



**Republic v Director of Public Prosecution & 2 others; Ayoo  
 (Exparte Applicant) (Miscellaneous Application E045 of 2022)  
 [2022] KEHC 15493 (KLR) (Judicial Review) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15493 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
 JUDICIAL REVIEW  
 MISCELLANEOUS APPLICATION E045 OF 2022  
 AK NDUNG'U, J  
 NOVEMBER 17, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE COURT MILIMANI LAW COURTS .. 3<sup>RD</sup> RESPONDENT**

**AND**

**GILBERT OKETCH AYOO ..... EXPARTE APPLICANT**

**RULING**

1. The ex parte Applicant by a Chamber Summons dated April 14, 2022 sought for leave to apply for Judicial Review orders. The court in its Ruling dated April 20, 2022 granted prayers 2 and 3 of the said application. The Court however, directed that on whether the leave should operate as a stay of the impugned proceedings, the issue be canvassed by way of skeletal written submissions. This question forms the subject of this Ruling.
2. The ex parte Applicant filed his Replying Affidavit (to the Respondents Grounds of Opposition) dated May 24, 2022, a Further Written Submission dated June 2, 2022; while the 1<sup>st</sup> Respondent filed their Written Submissions dated May 23, 2022, the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents filed their Written Submissions dated May 9, 2022. Also, the 3<sup>rd</sup> Respondent filed their Grounds of Opposition dated May 9, 2022.



3. In his Replying Affidavit, the ex parte Applicant averred that this court has an overriding duty to promote justice and prevent injustice done by the Respondents herein; That from this duty there arises an inherent power to stay; an indictment (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of the applicant's fundamental rights.
4. Further, that if stay is not granted before hearing and determination of the substantive motion the applicant shall lose tremendously and the application if successful be rendered nugatory; That the applicant shall suffer substantial loss unless the stay is granted; That sufficient cause exists to warrant the grant of a stay of the charging and prosecution of the applicant till substantive motion is determined; and That the applicant has demonstrated sufficient cause to warrant the grant of a stay of the charging and prosecution in the lower court.
5. The ex parte Applicant in his submissions, in sum, submitted that the Respondents decision and action to summon and charge him was un-procedural, unreasonable, illegal, unconstitutional and an infringement of his fundamental rights under the law, as the Applicant did comply with all regulatory requirements of the survey work done.
6. In particular, the Applicant submitted that the applicable law on whether leave so granted should operate as a stay is under Order 53 Rule 1(4) of the *Civil Procedure Rules*, and relied on the case of *Taib A Taib v The Minister for Local Government & Others Mombasa HCMISCA No 158 of 2006*
7. The Applicant contended that the main consideration in an application seeking orders for leave granted to operate as a stay is, whether the proceedings would be rendered nugatory should stay not be granted. Reliance was placed on the case of *R v Richard Kerich & 5 others [2013] eKLR*.
8. The ex parte Applicant maintained that he has demonstrated through the applications and supplementary affidavit dated the May 24, 2022 that he stands to suffer loss tremendously if the stay order is not granted. That as a licensed surveyor the intended charges have put his reputation and profession in jeopardy. Further, that to prevent cancellation of the survey jobs done by him, and ongoing ones too, that this court has a duty to stay the lower court proceedings till the substantive motion is heard and determined to save the applicant from being meted with heavy penalties by his clients.
9. In opposing the application to have the leave granted operate as a stay, the 1<sup>st</sup> Respondent asserted that in this instant matter, the outcome will not be rendered nugatory if a stay is not granted. Also, that there is no evidence that the decision of the Magistrate's court is imminent; and that a criminal trial is not a one off event.
10. The 1<sup>st</sup> Respondent contended that another factor for consideration in the courts discretion on whether or not to grant a stay in judicial review proceedings is that of the public interest. Reliance was placed on the cases of *R v Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) eKLR*; *R (H) v Ashworth Special Hospital Authority*; *Re Bivac International SA (Bureau Veritas) (2005) 2 EA 42*, and *R v Monopolies and Mergers Commission ex parte Argyll Group PLC (1986) 1 WLR 763*.
11. It was their submission that the leave granted should not operate as stay as the case has a public interest aspect; that the decision to charge has already been made; and that the forgery involves property of the Zambian High Commission. It was the 1<sup>st</sup> Respondents position that the Applicant herein simply seeks to curtail the mandate of the criminal justice system actors, as set out in the *Constitution*, by attempting to circumvent a trial process against him without any justifiable reasons; as he has failed to demonstrate with specificity how the Respondents have acted ultra vires or in bad faith.



12. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in opposing the leave granted to operate as a stay submitted along lines similar to the 1<sup>st</sup> Respondent's. Further, that the threshold for granting a stay of proceedings is however a high one. Unless a law being challenged will cause irreparable harm to those who are supposed to comply with it, the courts will be reluctant to suspend the operation of such a law. The cases of [\*Republic v County Council of Kiambu & Another Ex-parte Githunguri dairy Farmers Co-operative Society \[2012\] eKLR\*](#), and [\*R v Secretary of State for Transport Ex P. Factor tame \(No2\) \[1991\] AC 603 HL\*](#) were relied on.
13. The 3<sup>rd</sup> Respondent in their filed Grounds of Opposition opposed the leave granted from operating as stay on the following grounds, that:
- a. That the court does not have jurisdiction to deal with this matter.
  - b. That there are no allegations of incompetence or impartiality on 3<sup>rd</sup> respondents' part to merit prohibiting if from exercising its adjudicatory mandate over the matter.
  - c. That the respondent has mandate under the magistrates Act to here and determine the matter.
  - d. That the Applicant has not raised any grounds to show how he will suffer if the stay is not granted.
  - e. That should the applicant be charged, he has an opportunity before the trial court to prove and demonstrate innocence.
  - f. That the application herein is intended to curtail the statutory obligations and duties of the Respondent herein
  - g. That the Application is premised on explanations that can and ought to be made before the requisitioning officer and thus this Hon. Court would be usurping the statutory mandate of the Respondents if it were to stay the proceedings.
  - h. That the application is an abuse of court process.
14. That in the circumstances and based on the foregoing reasons the Application is therefore baseless, misconceived and devoid of any merit and leave sought to operate as stay should not be granted.
15. Having considered the materials on record, I find that the issue for determination is: Whether the ex parte applicant has achieved the legal threshold for the grant of an order staying the impugned prosecution pending the determination of the substantive motion, herein.
16. The applicable law on whether leave granted should operate as a stay is Order 53 Rule 1(4) of the [\*Civil Procedure Rules\*](#), which provides as that;
- “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.”
17. The High Court has previously pronounced itself on a similar issue as the one in this instant case. This Court in the case of [\*Republic v Director of Public Prosecutions & 2 others Ex Parte Jayesh Umedlal Shanghavi Victoria Commercial Bank Limited \(Interested Party\) \[2022\] eKLR\*](#) cited the case of [\*Taib A Taib v The Minister for Local Government & Others Mombasa HCMISCA No 158 of 2006\*](#) where Maraga J (as he then was) observed that:
- “...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...I also want to state that in judicial



review applications like this one 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. Therefore, where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction" 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. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) 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. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

"That the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councillor in the Municipal Council of Mombasa."

Can I grant this prayer in view of the scope and purpose of the stay order as stated above" I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councillor or to hold the elections or elect the Mayor of Mombasa."

18. It is then evident that in an application seeking orders for leave granted to operate as a stay; the main consideration is whether the proceedings would be rendered nugatory should stay not be granted.
19. I need to point out at this juncture that there is an error apparent on the face of the court's record in that, the court considered the Chamber Summons application dated April 14, 2022 and, being satisfied that an arguable case had been established, granted leave to institute judicial review proceedings in terms of prayers 2 and 3. Inadvertently, in its directions dated April 20, 2022, the court at direction 3 indicated that the question of leave shall be canvassed through skeletal written submissions. This direction was in error, leave having been granted. The said error has caused the respondents to submit on that aspect of the proceedings when, in fact, that was unnecessary as the question was already determined. That mix up is regretted.
20. Turning back to the issue at hand, the Applicant seeks to stay his imminent charging and prosecution in the Milimani MCCR No E328 of 2022 instituted against him by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents; however, the Applicant has not taken plea having filed this judicial review application - against the Respondent's decision to charge and prosecute him.



21. This court is guided by the observations in the case of *R v Richard Kerich & 5 Others [2013] eKLR* where it was stated that once the court has granted leave as in this case, the question of whether the Application is arguable becomes moot as that is the basis upon which leave was granted. The relevant consideration then becomes one centred on whether the substantive Motion would be rendered nugatory if stay is not granted. In the words of Odunga J in the above case; “In my view, it is only when the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the court would stay the said proceedings the strength of the applicant’s case notwithstanding.”
22. Aburili J correctly illuminated the applicable principle in regard to the grant of an order for leave operating as a stay of criminal proceedings in *Grace Wairimu Sorora v Chief Magistrate Criminal, Division Nairobi & Director of Public Prosecution [2018] eKLR* where she stated;
- “On the prayer No 4 for an order that the leave so granted do operate as stay of the criminal proceedings, although an applicant may demonstrate that they deserve leave, stay is not automatic either. They have to show that unless stay of the impugned proceedings is granted the intended application, if successful, will be rendered nugatory and therefore the applicant will be rendered a pious explorer in the judicial process.
38. In this case, albeit the applicant claims that the offences with which she was charged were allegedly committed in 2012, 2011 and 2009. It is worth noting that the charges were preferred after investigations by the police and following the court’s determination that the documents that the applicant had relied on in the Environment and Land Court cases Nos 592/2010 consolidated with ELC 29/2010, 340 and 504/2010 were forgeries.
39. Investigating a forgery claim after a court’s determination in a civil suit takes time and therefore this court does not buy in the idea that the criminal proceedings are in an afterthought or a witch hunt of the exparte applicant at this stage.
40. The law does not bar criminal process to continue side by side with civil proceedings. Each of the processes are intended to achieve justice for all the parties. Where there is prima facie evidence of a criminal offence having been committed the police have the power to investigate and charge the suspect for prosecution by the DPP.
41. In my humble view, the applicant has not demonstrated to this court that the pending criminal proceedings which she is allowed to challenge have absolutely no foundation. And as the criminal case is not shown to be intended to cause her eviction from the suit land since the civil court is handling the issue of eviction, where she has even obtained stay of eviction proceedings before the ELR Court, I see no merit in the prayer that the criminal case is intended to harass the applicant and cause her eviction. The criminal proceedings cannot evict her. It is a civil court that would issue an eviction order since there is no charge on forceful detainer facing the applicant.
42. The applicant has not demonstrated that the pendency of or proceeding with the criminal case will in any way prejudice her as the civil court has already made a finding on its own accord that the documents she relied on were forgeries.



43. Further, challenging jurisdiction of Honourable Nyamweya J to hear an Environment and Land Court matter does not change the position that documents relied on by the applicant to prove her case were forgeries, especially where the police have carried out their own independent investigations in the matter. The police have the power to carry out independent investigations to determine whether the said documents were indeed forgeries as per the court decision. It is for the trial court to then assess the evidence placed before it to determine whether the allegations by the prosecution are proved beyond reasonable doubt.
44. I see no outright malice in the charges framed. I would in the premises decline to interfere with the pending criminal charges facing the applicant and dismiss the prayer for stay”.

23. In the instant case, it was contended that the lower court listened to the ex parte Applicant’s request and had scheduled the mention of the case to be on August 3, 2022 for further direction as to whether the substantive motion shall have been heard and determined by this court.
24. It is clear that the lower court case, Milimani MCCR No E328 of 2022, is in its early stages and there is no evidence that the decision of the Magistrate’s court is imminent. A criminal trial is not a one off event. Further, there is no demonstration that the outcome of the substantive motion herein will be rendered nugatory. The Applicant retains the right to approach this court should the decision in the magistrate’s court approach earlier than the determination of the substantive motion.
25. The right to a fair hearing ring fenced under Article 50 of the *Constitution* remains dependable armour for the Applicant in the course of the trial at the magistrate’s court. If there be any infringement of the Applicant’s rights at the trial, this court would readily intervene to reconstitute such rights. Unless there is a clear demonstration of abuse of the criminal process, the court should be slow to interfere with the 1<sup>st</sup> Respondent’s constitutional mandate to institute and undertake criminal prosecution. At this stage therefore, it is my considered view that the due process of the law be allowed to take its course while energy should be directed at prosecuting the substantive motion to help the court determine the propriety of the charges and the prosecution. The outcome thereon will not be rendered nugatory since, as noted above, this judicial review is certain to be determined before the criminal trial and in any event the Applicant would be at liberty to approach the court should the position be otherwise.
26. Flowing from the foregoing, to my mind, a case for the leave granted herein to operate as a stay has not been established. Resultantly, prayer 4 of the Chamber Summons dated April 14, 2022 is declined.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER 2022.**

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**A K NDUNGU**

**JUDGE**

