



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 194 OF 2014

TIMOTHY ISAAC BRYANT.....1ST APPLICANT

GITONGA GERRY GRAHAM.....2ND APPLICANT

(Both practicing law in the firm of Bryant & Associates)

REGISTERED TRUSTEES KENYA YOUTH

HOSTELS ASSOCIATION.....3RD APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT...2ND RESPONDENT

ADAN AHMED HASSAN.....3RD RESPONDENT

DESIRAL KENYA LIMITED.....1ST INTERESTED PARTY

JAMES OSOGO.....2ND INTERESTED PARTY

GIDEON CHRIS MAINA.....3RD INTERESTED PARTY

MUSA MUKANGWA.....4TH INTERESTED PARTY

FRANCIS MUTHINI.....5TH INTERESTED PARTY

RULING

1. This Notice of Motion is dated 29th August 2014 and was brought under the **Judicature Act Cap 8, The High Court (Practice and Procedure Rules (Part 1 rule 3), Articles 23, 27 and 165 of the Constitution and Section 379 of the Criminal Procedure Code Cap 75 of the Laws of Kenya** respectively. It was filed under certificate of urgency under the vacation Rules and was duly certified as such.

2. In the application the applicants seek that:

1. there be a temporary stay of execution of the ruling and order issued by the Honorable Court on 12th August 2014 pending the *inter partes* hearing of this application.
2. there be stay of execution of the ruling and order issued by this honourable court on 12th August 2014 pending the hearing and determination of the appeal herein.
3. the costs of this application be provided for.

3. The grounds of the application as appear on the face thereof are that:

1. by a ruling delivered on 12th August 2014; this honourable Court issued an order requiring the Applicants in their personal capacities to deposit into court an amount of Kshs.8,694,587.90 within 21 days from 21st August 2014 that is on or before 2nd September 2014.
2. the Appellant/Applicant is aggrieved by the Ruling and order and filed an appeal against the Ruling and order of the honourable Court.
3. the intended appeal has High chances of succeeding as the money in question was client funds which had at the time the application was heard been released to the client account of the applicant's law firm.
4. the honourable court has fixed a date of 3rd September 2014 to confirm compliance with the above said order and the Appellants/Applicants are apprehensive that further adverse orders will be made against them.
5. unless a stay of execution of the ruling and order given on 12th August 2014 is hereby granted, the Appellants/Applicants will suffer grave injustice and substantial loss and the intended appeal rendered nugatory.
6. this application has been brought without unreasonable delay.
7. it is in the interests of justice and fairness that a stay of execution be granted pending the appeal.

4. The Respondents did not file separate grounds of objection and instead relied on the grounds filed by the Interested Parties. All the five Interested Parties filed joint grounds of objection in which they argued as follows:

1. The applicants ought not to be allowed by this honourable court to keep in their custody monies that are the subject matter of a major criminal investigation by the Directorate of Criminal Investigation of the Kenya Police Service.
2. The Applicants cannot be regarded to have legitimate right over the said sum of Kshs.8,694,587.90 until the said criminal investigations are completed and the Applicants are cleared of any possibility of having engaged in any criminal activities in respect thereto.
3. The intent of the 1st Interested Party is for the court to secure the moneys paid to the Kenya Youth Hostels Association, which monies if not secured before the investigations are done, it will definitely prejudice the 1st Interested Party.
4. That the Applicants have not provided to this honourable Court a statement of account showing how the sum of Kshs.125,000,000/= that they received for the sale of L.R. No. 209/965/2 has been spent as ordered by the court.

5. The Applicants have also stated that the funds in question relate to the client funds and by the time the application dated 4th July 2014 was served and heard, they had already released the funds to the account of their client but they have not provided any proof to show the same nor have they disclosed who their real client is.
6. That the main objective of the applicants said application is to enable them to continue keeping funds that does not legitimately belong to them but to the legitimate owners of the sum of Kshs.8,694,587.90.
7. The Applicants have not demonstrated how their appeal would be rendered nugatory if they deposit the said monies into Judiciary account. The deposit of the said monies has nothing to do with the substance of their intended appeal.
8. That the 1st Interested Party contends that the only reason that the Applicants intend to appeal to the court of appeal is to enable them to keep monies that is the subject matter of a criminal investigation away from this honourable Court and any other party to these proceedings. The 1st Interested Party further contends that the Applicants intended appeal has no chances of success and is likely to be a waste of judicial time.

5. On 24th September the counsels for the parties made verbal submissions before me, in which they gave brief highlights of their respective positions. Mr. Sande, learned counsel for the Applicants asserted that their intended appeal had high chances of success. That failure to comply with the orders of court appealed from would invite further adverse orders against the applicants, hence their apprehension and this application. In any case, Mr. Sande argued, the funds in question had been handled by three law firms and not the applicants alone. He urged that the application be allowed.

6. Mr. Mbaabu learned counsel contended for the second to the fourth Interested Parties the money in issue was under investigation as it was obtained in circumstances that could lead to the conclusion that it was obtained fraudulently. That it is not the applicant's money, but that if at the end of the day they proved that the money belonged to them, it would be released to them by the court. In his view the intended appeal which he termed as a shot in the dark has no chances of success. He urged that this application be dismissed.

7. Learned counsel Mr. Laichena for the first Interested Party was in agreement with Mr. Mbaabu and added that the issues raised by the applicants had been raised in the main hearing and had been addressed adequately. That there was no evidence that the applicant had paid out the said money from the clients account, neither was there any client who had sworn an affidavit that they would be prejudiced by the orders issued by the court. He too urged that the application be dismissed. Mr. Gataka, associated himself with the submissions of his lead counsel Mr. Laichena.

8. The advocates for the interested party urged the court to dismiss the application.

9. Learned state counsel Miss Ngalyuka for the Respondents associated herself with the submissions of the Interested Parties. She stressed that investigations were still under way and the subject matter thereof was the entire Kshs.31 million. That therefore, it was in the interest of justice for the funds to be preserved until investigations are finalized. She was in agreement with Mr. Mbaabu and Mr. Laichena that this application should be dismissed.

10. The basis of the success of an application for stay of execution appeal is that there be an arguable appeal with high chances of success and further that the applicant stands to suffer irreparable loss if the order is not granted. Therefore orders of stay of execution pending appeal will only be granted in the interest of justice.

11. I note that none of the parties herein will suffer loss since the orders of court that are being impugned, directed the monies in question to be deposited in court. The said monies will be released to the rightful

owner at the end of the proceeding. I will not delve into the merits or demerits of the intended appeal since this court has already pronounced itself on the issues therein. Indeed as stated by Mr. Mbaabu, I note that there has been partial compliance with the orders of court and that Kshs.23 million has been deposited in court, instead of the entire Kshs.31,565,548.40.

12. If, as Mr. Sande for the applicants submitted, the money in issue was deposited in the clients account then there should be no difficulty in complying with the order of court. The said money should just be transferred to the judiciary account to be preserved awaiting a final court order, since it is money in an account subject of investigation. There is no evidence that it has been released to the client and as observed by Mr. Laichana, no such client has sworn an affidavit to aver that they will be prejudiced by the said orders of this court.

13. It is not in dispute that the subject matter of the police investigations is the entire Kshs.31,565,548.40. Miss Ngalyuka submitted that those investigations have not been concluded. In my view therefore, the interests of justice will be best served if the entire sum of the money which is the subject matter of this application, that is Kshs.31,565,548.40, is deposited in court for preservation.

14. For the foregoing reasons the application dated 29th August 2014, seeking orders for stay of execution pending appeal is found to be without merit and is denied.

The application is dismissed with costs.

SIGNED DATED and DELIVERED in open court this 29th day of September 2014.

L. A. ACHODE

JUDGE