



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. JR. 424 OF 2014

**IN THE MATTER OF AN APPLICATION BY SENATOR JOHNSON NDUYA MUTHAMA FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND
PROHIBITION**

AND

**IN THE MATTER OF ARTICLES 10, 47, 50, 73 AND 157 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF SECTIONS 6(a) & (b), 16(1), (2) & (3), 29(1), (2) 3, 301 2 and 34(1)(a), (b)
& (c) OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013**

AND

**IN THE MATTER OF THE SPECIAL ISSUE OF THE KENYA GAZETTE VOL. CXVI-NO, 102
OF 27TH AUGUST 2014**

AND

**IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION CASE
NO. 19 OF 2014**

BETWEEN

SENATOR JOHNSON NDUYA MUTHAMA.....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS..1ST RESPONDENT

HON. PAUL KIBUGI MUTE SC.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.3RD RESPONDENT

NATIONAL POLICE SERVICE.....4TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT

RULING

1. By a Chamber Summons dated 31st October, 2014, the applicant herein **Senator Johnson Nduya Muthama**, sought the following orders:

1. **This application be certified as urgent and heard *ex parte* in the first instance**

2. **The Applicant, Senator Johnson Nduya Muthama be granted leave to apply for judicial review and an order of certiorari to remove into the High Court and quash the decision of the 1st Respondent contained in the Special Issue of the Kenya Gazette Vol. CXVI-No. 102 of 27th August 2014 Gazette Notice No. 5959 appointing Paul Kibugi Muite S.C to be a public prosecutor for purposes of criminal cases and all legal proceedings arising or connected with the following inquiry files:**

1. **CCIO Nairobi Area Inquiry File No. 20/2013;**
2. **Police Case File No. Cr. 121/761/2009;**
3. **CID HQs Inquiry File No. 96/2008; and**
4. **KACC/FL.INQ/96/2010**

3. **The Applicant, Senator Johnson Nduya Muthama be granted leave to apply for judicial review and an order of certiorari to remove into the High Court and quash the decision of the 1st Respondent made on or about 26th April 2014 or on any date between March 2014 and 27th August 2014 identifying, instructing and appointing Paul Kibugi Muite S.C to review, advice and/or in any manner handle the file(s) relating to or connected with investigations into matters touching on Malili Ranch Limited or any investigations into allegations of offences connected with the sale and/or purchase of land between Malili Ranch Limited and the Government of Kenya.**

4. **The Applicant, Senator Johnson Nduya Muthama be granted leave to apply for Judicial Review and an order of Certiorari to remove into the High Court and quash the decision of the 2nd Respondent made on or between 27th August 2014 and 29th August 2014 to commence proceedings, prosecute, summon and/or cause the Applicant to be summoned and charged for the purpose of prosecution in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others*.**

5. **The Applicant, Senator Johnson Nduya Muthama be granted leave to apply for Judicial Review and an order of certiorari to remove into the High Court and quash the decision(s) of the 3rd Respondent contained in the charge sheet dated 27th August 2014 Police Case No. 121/272/2014 charging the Applicant alongside others with offences and counts contained in the said Charge Sheet.**

6. **The Applicant, Senator Johnson Nduya Mutham be granted leave to apply for Judicial Review and an order of prohibition directed to the 1st Respondent prohibiting him from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Other* whether by himself or through any other public or private prosecutor.**

7. **The Applicant, Senator Johnson Nduya Muthama be granted leave to apply for**

Judicial Review and an order of Prohibition directed to the 5th Respondent prohibiting the 5th Respondent from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others* and/or any further proceedings arising from or connected with the following inquiry files:

1. CCIO Nairobi Area Inquiry File No. 20/2013;
2. Police Case File No. Cr. 121/761/2009;
3. CID HQs Inquiry File No. 96/2009; and
4. KACC/FI/INQ/96/2010

8. The grant of leave aforesaid do operate as a stay of the proceedings commenced in Nairobi Chief Magistrate's Court Anti-Corruption Case NO. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others* pending the hearing and determination of this matter.

9. The grant of leave aforesaid do operate as a stay of any investigations, process, criminal cases and/or all legal proceedings arising out of or connected with the decision of the 1st Respondent contained in the Special Issue of the Kenya Gazette Vol. CXVI-No. 102 of 27th August 2014 Gazette Notice No. 5959 including anything touching and/or connected with the following inquiry files:

1. CCIO Nairobi Area Inquiry File No. 20/2013;
2. Police Case File No. Cr. 121/761/2009;
3. CID HQs Inquiry File No. 96/2009; and
4. KACC/FI/INQ/96/2010

10. The costs of this application be in the cause

2. After hearing the application ex parte I was satisfied that the applicant had disclosed that the application established a prima facie case and I accordingly granted leave to apply for the judicial review orders which are being sought in these proceedings. However pursuant to the proviso to Order 53 rule 1 of the *Civil Procedure Rules* I directed that the issue of whether the grant of leave would operate as a stay of the proceedings would be heard inter partes. It is that inter partes hearing which is the subject of this ruling.
3. Whereas the strength or weakness of the applicant's case is a factor to be taken into consideration since it would not be right to stay proceedings where the Court is clear in its mind that the chances of the judicial review proceeding being successful are slim, in granting leave the Court is under an obligation to determine whether a *prima facie* case has been made out and ought not to be granted as a matter of course. See *Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR.*
4. Therefore as leave had been granted in these proceedings and as no application has been made to set aside the said leave, it is my view that it would be an exercise in futility for this Court to embark on an investigation at this stage whether or not the applicants' case is arguable since to arrive at a decision in the negative would impact negatively on the leave already granted. Consequently I do not intend to embark on that futile, absurd and potentially embarrassing exercise.
5. However the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that

- the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.
6. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since in that case there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**
 7. However even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.
 8. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.
 9. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”

10. Therefore it is not in every case that there are chances of the High Court reaching a decision contrary to the one in the proceedings sought to be stayed that the High Court will stay those proceedings. It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor.
11. It was contended that this court had previously in **JR Misc. Civil Application No. 333 of 2014**, a matter related to the instant one, declined to grant the orders seeking to stay the subject criminal proceedings and that by granting the orders sought herein, the court would be placed in an embarrassing situation. As correctly submitted on behalf of the applicant the applicant herein was not the applicant in those proceedings and never sought the orders sought herein in those proceedings. What the Court was asked to deal with was whether the orders granted in favour of the applicant in those proceedings were equally applicable to the applicant's situation and this Court determined that since the applicant herein was not the applicant in those proceedings, he could not take advantage of the said orders.
12. Secondly, an application for stay of proceedings in my view can be made at any stage of the proceedings in a judicial review application since the determination of an application for stay must necessarily depend on the prevailing circumstances and where the circumstances change, the court is perfectly entitled to grant stay. In other words a decision made with respect to stay is not necessarily caught up by the doctrine of *res judicata* though the same may amount to an abuse of

- the process of the court if made with the intention of overturning an earlier decision or as a means of haranguing the court.
13. In this application if I understood the applicant's case properly, it was not contended that **Hon. Paul Muite, SC** is generally incompetent or unqualified to prosecute the applicant. Far from it. **Hon. Paul Muite, SC**, is undoubtedly one of the eminent lawyers and legal minds in this country and a lawyer of no mean repute. Any suggestions that he is generally unqualified to conduct criminal prosecution would in my view be unworthy of consideration by this court.
 14. What is contended is that in the circumstances of this particular case, **Hon. Paul Muite, SC** may not be properly placed to conduct the prosecution of the applicant considering his position vis-à-vis that of the applicant, a position which may not be conducive to professional conduct of the said prosecution. Under section 4 of the *Office of the Director of the Public Prosecution Act*, the office of the Director of Public Prosecution is enjoined to be guided by such principles as the diversity of the people of Kenya; impartiality and gender equity; the rules of natural justice; promotion of public confidence in the integrity of the Office; the need to discharge the functions of the Office on behalf of the people of Kenya; the need to serve the cause of justice, prevent abuse of the legal process and public interest; protection of the sovereignty of the people; secure the observance of democratic values and principles; and promotion of constitutionalism.
 15. It is contended that either consciously or unconsciously, **Hon. Paul Muite, SC** may not be able taking into account the said unique position to discharge his mandate in accordance with the said principles. Whether that is correct or not is a matter which will have to await the hearing of the substantive motion.
 16. The other issue is that the appointment of **Hon. Paul Muite, SC** was not in accordance with the procurement procedures laid down in law.
 17. It is my view that since what is sought is an order barring **Hon. Paul Muite, SC** from prosecuting the applicant, to allow the applicant's prosecution by **Hon. Paul Muite, SC** to proceed would defeat the very purpose for which these proceedings were instituted since at the end of the day there would be nothing to bar as the prosecution would have been commenced any way. Unlike in cases where what is sought is the halting of the trial, in this case, it is the act of the prosecution itself which is under challenge.
 18. Again if **Hon. Paul Muite, SC** were to continue with the said prosecution and the Court were to find that he ought not to have done so, the possibility of nullifying all the process that shall have been undertaken cannot be ruled out. Precious but scarce judicial time would have been wasted in the meantime.
 19. Having considered the peculiarities of this case, it is my view that the prosecution of the applicant by **Hon. Paul Muite, SC** ought to be kept in abeyance at least for the time being while this court investigates the issues raised on his propriety to prosecute the applicant.
 20. Accordingly while not directing that the leave herein shall operate as a stay of the proceedings I question, I direct that the grant of leave herein shall operate as a stay of the applicant's prosecution by **Hon. Paul Muite, SC** pending the hearing and determination of the substantive application filed herein or until further orders of this court.
 21. The costs of this application will be in the cause.

Dated at Nairobi this 17th day of December, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Murithi, Mr Oluoch and Mr Ndolo holding brief for Ms Kethi Kilonzo and Dr Khaminwa for the Applicant

Mr Ashimosi and Mr Ondimu for the 1st Respondent

Mr Esmail for 2nd Respondent

Miss Odhiambo for the 3rd and 4th Respondents

Cc Richard