



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.310 OF 2014

BETWEEN

DR. ALFRED N. MUTUA.....PETITIONER

AND

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

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE...3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

Introduction

1. The Petitioner in his Notice of Motion Application dated 3rd July, 2015 has sought for the following orders;
 - a. *That the Honourable Court be pleased to certify this matter as urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.*
 - b. *That this Honourable Court be pleased to stay its orders made on 2nd July, 2015 pending the hearing and determination of this Application.*
 - c. *That the Honourable Court be pleased to review and or set aside orders of 2nd July, 2015 vacating the consent orders issued by this Honourable Court on 3rd December, 2014 and any consequential orders thereto.*
 - d. *That costs be provided for.*

Prayers (a) and (b) have been spent and that leaves only prayer (c) and (d) for determination.

Submissions

2. The Application is supported by an affidavit sworn by Wilfred Nyamu, an advocate of the High Court of Kenya and seized with the conduct of the matter on behalf of the Petitioner.
3. The Application is also based on grounds *inter alia* that on the date the Consent Orders were set aside, Mr. Nyamu Counsel for the Petitioner was absent and there was therefore no representation on behalf of the Petitioner. That the said Mr. Nyamu had also not been able to file written submissions as he had been away attending to a matter before the Commission of Inquiry for the dissolution of the County Government of Makueni, which had its sittings in Makueni County. He however claimed that he had managed to file the written submissions on 2nd July, 2015.
4. Further, that the Petitioner was not invited by the 1st Respondent for the purposes of fixing a convenient mention date and that on 2nd July, 2014 when the matter was mentioned, Mr. Nyamu was unavailable and the advocate he had instructed to hold his brief had several matters that had earlier been listed before other Courts, and he had therefore been late to attend to this matter before this Court.
5. In addition, he stated that the Consent Orders of 3rd December, 2014 were to be in place till the hearing and determination of the Petition. That the Consent Orders made in the presence and consent of Counsel are binding on all parties to the proceedings and cannot be varied or discharged unless done so by consent or unless they were obtained by fraud or collusion. That the orders of 3rd December, 2014 can only be vacated on the making of a formal application by the Respondents and upon proof of mistake, fraud or non-disclosure of material facts by the Applicant.
6. It is also contended that the Consent Orders of 3rd December, 2014 were made on the understanding that the Application dated 8th July, 2014 would be considered spent. The vacating of those orders would therefore presuppose a situation where the Petitioner's Application ought to be reinstated and heard on merit to prevent prejudice being visited upon the Petitioner.
7. It is further contended that unless the Orders of 3rd December, 2014 are reinstated, the Petitioner is likely to be arrested and charged in Court and the Petition herein would be rendered nugatory and would violate the Petitioner's right to fair hearing.
8. In support of the application, Mr. Nyamu relied on the cases of ***Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Appeal No.276 of 1997, the Board of Trustees National Social Security Fund vs Michael Mwalo Civil Appeal No.293 of 2014*** and ***Skyview Properties Ltd vs Attorney General & 2 Others Civil Suit No.1622 of 2001***.
9. In opposing the Application, the 1st Respondent, the Ethics and Anti-Corruption Commission, filed Grounds of Opposition dated 8th July, 2015, and they are as follows;
 - “(a) That the Petitioner has failed to give an explanation for his failure to fix the Petition for hearing since 3rd December, 2014 when conservatory orders were issued.***
 - (b) That the Petitioner is guilty of laches, undue delay and lack of diligence in pursuing his Petition.***
 - (c) That the Petitioner has failed to give cogent evidence in support of his application for review and or setting aside orders made on 2nd July, 2015.***
 - (d) In abuse of the Court process, the Petitioner has enjoyed the conservatory orders since 3rd December, 2014 without taking any further action to determine the Petition.***
- e. ***That Article 159(2)(b) of the Constitution requires that matters be dispensed with without delay***

and by delaying the prosecution of the Petition, the Petitioner was denying justice to the Respondents and the public they represent.

(f)That neither would the Petitioner suffer any prejudice nor would the Petition be rendered nugatory if the orders sought are not granted.”

10. In addition to the above grounds, Miss Lunyolo learned counsel for the 1st Respondent submitted that the absence of counsel and his engagement in the Makueni Commission of Inquiry is no reason to delay the hearing.
11. Further, that the Petitioner has enjoyed conservatory orders to delay the hearing of the Petition and therefore the Respondents and the public have been denied justice.
12. She concluded that the Petitioner would not suffer any prejudice if the orders are not granted and therefore urged the Court not to grant the orders sought.
13. The 2nd Respondent, The Director of Public Prosecution in reply to the Application filed a Replying Affidavit sworn on 7th July, 2015 by Laura Spira, Prosecution Counsel in the Directorate of Public Prosecutions.
14. She deponed that it was in the public interest that cases filed in Court be dispensed with expeditiously. That the conservatory orders enjoyed by the Petitioner were issued on 3rd December, 2014 and the parties were to file submissions by 22nd January, 2015 regardless of whether the Court was sitting or not, but those orders were not complied with. That the Petitioner has deliberately delayed in the filing of his submissions and has thus delayed the determination of the Petition while enjoying the conservatory orders.
15. She claimed that the fact that Counsel for the Petitioner was involved in the Makueni Commission of Inquiry was not a ground to delay the matter and that a Miss Mogire who had been instructed to hold Mr. Nyamu's brief arrived in Court late after the Consent Orders had been vacated and so the Respondents should not be held ransom by the conduct of Petitioner and his Counsel. She further claimed that if the conservatory orders are reinstated, they would interfere with the mandate of the 1st and 2nd Respondents.
16. Mrs. Obuo presented the 1st Respondent's case and it was her submission that the Petitioner is employing delaying tactics in the matter while the 2nd Respondent has always been ready to proceed with the hearing of the Petition.
17. She further stated that due to existence of the conservatory orders, the 2nd Respondent has been unable to proceed with necessary investigations and the existence of the orders is therefore an interference with the exercise of his mandate.
18. She concluded by urging the Court to dismiss the Application.

Findings

19. The Petitioner filed his Petition on 8th July, 2014. Together with the Petition he filed a Notice of Motion Application dated 8th July, 2014. Upon hearing of the said Application, this Court by Consent Orders crafted by the Parties on 3rd December, 2014 granted him the following orders;
 - a. ***That conservatory orders be and are hereby granted restraining the Respondents from causing the apprehension of the Petitioner and or considering to prefer any criminal charges against the Petitioner in any Court, based on the procurement process of motor vehicles subject of 1st Respondents inquiry No. EACC/FI/INQ/51/2014 pending hearing of the Petition.***

- b. ***That Respondents to file responses within 21 days and Petitioner to file any rejoinder within 14 days.***
- c. ***That parties to file submissions and directions be given on 22nd January, 2015.***

20. Upon the the above orders being granted and from the record, the matter was to be mentioned on 22nd January, 2015 but the Court was not sitting on that date. The Petition was mentioned again on 2nd July, 2015 on which date the Court vacated its orders of 3rd December 2014. In its Ruling on that date the Court stated partly as follows;

“I agree with Mrs. Obuo that where a party is seemingly enjoying conservatory orders; refuses and or declines to file submissions for over five months, then such a party should not enjoy interim orders as it is acting in abuse of Court process. In the event, and since the Petitioner is not in Court neither is his advocate, the Court must guard and protect itself from abuse of its processes and so, although the conservatory orders were issued by consent, and the Respondents now seek that they should be vacated, nothing should stop this Court from doing so. For the above reasons the conservatory orders issued on 3rd December, 2014 are hereby vacated and set aside”.

21. Mr. Nyamu has stated that the orders of 3rd December 2014 were issued by consent and therefore a formal application ought to have been filed for setting aside the orders. The principles governing the setting aside of Consent Orders/Judgments were set out in the case of ***Flora Wasike vs Destimo Wamboko [1982-88] 1 KAR 627***, which can be summarized thus;

- i. A consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation;
- ii. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.
- iii. The Court would not readily assume that a judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise.

22. I generally agree with the principles. However, from the pleadings and the record, the bone of contention in the instant Application is not *per se* the Consent Orders of 3rd December, 2014 but in fact the orders issued on 2nd July, 2015. In that regard, the issue is whether those orders can be vacated and or set aside?

23. The Court is being invited to exercise its discretion to set aside or vacate its orders made on 2nd July, 2015. I am aware that the discretion to set aside and or vacate Court orders should be exercised judicially. The principles guiding the exercise of discretion in such cases are well settled in civil litigation. For example, the Court of Appeal in ***CMC Holdings Ltd vs Nzioki [2004] KLR 173*** held;

“In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.”

24. I am guided and to my mind therefore such discretion should be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. In the instant case,

Mr. Nyamu submitted that he had not been able to comply with the Court orders to file submissions on time and also failed to attend Court because he was involved in the hearings of the Commission of inquiry into the dissolution of Makueni County. In that context, I am in agreement with Mrs. Obuo and Miss Lunyolo that the reasons advanced by Mr. Nyamu are not sufficient to warrant exercise of discretion in favour of the Petitioner.

25. Mr. Nyamu also stated that he was not able to attend Court on the 2nd of July, 2015 because his law firm had not been invited to fix the mention date and therefore the date fixed *ex parte* was inconvenient. I have seen the Mention Notice annexed to the Affidavit of Mr. Nyamu. A casual reading of it reveals that it was served on M/s. Nyamu & Nyamu Co. Advocates on 8th June, 2015 at 11.50 am. It does not indicate that it was received under protest as the date was not convenient to Mr. Nyamu. With respect therefore, I am unable to accept Mr. Nyamu's submission in that regard. Be that as it may, I am also of the view that from the date Mr. Nyamu was served with the mention notice he had sufficient time, a month precisely, to prepare and organize to attend Court. In fact, he did so and instructed Miss Mogire to do so on his behalf and I recall that she indeed attended Court after the orders in issue has already been made.

26. In addition to the above, I am aware that the Court cannot exercise its discretion in setting aside orders to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. This was been clearly articulated in ***Pithon Waweru Maina vs Thuka Mugiria [1983] eKLR, Civil Appeal No 27 of 1982***, where the Court held that;

“The principles governing the exercise of judicial discretion to set aside an *ex parte* judgment obtained in default of either party to attend the hearing are: Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties. Secondly, this discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. (Emphasis mine)

(See also ***Shah vs Mbogo [1967] EA 116 at 123B, Shabir Din vs Ram Parkash Anand (1955) 22 EACA 48.***)

27. In the above context, Both Mrs Obuo and Miss Lunyolo submitted that the Petitioner has not been keen in prosecuting his Petition and is in fact employing delay tactics. I have read the record again and I note that the consent Orders granting *inter alia* the Petitioner a conservatory order were made on 3rd December, 2014. The Petitioner failed to comply with the Court orders to file his written submissions by 22nd January, 2015 and I have said that the reasons given for the obvious delay are not tenable and I reiterate the fact that the Petitioner has acted in abuse of the Court process.

28. Having said so, I also heard Mr. Nyamu to submit that if the conservatory order is not granted, the Petitioner would be denied the right to a hearing. Looking at the totality of the facts in this case, I do not find that the Petitioner would be prejudiced in anyway by the failure to have the orders of 2nd July, 2015 set aside. I say so because Under **Article 157(6) of the Constitution**, it is within the mandate of the 2nd Respondent to institute criminal proceedings against any person including the Petitioner and on 17th July 2014 I ordered the Petitioner to record a statement with the 1st Respondent's investigators which he did. Thereafter, instead of expeditiously pursuing his Petition, he sat on his laurels and enjoyed the conservatory orders and I fail to see how his right to a fair trial has been compromised in the circumstances. He has however failed to state how his right to fair hearing may be violated.

Disposition

29. In the circumstances and for the above reasons I do not see any merits in the Application dated 3rd July, 2015 and it is hereby dismissed.
30. Let the parties set down the Petition for hearing on priority basis.
31. Each Party shall bear its own costs.
32. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015.

ISAAC LENAOLA

JUDGE

In the presence of;

Muriuki – Court clerk

Mr, Nyamu for Applicant

Miss Lunyolo for 1st Respondent

Mrs. Obuo for 2nd Respondent

Order

Ruling duly read

ISAAC LENAOLA

JUDGE

By Consent

Application dated 12th August 2015 is granted as prayed but Senator Johnstone Muthama is enjoined as an Interested Party and shall file Submissions within 7 days on matters affecting him only.

Submissions to be highlighted on 12th January 2016. Petitioner at liberty to apply.

ISAAC LENAOLA

JUDGE