REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

JUDICIAL REVIEW NO. 11 OF 2020

IN THE MATTER OF : AN APPLICATION BY CHARLES MBUGUA

NJUGUNA FOR LEAVE TO APPLY FOR JUDUICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

AND

CHARLES MBUGUA NJUGUNA.....APPLICANT

AND

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

ETHICS A ND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

THE CHIEF MAGISTRATE, ANTI-CORRUPTION COURT MILIMANI.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

Factual Background

1. Charles Mbugua Njuguna(hereinafter "the applicant") is an Advocate of the High Court of Kenya practicing in the name and style of Njuguna and Partners Advocates. He is seeking leave to institute Judicial Review proceedings to challenge the 2nd and 1st Respondents' recommendation and preferment of his prosecution respectively in Milimani Chief Magistrate's court Anti-Corruption case **No. 28/19** being charges arising from the discharge of his professional duties as an Advocate representing his client.

2. Through an Exparte Chamber Summons dated 21st April, 2020 the applicant herein moved to this court under Article 23(1) of the Constitution, Sections 8 and 9 of the Law Reform Act, Order 53(1) of the Civil Procedure Rules seeking orders as follows;

(1) That this application be and is hereby certified as urgent and service thereof be dispensed with in the first instance.

(2) That leave be and is hereby granted to apply for Judicial Review orders of;

(a) Prohibition prohibiting the 1st, 2nd and 3rd respondents herein from prosecution or ordering/facilitating the prosecution of the applicant in Chief Magistrate's Anti-Corruption Case No. 28 of 2019 herein on charges of money laundering and/or any other related charges based on the same facts.

(b) Certiorari to move this Honourable Court to quash the decision of the Director of Public Prosecutions, the 1st Respondent

herein, made on or about 22nd October 2019 to institute criminal proceedings against the applicant in the Chief Magistrate's Anti-Corruption Case No. 28/2019 on 22nd October 2019 and to quash the charges of Money Laundering as per the charge sheet presented in the Chief Magistrate's Anti-Corruption Case No. 28/2019 on 22nd October 2019 made against the applicant.

(3) That the leave so granted operates as a stay of the impugned proceedings in the Chief Magistrate's Anti-Corruption Case No. 28/2019 against the applicant.

(4) That costs of this application be provided for.

3. The application is grounded on the allegation that; the 1st Respondent acted in breach of his mandate as provided under Article 157(1) of the Constitution by preferring charges against the applicant without regard to the administration of justice; failure by the 1st, 2nd and 3rd respondents to consider that the acts complained of arose while the applicant was acting in his professional capacity as an advocate; the applicant was not given notice and reasons why he was not treated as a witness despite having been promised as such; the applicant was not given an opportunity to record a statement under inquiry before he could be charged; the decision to charge him was malicious, unreasonable and irrational, made in bad faith with ulterior motive after recording the applicant's statement as a witness thus causing him to record self-incriminating information instead of remaining silent hence frustrating his legitimate expectation of being treated as prosecution witness and that, the arrest and arraignment of the applicant in court amounts to an abuse of discretion of the 1st, 2nd and 3rd Respondents.

4. The application is further supported by a Statutory Statement and a verifying affidavit sworn on 21st April 2020 by the applicant stating that he is an Advocate practicing in the firm of Njuguna and Partners Advocates. He averred that sometimes in November 2013, Mars Technologies Associates limited through its Director Charles Karisa Mwaduna, instructed his law firm to claim on its behalf funds owed to them from OSI Kenya Limited for services rendered.

5. That later, Mars Technologies Associates Limited advised his law firm that the matter had been settled and that the funds owed would be paid through his law firm. He subsequently received a letter dated 28th November 2013, (CN.1) authored by Charles Mwaduna Director Mars Technologies addressed to OSI Kenya instructing them to deposit a sum of Kshs. 36,089,966 to the applicant's law firm client's Account No. 100234202 NIC Bank NIC House.

6. That pursuant to those instructions, OSI Kenya Limited remitted through RTGS money transfer the said amount on 4th December 2013. This was confirmed by a letter dated the same date addressed to Mars Technologies by the Managing Director OSI Kenya and a payment advise dated 6th January 2014 (CN.1).

7. Subsequently, Mars Technologies advised the applicant's law firm vide a letter dated 6th January 2014 to remit Kshs. 7,900,000/- of the received amount to Gachoka Advocates which they did vide RTGS money transfer services on 7th January 2014 (see CN-1).

8. Further, through a letter dated 14th January, 2014 their client instructed them to remit to Faida Investment Bank account of Nanazi Investment Ltd Khs 10,000,000, Car Master (K) Twenty Eleven Limited Kshs. 1,700,000/-, Stephen Ndungu Kinuthia Kshs. 16,257,966 and deduction of his legal fees of Kshs. 231,000/- thus exhausting the entire amount received from OSI Kenya. He annexed documentary proof among them bank statements to confirm the said remittances (CR-1).

9. He stated that on 22nd July 2016, the second respondent wrote a letter addressed to him requesting him to record a statement touching on the funds received on instruction by his client. That he sought permission from his client in conformity with Section 134 of the Evidence Act which insulates Advocates-Client confidentiality relationship. He averred that upon receipt of consent from his client, he recorded a statement on 7th November 2016 as directed by the 2nd Respondent. That his statement was in agreement with those of Charles Karisa Mwaduna of Mars Technologies and Maina Shem Kamau Patrick Director of OSI recorded on 29th July 2015.

10. He deponed that he was not aware of the source of the funds remitted by OSI Kenya Ltd and that he was not privy or aware of any transactions between them and Mars Technologies. That in the entire transaction, he acted as an Advocate in strict compliance with his client's instructions.

11. He contended that on the 3rd February 2017, the 1st respondent approved prosecution of several people excluding his name as per the recommendation of the 2nd respondent who had treated him as a prosecution witness (CN-1). That to his surprise, on 18th October 2019 he was without notice arrested and then charged with others on 22nd October 2019 with five counts of money laundering. That his request for review of the decision by the 1st respondent did not earn him any positive response.

12. He urged the court to intervene as the decision to charge him for acts committed in good faith in the course of discharging his professional duty was malicious, irregular, unreasonable, irrational, abuse of discretion and office.

13. Upon filing the application before the Judicial Review Division, the same was referred to the Anti-Corruption Division on 22nd April 2020. On 23rd April 2020 the duty Judge J. Lesiit directed that the application be served upon the respondents.

14. In response, the 1st respondent filed a replying affidavit sworn by Akula Alex prosecuting counsel opposing the application arguing that the application is generic, vague and ambiguous filled with conjectures, suppositions and speculations thereby engaging the court in a wild goose chase for an unwarranted academic exercise. He deposed that the application is an abuse of the court process, abstract, hypothetical and an academic exercise.

15. That the orders sought are intended to curtail the constitutional mandate of the 1st respondent in conducting prosecution hence detrimental to public interest. He contended that the applicant has not raised any serious questions of law or fact which raises any triable issues to warrant this court to issue a stay order as there is no prima facie case demonstrated with a probability of success.

16. He further deponed that the applicant has not demonstrated that he is likely to suffer irreparable injury and or loss and that his fundamental rights and freedoms to a fair hearing will be prejudiced incase a stay order in **ACC No. 28/19** is not granted. That stay will delay the trial of **ACC No. 28/19** before the magistrate's court where 21 other accused persons are facing prosecution whose pre-trial proceedings are approaching completion.

17. It was further deponed that the decision to charge the applicant was based on public interest, rule of law and sufficient evidence contained in the 2nd Respondent's investigation file. He averred that the applicant did not prove that they had formal written instructions from Mars Technologies through a board resolution to act for them by demanding payment of any funds from OSI Kenya.

18. He further deposed that the applicant cannot hide behind his client's instructions to run away from culpability. That advocate- client confidentiality relationship is not covered under Section 143 of the Evidence Act which lifts the veil of confidentiality privilege if the act amounts to an illegality or fraudulent activities.

19. It was deposed that one Edward Mulewa Mwachinga a Co-Director to Charles Karisa Mwaduna in Mars Technologies Ltd had denied knowledge of any instructions given to the applicant's law firm to receive cash on their behalf from OSI Kenya (see AA-3 being Edward Mwachinga's statement). That Karisa Mwaduna had disclosed to Edward that he had used their company to assist the applicant conclude some illegal processes.

20. That the applicant aided Charles Karisa Mwaduna accused 7 in ACC No. 28/19 to layer or integret Kshs. 7,900,000/- on 7th January 2014 as well as Stephen Ndungu who received Kshs. 10,000,000/-.

21. Regarding the promise that the applicant was to be treated as a prosecution witness, he deposed that such promise was not made nor is there proof of such promise done in writing.

22. Referring to the claim by the applicant that he was retained by the client, Mr. Akula deposed that the applicant should have inquired on the source of the money and the purpose for paying Mars Technologies. That the issues raised herein amount to a defence which the applicant should raise before the trial court which will determine on his alleged innocence based on the evidence at hand.

23. He further stated that public interest in this matter outweighs the interest of the applicant and that the request to the 1st respondent to review his decision of charging the applicant is not binding on the 1st respondent.

24. The second respondent opposed the application through a replying affidavit sworn on 8th May 2020 by Catherine Ngari an Investigator working with EACC. According to her, upon receipt of a complaint by the Treasury over allegations of corruption in the office of the Auditor General, they commenced investigations. In the course of investigations, they found out that on the advice of one Justus Ongera and Anne Mwangi working as Assistant Managers ICT department at the office of the Auditor General, they wrote a letter to the Auditor approving procurement of Audit Vault Software through single sourcing from ISO Kenya Ltd at a cost of about Kshs. 100,675,680 which was duly paid on 28th August 2003.

25. That it was after payment to OSI Kenya that the money was distributed to various people including officers in the office of the Auditor General and their relatives through various bank accounts among them the applicant's law firm. She denied the allegation that EACC gave a promise to the applicant that he was to be treated as a prosecution witness.

26. It was deposed that any internal communication between the Commission should not be relied on by the applicant to challenge the decision to charge him. That the applicant is culpable of acts of money laundering. She contended that the applicant has failed to prove any specific rights violated; he will be afforded an opportunity before the trial court to ventilate his case; sufficiency of evidence will be determined by the trial court; applicant is trying to pre-argue his defence and that, there is no proof of malice, bad faith or dishonesty on the 2nd respondent's part in recommending his prosecution.

Applicant's Submissions

27. Mr. Kanjama from Mumma and Kanjama Advocates filed his submissions on 30th July 2020 reiterating the averments contained in the affidavit in support of the application. Mr. Kanjama argued the application on three issues broken down as hereunder;

(a) Whether the application for leave and stay are merited.

(b) Whether on the face of the application, it is frivolous, vexatious or hopeless.

(c) Whether leave if granted should operate as stay of the impugned proceedings in the Chief Magistrate's Anti-Corruption Case No. 28/2019 against the applicant.

28. Counsel argued that the application was filed within the statutory period of six (6) months and that it raises substantive arguable issues. That on those grounds, the application should be allowed. In support of this proposition, learned counsel relied on the decision in the case of **Edwin Harold Dayan & Others v. DPP and Another (2017)eKLR** in which the court held that:-

"The applicant is not expected to delve into the depths of the merits of the case but he must show that the proceedings are not statute barred and that he should be granted an opportunity to be heard at the substantive stage."

29. Further reliance was placed in the holding in the case of **Paul Kihara Kariuki and 3 Others v. The Law Society of Kenya and 13 Others Misc. Civil Application No. 136/2020** where the court held that under the Constitution and the Fair Administrative Action Act No. 4/2015 a litigant does not require court's leave to commence Judicial Review proceedings and that the right to access the court is constitutionally guaranteed.

30. As regards the second issue, Mr. Kanjama submitted that the application is not frivolous, vexatious or hopeless. That the purpose of leave is to eliminate at the earliest stage possible matters that are frivolous, vexatious or hopeless which is not the case in this case. To justify that argument, counsel referred to the case of **Republic v. County Council of Kwale and Another Exparte Kondo and 57 Others Mombasa High Court Mombasa Civil Appeal No. 384/1996** and **Justus Ongera v DPP & Another Court of Appeal at Nairobi Civil Appeal No. 312/2017 (2018)eKLR**.

31. Counsel further submitted that in applying proportionality test while striking a balance between individual and public interest, the court is persuaded to exercise its discretion in favour of the applicant. Counsel supported this position relying on the holding in **Richard Malebe v. DPP and Others (2020)eKLR.**

32. According to Kanjama, the applicant is being victimized and his constitutional rights violated for actions arising out of the performance of his professional duty hence the actions of the 1st and 2nd respondents cannot be in the public interest. He urged the court to consider the holding in **Justus Mwenda Kithingo v Director of Public Prosecutions and 2 Others (2014)eKLR** where Lenaola J stated that:-

"…… where Article 157(1) of the Constitution has been breached, Article 165(3) (d) (ii) must be involved and the DPP told that he has acted inconsistently with the authority conferred upon him by the Constitution."

33. Touching on whether leave if granted should operate as stay; counsel submitted that the court must exercise its discretion judiciously. That if prosecution continues and the substantive motion succeeds then leave so granted will not serve any purpose. To support this holding, Mr. Kanjama relied on the holding in the case of **Edwin Harold Dayan Dande and Others v. DPP and Another (supra)**. He therefore submitted that the ongoing criminal proceedings before the lower court should be stopped pending hearing and determination of the substantive Notice of Motion.

1st Respondent's Submissions

34. The 1st respondent did not file written submissions. Mr. Akula reiterated orally on the averments contained in their replying affidavit. He submitted that the application is frivolous, vexatious and hopeless and that it has not met the conditions set out under Order 53(2) of the Civil Procedure Rules.

35. Counsel submitted that, since the DPP made the decision to charge the applicant, 6 months have lapsed hence leave cannot apply. He contended that the DPP has a good case based on sufficient evidence which will be tested before the trial court. Counsel opined that the 1st applicant has never promised the applicant that he was to be treated as prosecution witness.

2nd Respondent's Submissions

36. M/s Ngethe appearing for the 2nd respondent filed her submissions dated 23rd June 2020 restating the content contained in the affidavit in reply. Counsel submitted on three issues listed as hereunder;

(a) Whether the exparte applicant has met the threshold for grant of leave to institute Judicial Review proceedings.

(b) Whether the court ought to interfere with the mandate of the commission to investigate.

(c) Whether the leave sought, if granted, should operate as stay.

37. According to counsel, the applicant has not met the requisite conditions for grant of leave to institute Judicial Review proceedings. summarized as; proof that the suit application is not frivolous, vexatious or abuse of the court process; that there is a prima facie case and, that the suit is not time barred. To advance this argument, counsel relied on the holding in the case of **Matiba v. Attorney General Nairobi H.C. Misc. Application No. 790/1993 and Republic v. Land Disputes Tribunal Court Central Division and Another Exparte Nzioka (2006)IEA 321** where the court stated that:-

"Leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave, and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest opportunity possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out unmeritorious."

38. Counsel submitted that the applicant has not proved existence of any promise to be treated as prosecution witness and that there was no proof of any abuse of power or authority hence the claim of legitimate expectation to be treated as prosecution witness does not arise.

39. Learned counsel opined that the court should not unnecessarily interfere with the Commission's mandate in enforcing compliance and enforcement of the principles on leadership and integrity. That the applicant is putting forth his defence with the intention of pre-emptying the prosecution case which should be fully determined during the trial.

40. Regarding whether leave if granted should operate as stay, counsel urged the court to act with restraint in exercising its discretion as the issues raised can be ventilated before the trial court. To strengthen this argument, counsel relied on the decision in the case of **Thuita Mwangi and Ano. v. The Ethics and Anti-Corruption Commission and 3 Others Petition No. 153 and 363/2013** where the court held that;

> **"… It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."**

Rejoinder by the Applicant

41. In response to the first respondent's argument that the suit is time barred having been filed after the expiry of six months, Mr. Kanjama asserted that the decision to charge the applicant was made on 23rd October 2019 and that they filed the application on 22nd April 2020 which is within time.

Analysis and Determination

42. I have considered the application herein, response thereto and oral submissions by counsel. Issues that arise for determination are;

> **(a) Whether the application herein is time barred.**
>
> **(b) Whether the applicant has met the threshold for grant of leave to institute Judicial Review.**
>
> **(c) Whether leave if granted should operate as a stay of criminal proceedings in ACC No. 28/19 against the applicant and others.**

Whether the suit is time barred

43. Institution of Judicial Review proceedings is governed by Order 53 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. Order 53(2) of the Civil Procedure Rules provides time lines within which leave to institute Judicial Review proceedings should be instituted. It states thus;

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

44. Section 9(3) of the Law Reform Act further provides in mandatory terms that no leave shall be granted to file Judicial Review application if the same is brought after six months. This position was emphasized in the case of **Wilson Osolo v. John Ojiambo Ochola and Another (1996)eKLR Civil Appeal No. 6/1995** where the Court of Appeal had this to say:-

> **"There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed."**

45. Similar position was held in the case of **Ako v. Special District Commissioner Kisumu and Another (1989)eKLR Civil Appeal No. 27/1989** in which the court held that:-

> **"It is plain that under sub-section (3) of section 9 of the Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits for enlargement of time."**

46. From the wording of Order 53(2) and Section 9(3) of the Law Reform Act, an application for Judicial Review must be filed within six months failure to which leave to institute such proceedings will not issue. Although Justice Mativo in the case of **Paul Kihara Kariuki and 3 Others v. The Law Society of Kenya and 13 Others (supra)** was of the view that leave is not necessary in view of the new Constitutional dispensation and the Fair Administrative Action Act, the law requiring leave under the Civil Procedure Rules and the Law Reform Act is still relevant and applicable. The same does not in any way derogate from the progressive objective of the constitution in upholding people's rights to access justice. Proceedings for Leave do not in any way inhibit or circumvent the enjoyment of one's constitutional right/s to access justice.

47. There are so many statutes providing for leave e.g leave to appeal out of time which cannot be said to be inconsistent with the

Constitution or Fair Administrative Action Act. I do not agree with Mr. Kanjama's argument that leave was not necessary yet he is arguing the same application for leave. The applicant's constitutional rights cannot be any lesser or be compromised by observing clear provisions of the statute which are in any event products of the same constitution.

48. In the instant case, parties are in agreement that the applicant was arraigned in court on 22nd October 2019 to answer charges of corruption. For purposes of tabulating time, the cause of action arose the date when charges were presented in court hence time started running from then. Considering that the application herein was filed on 22nd April 2020, the same is within the required time of 6 months.

49. The argument by Akula that a decision to charge was made long before, it was not brought to the knowledge of the applicant. If for instance the DPP made the decision internally and communicated to the EACC to arrest the applicant but the EACC decides to sit for another seven months before charging the accused, that period of indolence cannot be considered to the detriment of the applicant who cannot be deemed not to have filed the suit within the required unknown period of action. In all fairness, time started running from the date the applicant was charged. I do agree with Mr. Kanjama that the application is not time barred.

Whether the Applicant has met the threshold for grant of leave to institute Judicial Review proceedings

50. The crux of the application herein and the intended Judicial Review application is to quash the decision made by the 2nd Respondent in recommending prosecution of the applicant together with others and the 1st respondent's action in preferring the charges whose action the applicant claims was illegal, irrational, malicious, abuse of the court process and a violation of his constitutional right as the action complained of arose in the course of him discharging his professional duties as an Advocate to his client.

51. According to the applicant, instructions from their client were in writing. That he was to receive some payment from their client's client (OSI Kenya) which instructions were dutifully executed. On the other hand, the 1st and 2nd respondents argued that, the applicant was aware that his office was being used to clean tainted money received through acts of money laundering. That the applicant did not act on any formal written instructions hence proof that he knew the money was from an illegal source.

52. For the applicant to persuade the court to grant leave, it is incumbent upon him to establish that he has a prima facie case which is arguable and that his intended substantive motion for Judicial Review orders is not frivolous, vexatious or hopeless. The very purpose for this condition or requirement is to sieve such frivolous, vexatious, baseless or hopeless cases which do not deserve court's attention so as to save on court's precious time and unnecessary parties' costs.

53. However, courts have unfettered discretion in determining whether to grant leave or not to grant. It follows then that leave is not automatic (see **Justus Ongera v. Director of Public Prosecutions and Another (2018)eKLR.**

54. In an effort to fortify the importance of seeking Judicial Review proceedings through the application for leave process, the Court of Appeal in the **Justus Ongera** case above quoted went further to state at paragraph 24 as follows;

> **"We are aware that the grant of leave is not automatic. The purpose of it, as stated in numerous court decisions, is to exclude frivolous and vexatious applications or applications which *prima facie* appear to be in abuse of the court process."**

55. In the same vein, the High Court Mombasa in **HCMCA No. 384/1996** between **Republic v. County Council of Kwale and Another Exparte Kondo and 57 Others(supra) held as follows;**

> **"… The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived …."**

56. From the above quoted cases, there is a great deal of consensus in our superior courts that leave to institute Judicial Review proceedings is not a hindrance to the attainment of justice. It is a necessary evil which serves a positive objective in expeditious delivery of justice as provided for under Article 159(2) of the Constitution by eliminating at the earliest opportunity possible from the smooth legal passage litigation that is not worthy substantive attention in the subsequent proceedings in the name of Judicial Review.

57. In the instant case, the applicant is of the view that he has an arguable case to convince the court on a prima facie basis that he ought not to have been charged based on the fact that he was acting legally within the course of his official duty as an Advocate and the only role he prayed was to execute his client's instructions. It is admitted by both parties that the applicant did receive instructions in writing to receive some monies from OSI Kenya on behalf of Mars Technologies. Whether this action was professionally acted upon is subject to further interrogation. To deal with the finer details as to whether the applicant had knowledge that the money was tainted with corruption would be prematurely determining the intended application and prayers thereof.

58. It is trite that, at the leave stage, a Judge should with extreme caution avoid delving into the merits of the application. See **Edwin Harold Dayan and 3 Others v Director Public Prosecutions (supra).**

59. After analyzing the correspondences between the applicant and his client instructing him to receive monies from OSI Kenya and further instructions on how to dispense with the said mount to various beneficiaries, primafacie, one would be convinced that an Advocate should not be held liable for his professional undertaking dutifully executed at the instruction of his client. **See Joseph Kanyi T/A Kanyi J and Co. Advocates v. Director of Public Prosecutions**, and **Ethics and Anti-Corruption Commission and the Chief Magistrate's Court Mombasa and 11 Others Constitutional Petition No. 1 of 2019** decided on 22nd May 2020 where Justice Ogola held that;

"The Petitioner, an advocate of the High Court, cannot be dragged to court in disregard of the law. The law clearly says that if an advocate is to be prosecuted pursuant to activities mentioned in Section 80 of the Advocates Act –

"…no prosecution for an offence under this Act shall be instituted unless a report has been made to the Attorney General by the Tribunal under sub-section (3) of Section 61."

There is no evidence before this Court that the Attorney General had received a report referred to above to enable the prosecution of the Petitioner."

60. The issue revolving around the applicant's professional conduct in representing his client vis a vis acts of money laundering in the process, has attracted a vicious argument and debate on when an advocate should lose his immunity or privilege from criminal prosecution under Section 134 of the Evidence Act. On the face of the record, and from the facts of this case, the applicant has an arguable case. He has also established a prima facie case that he has a case worthy listening to.

61. The issues raised are very weighty and quite substantial that cannot be wished away at a preliminary stage. To dismiss the applicant will amount to curtailment of the applicant's right to access justice as his liberty is at stake as well as his legal practice. The application is therefore not generic, frivolous, vexatious nor hopeless.

62. For those reasons, I am sufficiently persuaded that as an Advocate of the High Court of Kenya he is entitled to this court's audience for him to ventilate his case. As to whether there was promise not to be charged, those are details which cannot be canvassed at this stage otherwise its determination will prejudice the outcome of the main application.

63. Accordingly, it is my holding that the applicant has met the requisite conditions for grant of leave as prayed in the application herein. The applicant shall therefore file and serve a substantive motion within 7 days from the date of this ruling and the respondents to file their responses within 14 days from the date of service.

Whether the leave so granted shall operate as a stay

64. The purpose of grant of stay of proceedings in the ongoing criminal proceedings is to maintain the status quo. The objective or purpose for issuing such orders is to preserve the dignity of litigation so as not to render the Judicial proceedings nugatory or an academic exercise should the Judicial Review application succeed. The Power to grant stay or not to grant is generally a matter of discretion bestowed upon the court.

65. The proceedings in **ACC No. 28/19** are at the pre-trial stage which has not even been finalized. In other words, the process has just begun and due to Corona Virus, courts are not operating normally. In other words, substantive hearing may not even commence before the intended application is heard and determined. Given the backlog in the lower court, criminal proceedings which are more recent cannot even get to the critical stage of taking evidence before this matter is concluded.

66. With the above observation in mind, the applicant's Judicial Review application will not be rendered nugatory. I have taken this view given the fact that there are several accused persons who are facing similar charges. To stop the entire process which is at its infancy stage will also amount to delaying other people's rights. For those reasons and in the balanced interest of both parties and public interests, the preliminary process shall continue as we fast track the intended motion so that it is finalized before the lower court substantially starts dealing with the criminal proceedings. Accordingly, the application for stay is declined. Regarding the costs, the same shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF AUGUST 2020.

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J. N. ONYIEGO

JUDGE