REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURT

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JR. NO. 187 OF 2014

IN THE MATTER OF AN APPLICATION BY THE APPLICANTS, EDWARD MUTINDA NDETEI, PENINAH MASAI, STEPHEN WARUI KABUGI, ANTHONY KISINA MBUVI, TERESIA LEMA KIIO, PILISILA M. WAMBUA, VERONICA MUTUAL, JAMES MUTUAL MUTHOKA, WANYUA THANZA, TABITHA MUTE, JOYCE MWASIAYA, PETER MUTISO KIMUYU, NDILA K. MAVIA, DANIEL MAKAU MWOLOLO, DAMSON MWALIMU MAKENGA AND ELIZABETH MBULA TO APPLY FOR AN ORDER OF COMMITTAL FOR CONTEMPT OF COURT DIRECTED TO THE DIRECTOR OF LANDS AND URBAN PLANNING, GOVERNMENT OF MAKUENI COUNTY

AND

IN THE MATTER OF ORDERS MADE BY HONOURABLE JUSTICE ODUNGA IN THE HIGH COURT OF KENYA, IN JUDICIAL REVIEW CASE NUMBER 187 OF 2014 ON 20TH MAY 2014 DIRECTED TO THE DIRECTOR OF LANDS AND URBAN PLANNING, GOVERNMENT OF MAKUENI COUNTY

RULING

Introduction

1. By a Notice of Motion dated 7th September, 2015, the applicant in the present application, **Kennedy Ng'eny**, seeks the following orders:

> **1. That this Honourable court be pleased to grant an order staying execution of the decision, ruling or orders of this honourable court issued on 2nd May 2015 the subject matter of the Intended Appeal pending the hearing and determination of the Application herein.**
>
> **2. That the honourable court be pleased to grant an order staying execution of the decision, ruling or orders of this honourable court issued on 2nd May, 2015 the subject matter of the Intended Appeal pending the hearing and determination of the Intended Appeal.**
>
> **3. That the aforesaid orders be set aside pending the hearing and determination of the Intended Appeal.**
>
> **4. That cost of this application be provided for.**

***Ex Parte* Applicants' Case**

2. The application was supported by a supporting affidavit sworn by **Kennedy Ng'eny**, the Applicant herein, on 7th September, 2015.

3. According to the deponent, this court on 2nd July 2015 delivered its Ruling on the Applicants'/Respondents' application dated 24th October 2014 wherein the court found the Respondent to have been in contempt of the honourable court's orders issued on 20th May 2014.

4. Aggrieved by the said decision the Applicant has filed a notice of appeal in the Court of Appeal, dated 16th July 2015 and applied for proceedings for purposes of preparations of the record of appeal. In his view, if stay is not granted the execution which is imminent will be carried out and he stands to suffer irreparable loss and damage because of the following:-

i. The operations of the Makueni County Government will be greatly affected in the event that he is committed to civil jail.

ii. He was not even at the time of the alleged breach, aware of the impugned orders.

iii. The intended appeal will be rendered nugatory if stay is not granted and payment of a fine effected and or civil jail served as at the time the appeal will be heard, and determined more so when service of civil jail cannot be reversed should the appeal succeed.

5. The Applicant however expressed his willingness to deposit security for the due performance of the decree should the appeal fail. In his view, he has an arguable appeal with a likelihood of success, because the learned judge misdirected himself in his findings on the following:-

i. He had acted in contravention of court orders dated 20th May 2015 yet he was never aware of the impugned orders.

ii. In failing to appreciate that committal orders are to be issued sparingly in most plain and obvious cases, and only in special circumstances which did not exist in the instant case.

iii. In failing to take in to account the pleadings filed by myself.

iv. In taking in to account extraneous matters in arriving at his decision.

v. In finding that the Respondents proved that he was aware of the existence of the impugned orders at the time of the alleged breach.

vi. In finding that the Applicants/Respondents had satisfied the conditions as required in the contempt proceedings under the law applicable in Kenya.

vii. In failing to consider that contempt proceedings are very serious in nature and the standard of proof required is much higher than that required in civil matters.

viii. In failing to appreciate that contempt of court proceedings are personal in nature and that where service of the subject order is in doubt, he ought to be entitled to the benefit of doubt.

6. It was contended that a stay of execution of the said decision, ruling or orders issued by the court on 2nd July 2015 is necessary in order not to render the intended appeal nugatory hence it is in the spirit of fairness and justice that the court ought to grant prayers sought herein.

7. In his submissions the Applicant averred that the draft Memorandum of Appeal raises serious issues that need consideration and that the Applicant has a high chance of success on an appeal. In support of

this submission the Applicant relied on **Gyka Fuel Mart Ltd vs. Mshiri Sungura [2013] KLR** and contended that the consequences of the Court's finding is that the Applicant may be committed to jail. In support of this submission the applicant relied on **Barclays Bank of Kenya Limited vs. Evans Ondusa Onzere [2008] eKLR**.

8. To the Applicant, the Respondent will not suffer prejudice if stay is granted compared to the prejudice and hardship that the Applicant is bound to suffer if the stay is not granted. In support of this submission the Applicant relied on **Halar & Andner vs. Morntoro & Nippin (1963) Ltd [1990] KLR 365**.

Respondents' Case

9. In opposition to the application, the respondents herein who were the *ex parte* applicants filed the following grounds of opposition:

> **1. The Application as drawn and filed is bad in law, frivolous and an abuse of the court process.**
>
> **2. The Applicant has not fulfilled all the three requirements envisaged under Order 42 Rule 6 of the Civil Procedure Rules, 2010, which require one to show that they will suffer substantial loss unless the orders sought are given; that the application has been made without unreasonable delay and that the Applicant has furnished security for the due performance of the decree being appealed from.**
>
> **3. The Applicant herein is using the present application as a play to delay the conclusion of this matter.**
>
> **4. The Applicant herein has not demonstrated sufficient cause or grounds upon which the court can or should grant the orders sought.**

10. In the submissions filed on behalf of the ex parte applicants, after justifying why the orders being appealed from were warranted, it was submitted that the delay of two months as is in this case is inordinate pursuant to Order 42 rule 6 of the ***Civil Procedure Rules*** and relied on **Utalii Transport Company Limited & Others vs. NIC Bank Limited & Another [2014] KLR** for the proposition that there is no precise measure of what amounts to inordinate delay and delay and that the same differs from case to case depending on the circumstances of each case. It was however contended that in the circumstances of this case the delay was inordinate mores' as he same was not explained. Failure to satisfy all the requirements under Order 42 rule 6 aforesaid, it was submitted is fatal to the application based on **D K N vs. E W M [2013] eKLR**.

Determination

11. I have considered the foregoing. On 2nd July, 2015, this Court found that the applicant in this ruling was in contempt of Court for failing t comply with the orders of this Court. The Court then proceeded to direct the said applicant to personally appear before the Court to explain why appropriate sanctions ought not to be taken against him. The matter was then fixed for further orders on 24th July, 2015.

12. The powers of this Court to grant conservatory orders in the nature of stay of execution pending appeal are circumscribed in Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> ***(2) No order for stay of execution shall be made under subrule (1) unless—***
>
> ***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

13. Unlike the Court of Appeal which is empowered to consider the chances of the intended appeal succeeding, this Court in considering whether or not to grant a stay of execution pending appeal to the Court of Appeal is not required to consider such a condition.

14. That this Court has jurisdiction to entertain the instant application is not in doubt since the Court granted orders which are capable of being executed. I gather support for this position from the decision of the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572**, where the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. In that case the High Court ordered the University to "*convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling*." The Court of Appeal noted that there was no prayer before the Court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the University acting in obedience to the said order. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted.

15. One of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. The applicant has based its application on two grounds. The first ground is that if he is committed the County Government is likely to suffer. In my view this is not a basis for grant of an application of this nature where the Court is being asked to stay the execution of a decision in which the Court has found an applicant guilty of contempt. The Applicant ought not to equate himself to the County Government. The applicant ought to appreciate that he is not indispensable and his absence cannot ground to a halt the operations of the County Government.

16. The more serious ground is that if the applicant is committed to jail, the outcome of his appeal if successful may well be rendered nugatory. In matters where the liberty of the applicant is at risk or jeopardy, the Court normally grants stay of execution since to decline to do so may lead to the applicant being imprisoned a fact which cannot be undone if the appeal succeeds. As was appreciated by the Court of Appeal in **United Insurance Co. Ltd. vs. Stephen Ngare Nyamboki Civil Application No. Nai. 295 of 2001,** in a matter involving the threat of imprisonment, if the order of imprisonment were to be enforced, even for a few days and the intended appeal were to succeed, that success will obviously be rendered nugatory and therefore stay granted.

17. Similarly, it was appreciated by the same Court in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another [2006] 1 KLR 77** that in matters involving penal consequences must, of necessity, be treated differently since it can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week in which event the appeal would have been rendered nugatory. In **Rev. Jackson Kipkemboi Koskey & 7 Others vs. Rev. Samuel Muriithi Njogu & 4 Others Civil Application No. Nai. 311 of 2006** it was held that:

> **"If the stay is refused the first applicant and his advocate will have to be committed to jail for a period of one month and by the time their intended appeal is heard and determined even if they were to succeed their success would be rendered nugatory since they will have served the prison sentence."**

18. It is however necessary for the applicant to prove that he is in imminent danger of being imprisoned otherwise the application would be premature. As was appreciated by the Court of Appeal in Wardpa Holdings Limited & Others vs. Emmanuel Waweru Lima Mathai & Another Civil Application No. Nai. 351 of 2009:

> **"On the second requirement under rule 5(2)(b) it is the view of the court that the applicants cannot presently demonstrate that they are likely to lose their liberty or that there is an immediate threat to lose their liberty as no order for their committal has been made yet, and the application had been set down for them to show cause why they were not guilty of**

contempt. It is for example possible for the Superior Court to make an order for the payment of a fine or lift the challenged order, when the applicants appears next before it in which event the applicants' liberty would not be at risk at all. Therefore as regards the second requirement, the application is premature and speculative and is dismissed."

19. What is usually the course taken by the Court where the Court finds that a person is in contempt? The finding that a person is in contempt ought not necessarily to be equated to imprisonment. Even where a contemnor has been committed for contempt the Court may, on application of any person committed to prison for contempt, discharge him. This means that a contemnor may, in suitable circumstances proved to the court, be discharged whether it arose from or in civil or criminal proceedings. The issue therefore is left at the discretion of the court which discretion will be exercised judicially taking into account the circumstances of the case. Where committal to jail is to enforce obedience to an order of the court, it will not in every case be continued until the order is obeyed and the contemnor may be released if it is clear that further imprisonment will not secure compliance provided that he has sufficiently been punished for his disobedience. The application to discharge should if possible, be made to the court which made the order of committal by a notice of motion but there are no hard and fast rules about it. It can therefore be dealt with by any Judge of the High Court in which the order was made if the Judge who made it is not available. Such motion takes precedence over all other applications in the relevant file at a given time. The contempt proceedings are intended to uphold the authority and dignity of the courts. It follows, therefore that if the court is satisfied that the contemnor's conduct has been genuinely reformed to the extent once more fully recognising the authority, the court may, in its discretion, revise the punishment earlier meted against the contemnor. Such power and authority of the court is not donated under Order 45 ***Civil Procedure Rules***, but under the ***Rules of the Supreme Court*** of England now being replaced with the ***Civil Procedure Rules, 1999*** and imported to our jurisdiction by section 5 of the ***Judicature Act*** (Cap 8). The exercise of such jurisdiction and discretion, is not intended to reverse the contempt order made on the ground that such order is in any way wrong or contrary to the law but the court discharges the contemnor on the basis that the conduct of the contemnor which threatened or stood to undermine the integrity, dignity, honour and authority of the court has been purged to the satisfaction of the court and that the contemnor has satisfactorily undertaken not to repeat such conduct. The court would even have authority and power under the circumstances, to take a different course other than discharging the contemnor. For example the court may in suitable case, substitute the imprisonment term, not with a discharge from prison *per se* but with a fine or taking of security for good future conduct or behaviour, or even grant an injunction against the repetition of the act of contempt. The conclusion, therefore, is that the only limitation is that such discretion must be exercised carefully and judicially. See **Re Barrell Enterprises [1972] 3 All ER 631; Yager vs. Musa [1961] 2 QB 214.**

20. It is therefore my view that before the Court metes out punishment, the contemnor ought to be called upon to show cause why a particular punishment ought not to be meted upon him. It was in appreciation of tis fact that I directed the applicant to appear before me "to explain why appropriate sanctions ought not to be taken against him in light of his disapproving conduct."

21. Instead of doing so the applicant filed the application the subject of this ruling. It is therefore clear that there is no certainty that unless the stay is granted the applicant risks losing his liberty. By making this application the applicant has jumped the gun. This application is therefore both speculative and premature.

22. In the premises the same is struck out with costs to the ex parte applicants.

Dated at Nairobi this 15th day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kago for Mr Nyamu for the Respondent/Applicant

Cc Mutisya