



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC MISC. APPLICATION NO. 23 OF 2016

ELIZABETH OYWER1ST APPLICANT

DUNCAN MUISYO2ND APPLICANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION ...1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS2ND RESPONDENT

RULING

1. The Applicants vide the Chamber Summons dated 11th August, 2016 sought leave under Order 53 Rule 1 Civil Procedure Rules to file Judicial Review seeking the orders of Prohibition and Certiorari. In their prayer No. 4, they sought orders to the effect that if leave was granted, the said leave operates as stay.
2. Leave was granted on 15th August, 2016 with direction that the Respondents be served for hearing of prayer No. 4 on 29th August, 2016.
3. A Replying Affidavit by Charles Kiptanui was filed by the 1st Respondent on 26th August, 2016. The 1st Respondent opposes the Application. There has been no response from the 2nd Respondent.
4. Mr. Wakwaya for the Applicants has submitted that there was no secret about the account operated by the Applicants as claimed since the same was known by the Nursing Board. According to the Applicants, the charges facing them are an infringement of their Constitutional rights to fair trial among others.
5. He submitted that the Applicants had taken plea and are to appear for Mention before the Magistrate's Court on 14th September, 2016 for the purpose of fixing a hearing date. Mr. Wakwaya therefore urges this Court to stay the proceedings before the lower court pending the hearing and determination of this matter.
6. M/s. Maina for the 1st Respondent submitted that the 1st Respondent has acted within its mandate and investigated the matter. That it had not been shown that the 1st Respondent acted with malice or bias and/or without the requisite mandate.
7. Finally, she submitted that the Applicants would suffer no prejudice if the sought for orders are not issued.

I have carefully read through the affidavits, annexures and considered the submissions by counsel for both parties.

8. When the Applicants filed this Application on 11th August, 2016 they had not appeared for plea. This is what prayer No. 4 states;

“Leave granted to act as stay of the decision of the Respondents to charge the Applicants with the charge of abuse of office and any other proceeding incidental thereto.”

9. In his submissions, Mr. Wakwaya confirmed that indeed the Applicants are already facing charges before the Magistrates’ Court and plea has been taken. They will be appearing for mention on 14th September, 2016 for purposes of taking hearing dates. The applicants’ request for stay of the decision to charge them has therefore been overtaken by events.

Counsel urged the Court to stay the proceedings in the lower court.

10. Besides the plea taking process, there is no proceeding or proceedings about to take place soon in the lower court. It is unlikely that the case in the lower court will be heard and determined in the next 90 days. There is therefore no likelihood of the application herein being rendered nugatory in the circumstances.

11. The issues on infringement of the Applicant’s Constitutional rights are matters which can only be canvassed during the hearing of the Substantive Motion and not at this stage. As can be seen from the Replying Affidavit, the 1st Respondent has denied any wrong doing on its part.

12. It would not be prudent to deal with the said issues at this stage by granting stay before being fully addressed on the same.

In the circumstances, prayer No. 4 is declined.

13. The applicants should comply with the directions given on 15th August, 2016.

Upon service of the Substantive Motion, the Respondents should file and serve their responses within 15 days.

14. If need be, the Applicants to file Further Affidavits within 7 days of service of the Responses.

15. Thereafter, parties to appear before the Deputy Registrar to confirm compliance before a hearing date is taken.

Dated and delivered this 30th day of August, 2016 at Nairobi

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HIGH COURT JUDGE