



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.108 OF 2014

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFFE GISEBE.....2ND PETITIONER

AND

JUSTINE BEDAN NJOKA MUTURI.....1ST RESPONDENT

JUSTUS KARIUKI MATE.....2ND RESPONDENT/ APPLICANT

EKWE DAVID ETHURO.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

THE INSPECTOR GENERAL NATIONAL POLICE SERVICE.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

AND

PARLIAMENTARY SERVICE COMMISSION.....INTERESTED PARTY

RULING

1. This Ruling relates to a Notice of Motion Application dated 28th January, 2015, supported by an Affidavit sworn by Justus Kariuki Mate, the 2nd Respondent in this matter. In the Application, he prays for the following orders;

“(1)

2. *That this Honourable Court be pleased to grant stay of the present proceedings pending the hearing and determination of the appeal filed in the Supreme Court of Kenya being, Petition of Appeal No. 32 of 2014, Justus Kariuki Mate and Another vs Honourable Martin Nyagah Wambora and Another.*

3. *That costs of this Application be in the cause.*”

2. The Application is founded on the grounds that;

“(1) The present Petition as against the 2nd Respondent is founded on the decision of this Court made in Kirinyaga High Court Petition No. 3 of 2014, Hon. Martin Nyaga Wambora and Another vs Speaker of Senate and 5 Others made on the 16th April, 2014.

(2) The 2nd Respondent made an appeal from the finding of the court in Nyeri Civil Appeal No. 24 of 2014, Justus Kariuki Mate and Another vs Hon. Martin Nyaga Wambora and Another and which was dismissed on 30th September, 2014.

(3) The 2nd Respondent subsequently filed a Petition of Appeal in the Supreme Court being the said Petition No. 32 of 2014, challenging the entire decision and finding of the court in the said Kirinyaga Petition No. 3 of 2014.

(4) The 2nd Respondent did simultaneously with the filing of the said Petition apply for interim orders of stay of the orders of the court made in the said Kirinyaga Petition No. 3 of 2014.

(5) The Supreme Court did on the 29th December, 2014 allow the 2nd Respondent’s application for stay and ordered that the status quo presently obtaining pending the hearing and determination of the said Petition of appeal.

(6) The determination of the said Petition shall settle the issues arising in the above matters and specifically the question of whether or not the 2nd Respondent acted in contempt of court as alleged in the present Petition.

(7) In the circumstances, it is fair and just to allow the present application.

(8) No prejudice shall be occasioned upon the Petitioners herein if the present Application is allowed.”

3. The Interested Party, the 4th, 5th and 6th Respondents were all in support of the present Application while there was no appearance for the 1st and 3rd Respondents.

The Response

4. In response to the Application, the 1st and 2nd Petitioners objected to the grant of the above order and through their Written Submissions dated 8th July, 2015 submitted that this Court is not the right forum for the Applicant to seek the said stay orders for the reasons that although the proceedings herein are premised on his alleged decision to disobey Court orders issued and served on him in **Kirinyaga H. C. Petition No. 3 of 2014**, the proceedings herein are not in any way related to those in the Supreme Court. That the appeal in the Supreme Court does not emanate from these proceedings and that there is no basis for creating a nexus between the two proceedings which are totally independent of each other.

5. It was their case further that the issues for determination herein are not before the Supreme Court as the appeal before that Court is not about the same subject matter as these proceedings which are about alleged disobedience of Court orders and therefore the outcome of the Supreme Court proceedings will have absolutely no bearing on the final decision in the present matter. In any event, if the two proceedings had a bearing on each other, the right court for the 2nd Respondent’s Application is the Supreme Court itself.

6. Further, the Petitioners have contended that besides failing to make this Application in the Supreme Court, the reasons for asking this Court to stay these proceedings ought to have been that the 2nd

Respondent has an arguable appeal and that unless the proceedings herein are stayed, the Petition of appeal would be rendered nugatory, as was held in **Judicial Commission of Inquiry into the Goldenberg Affair and 3 Others vs Kilach, Nairobi Civil Application No.77 of 2003 (UR. 40/03)**.

7. The Petitioner's case is also that the Application herein is faulty to the extent that it attacks the merits of the Petition, advances the erroneous counter-argument to the Petition that Court orders are obeyed on their merit, and that the Supreme Court should determine that the orders were not merited and only then can the 2nd Respondent be justified in disobeying them as he allegedly did. From the foregoing therefore, it was their argument that the Application amounts to arguing that the Court was in error in issuing the said orders which were later allegedly disobeyed.

8. The Petitioners added that the Applicant's folly must not be entertained and that the argument that the court order is unfair or wrong because of a mistake or a lie is fruitless because, if there really is something amiss with a Court order, the Court must be asked to reconsider it since it is only a Court that issued an order that can change it, and until a change is granted, the order must be strictly obeyed.

9. It was their other submission that the lack of merit in a Court order is no legal justification for one to violate it and only two viable excuses are allowed for not obeying Court orders, that is: either the party did not know about it, or the order was impossible and not inconvenient or difficult to obey; and that any advocate who advises a client to come to court with explanations other than these, do their clients a terrible and costly disservice.

10. Finally, they contended that to allow this Application as prayed would be akin to endorsing the thinking that Court orders are obeyed on merit, and **"that some Court orders are stupid"**, as one of the Respondents herein is alleged to have stated in public. From the foregoing, they submitted that the Application is meritless and constitutes an abuse of the court process, and the same should be dismissed with costs.

Determination

11. The key question that begs for an answer in the instant matter is whether the Applicant has made a case for stay of the instant proceedings and in that regard it will be noted from the pleadings that the main reason advanced for seeking a stay of the Petition is that the matters arising herein are substantially similar and are likely to be addressed by the Supreme Court in the appeal before it. Is there therefore a connection between the instant Petition and the Petition of Appeal before the Supreme Court?

12. I note that in the instant Petition, as can be deduced at paragraph 8 of the Petition, the Petitioner outlines a summary of his case in the following terms:

"8. The Petitioners are inviting the Honourable Court to;

- ***Make a finding that the 1st, 2nd, and 3rd Respondents disobeyed orders of the Honourable Court;***
- ***Declare the 1st, 2nd and 3rd Respondents unfit to hold public office because disobeying court orders amounts to gross misconduct and serious violation of the Constitution;***
- ***Commit the 1st, 2nd and 3rd Respondents to civil jail for defying effectively and duly served Orders of the Honourable Court***
- ***Subsequently order the 6th Respondents to remove the 1st, 2nd and 3rd Respondents from being Speaker of the National Assembly, Speaker of the County Assembly of Embu, and Speaker of the Senate."***

At paragraph 9, the Petitioners go on to state that;

“The Petitioners are also inviting the Honourable Court to:

- ***Declare that the 4th and 5th Respondents have a duty to enforce court orders, including seeking ‘punitive’ sanctions, which are designed to punish a disobedience which can no longer be remedied.***
- ***Order the 4th and 5th Respondents to criminally prosecute the 1st, 2nd and 3rd Respondents for disobeying orders of the court.”***

My understanding of the Petitioners’ case herein is therefore that they are challenging the Respondents’ actions in regard to the Court orders issued in the decision in which the Applicant herein has appealed to the Supreme Court. This can further be seen from the Prayers they are seeking in the Petition.

13. In that context, it is not in dispute that the instant Petition arises out of the decision of the High Court in **Kirinyaga High Court Petition No.3 of 2014, Hon. Martin Nyaga Wambora and Another vs Speaker of Senate and 5 Others** made on the 16th April, 2014. Further, it is also not in dispute that the Applicant filed an appeal from the finding of the High Court to the Court of Appeal in **Nyeri Civil Appeal No.24 of 2014, Justus Kariuki Mate and Another vs Hon. Martin Nyaga Wambora and Another** and which was dismissed on 30th September, 2014 after which the Applicant filed the appeal to the Supreme Court, challenging the entire decision in both the Nyeri Court of Appeal and the prior Kirinyaga High Court decisions. I also note that on 29th December, 2014, the Supreme Court allowed the Applicant’s Application for stay and ordered the *status quo* presently obtaining to continue subsisting pending the hearing and determination of the said appeal.

14. Can this Court then grant the orders of stay, in the circumstances? My answer to this question is in the affirmative. My reasoning is informed by the fact that the question of contempt of the orders of the Court in Kirinyaga High Court is the subject of the appeal in the Supreme Court. My holding is guided by the fact that the Supreme Court in **Civil Application No.37 of 2014, Justus Kariuki Mate and Another vs Hon. Martin Nyaga Wambora and Another** (the decision in regard to *the Application for stay*) addressed the question of contempt as against the Applicant herein. The Supreme Court expressed the following view in the said decision:

“[54] In the instant case, the issue that emerges is whether the High Court and Court of Appeal properly arrived at the finding that the applicants were in contempt of court. The 1st applicant is the Speaker of a County Assembly is established by Article 178 of the Constitution, which vests in the Speaker the power to preside over a sitting of the County Assembly...

[55] Did the Courts exceed their jurisdiction by finding the applicants to be in contempt of a Court Order? The determination of this question calls for the interpretation and application of the Constitution, which is the criterion of jurisdiction, by the terms of Article 163 (4) (a) of the Constitution.

[56] We would agree with the applicants’ argument, that indeed, the issues have transcended the parties as individuals, and crystalized into a conflict involving the interpretation and application of the Constitution, thus falling within the jurisdiction of this Court.”

15. The Supreme Court also acknowledged the fact that the appeal relates to the conduct of the Applicant and others. It stated thus:

“[62] It is clear that the whole question is about the conduct of the applicants, with regard to the Court Order touching on their duties, respectively, as Speaker, and Clerk, of the Embu County Assembly. This contest, in our perception, has snowballed and transcended the dispute-situation between the parties; it has crystallised into a matter

requiring the interpretation and application of the Constitution, to determine the parameters of the doctrine of separation of powers, and to ascertain the scope of privilege for discrete constitutional agencies established under the principle of devolution.”

16. In its conclusion, the Supreme Court expressed the view that:

“[69] We have taken into account the weighty submissions made for the respondents, regarding the essential principle of compliance with Orders issuing from a Court of law, just as we have closely adverted to the applicants’ case for a proper interpretation of the constitutional status of County Assembly privileges, operating within the scheme of the separation of powers doctrine. as it is clear to us that the respondents’ case rests on fundamental constitutional questions not yet interpreted, and which bear a close relation to the appellants’ case, our starting point must be an interpretation of the Constitution, ahead of the application of the standard law of contempt...”

17. Based on the foregoing, I am satisfied that the Petition herein is closely related to the appeal pending at the Supreme Court and the question of contempt to be addressed therein shall have a bearing on the issues of contempt before this Court against the Applicant and others, as raised in this Petition. In the circumstances, I am of the view that allowing the Application for stay is the appropriate step to take.

18. Having answered the question of whether the Applicant has made a case for stay in the affirmative, I am of the further view that this is the appropriate Court for him to seek the said orders of stay since this Petition was filed against him and the other Respondents alleging violations of the Constitution. I would hereby disagree with the Petitioners’ contentions that this is not the appropriate forum.

19. Based on my reasoning above, I shall allow the Application for stay and the following are the orders I deem fit in the circumstances;

- a. The present proceedings in **Petition No. 108 of 2014, Okiya Omtatah Okoiti and Another vs Justin Bedan Njoka Muturi and Others**, are hereby stayed pending the hearing and determination of the appeal filed in the Supreme Court being, **Petition of Appeal No.37 of 2014, Justus Kariuki Mate and Another vs Hon. Martin Nyaga Wambora and Another**.

2. Let each party bear their own costs.

20. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Petitioner absent

Miss Mukindia for Interested Parties

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 24/5/2016.

ISAAC LENAOLA

JUDGE

19/2/2016