



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 102 OF 2016**

**IN THE MATTER OF AN APPLICATION BY PATRICK OGOLA**

**ONYANGO FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 165 (6) & (7) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) THE LAWS  
OF KENYA**

**IN THE MATTER OF THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT  
NO. 59B**

**IN THE MATTER OF THE NAIROBI CHIEF MAGISTRATES COURT,**

**MILIMANI LAW COURTS CRIMINAL CASE NO. 301 OF 2016**

**REPUBLIC VS 1. JOSEPHINE KABURA IRUNGU 2. JOHN KAGO**

**NDUNGU 3. CHARUTY WANGUI GETHI 4. SAMUEL MUDAYI**

**WACHENJE (ALIAS SAM MWADIME) PATRICK OGOLLA ONYANGO 6. ANTHONY  
KIHARA GETHI 7. BENSON GETHI WANGUI 9 JOHN HOPE VANDAMME 10. MARTINE  
GACHARA WANJOHI 11. JEDIDA WANGARI WANGUI**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT, AT NAIROBI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 1<sup>st</sup> March, 2016, this matter came up for the hearing of the chamber summons dated the same day which sought the following orders:
  1. **That this application be certified urgent and be heard and determined forthwith**
  2. **That the Applicant be granted leave to apply for an order of certiorari to remove into the High Court and quash the 1<sup>st</sup> Respondents decision to prefer charges against the Applicant which decision is set out in the Charge Sheet dated 22<sup>nd</sup> February 2016 and registered before the 2<sup>nd</sup> Respondent in Nairobi Chief Magistrate Court Milimani Law Courts Criminal Case NO. 301 of 2016 – Republic V Josephine Kabura Irungu & 10 Others**
  3. **That the Applicant be granted leave to apply for an order of Prohibition directed at the 1<sup>st</sup> Respondent its officers and any other authority acting on its instructions from prosecuting or proceeding with the prosecution of the Applicant on offences of Money Laundering in Nairobi Chief Magistrate Court Milimani Law Courts Criminal Case No. 301 of 2016 – Republic –vs Josephine Kabura Irungu & 10 Others or any related charges.**
  4. **That the Applicant be granted leave to apply for an order of prohibition directed at the 2<sup>nd</sup> Respondent prohibiting the 2<sup>nd</sup> Respondent from hearing, proceeding with or in any way entertaining Nairobi Chief Magistrate Court Milimani Law Courts Criminal Case No. 301 of 2016 – Republic v Josephine Kabura Irungu & 10 Others.**
  5. **That the Applicant be granted leave to apply for an order of Prohibition directed at the 2<sup>nd</sup> Respondent prohibiting the 2<sup>nd</sup> Respondent from hearing, proceeding with or in any way entertaining Nairobi Chief Magistrate Court Milimani Law courts criminal Case NO. 301 of 2016 against the Applicant until a finding has been reached in Criminal Case No. 1905 of 2015 that would thereby constitute the said sum of Ksh 791,385,000.00 to be proceeds of a crime.**
  6. **That the leave so granted to operate as stay of proceedings in Nairobi Chief Magistrate Court Milimani Law Courts Criminal Case No. 301 of 2016 – Republic V Josephine Kabura Iruungu & 10 Others pending the hearing and determination of the substantive Notice of Motion.**
  7. **That the court be at liberty to make such further and other orders that as it deems fir to meet the ends of justice.**
  8. **That the costs of this application be provided for.**
2. After hearing the application, I granted leave as sought. I however directed that the issue as to whether the grant of the leave aforesaid would operate as a stay ought to be dealt with at an *inter partes* hearing as provided under Order 53 rule 1(4) of the ***Civil Procedure Rules***.
3. However in the exercise of this Court’s inherent powers, I granted a temporary stay of the proceedings in question and directed that the said limb be dealt with on 10<sup>th</sup> March, 2016.
4. On the said day of the *inter partes* hearing, it was clear that the Respondents and interested parties were not prepared to argue the said prayer in light of inadequate time between the service of the pleadings and the date scheduled for hearing. They sought 7 days within which to file their papers.
5. An issue however arose as to whether the stay granted ought to operate in favour of the interested parties as well or whether the same ought to only operate as a stay in so far as the applicant herein is concerned.
6. It was the Respondents’ case that since the interested parties have not moved the Court in these proceedings, the stay ought not to be extended to apply to the said interested parties albeit being co-accused to the ex parte applicant herein in the subject criminal proceedings.
7. The Respondents disclosed which disclosure was admitted by the interested parties that some of the interested parties had instituted separate judicial review application and a constitutional petition and in the judicial review application this Court declined to stay the subject criminal proceedings. The particulars of the matters were disclosed as Judicial Review Application No. 89

- of 2016 that is scheduled to come up on 14<sup>th</sup> March, 2016 before this Court and in which an application for stay was declined. There was also Miscellaneous Application No. 16 of 2016 before the Criminal Division in which an application for anticipatory bail was declined. Apart from these there is also Petition No. 62 of 2016 pending in the Constitutional and Human Rights Division of this Court which matter is scheduled for 21<sup>st</sup> March, 2016.
8. The Respondents were of the view that this Court ought to expedite the hearing of the substantive motion and to that end they urged the Court to give timelines within which the motion itself ought to be heard and determined.
  9. Not surprisingly, this position did not find favour with the interested parties who were of the view that since the criminal case in which the interested parties are charged is one and the same case in which the applicant is charged and since the issues raised by the ex parte applicant herein affect the said interested parties as well, it would not make sense to grant orders in favour of the applicant when the same are not extended to the interested parties as well.
  10. To the interested parties, the Court having granted the stay of proceedings, what in effect the Respondents are seeking is an order for review of the same and that being the position, the Respondents ought to make a formal application.
  11. I have considered the arguments made on behalf of the parties herein. If I understand the Respondents correctly, in particular the 1<sup>st</sup> Respondent, he is not seriously contesting the stay of the said criminal proceedings in so far as they relate to the applicant herein if these proceedings can be expedited. He is however opposed to the interested parties enjoying the same stay.
  12. I have listened to the submissions made by counsel for the parties herein. It was contended that the Court having granted the stay, it must have been satisfied that a *prima facie* case had been made out and therefore any order varying the same can only be made on a formal application. As indicated herein above when this Court granted leave in this matter, the Court was very clear in its mind that the stay was being granted in the exercise of the Court's inherent jurisdiction. It has not been contended that in judicial review the Court has no jurisdiction to invoke its inherent jurisdiction. In fact the course suggested by the interested parties that the Respondents ought to apply for setting aside of the leave and stay can only be resorted to by the invocation of the Court's inherent jurisdiction. See **R vs. Communications Commission of Kenya & 2 Others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199, Njuguna vs. Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184, Judicial Commission of Inquiry Into The Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249 as well as Aga Khan Education Service Kenya vs. Republic Civil Appeal No. 257 of 2003 [2004] 1 EA 1.**
  13. On Inherent jurisdiction, **Ouko, J** (as he then was) in **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004**, expressed himself as follows:

**“It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”**

14. Inherent power, it must be stressed is not donated by legislation. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
15. Dealing the same issue it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
16. In my order of 1<sup>st</sup> March, 2016, I made it clear that the limb for stay was to heard *inter partes* and the stay that was granted was a temporary one pending the said *inter partes* hearing or further

orders of this Court. Such further orders could be made at any stage of the proceedings as long as circumstances warranted the same. Accordingly it is incorrect to contend that the temporary orders granted herein can only be varied on a formal application since they were not strictly speaking granted on the basis of the application in the first place.

17. In any case Order 53 rule 1(4) of the **Civil Procedure Rules** provides:

***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.***

18. In my view, even where the Court grants orders of stay under the aforesaid provision, it has wide powers to do so on such terms as are just including the period for which the stay is to last. Therefore, it is my view that a stay pending *inter partes* hearing is one of the powers contemplated under the phrase “*until the judge orders otherwise.*” In **Republic vs. Kenya Revenue Authority & Another ex parte Romageco** J R Misc. Application No. 58 of 2013, this Court held that whereas Order 53 rule 1(4) of the **Civil Procedure Rules** does not, strictly speaking, provide for the grant of a temporary stay pending *inter partes* hearing, in deserving cases the Court may grant a temporary stay in the exercise of its inherent jurisdiction pending *inter partes* hearing. This Court has similarly held that as opposed to the grant of leave which a party is entitled once a *prima facie* case disclosing grounds for judicial review are established, the grant of direction that the leave operate as a stay is an exercise of judicial discretion which must be based on the prevailing circumstances. It may be granted at any stage of the proceedings and may similarly be varied, set aside or vacated all together depending on the circumstances of the case.

19. It is therefore my view that as opposed to where a person seeks to set aside leave in which case a formal application would be necessary, where the Court grants temporary orders pending hearing *inter partes*, the Court is still seised of the application and may decline to extend the same at any stage of the proceedings. The decision by the Court not to extend the same cannot however in my view be interpreted to mean the same thing as vacating the orders since the former occurs by effluxion of time unless otherwise directed.

20. The next issue has to do with the binding effect of Court orders on non-parties as well as whether a non-party to legal proceedings can directly reap the benefits thereof. When this Court granted orders staying the proceedings in question, the Court did so after considering that the manner in which the application for stay was crafted was likely to affect the interested parties in one way or the other. At that point in time the position of the interested parties was unknown to the Court. To stay the criminal proceedings without getting their view of the matter, assuming some of them were not for the idea of staying the subject criminal proceedings would obviously have been prejudicial to their interests. It is now however clear that the interested parties themselves are desirous of the criminal proceedings being stayed. In other words if this Court was to grant the stay in the manner sought by the applicant, no prejudice would be occasioned to them since some of them have in fact commenced their own legal proceedings challenging the said criminal proceedings.

21. The only question is therefore whether this Court can extend the benefit of the said orders to the interested parties who have not sought before this Court orders for stay and are neither the applicants nor respondents in these proceedings. In fact the interested parties appeared before this Court courtesy of the directions of the Court with respect to the aforesaid issues.

22. Can this Court therefore extend the benefit of the stay granted to the applicant herein more so when some of them have attempted to stay the said criminal proceedings without success? In my view to grant the orders of stay to those who have attempted to seek stay and have been unsuccessful would turn judicial process into a circus. It would amount to reversing its decision in other proceedings without either an appeal or review.

23. What is the position of an interested party to these kinds of proceedings? The Court of Appeal in **Transouth Conveyors Ltd and Another. vs. Kenya Revenue Authority and 3 Others [2008] KLR 216** expressed itself as follows:

**“The learned Judge made a decision as to the status of parties who were referred to as interested parties. They were not essential parties in the litigation but requested to be heard**

merely because they too had a cause or causes of action which happened to be based on the same set of facts. None of them is a party in these consolidated appeals. The learned Judge did deal with all the basic issues between the parties who had filed motions and whose causes of action he set out at the beginning of his ruling. While it would have been more prudent to assign reasons for his decision regarding the *locus standi* of those “interested parties” we do not think in the peculiar circumstances of these appeals the failure to assign reasons vitiated the ruling. The case of those “interested parties” is severable in the sense that it cannot be said that their matters were determined in the consolidated suits. Besides, the absence of those reasons in no way prejudiced either appellant.”

24. Can a non-party therefore directly reap the benefits of a matter in which it has not sought such favourable orders? In Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69, Muli, JA was of the view that a person who is not a party to legal proceedings cannot reap benefits thereof. In Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995, the Court of Appeal was of the view that an order made in proceedings to which the appellant was not a party could not bind the appellant. That parties not before the Court may not be bound by orders granted therein was also the position taken by a majority in The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997. If the interested parties are not bound by the orders issued herein it would mean that if there was a conditional stay, they could choose to enjoy the benefits thereof without necessarily complying with the conditions attached thereto.
25. This is not the first time this Court is called upon to deal with a similar matter. In David Ndolo Ngali & 2 Others vs. Director Of Criminal Investigations & 4 Others [2014] eKLR this Court expressed itself *inter alia* as follows:

“In this case however, though leave was only expressly granted to the applicants herein, the order for stay as was framed by the applicants and granted by this Court on the face of it stayed the proceedings in the said Criminal Case... Yet the interested parties to whom leave was neither sought nor granted insist that the stay granted at the instance of the applicants who are not parties to the said proceedings ought to remain in force in their favour. In fact the applicants herein have submitted before this Court that were it not for the fact that the respondents have intimated that the applicants may be charged in future they would have had no problem withdrawing the application. In the event that the application is withdrawn would the interested parties still insist that the stay would remain in force? If the Court were to accede to that position it would with due respect turn this Court and its proceedings into a theatre of the absurd... Whereas the Court may perfectly grant an order staying proceedings whose effect would be to benefit non-parties, the Court ought to be cautious in order not to grant orders which may affect parties who may not be interested in having their criminal case delayed. Therefore for the Court to stay proceedings generally rather than the proceedings affecting the parties before it, the Court ought to be satisfied that all the parties were aware of the application for relief for stay and had no objection to the same being granted. In this case, it is clear that the interested parties herein not only did not seek orders for stay of the proceedings herein but in fact were unaware that such orders were being sought. In other words the interested parties never expected to reap the benefits of the stay orders which the applicants herein sought and obtained. As a result, no objection was taken to the amendment of the charge sheet whose effect was that the applicants were excluded from the criminal proceedings. The applicants sought *inter alia* an order prohibiting them from taking pleas in the criminal proceedings. The interested parties on the other hand have already taken the plea. Accordingly, the applicants' position cannot be said to be exactly the same as that of the interested parties. Having considered the submissions made herein I have no doubt in mind that even going by the submissions made on behalf of the interested parties the stay granted herein was never intended to benefit the interested parties but were solely meant to protect the applicants to whom leave had been granted to commence judicial review proceedings. In other words the interested parties cannot be expected to take a free ride on the wings of the applicants' claims, claims which they never instituted and were unaware of. Apart from that, without casting aspersion on the petitioner in Petition No. 436 of 2014, whose application for conservatory orders was disallowed, by holding that the stay granted herein was for the benefit of all the accused in the subject criminal case, this

**Court would have in effect overturned its decision in the said Petition without an application to do so having been made. That in my view would not only bring these proceedings into disrepute but would turn this Court into a circus.”**

26. Similarly, to grant orders in these proceedings whose effect would be to render the denial of the same in proceedings instituted by some of the interested parties herein of no effect would not augur well for the proper administration of justice. As for those interested parties who have not sought orders similar to those being sought by the applicant herein, this Court ought not to gratuitously dish out orders to them when they have not even sought leave to apply for judicial review. An order of stay follows the grant of leave hence without leave being sought and granted stay cannot go forth. Where a party has not sought and obtained leave to grant it stay would defeat the letter and spirit of Order 53 rule 1(4) of the **Civil Procedure Rules**.
27. I must emphasise that the reason why the temporary orders were granted in the manner sought was to avoid a situation in which this Court would stay the whole criminal proceedings when such a stay would probably be detrimental to the interested parties. It was not meant to afford the interested parties an opportunity to appear before this Court and apply for stay. One may argue that and if I understand the interested parties' position correctly, their position was that since they are similarly charged with the applicant, to decline to extend the stay to them would adversely affect them. I don't buy in this argument since it is upon a person who feels aggrieved by an action of another to move the Court for relief. I wish to reiterate that the mere fact that persons are jointly charged with the same offence, an order of stay in judicial review must not necessarily apply to them in equal measure. Each person's case must be decided on its own merits based on its peculiar facts and circumstances. As to whether the circumstances of the applicant herein differ from those of the interested parties is a matter which will have to await the determination of the stay.
28. Suffice it to say that since the interested parties have not moved this Court for leave and for such leave, if granted, to operate as a stay, the interested parties cannot claim that they will be prejudiced if the stay is not extended to them
29. In the premises the directions I give is that the stay granted will only avail the *ex parte* applicant herein unless otherwise directed.
30. Having said that, it is now clear that there are other proceedings pending before this Court in which the same issues have been raised. In order to avoid conflicting decisions being made in respect of the same issues, it is proper that these similar matters be heard by one Judge either as a consolidated suit or separately. In the premises the directions which commend themselves to me and which I hereby issue are that this application together with JR 89 of 2016 be placed before the **Hon. Mr Justice Onguto** who is seized of Petition 62 of 2016 on 15<sup>th</sup> March, 2016 for further orders.
31. For avoidance of doubt, the temporary orders granted herein will remain in force in so far as the proceedings against the applicant are concerned subject to further orders by **Onguto, J.**

**Dated at Nairobi this 14<sup>th</sup> Day of March, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Ondong and Mr Awa for Mr Nyamodi for the Applicant**

**Mr Mule for the 1<sup>st</sup> Respondent**

**Mr Gachie for Paul Kinuthia and John Hope Vandamme**

**Mr Wagara for Mr Amuga for 4<sup>th</sup> interested party, Samuel Wachenje and Mr Omino for 1<sup>st</sup> interested party, Josephine Kabura**

**Mr Wagara for the 4<sup>th</sup> interested party**

**Mr Oonge for Charity Wangui and JedidaWangui**

**Mr Masika for Martine Gachara Wanjohi**

**Cc Florence**