REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

JUDICIAL REVIEW NO.1 OF 2019

REPUBLIC..APPLICANT

VERSUS

THE COUNTY CRIMINAL INVESTIGATION

OFFICER, MARSABIT COUNTY............................1ST RESPONDENT

THE PRINCIPAL MAGISTRATE

COURT AT MARSABIT...2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

AND

ABOINUR HASSAN ADAN..............................EX-PARTE APPLICANT

AND

WATTO GODANA DABASSO.......................1ST INTERESTED PARTY

NUNO GUYO BORU.....................................2ND INTERESTED PARTY

RULING

The applicant filed his application dated 28th December, 2018 seeking leave to apply for orders of Judicial Review intended to quash the proceedings in Marsabit Principal Magistrate's Court Criminal case No. 690 of 2018. The applicant is also seeking an order of prohibition intended to restrain the trial court from continuing with the criminal proceedings. Prayer (c) of the application reads as follows:

> ***(c) The leave granted herein to operate as a stay of any further criminal proceedings at Marsabit Principal Magistrate's Court Criminal Case No.690 of 2018, Republic Vs Abdinur Hassan Adan for purported offences of obtaining money by false pretences contrary to section 313 of the Penal code, Cap 63, Laws of Kenya until the determination of their application for the reliefs sought***.

The application for leave is supported by the applicant affidavit sworn on the 21.12.2018. The application was placed before Justice Gikonyo on 9.1.2019. The judge granted leave to the exparte applicant to apply for Judicial Review orders of certiorari and Prohibition. The Judge also stated as follows;

> ***pursuant to (4) above, whether stay therein shall operate as stay shall be heard on 21.1.2019 by Chitembwe J. To facilitate the said hearing, Marsabit PMCCRC No.690 of 2018 Republic V Abdinoor Hassan Adan be availed before the Judge on 21.1.2019.***

I do hereby set out from the initial stage that this ruling is only concerned with the issue as to whether the leave granted on 19.1.2019 should operate as stay or not. The applicant did not file the substantive motion as directed by one Gikonyo J. The respondent opposed the application. There is an affidavit by Mr. Daniel Mwangangi, Prosecution counsel, on behalf of the third respondent. The Attorney General filed grounds of opposition to the application while the interested parties filed a replying affidavit sworn by Wotto Godana Dabasso on

24.1.2019.

Mr. Lakicha appeared for the applicant. Counsel submit that there is an allegation that the applicant purported to sell motor vehicles that were in a United Nations compound. The complainant is alleged to have paid some money to the ex-perte applicant. However, the charge before the trial court involve money paid to a third party.

The ex-parte applicant believe that the criminal charge as well as the complaint is purely a civil dispute. The complainant has no legitimate grounds for preferring criminal charges against the applicant. The charge is intended to embarrass and cause the ex-parte applicant psychological torture.The charge is intended to harass the ex-parte applicant. Whereas the incident occurred in Nairobi, the interested party chose to prefer charges in Marsabit. This creates serious doubt on the criminal charges.

Counsel further submitted that the complainant in his statement to the Police indicate that he was introduced to the exparte applicant in Nairobi on 12th October 2017. The incident occurred in Nairobi. The criminal process cannot be a substitute for a civil remedy. The exparte applicant paid Ksh.100,000 to the complainant on 19thJune 2018. The application is not an abuse of the court process and the charge has been brought so as to put pressure on the ex-parte applicant to pay the disputed sum. The complainant tried to use the Police to force the payment.

Mr. Muriuki appeared for the two interested parties. Counsel submit that the application is misplaced and is an abuse of the Court process. The ex-parte applicant initially filed Judicial Review case No.509 of 2018 in Nairobi. The Nairobi court denied him stay orders. Without disclosing to the court in Meru that there was a matter in Nairobi, the ex-parte applicant preferred this current suit. The ex-parte applicant was expected to file a notice of motion within 21 days. The applicant is now seeking stay of proceedings yet there is no pending application. It is erroneous to suggest that the matter is civil in nature. Mere presence of a civil suit is no bar to criminal proceedings. The charge is one of obtaining by false pretences. The complainant is at liberty to file a civil suit. This Court is not supposed to determine the weight of the evidence. All what the prosecution has to do is to establish reasonable suspicion. The ex-parte applicant has to prove his innocence before the trial court. The incident did not take place in Nairobi. Money was wired from Marsabit. The ex-parte applicant has not filed an application to have the criminal case transferred to Nairobi. Mr. Muriuki maintains that this is not the forum to deal with the merit of the criminal process. All what the ex-parte applicant is saying is that since this a civil dispute he should not be charged.

Mr. Mwangangi contends that money was paid to the ex-parte applicant through banks in Marsabit. A total of Ksh.7.6 million was paid. The ex-parte applicant indicated to the interested parties that he was in a position to sell the vehicles. He failed to deliver the vehicles and went underground until when he was arrested on 8.12.2018. The ex-parte applicant purported to be selling United Nations vehicles yet he is not even an employee of the United Nations. Even if the dispute may have some civil elements, the law allows concurrent Civil and Criminal proceedings. The exparte applicant ought to have filed a substantive motion together with a prayer seeking stay of proceedings within 21 days.

Miss Mbaikyatta associated herself with the submissions of Mr. Muriuki and Mr. Mwangangi. Counsel maintain the Judicial review remedy is not concerned with the merits of the case but the process. It is only the trial court that is best equipped to deal with the quality and sufficiency of the evidence. The ex-parte applicant will have a chance to ventilate his defence. He will examine witnesses and all his rights under Article 50 of the Constitution are well guarded. The charge is one of obtaining money by false pretences Contrary to Section 313 of the Penal Code. The trial court has powers to deal with that case.

As indicated hereinabove this ruling will only restrict itself to the issue as to whether the grant of leave to apply for orders of certorari and Prohibition granted by Justice Gikonyo on 9.1.2019 should operate as a stay against the prosecution of the ex-parte applicant in Criminal case No.690 of 2018.

Order 53 rule 1(3) and (4) of the Civil Procedure Code together with the proviso states as follows:

> **(3)** ***the Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.***
>
> ***(4) 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.***
>
> ***Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter parties before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.*** *(emphasis added)*

The issue as to whether leave granted in a Judicial Review application is to operate as a stay is usually determined within the parameters of the discretionary nature accorded to the Court in relation to the entire application seeking leave. Leave in this case was granted but the issue of whether that leave should operate as a stay is the subject of this ruling. The Proviso to Order 53 rule (1) indicate that the judge can direct that the application for leave be served and the question of leave and whether such leave should operate as a stay may be heard and determined separately within seven days. Unfortunately, the seven days requirement was not complied with. From 9.1.2019 when Gikonyo J granted leave to 21.1.2019 when the matter was placed before me is a period of more than seven days.

In the case of **TAIB A. TAIB -v- MINISTER FOR LOCAL GOVERNMENT & 3 OTHERS (2006) eKLR**, Maraga J (as he then was) observed as follows:

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 of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten

that 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 think. It also 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 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.

Counsels relied on several authorities. I have observed that most of the authorities involve situations where the courts dealt with the entire issue of granting leave to apply for Judicial Review orders or dealt with the substantive application filed subsequent to leave having been granted. The concern of this court in this ruling is only whether the leave that has already been granted should operate as a stay. This calls upon the Court to avoid as much as possible dealing with issues which ought to be dealt with in a substantive application.

In the case of **KURIA & 3 OTHERS -V- ATTORNEY GENERAL (2002) 2 KLR at 69,** Mulwa J held as follows:

> ***1. The court has the power and indeed the duty to prohibit the continuation of criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation.***
>
> ***2. It is the duty of the court to ensure that its processes are not used as tools for vilification on issues not pertaining to that which the system was even formed to perform.***
>
> ***3. An order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.***
>
> ***4. The machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. The power of judicial review is invariably invoked so as to jealously guard it from this abuse.***
>
> ***5. It is the duty of the court to ensure that the utilization and or invocation of its processes and the law is not actuated by other considerations so divorced from the goals of justice as to make the court virtually a scapegoat in personal score settling and vendetta.***
>
> ***12. The simultaneous existence of a civil and criminal case does not constitute double jeopardy as envisaged by section 77 (5) of the Constitution.***
>
> ***13. The court does not have the power to order that no criminal prosecution should be instituted or continued side by side with a civil suit based on the same or related facts.***
>
> ***14. The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution.***
>
> ***18. In order for an application such as this one to succeed, there is need to show how the court is being abused or misused, there is need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution.***
>
> ***19. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in society. There is a public interest underlying every criminal prosecution, which are being jealously guarded, whereas at the same time there is a private interest of the rights of an accused person to be protected. Given these bipolar consideration, it is imperative for the court to balance these considerations vis-à-vis the available evidence.***

In deciding whether leave granted in a Judicial Review application should operate as a stay, the court takes into account the fact that the substantive application is yet to be heard and determined. The court has to consider the mischief, hardship or peril that would affect the ex-parte applicant during the pendency of the substantive application. What prejudice would the ex-parte applicant suffer? Would the substantive application be rendered nugatory? On the other hand, what would be the effect of the stay order? Will such order of stay serve public interest?

The prosecution of the ex-parte applicant has not been completed. From the record, it is clear to me that no witness has testified. The complainant in that case is eager to pursue his claim against the ex-parte applicant. On the other hand, the ex-parte applicant believes that the complainant is using the criminal process to settle civil dispute. Mr. Lakicha submitted that the ex-parte applicant paid back Ksh.100,000 on 19th June, 2018. In essence therefore the ex-parte applicant admits that he received money from the complainant even if he at the same time contend that the money was paid to a third party.

In the case of **SOLOMON MUYEKA ALUBALA -V- CAPITAL MARKETS AUTHORITY & ANOTHER (2018), eKLR** Justice Nyamweya at para 23 stated as follows:-

> ***From the above decisions, it follows that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness***

or continuing nature of such implementation. If it is a continuing nature then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly, and <u>even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.</u>(emphasis added)*

In my view, before the Court decides, whether leave granted in a judicial review application should operate as a stay, the court has to consider:-

1. Whether the action complained of has been fully completed or is in the course of implementation

2. What prejudice would the ex-parte applicant suffer if an order of stay is not granted.

3. What is the effect of an order of stay on public interest in relation to the matter in dispute.

4. Whether there is likelihood of violation of constitutional rights if the action complained of is left to continue before the substantive application is heard and determined.

5. Whether there is a possibility of the Judicial Review application taking quite a long period before it is heard and determined and therefore rendered nugatory.

6. Whether there is breach of fair administration of justice on the part of the respondent.

The issues to be considered in such cases are not exhaustive. Each case has to be determined on its own merit. In Judicial review application involving criminal proceedings the court should not allow itself to be used by suspects in criminal cases and grant stay orders in the hope that the accused would have a breathing space to navigate his way in the interim period and have the criminal charges withdrawn. Public interest requires that those accused in criminal cases should deal with their accusers in the trial court unless it is established that the criminal process is being abused and is meant to serve ulterior motives.

The ex-parte applicant was granted leave to file the substantive application on 9.1.2019. No such application has been filed. Should the court order that the leave granted by the Court on 9.1.2019 does operate as a stay, there is no guarantee that the substantive application will be filed. Equally, the respondents seems to have sharpened their tools and are already contending that there is no room for the filing of the substantive application as time to do so has already elapsed.

In my view, should there be a possibility of hearing and determining the Judicial Review application, the same can be heard and finalised within the shortest time possible. A criminal case goes through a process. It is not heard and determined within a short period especially where the charges are strongly disputed and the accused is represented by an advocate. I do find that before the criminal process is likely to be completed, the Judicial Review process would long be done away with. No one is happy to stand trial and undergo a criminal process. However, the law requires that those suspected of having violated the law should stand trial.

Since I am not dealing with the substantive application, I am satisfied that the leave granted on 9.1.219 should not operate as a stay. The court can hear and determine the Judicial Review application long before the criminal process is finalized. The ex-parte applicant will not suffer any prejudice.

The upshot is that leave granted by Gikonyo J on 9.1.2019 shall not operate as a stay. Parties shall meet their own respective costs.

Dated and Delivered at Marsabit this 29th day of March, 2019

S. CHITEMBWE

JUDGE