



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 597 of 2012

RUTH MUGANDA.....

APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. Before me is a Notice of Motion dated 14th December 2012 brought under **Section 356(1)** of the **Criminal Procedure Code**, the inherent jurisdiction of the court and all other enabling provisions of the law. The Application was filed under Certificate of Urgency on 17th December 2012. It is supported by the Affidavit sworn by Ruth Muganda, dated 14th December 2012.

2. The Applicant is seeking the following orders:

- 1) Conservatory orders restraining the Respondents from arresting the Applicant or serving summons upon her pending the hearing and determination of the Application *inter partes* or until further orders of the Court,
- 2) Conservatory orders restraining the Respondents from arresting the Applicant or serving summons upon her pending the hearing and determination of the Application or until further orders of the Court,
- 3) Conservatory orders restraining the Respondents from executing the orders of Hon. Lady Justice L. A. Achode in a ruling delivered on 29th November 2012 requiring the Applicant to be served with summons meant for her plea taking exercise in the Anti-Corruption Court pending the hearing and determination of the Appeal,
- 4) Stay of the ruling delivered by Hon. Lady Justice L. A. Achode on 29th Nov. 2012 pending the hearing and determination of the intended appeal or until further orders of the Court,
- 5) Any further orders or directions the Court may consider appropriate.

3. The Application is premised on the following grounds:

- 1) The Applicant has already lodged an appeal against the ruling delivered by the Hon. Lady Justice L. A. Achode on 29th November 2012,

- 2) The Judge in the said ruling ordered the Respondents to serve the Applicant with summons of her intended plea taking,
- 3) The Applicant is apprehensive that she risks being arrested and prosecuted on trumped charges engineered by the Respondents,
- 4) In the event that the Court does not intervene by staying the said ruling the Applicant's fundamental right to equal protection of the law as enshrined under **Article 27(1)** of the **Constitution** stands to be violated by the execution of the directive of the Honourable Judge,
- 5) The Respondents are likely to arrest and arraign in court the Applicant even without having done satisfactory investigations to establish the facts of the matter,
- 6) The execution of the order of the Judge for the Applicant to be arraigned in court for plea taking exercise would gravely prejudice the Applicant and further would render her intended Appeal nugatory and an academic exercise,
- 7) It is in the best interests of justice that the Court intervenes and puts a stop to the suffering and harassment that the Applicant continues to undergo at the hands of the Respondents,
- 8) The Respondents herein are yet to conduct satisfactory investigations on the alleged misuse of funds,
- 9) No prejudice will be suffered by the Respondents if the said ruling is stayed by the Court.

4. The 1st Respondent filed Grounds of Opposition on 15th January 2013 raising the following grounds:

- 1) The jurisdiction of the Court under **Section 356 (1)** of the **Criminal Procedure Code** is restricted to adjudicating over applications for stay pending appeal by persons who have been convicted or sentenced by a criminal court,
- 2) The inherent powers of the Court cannot be invoked where there are specific procedural issues governing the procedure,
- 3) Conservatory orders cannot issue as sought in prayers 2, 3 and 4 of the Application to restrain the Respondents from executing valid Court orders,
- 4) The Court's jurisdiction is limited at this stage of the proceedings to granting an order of stay of the decision or order appealed from,
- 5) The Application does not satisfy the legal conditions for the granting of stay pending appeal.

5. The Application arose out of the ruling of this Court on 29th November 2012. At the hearing of the Application, *inter partes*, Mr. Paul Muite, learned Senior Counsel for the Applicant submitted that the main issue being challenged by the Applicant is the constitutionality of the Ethics and Anti-Corruption Commission (EACC) and thus its capacity to prosecute matters, including, the charges being preferred against the Applicant. The learned Senior Counsel urged the Court to allow the Application in that there is a pending appeal with regard to my ruling on the constitutionality of the EACC.

6. Learned Senior Counsel urged that the Applicant has an arguable appeal and persuaded the Court to be inclined to allow the Applicant to exhaust available avenues in the protection of her rights. He contended that no prejudice would be suffered should the intended appeal fail, in which case, the Applicant would be prosecuted, while, if the Application is not granted, the Applicant shall have been prosecuted by the time the intended appeal is determined.

7. Mr. Muite, also challenged the authorities cited by the Respondent as they deal with civil matters

while this matter concerns individual rights. He urged the court to facilitate the prosecution of the Appeal which he assured would be prosecuted with expedition.

8. Mr. Waudo for the 1st Respondent opposed the Application. Learned Counsel submitted that the Application is incompetent since jurisdiction of the court has been improperly invoked. He stated that **Section 365(1)** of the **Criminal Procedure Code** under which the Application has been moved to Court is limited to persons convicted and sentenced in a criminal court. He further opined that the inherent jurisdiction of the Court can only be invoked where there are no specific provisions on how to approach the court, while in the matter before Court, there is prescribed procedure, that is **Order 42 (2)** of the **Civil Procedure Rules**, noting that there is no rule under **Gicheru Rules** governing matters such as the ones before the Court, thus the Court should resort to the provisions of the **Civil Procedure Rules**.

9. With regard to the jurisdiction of the Court, Mr. Waudo submitted that it is limited to granting the stay of the orders of 29.11.12 thus prayers 3 and 4 sought could not be granted because: firstly, the Court's decision was a determination on whether the rights of the Applicant had been infringed or not and having determined in the negative, the finding could not be stayed.

10. Secondly, the summons which was issued as a consequence of the court's decision cannot be stayed because it had already been executed, emphasizing that the Court can only stay what is apprehended. Thirdly, the Applicant did not satisfy the grounds for granting a stay order as set out under **Order 42(2)** of the **Civil Procedure Rules** that is, demonstrate that irreparable loss would occur unless the orders sought are granted by advancing evidence by way of Affidavit or otherwise to demonstrate the apprehended loss.

11. On this ground, Counsel relied on the decision of the Court in **Machira T/A Machira & Co. Advocates v. EA Standard (No. 2) [2002] KLR 63**. Fourthly, the issue of the appeal being rendered nugatory is not applicable since the same applies to applications brought under **Rule 5(b)** of the **Court of Appeal Rules** as held in **Lawrence Sese Mosingh vs Settlement Fund Trustees & Another, Civil Case No. 31 of 2002, [2011] eKLR**. He urged the Court to dismiss the Application with costs. Miss Kuruga, Learned State Counsel for the 2nd Respondent associated herself with the submissions of Mr. Waudo for the 1st Respondent.

12. In rejoinder, Mr. Muite submitted that **Section 356** of the **Criminal Procedure Code** is inapplicable since it applies to situations where an accused is applying for a stay following a conviction. He stated that the orders of the Court dated 29.11.12 were made in a constitutional petition filed pursuant to **Article 49** of the **Constitution**, thus, the **Criminal Procedure Code**, had no place in the matter and urged the Court to take recourse to **Article 159** of the **Constitution**. This is surprising since the Notice of Motion dated 14th December 2012 was brought under Section 356(1) of the Criminal Procedure Code.

13. Having listened to the submissions of all parties and the record before me, the following are the issues for determination:

- a) Whether the Application is procedurally before the court, and
- b) If the answer to (a) above is in the affirmative, whether the Application has merit to be allowed.

On whether the Application is procedurally before the court,

14. This Application was brought under the provisions of **Section 356(1)** of the **Criminal Procedure Code**; the Applicant also invoked the inherent powers of the Court. **Section 356(1)** of the **Criminal Procedure Code**, provides that,

“The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering of an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering

of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.”

15. The wording of the above-cited section of the law is clear in its plain meaning that it applies to instances where the High Court or the subordinate court has convicted or sentenced a person pending the entering of an appeal. Thus, on this reading alone, the section by itself would not support an application of the nature that is before me.

16. To consider this issue, I am alive to the lacuna in the criminal procedure provisions. The Respondent’s contention on the manner in which the Court’s jurisdiction was invoked was that the Applicant invoked the wrong provisions of the law and further that the inherent jurisdiction of the court could not be invoked where statute provided for procedure, in this case, **Order 46, Rule 6(2)** of the **Civil Procedure Rules**.

17. The **Civil Procedure Act** being “***an Act of Parliament to make provision for procedure in civil courts,***” on the onset, is not applicable in matters concerning criminal proceedings. The matters before me emanate from an intended prosecution of the Applicant for alleged commission of corruption-related offences. Thus, the nature of proceedings is criminal and the **Civil Procedure Rules** would not be the law to be invoked in such a case.

18. This Court, however, can exercise its inherent jurisdiction to hear the Application before it in the interests of justice. The Applicant also invoked the inherent powers of the Court and it is on this premise that I wish to go ahead and determine this Application on its substance.

On whether the application merits to be allowed,

19. This Application is for orders seeking stay of a ruling and orders issued by a Court pending the determination of an appeal. The Applicant has already filed a notice of appeal. Secondly, the nature of the Application does not relate to already concluded criminal proceedings. The Application and the matters preceding it are of a special nature and there are no clear provisions for instances where an application as is the case herein, is made before the commencement of criminal proceedings.

20. The **Criminal Procedure Code** is silent on provisions to guide the Court in instances such as these concerning stay of orders of the court resulting from an application that is not premised upon sentence or conviction. To this extent, **Section 356(1)** of the **Criminal Procedure Code** alone is insufficient to deal with the matter before me.

21. The grant of a stay of execution of a court’s order is the discretion of the Court, and not an automatic result from an intended appeal from the Court’s decision. In my view these provisions require an applicant to show that the intended appeal has overwhelming chances of success.

22. The purpose of stay was captured succinctly by the learned Judges of Appeal in the case of **Attorney General v Law Society of Kenya & Another Civil Application No. 144 of 2008 [2009] KLR 304**, that,

“A stay does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of the orders of the trial court but merely suspends the time required for the performance of the particular mandates stayed to preserve a status quo pending appeal....The Court of Appeal could not in a motion for stay restore the nullified sections, the effect of that would be to reverse the decision of the trial judge on a motion for stay which is not permissible,”

23. Further, in determining whether the Applicant has an arguable appeal, the Court is under an obligation to consider the entire record of the Court that determined the decision being appealed from and the grounds to be relied upon in the intended appeal. The Applicant in this case, to demonstrate the merits of the intended appeal has presented me with a draft Memorandum of Appeal. The Applicant is therefore calling upon this Court to examine its own determination, thus, weigh the merits or demerits of its own

decision so as to determine whether or not the intended appeal has merit.

24. The Applicant is seeking stay of my orders refusing the stay of the proceedings of the lower court. Staying an order refusing grant of stay, in my opinion, has the absurd effect of granting the same orders that the Court had earlier refused to grant. Thus, by granting the stay as prayed, this Court will in essence be reversing that which it dismissed in the first place. It is not disputed that the issues emanating from the Application before me are in entirety and on a balance of scale, important matters of public policy.

25. In my view the Applicant ought to have made this Application before the Court of Appeal. I therefore decline to grant the prayers as sought.

The application is dismissed.

SIGNED, DATED and DELIVERED in open court this **18th** day of **March 2013**

L. A. ACHODE

JUDGE