



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC. CIVIL APPLICATION NO. 362 OF 2013

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT, NO.3 OF 2005
LAWS OF KENYA**

IN THE MATTER OF: THE LAW REFORM ACT, CAP 75 OF THE LAWS OF KENYA

**IN THE MATTER OF: THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT, ACT NO.
3 OF 2003 OF THE LAWS OF KENYA AND THE ETHICS AND ANTI-CORRUPTION
COMMISSION ACT, 2011**

**IN THE MATTER OF: AN APPLICATION BY FOR LEAVE TO INSTITUTE JUDICIAL
REVIEW PROCEEDINGS AGAINST THE DIRECTOR OF PUBLIC PROSECUTION,
SPECIAL MAGISTRATE ANTI-CORRUPTION COURT OF KENYA AND ETHICS AND
ANTI-CORRUPTION COMMISSION BY WAY OF ORDERS OF CERTIORARI,
PROHIBITION**

BETWEEN

**MARWA FADHILI CHACHA.....
.....APPLICANT**

AND

**THE DIRECTOR OF PUBLIC PROSECUTION.....1ST
RESPONDENT**

**THE SPECIAL MAGISTRATE ANTI-CORRUPTION COURT OF KENYA NAIROBI
REGISTRY....2ND RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....
.....3RD RESPONDENT**

EX PARTE

MARWA FADHILI CHACHA

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 375 OF 2013

BETWEEN

**DAVID KIPRUTO CHINGI.....
.....APPLICANT**

AND

**THE DIRECTOR OF PUBLIC PROSECUTION.....1ST
RESPONDENT**

**THE SPECIAL MAGISTRATE ANTI-CORRUPTION COURT OF KENYA NAIROBI
REGISTRY....2ND RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....
....3RD RESPONDENT**

EX PARTE

DAVID KIPRUTO CHINGI

RULING

INTRODUCTION

1. This ruling is the subject of two consolidated applications filed in High Miscellaneous Civil Application Nos. 362 of 2013 and 375 of 2013 by **Marwa Fadhili Chacha** and **David Kipruto Chingi** respectively.
2. For the purposes of this ruling the applicants are seeking orders that the leave which was granted in both applications to apply for orders of judicial review do operate as stay of proceedings pending the hearing and the outcome of these proceedings. In Miscellaneous Application No. 375 of 2013, the applicant is also seeking an order that the grant of the leave do operate as a stay of variation of the employment terms of the applicant by the National Hospital Insurance Fund pending the determination of these proceedings.
3. The applications were supported by affidavits sworn by the applicants while the same were opposed by grounds of opposition filed on behalf of the interested party, Ethics and Anti-Corruption Commission (hereinafter referred to as the Commission) as well as a replying affidavit sworn by **Stella Nyamweya**, a prosecution counsel in the office of the Deputy Public Prosecutions. The parties also filed written submissions which were highlighted by their counsel.
4. On behalf of the applicants, it was submitted by their learned counsel **Mr Makori**, that since the affidavit filed in reply to the application did not rebut the factual issues deposed to in the verifying affidavit, the contents of the latter remained uncontroverted. He submitted that the reason for seeking that the leave granted herein does operate as a stay is to be found in Article 157(11) which ties down the Director of Public Prosecution (hereinafter referred to as the DPP) to avoid abuse of legal process as well as section 12 of the ***Ethics and Anti-Corruption Commission Act***, (hereinafter referred to as the Act) which binds the Commission to observe the rules of natural justice. According to him there is an abuse of the process of the Court since the applicants are protected under Article 236(a) of the Constitution against discrimination. It was submitted that since there are 302 instances of similar nature, the applicants risk being charged in respect of the

said instances as well. It was further submitted that section 138 of the **Public Procurement and Disposal Act** accords the applicants immunity and so far there is no affidavit showing the reason why he should be deprived the said immunity. Having been granted leave it was submitted that so far the balance is in favour of granting stay. In **Mr Makori's** submission the Commission has no powers at all to bring charges against the applicant and he relied on the provisions of Article 79 of the Constitution which limits the jurisdiction of the Commission. It was further submitted that the Commission does not have the powers to prefer the charges that were brought to court since section 11(d) of the Act specifies areas in which the Commission may act and this is in respect of Chapter VI of the Constitution yet the subject charges do not fall under that Part. It was contended that the applicants are not the targets of the law under which they are charged which is failing to follow procurement law in accordance with the **Public Procurement and Disposal Act** which ought to have targeted NHIF hence any prosecution of the applicant will be a violation of his rights.

5. According to the applicants the continued prosecution of the applicants will affect other people and interfere with the tendering process. Since the applicants are seeking orders of prohibition, it was submitted that the same will not be effective unless the stay sought is granted and reliance was placed on **Joram Mwendwa Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003** in which the orders sought were granted as the criminal proceedings were brought against a person other than the entity concerned. The grant of the stay, it was submitted will not prejudice the applicants' other co-accused who have similarly applied for and obtained leave and are challenging the process hence there is a commonness of purpose. In any case under section 87 of the **Criminal Procedure Code**, the DPP is empowered to withdraw charges against other accused persons without jeopardising his chances to prosecute. As Parliament has not enacted a law since the promulgation of the Constitution in 2010 dealing with procurement to charge the applicants would cause serious prejudice and since the intended witnesses are serious Government Officers, it would save valuable judicial time if these proceedings were determined which does not require them to appear as witnesses. According to the applicant the Commission under section 23(3)(d) of the **Interpretations and General Provisions Act** cannot assume more powers than what it had and he relied on **Republic vs. Kenya Sugar Board & Another ex parte Krish Commodities Ltd Mombasa Miscellaneous Civil Application No. 532 of 2004** and prayed that the orders of stay be granted as sought.
6. On his part **Mr. Mule** learned Counsel for the Respondents submitted that at this juncture the Court is required to determine whether the failure to grant stay will render these proceedings nugatory. In his view, even if stay is not granted these proceedings will not be rendered nugatory since the hearing of the Criminal Case is set down for 27th February 2013. According to him the proceedings have so far been filed timely in these proceedings and hence there is no likelihood that the Criminal Case will proceed before these two matters are concluded. Therefore, he submitted, to grant the stay sought herein will be in vain. According to him the substantive orders sought herein are unmerited since the orders of certiorari are sought to quash under section 62 of the Act the consequences follow automatically. In his view there is likely to be no prejudice hence the stay sought ought to be declined. In his view the charges are not instituted by the Commission but by the DPP under section 157 of the Constitution.
7. On his part **Mr Murei**, learned counsel for the interested party submitted that the charge sheet in the criminal case is signed by the Officer in Charge Kilimani Police Station based on charges investigated by the Commission which have the powers to investigate crimes beyond those under section 35 and forward the results thereof which it did. According to him this Court in High Court Misc. Application No. 363 of 2013 rendered a decision in respect of the applicants' co-accused and gave directions hence the present applications are moot as no special circumstances have been shown distinguishing the present applications from the said matter. In his view the only exception is the prayer for stay of variation of terms of employment. However he submitted that what is before the court is the issue whether leave should operate as stay of the criminal proceedings and not terms of employment. Under section 62 of the Act a public officer charged with a criminal offence shall be suspended from the date of the charge and since the applicant have already been charged, the stay cannot be granted. Secondly, the Court cannot stay the operation of the law hence this Court lacks the jurisdiction to grant the prayer sought. In his view no valid reason has been given why the leave should operate as a stay and he relied on **Dream Camp Kenya Ltd vs.**

Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012 for the proposition that every litigation is in one way or another inconvenient to every litigant. Since these proceedings are only concerned with Criminal Case No. 12 of 2013, they will not be of any assistance in other proceedings. In his view the applicants were heard and will still be heard by the Court and that the mere fact that Article 79 of the Constitution provides that the Commission is to investigate crimes under Chapter VI does not bar them from investigating other crimes. Since this is not a class action the issue of effect on other employees is not material hence the application should be dismissed.

8. In its reply **Mr Makori** submitted that section 35 of the Act refers to the Attorney General and not the DPP. Since the only way in which the applicants can be interdicted is through the charges, he submitted this Court has powers to grant the orders of stay sought and that no prejudice will be caused to the respondents.
9. Order 53 Rule 1(4) of the **Civil Procedure Rules** provides:

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise. [Emphasis mine].

10. In my view “proceedings in question” refer to the proceedings in respect of which leave is sought. In this case the proceedings in question must of necessity refer to the proceedings in ACC. No. 12 of 2013, **Republic vs. Richard Langat Kerich, Marwa Fadhili Chacha, David Kipruto Chingi, Peter Ngunjiri Wambugu, Ndiba Wairioko and Median Medical Centre Limited.**
11. Apart from that it is submitted on behalf of the respondents and the interested party that the variation of terms is automatic once a person is charged. That position has not been contested by the applicants. An order of stay, however, as we shall see hereunder, cannot be granted where what is sought to be stayed has already taken place.
12. Accordingly it follows that the prayer seeking stay of variation of the applicants’ terms of employment not being “proceedings in question” cannot be granted under the provisions of Order 53 rule 1(4) aforesaid.
13. With respect to application for stay the decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles.
14. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction and some of them are that where the decision sought to be quashed has been implemented leave ought not to operate as a stay; 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; that the objective of granting stay is to ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application; that 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; that it is however not appropriate to compel a public body to act and that a stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005; Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995; Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006.**
15. As I held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre;**

“...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.....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."

16. In this case it has been submitted that since the applicants seek orders of prohibition, unless the grant of leave is directed to operate as a stay of the impugned proceedings, the outcome of these proceedings may become nugatory. Whereas I agree that one cannot state with certainty that the impugned proceedings cannot be determined before these proceedings, it is not an issue of probability that determines whether or not to grant the stay sought. In my view it is an imminent threat that the event is likely to occur that is the paramount consideration. Otherwise the rule would be that in all cases where a party applies for an order prohibiting the challenged decision an order that the leave do operate as a stay of those proceedings would follow as a matter of course. That in my view would take away the exercise of discretion which ought to be exercised based on the circumstances of each case.
17. In this case the applicants have already been charged and the trial is fixed for 27th January 2014. In my view there is no imminent threat that the challenged proceedings would be determined before these proceedings taking into account the fact that speed and promptness are the hallmarks of judicial review. This is due to the fact that judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities. The court's responsibility is that of handling matters before it with speed, efficiency and economy so as to achieve the overall objective of judicial review. See **O'reilly vs. Mackman and Others [1982] 3 ALL ER 1124.**
18. In order to achieve this judicial review proceedings are meant to avoid technicalities of procedure in order to achieve flexibility, promptness, speed and finality hence the avoidance of the application of the Civil Procedure Rules, hook, line and sinker. See **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353.**
19. Taking into account the foregoing I am not satisfied that there is at this stage any imminent threat that the criminal proceedings are likely to be determined before these proceedings. It must always be remembered that since *res judicata* does not strictly apply to these kind of proceedings an application for stay of proceedings may be made as and when the occasion arises.
20. According to the applicants there are other 302 instances arises from similar transactions and unless the leave granted herein operates as a stay, more charges are likely to be preferred. However as held herein above, the court is only empowered to direct leave to operate as a stay of the proceedings in question. It follows that the grant of the stay sought herein will not necessarily bar the authorities concerned from preferring other charges against the applicants.
21. It was further contended that under section 138 of the ***Public Procurement and Disposal Act***, the applicants have immunity against prosecution. In my view if such immunity against prosecution exists then to commence or continue with the prosecution of the applicants ought to be halted. The said section however provides as follows:

No person shall, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act.

22. From the foregoing provision it is clear that the immunity granted under the foregoing provision does not bar the prosecution of a person but only provides that where an act or omission is done in good faith the person charged is not liable. At this stage of the proceedings, I am unable to find that the said immunity applies to the applicant.
23. It is also submitted that Article 79 of the Constitution limits the jurisdiction of the Commission and hence the Commission does not have the powers to prefer the charges that were brought against the applicants. Whereas I agree that if the Court finds that the Commission is not empowered to bring the charges facing the applicants the Court ought to halt such proceedings, Article 79 aforesaid provides:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

24. Again in my view whether or not the Commission carried out its mandate as provided under the said provision is a matter which will have to be determined at the hearing of the substantive motion.
25. It was further submitted that unless the stay sought is granted, it would adversely affect the tendering process as the people involved in the said process are operating in fear of being prosecuted. Suffice it to state that the mere fact that the stay sought herein is granted does not bar commencement of prosecution against other persons who are not parties to these proceedings.
26. According to the applicant the grant of stay sought herein will save the valuable judicial time since most of the witnesses in the criminal trial are senior Government Officers whose presence will not be required in these proceedings. As already held elsewhere in this ruling that trial will not commence until 27th January 2014 hence at this stage there is no imminent loss of valuable judicial time.
27. As I held in **In Re: Meridian Medical Centre** (supra) that the institution of criminal proceedings invariably has the potential of somehow adversely affecting the accused's standing cannot be farfetched. I am however in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others** (supra) that:

“Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”

28. Similarly, whereas the Court appreciates that no one cherishes being dragged to Court on criminal charges and that the experience may be discomforting and unpleasant, the discomfort and unpleasantness does not without more justify the stay of the criminal proceedings in question.
29. In granting leave in these applications I appreciated that the applicants had established a *prima facie* case. If and when at the hearing of their substantive motion they establish their claims this Court will not hesitate to terminate the criminal proceedings brought against them. As was held in **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**, the Courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountaintops and to open up the heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. I agree that at the end of the day, we must remember those famous words of a famous jurist – Justice is not a cloistered virtue and that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. See **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443**.
30. Having considered the prayer that the grant of leave herein do operate as a stay of the impugned proceedings, I am not satisfied that that prayer is merited at this stage of the proceedings. Accordingly I decline to grant the said prayer.
31. The costs of the application will be in the cause.

Dated at Nairobi this day 17th of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makori for the applicant

Mr Njogu for the 1st Respondent

Mr Waudu for Mr Murei for the 3rd Respondent