a conservatory order. This was the holding of the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwendu Kitbinji and 2 others* Application No. 5 of 2014 [2014] eKLR, the Supreme court summarised the principles as follows:

“(86) conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

10. Similarly, in the case of *Republic v Attorney General & 4 others ex parte Kenneth Kariuki Gitbii* [2014] eKLR, the court while considering a similar application for stay of criminal proceedings held as follows:

“The court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal



proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings.....”

11. The applicant has averred in his affidavit and further affidavit that the offences he has been charged with are alleged to have been committed on October 1, 2018, at a time he had resigned from Kenya Revenue Authority and was serving his notice period. He denies having issued the tax clearance, that is the substratum of the charges and gives an alibi that he was at the University of Nairobi at the time of the offence, and not at the Kenya Revenue Authority premises. He also claims that his signature was forged and adds that the impugned Tax Clearance Certificate can be revoked by the Kenya Revenue Authority at any time using internal mechanisms, as provided in paragraph 7.7. of the Domestic Taxes Department Compliance Procedures and Work Instructions Manual and as such, the charges are meant only to disparage his reputation and to hurt his career. He states that he has lost earnings, and reputation and his quality of life continues to dwindle due to the ongoing criminal proceedings.
12. For the Respondents it is argued that the offences were committed when the Applicant was still in the employment of Kenya Revenue Authority; that the evidence in their possession reveals that the tax compliance certificate in issue was approved by the Applicant on October 1, 2018, while the Applicant’s notice period was from October 6, 2018 to October 15, 2018. They contend that their powers to investigate and charge the Applicant were exercised within the constitutional and statutory authority under the *National Police Service Act* and the *Office of the Director of Public Prosecutions Act* respectively.
13. I have considered this application carefully. The contentions by the Applicant on whether his signature was forged and his contention that he was at the University of Nairobi at the time the offence was committed (alibi) are matters of evidence, which the trial court is adequately equipped to deal with during the trial. Those would not be issues that would warrant this court to stay the criminal proceedings. My holding finds support in the case of *Uwe Meixner and another v The Attorney General* [2005] 1 KLR 189, where it was held:-

“The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the *Evidence Act*. There are also constitutional safeguards stipulated in section 77 of the *Constitution* to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

14. It also finds support in the case of *Republic v Director of Public Prosecutions ex parte Stephen Macharia Mwangi* [2014] eKLR where it was held:

“As stated in the above authorities, the mere fact there is no sufficient evidence to sustain a conviction is no ground for halting or terminating a criminal case. The trial Court is usually in a better position to scrutinise the evidence presented before it in determining whether such evidence prove the accused’s guilty beyond reasonable doubt. To paraphrase the decision in *Meixner & another v Attorney General (supra)* to set out on that voyage would have the effect of embarking upon an examination and appraisal of the evidence to be adduced before the trial Court with a view to showing the applicants’ innocence yet that is hardly the function of the judicial review court.”



15. Save for inviting this court to delve into the merits of the evidence in the trial court, the Applicant has neither pleaded nor demonstrated how his constitutional rights have been infringed upon as would warrant this court to interference with the proceedings in ACC E056/2020. The Applicant has not demonstrated how the decision to charge him was impartial, irrational, capricious or discriminatory or how it is an abuse of the court process. The Applicant has not demonstrated that the Petition is arguable and as such this court is not satisfied that he has met the threshold for grant of a conservatory order.
16. Consequently, I find the Notice of Motion dated November 3, 2022 unmerited and I hereby dismiss the same with costs to the Respondents.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2023.

E.N. MAINA

JUDGE

