



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**ANTI-CORRUPTION DIVISION AT NAIROBI**

**MISCELLANEOUS APPLICATION NO.7 OF 2016**

**ETHICS AND ANTI –CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT**

**VERSUS**

**ENG.PETER MANGITI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ADAN GEDOW HARAKHE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DR. NELSON GITHINJI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**HASSAN NOOR HASSAN.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**SAMUEL CLOYD ODHIAMBO.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**SAMUEL MDANYI WACHENJE.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**HENDIRICK NYONGESA PLILISI.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOHN MUNYWOKI.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**RUTH KIIRU.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**HEZBOURNE MACKOBONGO .....10 DEFENDANT/RESPONDENT**

**MICHAEL W. OJIAMBO.....11<sup>TH</sup> DEFENDANT/RESPONDENT**

**JAMES KIRIGWI.....12<sup>TH</sup> DEFENDANT/RESPONDENT**

**SALIM ALI MOLA.....13<sup>TH</sup> DEFENDANT/RESPONDENT**

**KENNEDY NYAMAO.....14<sup>TH</sup> DEFENDANT/RESPONDENT**

**MOSES OSORO OGOLA.....15<sup>TH</sup> DEFENDANT/RESPONDENT**

**FRESHIA KAMAU.....16<sup>TH</sup> DEFENDANT/RESPONDENT**

**BETTY NJOKI MURITHII t/a**

**BLUE STAR ENTERPRISE.....17<sup>TH</sup> DEFENDANT/RESPONDENT**

**JENNIFER MUTHONI KINOTI t/a**

**BLUE STAR ENTERPRISES.....18<sup>TH</sup> DEFENDANT/RESPONDENT**

## **R U L I N G**

1. The plaintiff/applicant herein vide the Notice of Motion dated 23<sup>rd</sup> January, 2017 seeks to stay the proceedings herein pending the hearing and determination of ***Nairobi Chief Magistrate's Anti-Corruption Case No. 26 of 2016***. The Application is brought under the provisions of Section 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other provisions of the law. It is supported by the grounds on the face of the application as well as the affidavit of ***Mark Ndiema*** a forensic investigator with the plaintiff/applicant herein.

2. The 6<sup>th</sup>, 9<sup>th</sup>, 13 and 14<sup>th</sup> defendants/respondents did not file any response though served. They are therefore not opposed to the application. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application vide replying affidavits dated 5<sup>th</sup> May, 2017 and filed on 11<sup>th</sup> May, 2017. The 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup> – 18<sup>th</sup> defendants/respondents filed grounds of opposition.

3. ***Mrs. Odipo*** for the applicant relied on the grounds on the face of the application and authorities filed. She submitted that there exists a criminal case, ***Nairobi Chief Magistrate's Anti-Corruption Case No. 26 of 2016*** against the respondents herein. The said case arises from the same facts as this present case. It was her submission that the evidence is voluminous and they would be using the same documents in both counts which could lead to interference in the quick disposal of this matter. Referring to Section 193 A Criminal Procedure Code, she stated that the applicant was seeking the stay of the civil proceedings so as to promote orderly conduct of proceedings and ultimately save on judicial time.

4. She explained that the criminal court proceedings at the Anti-Corruption Court were instituted by the Director of Public Prosecutor (DPP) and that the applicant had no control over the same. She was sure the proceedings in the lower court would be concluded soon and that the respondents would not suffer any prejudice if the orders sought were granted. Relying on the authorities attached, Mrs. Odipo concluded that this court had the discretion to issue the orders sought and prayed that the application be allowed.

5. ***Mr. Wandungi*** for the 17<sup>th</sup> and 18<sup>th</sup> respondents relied on the grounds of opposition filed on 2<sup>nd</sup> March 2017 and confirmed that both cases exist and that they can be heard simultaneously. He opposed the application saying it was incurably defective as it was brought under the wrong provision of the law. He submitted that the respondents are entitled to a speedy trial as per the provisions of Article 50 of the Constitution of Kenya and that the respondents were already prejudiced since the applicant had obtained an injunction against them.

6. He further submitted that all the parties should be aware of all the circumstances of the case and that the matter cannot be heard at the applicant's convenience. He argued that the applicant investigated this case before deciding to prosecute in both courts and so they knew they would need the documents. He further submitted that a High Court matter could not be stopped because of a matter in the Magistrate's Court. On the authorities cited, he said both were from outside Kenya i.e Malaysia and South Africa but were relevant as the element of prejudice was very clear in them unlike the present case.

7. He was concerned that the criminal case could take too long to conclude hence prejudicing the 17<sup>th</sup> and 18<sup>th</sup> defendants who are already improvised by this case. He urged the Court to consider the interest of justice and dismiss the application.

8. **Mr. Olonde** for the 8<sup>th</sup> defendant opposed the application saying a similar application had been made before and it had been agreed that the matters be heard simultaneously. He asked the Court to consider the prejudice suffered by the defendants. On the filed authorities, he referred to page 13 – 14 of ***Suruhanjaya Sekuriti –vs- Datuk Ishak Bin Ismail & Another Civil Appeal No. W-01 (IM) (NCC) – 366-09-2016*** and stated that the parties had already filed all their documents and so the matter should be expeditiously determined. On the case of ***The Prosecutor-General –vs- Mwananyambe (I 18/2014) (2017) NAHCMD 48***, he submitted that the Court should consider the competing interests as the applicant was enjoying an injunction against the defendants.

9. **Mr. Rotich** for Mr. Sagana for the 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendant’s associated himself with the submissions of the other Counsels. He argued that the applicant had demonstrated unwillingness and unpreparedness to conclude this matter. That parties had filed all their documents and there had been compliance with Order 11 Civil Procedure Rules making Section 1A and B Civil Procedure Act and Article 159 (2) (b) irrelevant in the matter. He argued that a previous request to stay the criminal proceedings had been opposed by the applicant with whom the Court agreed.

10. **Mr. Mutange** for the 3<sup>rd</sup> defendant in opposing the application, submitted that the 3<sup>rd</sup> defendant was not a party to the criminal case and so any stay of this matter would prejudice him.

11. **Mr. Osiemo** for the 5<sup>th</sup>, 10<sup>th</sup> – 12<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> defendants opposed the application saying he associated himself with what the other Counsel had submitted. The 1<sup>st</sup> defendant filed grounds of opposition.

12. In reply, Mrs. Odipo for the applicant stated that the application was brought under the correct provisions of the law and the Court had jurisdiction to hear it. She submitted that the injunction talked about was legally issued and the applicant was not enjoying it. She confirmed that the criminal case was ready for hearing while this one was not.

13. Having considered the application, replying affidavits, grounds of opposition as well as oral submissions, I find the issue falling for determination to be whether the plaintiff/applicant has qualified itself for issuance of the Order sought.

14. There is no dispute about the existence of Nairobi Anti-Corruption Case No. 26 of 2016 which is pending hearing at the Chief Magistrate’s Court, Milimani, Nairobi. It is also not disputed that the parties in both cases are the same and the facts giving rise to both cases are the same. The respondents contend that the application has been brought under the wrong provisions of the law.

15. Section 3A Civil Procedure Act provides;

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

Order 51 Rule 1 Civil Procedure Rules provides;

***“All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”***

16. The gist of the aforementioned provisions of the Criminal Procedure Rules is to affirm the jurisdiction of the Court and to provide the procedure of approaching the Court. I therefore find the said provisions of the law not to be defective in the instant application.

17. Another reason given by the respondents for opposing the application is that such stay will greatly prejudice the respondents since there is an injunction against the respondents. Secondly, they argue that if stay is granted, it will delay the hearing and determination of this matter. Mrs. Odipo for the applicant

has argued that the exhibits to be used in proving this case and Nairobi Chief Magistrate's Anti-Corruption Case No. 26 of 2016 are the same and the criminal case is ready for hearing while this one is not. It was her view that such an arrangement would promote an orderly conduct of proceedings and promote a quick disposal of the matter while saving judicial time.

18. While delivering a Ruling on preservation of the funds in the account of the 17<sup>th</sup> and 18<sup>th</sup> respondents', this Court held that **"it is in the public interest that the public coffers money be protected until this suit is heard and determined"**. It is not disputed that this is a public interest matter. Section 193 A Criminal Procedure Code provides;

***"Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."***

19. The instant application seeks to stay civil proceedings in order to allow the conclusion of related criminal proceedings. Much as Section 193A Criminal Procedure Act provides for Criminal and Civil Proceedings to be conducted concurrently, it specifically provides that criminal proceedings should not be stayed pending civil proceedings.

20. As stated earlier, this Court had held that this is a public interest matter and should be heard and determined expeditiously. Mrs. Odipo submitted that Nairobi Anti-Corruption Case NO. 26 of 2016 is ready for hearing. She also said that the documents in this file shall be used as exhibits in the said Magistrate's Court case. The documents talked about are voluminous.

21. This case is yet to take off. Faced with the same circumstances in *Republic –vs- Director of Public Procedure and 2 Others Exparte Francis Nyakwe Maina & Another Misc. Civil No. 340 of 2014 [2015] eKLR, Odunga J.* stated:

***"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving applicants the chance to clear their names."***

22. In *Floriculture International Ltd. & Others, High Court Misc. Civil Application No. 114 of 1997, Kuloba & Khamoni JJ.* held that;

***"the normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal cases as the determination of the criminal cases as the determination of civil rights and obligations are not the subject of a criminal prosecution."***

23. In *Kuria & 3 others –vs- Attorney General (2002) 2 KLR 69 Mulwa J.* held as follows;

***"In such instances, where there is a co-existence of a civil suit and a criminal case, it is rather that a stay be granted on the civil process pending the completion of the criminal case..... The effect of a criminal prosecution on an accused person is adverse but so also are the purposes in the society which is immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded whereas, the same time there is a private interest of the accused person to be protected by whichever means."***

24. In the case of *Jadra Karsan –vs- Harnam Singh (1953) 20 E.A.C.A 74* it was held;

***"There is no doubt that there is an inherent power of stay of proceedings where the ends of justice so require."***

25. This being a public interest matter and being guided by the above authorities, I do find that it is in the

public interest as well as the interest of the parties that one of these cases be stayed pending the hearing and determination of the other.

26. It would be untidy having many documents moved from one court to another as some will end up being misplaced or even lost. Since statute specifically outlaws the staying of criminal cases on grounds of a pending civil case, I find that the case to be stayed would be this one (***Ethics and Anti-Corruption Commission –vs- Peter Mangiti & 17 Others***) pending the hearing of Nairobi Chief Magistrate’s Anti-Corruption Case No. 26 of 2016.

27. The Chief Magistrate’s Court and the DPP are directed to expedite the hearing of the said case which should be heard from back to back where possible. This Court will mention this matter after six (6) months for an update on the progress of the criminal case aforementioned. The application therefore succeeds. Costs in cause.

**Date and delivered this 27<sup>th</sup> day of July 2017 at NAIROBI**

.....

**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**