



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 2 OF 2020

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR THE
JUDICIAL REVIEW REMEDIES OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

IN THE BILL OF RIGHTS UNDER CONSTITUTION OF KENYA (2010)

HENRY AMING'A NYABERE.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, NAKURU.....3RD RESPONDENT

AND

SARAH JOSLYN.....1ST INTERESTED PARTY

STEPHEN NGATIA MAINA.....2ND INTERESTED PARTY

RULING

1. The Applicant (Henry Aming'a Nyabere) is an Advocate of the High Court of Kenya. In that capacity, he acts as Counsel to one Sarah Joslyn (the 1st Interested Party) in *Nakuru High Court Succession Cause No. 356 of 2018 (In the Matter of the Estate of Richard Ingram Crawford)* and in *Nakuru Chief Magistrate's Criminal Case No. 215 of 2018*.

2. In the Succession Cause, the Applicant's client claims to be the Administratrix of the Estate pursuant to a will she says is the authentic last will of Richard Ingram Crawford (Deceased). The 2nd Interested Party has contested the will and claims it to be a forgery. That is the subject of the Criminal Matter in which the 1st Interested Party is the Accused Person.

3. Related to these matters, the DPP has now registered *Chief Magistrate's Court Criminal Case No. 1977 of 2019* in which the Applicant is the Accused Person. The Applicant faces six counts of forgery, making documents without authority and conspiracy to defraud. They all relate to various properties owned by the Late Richard Ingram Crawford (Deceased). While the Complainant in *Nakuru Chief Magistrate's Criminal Case No. 215 of 2018* is the 2nd Interested Party, it is unclear who the Complainants are with respect to *Chief Magistrate's Court Criminal Case No. 1977 of 2019*.

4. The Applicant is persuaded that he is being targeted because of advice granted and work undertaken in his role as a lawyer to the 1st Interested Party. He has, therefore, approached this Court for Judicial Review orders as follows:

(1) An Order of *Certiorari* to remove to this Court and to quash the entire Criminal Case and the entire proceedings in ***Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic Vs Henry Aming'a Nyabere.***

(2) An Order of Prohibition, to prohibit the 1st, 2nd and 3rd Respondents herein, being the Director of Public Prosecution (DPP), Directorate of Criminal Investigations, and the Chief Magistrate's Court, Nakuru from prosecuting, trying hearing, or taking any further proceedings whatsoever in ***Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic Vs Henry Aming'a Nyabere.***

5. This Court already granted leave to the Applicant to file the substantive Judicial Review Application – which has already been filed. In the Chamber Summons seeking leave, the Applicant also sought the prayer that the leave do operate as a stay of all proceedings in the ***Chief Magistrate's Court Criminal Case No. 1977 of 2019.*** The DPP and the 2nd Interested Party have opposed the prayer. The DPP filed Grounds of Opposition and a Replying Affidavit by the Investigating Officer, Chief Inspector Joseah Maritim while the 2nd Interested Party filed a Replying Affidavit.

6. The parties' advocates orally argued the application before me and Counsels for the Applicant and the 1st Respondent filed Lists of Authorities. I have keenly considered both the submissions of Ms. Magana for the Applicant; Mr. Chigiti for the 1st Respondent and Ms. Wangari for the 2nd Interested Party. I have also read the authorities cited. It is unnecessary for me to rehash the submissions and the holdings of those authorities in this interlocutory application.

7. The issue presented is a simple one: should the court order a stay of proceedings in ***Chief Magistrate's Court Criminal Case No. 1977 of 2019*** in which the Applicant is the Accused Person until the substantive Judicial Review Application is heard on its merits?

8. In ***Freshco International Limited & Another v Kenya Plant Health Inspectorate & 2 Others [2018] eKLR***, I dealt with the question of when a Court would order that the grant of leave to bring Judicial Review Proceedings operate as stay and held as follows:

9) *As I understand our applicable case law, for the Applicants to succeed in persuading the Court to grant the order that the leave to bring Judicial Review Application should serve as stay of the decisions and actions of the 1st Respondent, they need to demonstrate at least three things:*

a) That the intended Judicial Review Application is arguable or that it raises a prima facie case;

b) There is a real risk that the Applicants will suffer irredeemable or serious prejudice as a result of the alleged illegal or unlawful action by the Respondents. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No 16/2011, Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011 and V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR. The prejudice to be suffered must be one which is preventable and one which, but for the action sought by the Court, would "render the Applicant helpless or hapless in the eyes of the wrong to be visited upon him." See The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012.

c) Public interest concerns accord with the grant of the orders sought. See Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014.

9. A scan of our case law for instances where these principles are applied to situations where the stay sought is one to halt criminal proceedings yields, to my mind, a fourth factor which is really an instantiation of the public interest factor where criminal prosecutions are concerned: the need to ensure that the suit or application is heard timeously so as not to hold the criminal proceedings in abeyance for an unduly long period. Hence, as a general point, Courts do not, generally, grant a stay of prosecution in criminal cases unless four conditions are met:

1) *First*, a demonstration that the points taken up by the substantive Judicial Review Application (or Petition) are arguable and not merely frivolous;

2) *Second*, that exceptional circumstances are present to warrant such an extraordinary interim relief and, in particular, a showing that absent the stay the Applicant will suffer irredeemable or serious prejudice as a result of the impugned prosecution;

3) *Third*, a demonstration that the interim relief sought is not inimical to public interests; and

4) *Fourth*, a showing by the Applicant that he or she is committed to concluding the substantive suit in the shortest time possible.

10. In the present case, the Applicant is an Advocate of the High Court of Kenya. It is true that an advocate who commits a crime in the course of their work as such can be charged with the offence committed. There is no immunity from criminal prosecution for lawyers. However, due to the special and sacred relationship between a lawyer and his client, prosecution of a lawyer for work undertaken on behalf of a client is rare and invites strict scrutiny in the first place.

11. The unique features of this case are that the Applicant is a lawyer who is charged with offences which appear, at first blush, to be related to his work as a lawyer. Of course, on full ventilation of the facts it may be demonstrated that the Applicant did travel outside his remit as a lawyer to facilitate or commit fraud or other crimes or that the intended prosecution is unrelated to his work as a lawyer. Before then, however, it is prudent for the Court to act with abundance of caution to protect the sacred lawyer-client relationship. This can only be done, in the present circumstances, by staying the criminal proceedings until the Court determines the merits of the Judicial Review Application.

This aspect of the case satisfies the first three conditions for grant of the stay requested. To be clear, what distinguishes this case from ***Attorney General v Chief Magistrate's Court Milimani & 3 Others Ex Parte Mahan Galot [2018] eKLR*** is that here the intended Accused Person is an advocate who is being prosecuted for work which appears to have been rendered in his capacity as an advocate. Such a prosecution is presumptively definitionally prejudicial to the Applicant and inimical to public interest and warrants a stay of proceedings pending full consideration of the context and circumstances by the Court. To be sure this is not to suggest that advocates are presumptively immunized from prosecution before scrutiny by the Courts. Instead, it is to say that when an Advocate is, on the face of it, is charged with an offence for work undertaken *qua* advocate, there will be a need to ascertain that the prosecution is warranted before the criminal prosecution is allowed to proceed. This is a necessary incident and corollary to the sacred advocate-client relationship. That principle is also good for public policy because it reinforces the sacred nature of Advocate-Client relationship by assuring both Advocates and public that advocates will not be whimsically hauled to Court for work performed in their professional capacities. This, in turn, accentuates the independence of the bar which is an unqualified public good in a constitutional democracy.

12. As for the fourth condition, and in order to ensure that the stay granted is not abused, a condition shall attach that the stay is time-bound: it shall subsist for a maximum of sixty (60) days of today. The Applicant must prosecute his Application before then. Any delay attributable to the Applicant shall be docked against the sixty-day period. It is therefore incumbent upon the Applicant to move with all due dispatch to conclude the substantive Application. That Application shall be heard on a priority basis.

13. **The upshot is the following:**

1) The leave granted on 27/01/2010 to bring the Judicial Review Application in this matter shall serve as stay of proceedings in Nakuru Chief Magistrate's Court Criminal Case No. 1977 of 2019, Republic Vs Henry Aming'a Nyabere.

2) The stay shall be valid for sixty (60) days only unless otherwise extended by the Court pursuant to paragraph 9 above or until judgment is delivered whichever comes first.

3) The Judicial Review Application shall be heard on a priority basis.

14. Orders accordingly.

Dated and delivered at Nakuru this 27th day of February, 2020

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JOEL NGUGI

JUDGE