



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC PETITION NO 24 OF 2020

H.E.HON. MBUVI GEDION KIOKO MIKE SONKO.....PETITIONER

VERSUS

ETHICS AND ANTI- CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

WITNESS PROTECTION AGENCY & 2 OTHERS.....3RD RESPONDENT

RULING

1. This petition was initially filed at the High court Machakos registry before the same was transferred to this Anti- Corruption and Economic Crimes Division of the High Court at Nairobi.

2. The petition for the purposes of this ruling sought the following orders:

a) That this Honourable Court be pleased to call to this court, the proceedings in the **CHIEF MAGISTRATE MILIMANI ANTI-CORRUPTION CASE NO. 31 and No. 32 of 2019 and No. 1 of 2020, REPUBLIC vs HON. KIOKO MIKE SONKO AND OTHERS** and temporary stay any further proceedings, hearing, mentions or other action until the petition herein is heard and determined.

b) In its supervisory jurisdiction over subordinate courts exercising judicial authority , this Honourable Court be pleased to call for the record and entire proceedings pending before the Chief Magistrates **Court in Nairobi Anti — Corruption case Numbers 31 , 32 of 2019 and 1 of 2020 REPUBLIC VS HON. MIKE MBUVI SONKO GIDION** and Others and make such orders or give such directions appropriate to ensure the protection of the Applicants rights under Articles 25(c) 27 (1) 50 (2) and (4) of the Constitution for fair hearing and end of justice

3. The application was grounded on the grounds that; the Witness Protection Act Cap 79 of the Laws of Kenya does not suspend the principles of fair trial under Articles 25(c) and 50 of the constitution and should instead complement and fulfil the said values.

4. It was stated further that the witness protection Act and regulations made thereunder were inconsistent with the Constitution of Kenya 2010 and void to the extent of the inconsistency.

5. The application was supported by the petitioner's own affidavit in which he deposed that he was arrested and arraigned in court on the 9th day of December 2019, to take plea in respect to the cases stated herein. On the 14th day of January 2020, this court issued the following orders on an application by the State ex-parte;

i. Witness protection order is hereby granted for the protected witnesses statements to be redacted.

ii. Witness protection orders be and is hereby granted for the protected witnesses to testify in a closed session.

iii. Witness protection orders be and is hereby granted for the protected witnesses to use pseudonyms during the hearing of their evidence.

iv. a Witness protection orders be and are hereby granted for the protected witnesses to use witness box during the taking of their

evidence.

6. It was contended that the said order was ambiguous and had been interpreted by the 4th respondent to allow the 1st and 2nd respondents to deem protected witness statements recorded after the said order was made, the ambiguity of the order had therefore made it impossible to identify how many witnesses were under the witness protection and as such allowed the respondents to arbitrarily deem any witness protected and as such redacted all the prosecution witnesses statements in Anti-corruption case no 1 of 2020 , making all witnesses protected.

7. It was contended that as a result of the protection order, the prosecution had redacted all the statements supplied, making it impossible for him to adequately prepare for his defence and that despite objections by his Advocates on record, the trial Magistrate allowed the prosecution to rely on the said statements in ACC no 1 of 2020 which was not covered by the protection order.

8. It was stated further that his trial was proceeding despite the fact that he had raised the issues of violation of his constitutional rights to a fair trial, which cannot be limited.

9. It was the petitioner's case that as a result of the matters stated in the affidavit, he had suffered prejudice, in that in the hearing of ACC No. 1 of 2020, the resultant effect of the protection order in the High Court Misc. No. 1 of 2020, the trial court was compelled to admit evidence that was in violation of the provisions of the Evidence Act. It was contended that the said protection order had been used to deny him and his co-accused the right and opportunity to be heard by an open and impartial tribunal, since the whim afforded to the Respondents is to choose the option of closed sessions.

10. The second respondent in response to the application, filed a replying affidavit sworn by **CHRISTINE NANJALA**, in which she deposed that the 3rd respondent obtained protection orders for the witnesses in the cases the subject matter of this petition, and at the pre-trial directions, the trial court directed the 2nd respondent to disclose its evidence within two weeks, which order the 1st respondent complied with.

11. It was deposed further that the said protection order allowed use of pseudonyms, witness box, witnesses testifying in closed session and redaction of statements. In the course of the proceedings, the 2nd respondent filed a substituted charge sheet, wherein Anti- Corruption Case No. 31 of 2019 was split giving rise to Anti-Corruption No. 1 of

2020.

12. The first respondent thereafter disclosed all material evidence to be relied upon in the course of the trial to the applicant, who accordingly signed the inventories, which was filed in court. The court thereafter directed the parties to conduct pre-trial conference, where all the documents were verified, at which the applicant confirmed the authenticity of each document.

13. That when the matter came up in court for pre-trial and taking of hearing dates, some of the defence Counsels indicated that they had challenges with the documents served, to which the trial court directed the prosecution to serialize its documents and supply the same, together with new inventories in soft copy to the defence, via a common email address created for the purposes of the said trial, which order was fully complied with. The trial courts being satisfied with the pre-trial disclosures directed that the matters be set down for hearing.

14. It was contended that in this petition, the applicant was only questioning the constitutionality and implementation of the witness protection Act, for which he has sought the empanelment of an even Bench, but has failed to demonstrate how the issues he is raising in the application/petition are capable of creating doubt, difference in opinion or capable of generating different interpretation on the application of the Witness Protection Act or the protective order issued in accordance to the provisions of the Act.

15. It was deposed further that the temporary stay/conservatory orders sought by the applicant could not be granted, since he had failed to provide and place facts before court, which establishes a prime facie case with probability of success and that he shall suffer irreparable injury.

16. It was contended that the respondents shall be gravely and irreparably prejudiced if the orders of stay are granted as the proceedings before the trial court will be impeded, which will highly prejudice the protected witnesses, causing grave miscarriage of justice. It was further stated that the petitioner was guilty of laches.

17. The 3rd Respondent filed a replying affidavit sworn by NELSHON NJIRU in which he deposed that the application of witness protection Act and rules therein was in accordance with Article 24 (1) of the constitution which provides for limitation of rights as it was geared towards promoting the right to life and human dignity as enshrined in Article 26 and 28 of the constitution and Article 29 and therefore did not violate the applicant's constitutional rights under Article 50.

18. It was stated that the High Court had already pronounced itself in **Criminal case No. 16 of 2019** and **MISC. CRIMINAL APPLICATION No. 1 of 2018** that the protection of witnesses was no longer a matter of statutory expression only, it is derived from the constitution and that in the granting of the protection order, the court acted in accordance with section 16 of the witness protection Act and Rule 4(4) thereof.

19. It was contended that the court proceedings for obtaining the protection order are separate proceedings from the trial of the accused

person and that parties dissatisfied with the protection order may apply for discharge or variation in accordance with rule 7(1) of the rules, which should be done by the court that granted the orders or by way of an appeal.

SUBMISSIONS

20. The parties herein filed written submissions, which were highlighted by their respective advocates as regards the order for stay of proceedings. On behalf of the applicant, it was submitted by Mr. Mare, that the applicant had demonstrated that if the order for stay was not granted, then his right to fair trial will be affected. It was contended

that the trial court had applied the witness protection order issued in a manner that denied the applicant the right to access evidence in good time, the right to prepare for the hearing, the right to be supplied with all evidence in a clear and readable manner and the right to have an adequate time to prepare for his defence.

21. It was submitted the respondents had misapplied the protection order to ACC No. 1 of 2020 in spite of the trial court having ruled that it could not be used in that case. It was the petitioner's case that the court had jurisdiction under Article 165(7) to exercise supervisory jurisdiction over the trial court and as provided for under Section 362 of the Criminal Procedure Code, so as to ensure that the ends of justice were met.

22. It was submitted that should an order of stay not be granted, the continued prosecution of the cases in the lower court will inevitable result in extreme prejudice to the applicant, with the further consequences of continued abuse of due process, in total violation of his rights to fair trial. In support thereof reference was made to the case of **ATTORNEY GENERAL v. CHIEF MAGISTRATE MILIMANI LAW COURTS OTHERS EX-PARTE MOHANGA TOT [2018] eKLR** where the court stated that in making a determination whether or not to grant stay, the court must place the respective cases of the parties before it on a legal scale. It must balance the competing interests in order to arrive at a just decision.

23. It was stated that should the respondents be allowed to apply the protection order and proceed with the prosecution of the applicant, the same will be denied a right to fair trial and shall not get a remedy, it was contended that the court ought to take into account the likely effect of granting the stay on the proceedings in question and lean towards a determination which was unlikely to lead to an undesirable or absurd outcome and to put the parties before the court on equal footing as was stated in the case of **SULEIMAN vs. AMBOSELI RESORT LTD [2004]2KLR**.

24. It was contended that the applicant was already suffering prejudice as the court had directed the respondents to supply him with witness statements within 36 hours to the hearing, which statements were redacted and further subjecting the same to rash hearing on account of the security of the protected witnesses.

25. It was finally submitted that one of the grounds for grant of stay of proceedings is where the rights of the accused to fair trial was in danger as was stated in the case of **REPUBLIC V DPP & 3 others ex-parte BEDAN MWANGI NDUATI & another [2015] eKLR**. The court was therefore urged to grant stay of proceedings of the cases before the subordinate courts.

26. On behalf of the 1st respondent, Mr. Wambugu, submitted that it was against public policy that hearing of criminal trials should be delayed as was stated by the Court of Appeal in the case of **THOMAS PATRICK GILBERT CHOLMONDELY vs REPUBLIC [2008] eKLR**. It was contended that any adverse issue can be raised once and for all on appeal. It was stated that an order of stay in criminal cases should be made sparingly as was stated in the case of **GODDY MWAKIO & ANOTHER V. R [2011] eKLR**.

27. It was submitted that the petitioner was attacking the constitutionality of the Witness Protection Act, but the court should proceed in a manner that does not offend the doctrine of the presumption of constitutionality of the Acts of Parliament.

28. It was finally submitted that the petitioner had acknowledged that the cases complained of had a total of 71 witnesses and it was therefore highly unlikely that the proceedings will be concluded before the petition was heard and determined and that the issues raised by the petitioner on the witness protection order could be addressed in Misc. Application No. 23 of 2020 where the same had invoked the courts supervisory jurisdiction and not before this court which was sitting as a Constitutional Court.

29. On behalf of the 2nd respondent, Ms Thuguri submitted that the law on grant of stay orders was settled as per the case of **GODDY MWAKIO (supra)** and can only be granted on exceptional circumstances. It was submitted that it was upon the applicant who seeks to stop criminal proceedings to prove to court that unless stay of proceedings in question is granted, there is an imminent threat of the impugned proceedings being undertaken and determined before the proceedings and or an occurrence of an event that would render the outcome of the latter nugatory.

30. It was contended that the prosecution had disclosed several unredacted statements in pursuance of the court direction on disclosure and if

stay is granted it will expose the protected witnesses adversely by exposing them to risk, in support of the submissions, the following cases were tendered: **R v. RUPERT JOHN MASSY [2001] EWCA Crim 2850** and **JAGO v DISTRICT COURT (NSW) [1989] HCA 46**.

31. It was contended that the applicant had not been prejudiced since he had a right of appeal on the issues complained of. It was stated that the applicant had not established a prime facie case with probability of success.

32. On behalf of the 3rd and 4th respondents, Ms Robi submitted that the right to fair trial is applicable to both the applicant and the prosecution witnesses, who were entitled to protection under articles 58 and 50 (e) (8) Of the constitution and that the petition had not established compelling reasons for grant of orders of stay of proceedings.

DETERMINATION

33. The only issue for determination at this stage is whether the applicant has made up a case for grant of order of stay of proceedings pending the determination of the petition herein.

34. The following facts are not disputed; that the applicant has moved this court by way of revision and or review of the witness protection orders issued by the court, which matter is before this court differently constituted. I would therefor agree with the submissions by the 1st respondent that all the issues raised by the petitioner as regards the application of the witness protection order issued by the court are the subject matter of **MISC APPLICATION NO 23 of 2020. H.E. HON. Mbuvi Gideon Kioko Mike Sonko v. The Republic and EACC & 16 others**, which is pending before this court.

35. It is also not in dispute that the petition herein seeks that witness protection Act be declared unconstitutional, in as far as it affects the rights of the applicant herein and all other accused persons who are affected by the application of the Act and regulations made thereunder. The outcome of the petition will therefore be to either declare the Witness Protection Act either constitutional or unconstitutional.

36. For a court to grant stay of criminal prosecutions, the following factors must be satisfied: that the lower court is proceeding in excess or lack of jurisdiction or in contravention of the law of the land as well as in a departure from the rules of natural justice. It does not lie to correct the course; practice or procedure of an inferior tribunal, as was stated in the case of **JORUM MWENDA GUANTAI v THE CHIEF MAGISTRATE NAIROBI [2007] 2EA 170**

37. In **SAMUEL RORO GICHERU & ANOTHER v. OCS NANYUKI POLICE STATION & Another [2014] eKLR** the court had this to say: -

"Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to stay an indictment or stop a prosecution in the magistrate courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of court

The leading case on the application of the abuse of process remains BENNET vs. HORSEFERRY MAGISTRATES COURT & ANOTHER. The court confirmed that an abuse of the process justifying the stay of prosecution could arise in the following circumstances:

1. where it would be impossible give the accuse fair trial or

2. where it would amount to a misuse/manipulation of the process because it offends the courts sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

The above categories are not mutually exclusive and the fact of a particular case may give rise to an application to stay involving more than one alleged form of abuse and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances."

38. In the case of **GODDY MWAKIO & ANOTHER v. R [2011] eKLR** the court stated that an order of stay of proceedings particularly in a criminal proceeding is made sparingly and only in exceptional circumstances.

39. Section 193A of the Criminal Procedure Code provides that notwithstanding the provisions of any written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil (to which I add constitutional proceeding) shall not be a ground for any stay, prohibition or delay of any criminal proceedings.

40. It was therefore upon the petitioner to put himself within the stated exceptional circumstances to enable that court grant stay of proceedings.

41. In this matter the order complained of is a lawful order issued by a court of competent jurisdiction, the applicant has challenged the use of the said order in the proper channel by filing an application to discharge or set aside the other parties' order issued by that court and therefore to issue any order of stay in this forum would amount to interfering with the ongoing court process.

42. From the material placed before me, I am unable to find any prejudice that the petitioner shall suffer should this court fail to grant the stay of the ongoing proceedings before the Lower Court as this subject matter of this petition which is before me only to relate to this declaration that an Act of Parliament (Witness Protection Act) is unconstitutional in so far as it affects the accused person's right to fair trial. I further take the view that the outcome of the petition which will have effect in them as opposed to prosecution.

43. I am further satisfied and hold that, the issues of the specific protection order issued as regards the petitioner am currently being dealt with by the court which issued the said orders by way of revision and review and therefore the applicant has exercised alternative procedure available to him in view such an adequate remedy.

44. It is also clear to my mind that our Constitution provides clear safeguards for the protection of all accused person's rights during trial and therefore a petition challenging the constitutionality of an Act of Parliament should not stand in the way of this criminal court to proceed with the trial and for the DPP to proceed with criminal prosecution that has been validly instituted as required under Article 50 of the Constitution.

45. I therefore find and hold that the petitioner has demonstratively failed to show that he cannot be exposed to grant prejudice should this stay not be qualified and or that he falls under any of the exceptional circumstances for the grant of stay of proceedings and therefore both this petition and his trial before the court count can continue simultaneously.

46. It therefore follows that the application for stay of proceeding pending the determination of this petition lacks merit and is dismissed with cost in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2021

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J. WAKIAGA

JUDGE