



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 574 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL

REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF THE LAW OF SUCCESSION ACT, CHAPTER 160 LAWS OF KENYA,
NATIONAL**

**POLICE SERVICE ACT, FAIR ADMINISTRATIVE ACTION ACT, No. 4 of 2015, THE LAW
REFORM**

**ACT, CAP 26, ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010, THE CONSTITUTION
OF**

**KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE
LAW**

BETWEEN

REPUBLIC.....APPLICANT

- VERSUS -

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

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

EX PARTE

GUY SPENCER ELMS

RAFFMAN DHANJI ELMS & VIRDEE ADVOCATES.....EX PARTE APPLICANTS

RULING

1. On 14th June, 2017 I delivered a judgement in this matter in which I declined to grant the orders in the manner sought by the applicants in the Notice of Motion dated 1st December, 2016, in which the applicants sought and order to quash the decision by the 1st Respondent to charge the 1st Ex Parte Applicant for forgery of a testamentary instrument as well as an order prohibiting the Respondents from harassing, intimidating, threatening, arresting, detaining and or charging the 1st Ex Parte Applicant on charges related to the Written Will of the Estate of Roger Bryan Robson.

2. Aggrieved by the said decision the ex parte applicant have moved this Court seeking the following orders:

1. That this application be certified as extremely urgent and the same be heard *Ex parte* in the first instance

2. That pending the hearing and determination of this application *inter partes*, this honourable court be pleased to grant a temporary injunction and or extend the conservatory orders that were issued by this honourable court on 14/6/2017 restraining the respondents whether by themselves, their servants, agents, representatives and or officers or anyone claiming under their name howsoever from harassing, intimidating, threatening, arresting, detaining and or charging the 1st applicant for any charges related to the Written Will of Roger Bryan Robson (Deceased) and or arising from the execution of the statutory obligations pursuant to the Grant of Letters of Probate arising, therefrom and issued by this honourable court on 30/10/2013 in Nairobi Succession Cause No. 955 of 2013 in the matter of the estate of Roger Bryan Robson (Deceased).

3. That pending the hearing and determination of the intended appeal herein at the Court of Appeal, this honourable court be pleased to grant a temporary injunction and or conservatory orders restraining the respondents whether by themselves, their servants, agents representatives and or officers or anyone claiming under their name howsoever from harassing, intimidating, threatening, arresting, detaining, and or charging the 1st Applicant for any charges related to the Written Will of Roger Bryan Robson (Deceased) and or arising from the execution of the statutory obligations pursuant to the Grant of Letters of Probate arising therefrom and issued by this honourable court on 30/10/2013 in Nairobi Succession Cause No. 955 of 2013 in the matter of the estate of Roger Bryan Robson (deceased).

4. That the Intended Appeal at the Court of Appeal be filed within the next 45 days, and in failure thereof, the orders in paragraphs 2) and 3) above shall lapse.

5. That this application be heard *inter partes* as a matter of urgency on such date and at such time as this honourable court may direct.

6. That the costs of this application be borne by the respondents.

3. According to the applicant, following the lapse of the temporary conservative orders on 21st June 2017 or thereabouts which were issued after the delivery of the judgement herein and there is huge risk, likelihood and or probability that the Respondents' officers and or agents will arrest and detain him as previously they have demonstrated viciousness and zealousness in attempting to arrest him and were only restrained by orders of this Honourable Court.

4. It was averred by the applicants that the Respondents and the interested party through their media army and agents have since the delivery of the said judgment been running a series of articles and publications in the newspapers and social media informing everyone that the 1st applicant forged the said Written Will and Power of Attorney and as such they will swiftly move to arrest and charge him in court. Apart from that the Respondents and interested party are spreading rumours and falsehoods that indeed he forged the said Written Will, Power of Attorney and that he was on the verge of selling the said estate's properties to a potential buyer that he had already secured. To the 1st applicant, this is a breach of his constitutional

right to presumption of innocence until proved guilty by a court of law. The 1st applicant therefore concluded that the intent of the Respondents to embarrass and soil his name at the slightest of opportunities available.

5. It was contended that the Respondents, at the whims and instance of the interested party herein, have acted unreasonably, unlawfully, with ulterior motives, spitefully and maliciously with the sole aim of vexing, intimidating, coercing, blackmailing, embarrassing and soiling the applicant's name knowing very well that the applicant will lose clients and hence his law firm would lose business should trumped up, malicious and vexatious criminal charges be instituted against him yet he intends to appeal against this Court's judgment delivered on 14th June 2017.

6. To this end the applicant confirmed that he had filed a Notice of Appeal and requested for certified, typed proceedings, orders and judgment to enable him lodge the appeal at the Court of Appeal.

7. The applicant disclosed that there has been discovery of a new piece of evidence whereby there is a report by the National Land Commission exonerating him from any wrong doing and or culpability and further casting doubt on the authenticity, veracity and validity of the conveyancing documents presented by the interested party herein forming the basis upon which the purported charges of forging the deceased's Written Will dated 24th March 1997 are brought thus the same are trumped up, malicious, frivolous, vexatious and aimed at intimidating, blackmailing and coercing him into yielding to the demands by the Respondents and the interested parties.

8. The applicant therefore averred that it was unreasonable, irrational and illogical for the Respondents to attempt to arrest, detain, charge and prosecute him as the executor for forgery of the Written Will of **Roger Bryan Robson** dated 24th March 1997 while conspicuously, deliberately and intentionally leave out the author and the witnesses thereof.

9. The applicant averred that this Court erred in failing to take into account the overwhelming and compelling exculpatory evidence exonerating him from the purported and trumped up charges by the Respondents. He further averred that the Court failed to take into consideration the fact that the actions of the Respondents have at all material times been actuated with malice, unreasonableness, irrationality, been unlawful, illegal, ultra vires and above all been at the whims and or at the instance and or control of the interested party. He contended that the Court failed to take judicial notice of the fact that the said Written Will of Roger Bryan Robson dated 24th March 1997 has been the subject of proceedings in **Nairobi Succession Cause Number 955 of 2013** where there has been a partial confirmation of the grant therein on the basis of the said Written Will and further that the said Written Will has never been challenged by the objector therein who happens to be the interested party herein and or has not been declared to be invalid by the said Court yet the interested party is influencing the Respondents to prosecute the executor herein for ulterior motives and agendas.

14. It was the applicant's case that the Respondents are not interested at all in the pursuit of justice but are merely working at the whims and instance of the interested party herein with the sole aim of intimidating, harassing, coercing, blackmailing and forcing him into renouncing his executorship to the estate of Roger Bryan Robson(deceased) so that they can grab the properties therein that are the subject of proceedings at the **Nairobi Milimani Environment and Land Court ELC Number 80 of 2015**. The applicant insisted that the Respondents' actions are unlawful, illegal, ultra vires, violating the statutory and constitutional provisions and the National Prosecution Policy.

11. It was the applicant's case that his intended appeal at the Court of Appeal is arguable, well grounded, and meritorious with a high probability of success and that he stands to suffer great prejudice and irreparable loss in terms of the unprecedented embarrassment, and soiling of his name which the Respondents well know of and are capitalizing on the same to unduly pressure him into yielding into their demands.

12. It was therefore the applicants position that this application should be granted because if arrested,

detained and or charged in relation to the said Written Will of Roger Bryan Robson(Deceased) and or arising out of his execution of the statutory obligations pursuant to the Grant Of Letters of Probate issued on 30th October 2013, the same will be an affront to the discharge of his statutory duties as the duly appointed executor of the estate of the deceased and the assets thereof stand to be wasted, disposed of, sold, transferred and or interfered with by the Respondents and particularly the interested party. It was therefore his case that that unless the Respondents are restrained by this Court during the pendency of the intended appeal, these proceedings will be rendered nugatory, a mere academic exercise and an effort in futility.

Respondent's Case

25. In opposing the application the Respondent filed the following grounds of opposition:

- 1. There are specific statutory provisions for stay pending appeal which the applicant has not invoked which renders the application incompetent, bad in law and an open abuse of the court process.**
- 2. The statutory provisions relied upon by the applicant are inapplicable and not available to him.**
- 3. Under Order 42 Rule 6 of the Civil Procedure Rules (Rules), an appeal cannot operate as a stay of execution or proceedings under a decree or order appealed from.**
- 4. Under Order 6 of the Rules, the court appealed from may only issue a stay of execution of such decree or order. In this case, there is nothing to stay as no orders of execution were issued.**
- 5. An order for stay of execution can only be made under Order 6 of the Rules if the court is satisfied that, substantial loss may result to the applicant. In this case, as the court did not issue any orders for execution, the orders sought in the application herein cannot issue.**
- 6. The High Court has no powers to grant prayer number 4 of the substantive Notice of Motion application in that, the Civil Procedure Act and the Rules made thereunder have express provisions on the procedure and mode of filing appeals.**
- 7. That the purported discovery of new evidence exonerating the applicant, which is denied and is irrelevant for purposes of an application of this nature, is not a proper legal ground for a grant of the orders sought by the applicant,**
- 8. Neither the High Court in an application of the nature filed herein nor the Court of Appeal have the powers to interrogate and determine the innocence or otherwise of the applicant either in an application of the nature filed herein, an appeal or an application for Judicial Review.**
- 9. That the authenticity, relevance and veracity of the purported report by the National Land Commission referred to by the applicant in his application can only be ascertained in proceedings before a subordinate court. In any event, during the hearing of the Judicial Review application, no party was barred by the court from presenting any evidence. Indeed the applicant filed numerous documents without the leave of the court and the respondents never objected thereto.**
- 10. That only a trial court, taking both oral and documentary evidence can making a finding on whether or not the applicant is innocent.**
- 11. This court has already made a finding on which judicial forum has the power to make a finding on whether or not the applicant is guilty and to admit or otherwise deal with**

exculpatory evidence. In the circumstances, it would be tantamount to sitting on an appeal of its own finding for the court to be requested to make a finding on whether or not the applicant is guilty or innocent.

12. The applicant is raising numerous new issues which were not raised in the application for judicial review through the application herein which is not only unprocedural but also lacking in any legal basis.

13. Under section 1A of the Civil Procedure Act, Chapter 21 (Cap 21) of the Laws of Kenya, the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. To grant the orders sought would be in breach of this objective.

14. Under section 1B of Cap. 21, for purposes of furthering the overriding objective specified in section 1A, courts are required to handle matters presented before them with the aim of ensuring the timely, efficient and effective disposal and determination of such cases. To grant the orders sought would be against these aims under the Act.

15. Section 63(c) of Cap 21 deals with situation in which the High Court, in order to prevent the ends of justice from being defeated, is permitted to grant a temporary injunction and in the case of disobedience commit the person guilty thereof to prison and order his property to be attached. The section is irrelevant in the circumstances of this application.

16. Generally, section 63 of Cap 21 is intended to deal and address contempt of court.

17. Order 20 Rule 1 deals with an order for accounts where a plaintiff prays for an account and the relief seeks the taking of accounts. These provisions have no relevance to these proceedings.

18. Order 40 Rule 2(1) deals with cases in which it is proved by affidavit or otherwise that, any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party or such like circumstances. These provisions are irrelevant for purposes of the application herein.

19. Order 40 Rule 4(1) is on situations in which the court may hear an application ex parte. It is irrelevant for purposes of this application.

20. Further grounds and authorities shall be adduced at the hearing hereof.

Determination

13. I have considered the foregoing.

14. While I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds, under Order 42 rule 6 of the *Civil Procedure Rules*, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

“The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question...At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal... There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success.”

15. **In Mangungu vs. National Bank of Commerce Ltd [2007] 2 EA 285**, the Court expressed itself on the issue as follows:

“Generally the merits of a party’s case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction.”

16. Accordingly, I do not intend to make any finding with respect to the chances of success of the intended appeal.

17. In its judgement herein, all that this Court did in the judgement against which the Applicants intend to appeal was to dismiss the Applicant’s application for judicial review. There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for judicial review, the superior court does not grant any positive order in favour of the Respondents which is capable of execution. See **Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004**, **Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006** and **William Wambugu Wahome vs. The Registrar of Trade Unions & Others Civil Application No. Nai. 308 of 2005**.

18. In this case the applicants are seeking an order that until the hearing and determination of their intended appeal against the judgment delivered by this Court this court be pleased to grant a temporary injunction and or conservatory orders restraining the respondents whether by themselves, their servants, agents representatives and or officers or anyone claiming under their name howsoever from harassing, intimidating, threatening, arresting, detaining, and or charging the 1st Applicant for any charges related to the Written Will of Roger Bryan Robson (Deceased) and or arising from the execution of the statutory obligations pursuant to the Grant of Letters of Probate arising therefrom and issued by this honourable court on 30/10/2013 in Nairobi Succession Cause No. 955 of 2013 in the matter of the estate of Roger Bryan Robson (deceased). In other words the applicants seek an order that the Court extend the stay that was issued by this Court consequent upon the grant of leave. It must however be noted that such stay is usually directed at the “proceedings in question”. In this case the “proceedings in question” have since been terminated.

19. Whereas the Court of Appeal may well be justified to granting the stay, where this Court has simply declined to grant the orders sought a stay will normally not be issued. In this case, the 1st applicant’s trial is yet to take off as the applicant has not been charged. When and if that happens, he would be entitled to bail and the applicants have not contended that the trial may be determined before the intended appeal which the applicant confirmed would be in place within 45 days of the judgement intended to be appealed against.

20. In their intended appeal, the applicants can only challenge the decision of this Court by which the Court declined to prohibit the Respondents from harassing, intimidating, threatening, arresting, detaining,

and or charging the 1st Applicant for any charges related to the Written Will of Roger Bryan Robson (Deceased) and or arising from the execution of the statutory obligations pursuant to the Grant of Letters of Probate. It is however sought to stay the decision to arrest and charge the 1st applicant.

21. In **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J** (as he then was) held:

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant’s appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court’s judgement or decree.”

22. Where therefore the application for stay is directed to a decision against which the intended appeal is not directed, and cannot possibly be directed, a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score. See **Muhamed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**

23. That was the position which was adopted in **Republic vs. Director of Public Prosecutions & 4 Others Ex parte - Senator Johnson Nduya Muthama [2015] eKLR** where the Court held that:

“this case, if I understood the submissions made on behalf of the applicant correctly, he is seeking conservatory orders to restrain the Respondents from proceeding with the criminal proceedings before the trial court...This Court however can only grant conservatory orders in respect of the orders against which an appeal is directed. In other words conservatory orders would only have the effect of preserving the *status quo* rather than granting fresh orders which confer benefit on the applicant which the applicant was not enjoying before the decision intended to be appealed against was made.”

24. Apart from the foregoing **Mr Litooro** during his submissions informed the Court that the applicants were seeking a stay for only 45 days presumably to enable the applicants seek orders in the Court of Appeal. Those 45 days lapsed on 1st August, 2017.

25. Having considered the foregoing, I find no merit in the instant application.

Order

26. In the result the Motion fails and the same is dismissed with costs.

27. It is so ordered.

Dated at Nairobi this 11th day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Litooro for the applicant

Mr Mule for the Respondent

Mr Maloba for the interested party

CA Mwangi