



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 61 OF 2016

OSMAN ERDINC ELSEK ----- APPLICANT

VERSUS

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE

DIRECTOR OF PUBLIC PROSECUTIONS

CHIEF MAGISTRATE MOMBASA LAW COURTS

ATTORNEY GENERAL -----RESPONDENTS

RULING

1. On the 19/8/2016 when this matter came before the court the court made orders as follows:-

“Matter stood over to 31/8/2016 for mention to confirm filing of notice of motion and for further directions.”

2. Pursuant to those orders it is apparent that the *ex parte* applicant filed the Notice of Motion dated 24th August 2016 seeking orders of Judicial Review.

3. Today when the matter was called out as order by the court, Mr. Miyare for the *ex parte* applicant brought to the attention of the court the fact that in the intervening period between 19/8/2016 and today, there have occurred developments in that the prosecution went before the trial court and applied to amend the charge sheet by introducing count No. 2 which has direct relation to the *ex parte* applicants' prayer 3 in the application seeking leave to apply for judicial review. He contended that development points to unfair criminal prosecution and that it portends the litigation before the court being rendered nugatory in that the ruling on whether that amendment ought to be allowed is due for the 2/9/2015. He thus sought for stay of further proceedings in terms of prayer c in the *ex parte* Chamber Summons.

4. On his part Mr. Makuto who appeared for the Respondents opposed the application and grant of orders of stay while contending that the court having considered the *ex parte* chamber summons and made determination, that application is spent and the court is *functus officio* on it. He further pointed out that the hearing of the criminal case before the lower court is slated for the 14th and 15th November 2016 and that what the court needs to do is to fast tract this application rather than injuncting the criminal process before the trial court. He proposed that the respondents be given a limited time within which to respond to the application so that it could be dealt with and determined prior to the date set for hearing of the

criminal case.

5. The parties in effect are asking the court to deliver itself and determine whether or not to order that the leave granted by Njoki Mwangi Judge, on the 12/8/2016 should operate as stay of the further proceedings before the magistrate at Shanzu.

I have perused the record of the court and proceedings before Judge Njoki Mwangi on 12/8/2016 and it is apparent to me that the court made the following orders:-

i) Application dated 11/8/2016 is certified as urgent.

ii) Leave is granted to the *ex parte* applicant to apply for order of judicial review in the nature of certiorari, prohibition and mandamus.

iii) The substantive application Notice of Motion to be filed and served within 21 days.

iv) Upon filing a date be taken at the registry.

v) Costs in the cause.

6. To this court the prayer for stay was not granted nor was its consideration reserved for another date. It therefore follows by dint of Section 7, explanation(5) of the Civil Procedure Act that that prayer was not granted but deemed refused. Section 7 explanation 5 provides;

“Any relief claimed in a suit, which is not expressly granted by the decree shall for the purposes of this section be deemed to have been refused.”

7. To this court therefore Judge Njoki Mwangi in failing to expressly order that the leave granted to operate as stay of further proceeding did refuse that prayer. It is therefore spent or rather dealt with and not available to be revisited unless as may be permissible under the law. No provision has been cited to me to merit me revisiting that prayer and I see no reason that would judiciously merit a revisit.

Equally on the 19/8/16 when the matter was placed before the court for the purposes of taking a hearing date for the notice of motion; it turned out that due to the bereavement on Mr. Miyare, the notice of motion had not been filed and time was thus sought to enable filing.

8. The court, without setting time-lines, granted the adjournment and stood over this matter to today to confirm filing of the motion and for further direction. It seems to this court that the *ex parte* applicant has interpreted the expression '**further directions**' to open a window for reurging the prayer for stay. To this court and on the basis of what I have said over the status of that prayer, the expression '**further direction**' must be seen in the light of the purposes for which the matter was in court when the order was made. It was the purposes of taking a date for the notice of motion, if filed and not to consider a prayer in the application which had been dealt with.

9. In the circumstances I am in no doubt that the plea by Mr. Miyare for stay of further proceedings before the trial court has not been properly taken and thus cannot be granted. In his submissions Mr. Miyare has stressed the point that if stay is not granted his clients matter in this file will be rendered nugatory in that proceedings have taken place and will take place between now and the hearing date in November 2016.

10 Without seeking to delve so much on the merits of the matter pending before this court I take the view that the trial will only commence as set by the trial court in November. The only other proceedings that can be reasonably anticipated from the submissions by the parties is the delivery of the ruling on 2/9/2016. That ruling will merely determine whether or not the charge sheet should be amended as purported and maybe ask the accused/*ex parte* applicant, to plead to the amended charge. That in the view of this court is a preliminary stage in setting the stage for trial and will not have

determined any rights of the accused. All the rights the accused seek protects, in the opinion of the court, will be decided at trial, if that time comes.

11. In the circumstances therefore I agree with Mr. Makuto's proposal that this matter be fast-tracked so that if circumstances of all allow, it is determined before the date set for hearing. I agree with the proposal fully taking into account that the *ex parte* applicant approached this court citing urgency and the court has certified the matter urgent.

I therefore make the following orders:-

i. The prayer for stay was declined by the court on 12/8/2016. It cannot be revived in the manner sought by Mr. Miyare.

ii. This matter needs to be fast tracked so that the *ex parte* applicant knows his fate whether or not he shall stand trial before the trial court. I order that it shall be heard on the 21/9/2016.

12. To enable that hearing to take place, the Respondents are ordered to file and serve the responses as well as submissions within 10 days from today. Upon service the *ex parte* applicant shall equally file and serve submissions within 10 days from the date of service. Time shall be of essence.

Dated and delivered this 31st day of August 2016.

P.J.O. OTIENO

JUDGE

In presence of Mr. Miyare for the *ex parte* applicant, Ms Mutua for the 1st and 2nd Respondents and Mr Makuto for the 3rd and 4th Respondents

P.J.O. OTIENO

JUDGE

Mr. Miyare: I apply for leave to appeal against the ruling of the court. I also pray that having filed the substantive motion I get leave to amend the substantive Notice of Motion.

Ms Mutua: No objection to the prayers.

Mr. Makuto: I equally have no objection to the two prayers by Mr. Miyare.

COURT – Leave is granted to the *ex parte* applicant to appeal against the ruling made today. Leave is also granted to the *ex parte* applicant to amend the Notice of Motion on or before 6/9/2016.

P.J.O. OTIENO

JUDGE