



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Constitutional Reference 483 of 2012

(In the matter of Rule 12 of the Constitution of Kenya Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual)

PAUL NG'ANG'A NYAGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI.....2ND RESPONDENT

RULING

1. The Petitioner herein filed a Notice of Motion dated 4th October 2012 under Certificate of Urgency brought under **Articles 21, 22, 23 (1), 24, 27, 29, 31, 47, 48, 49(1)(a) and (c), 50 and 165(3)(b)** of the Constitution of Kenya; **Order 51 of the Civil Procedure Act and Rules 6 and 20 of the Legal Notice No. 6 of 2006 of the Civil Procedure Rules**. The Application is supported by the Affidavit sworn by Paul Ng'ang'a Nyaga, the Petitioner, dated 3rd October 2012.

2. The Petitioner seeks the following orders:

- a) Stay of further proceedings in the **Chief Magistrate's Court, Nairobi, Criminal Case No. 1298 of 2012- Republic vs. Paul Ng'ang'a Nyaga and 2 Others** pending the hearing and determination of the Application
- b) Stay of the warrant of arrest issued against the Petitioner in **Criminal Case No. 1298 of 2012- Republic vs. Paul Ng'ang'a Nyaga and 2 Others** pending the hearing and determination of the Petition.
- c) Stay of further proceedings in the Chief Magistrate's Court in **Criminal Case No. 1298 of 2012- Republic vs. Paul Ng'ang'a Nyaga and 2 others** pending the hearing and determination of the **Nairobi Civil Appeal No. 335 of 2012**.

3. The Application is based on the following grounds:

- a) There is a pending appeal in the High Court which substantially relates to the issues raised in the **Chief Magistrates Court Nairobi, Criminal Case No. 1298 of 2012 Republic vs. Paul Ng'ang'a Nyaga and 2 Others**
- b) The **Civil Appeal No. 335 of 2012** arising from an **CMCC No. 3283 of 2011** is scheduled for hearing on 5th November 2012 for stay where the Applicant and the Complainant are one and the same person

- c) The Petitioner is an Advocate who acted for the Plaintiff in **CMCC No. 3283 of 2011** and secured a judgment and is still on record for the Respondent in the pending Appeal. The Applicant instructed auctioneers who carried out their work diligently, with the Court Process Server who effected service.
- d) The disputes herein ought to be dealt in one forum since multiplicity of disputes is likely to bring confusion in case different decisions are made by two courts.
- e) The Petitioner's rights are likely to be infringed if the orders sought are not granted for the reason that the Applicant in Civil Appeal No. 335 of 2012 has extensively relied on the criminal case to defeat the civil claim which is contrary to public policy. The Petitioner only acted for the Plaintiff in the lower court.
- f) Proceeding with the criminal case is likely to prejudice the civil dispute since the Applicant in Civil Appeal No. 335 of 2012 has lead evidence on the pending criminal case to confuse and take advantage of the civil dispute.
- g) It is in the interests of justice that all matters and disputes relating to the same transaction and/or property be tried in one forum to avoid conflicting rulings/decisions and saves the court's time.
- h) If the order is not granted, the Petitioner shall suffer substantial injustice, loss and prejudice as a result of acting for the Plaintiff
- i) In **Githunguri's vs. Republic 1986** the court which granted prohibition of criminal proceedings, held that it is eminently right for a person to apply for prohibition of criminal proceedings rather than wait for a trial with a risk of conviction and imprisonment.
- j) Through the institution and maintenance of the criminal case the Respondent has contravened the Petitioner's right under **Article 27(i)** of the **Constitution** to equality before the law and to equal benefit of the law and the right of access to justice in a fair manner
- k) The contravention of the Petitioner's rights is still ongoing as the suit is still pending as the Civil Appeal referred to above is still pending while the pendency of the criminal case is being used as a ladder to advance a civil claim as against the petitioner.
- l) Unless the conservatory orders are granted, the Petitioner's rights to seek redress for contravention of fundamental rights will be rendered nugatory.
- m) The DPP has contravened **Article 157(6)** of the **Constitution**

4. Ms. Kahoro, learned State Counsel for the Respondent opposed the application and relied on the affidavit of James Njogu sworn on 18th December, 2012. She submitted that the criminal proceedings resulted from investigations conducted by the police after a complaint by one GaoJian the Managing Director of China Wu Yi Ltd, the Appellant in the Civil Appeal. She further stated that investigations revealed that there was sufficient evidence to charge the Petitioner in the criminal case.

5. Ms. Kahoro urged the Court to dismiss the Petition since under **Section 193** of the **Criminal Procedure Code** the existence of criminal proceedings on a matter in issue in the civil suit shall not be the basis of staying the civil suit. On the allegation of violation of the rights of the Petitioner, the learned State Counsel submitted that the Petitioner did not demonstrate how his rights under the cited constitutional provisions were violated. She urged that the Petitioner's attempt to stop the respondent from conducting their constitutional mandate is an abuse of the court process, and that the fact that the Petitioner acted for the Plaintiff in the civil proceedings did not shield him from prosecution if a crime was committed. She urged the Court to dismiss the Petition in the interests of justice for the criminal proceedings to continue to conclusion.

6. The chronology of events leading to this Petition was that Ujenzi Works Limited sued China Wu Yi

(K) Limited in **CMC Civil Suit No. 3283 of 2011** seeking payment of Kshs 1, 768,000 and interests as a result of termination of a labour-based agreement by the Defendant, who is the Respondent herein. The Petitioner acted for the Plaintiff in the said civil suit.

7. On 31st October 2011, a final judgment was entered *ex parte* against China Wu Yi (K) Ltd in default of entering appearance and filing a defence in the total sum of Kshs. 2,432,962 and costs of Kshs. 134,075. The Plaintiff proceeded to execute the decree. The Defendant by an Application dated 28th November 2011, moved to court seeking stay of execution of the decree, the setting aside of the judgment entered against the Defendant company and grant of leave to file its defence out of time. In the Application, the Defendant Company alleged that it learnt about the civil suit when the Plaintiff's agent attached its goods and further that the Defendant Company had never been served with suit papers all along. The Court in a ruling dated 26th June 2012 dismissed the Application thus the Civil Appeal No. 335 of 2012 by China Wu Yi Ltd.

8. Meanwhile, a complaint was made to the police by China Wu Yi Ltd on allegations of possible forgery of documents. On the basis of a forensic examination of the documents conducted by the Kenya Police Criminal Investigation Department on 27th December 2012, criminal charges were instituted, against the Petitioner. The Petitioner is charged with forgery, uttering a false document and stealing of motor vehicles in **CM Criminal Case No. 1298 of 2012**.

9. In reaching a finding, I will not delve into the substance of pending issues in the civil appeal and criminal proceedings before the High Court and the Magistrates' Court respectively. I am restricted to determining whether the criminal proceedings should be stayed on the basis of the following issues raised in the Petition;

a) Whether the criminal proceedings have been instituted for the purposes of defeating the civil claim contrary to public policy and thus an abuse of court process.

b) Whether the criminal proceedings are likely to prejudice the civil dispute in **Civil Appeal No. 335 of 2012**

c) Whether the Petitioner's constitutional rights under **Articles 23, 27, 29, 48 and 49** of the **Constitution** are violated through the institution and continuance of the criminal proceedings

d) Whether the Director of Public Prosecutions has contravened **Article 157(6)** of the **Constitution** through the institution and continuance of the criminal proceedings.

10. To begin with let me restate the law on the determination of concurrent civil and criminal proceedings on substantially similar issues. **Section 193 A** of the **Criminal Procedure Act** provides that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

Therefore, the reasons advanced by the Petitioner in grounds 1, 2, and 3 cannot hold in light of the above provision. The reasoning that there is a pending Civil Appeal and the disputes ought to be dealt with in one forum does not, by itself warrant the granting of stay of concurrent criminal proceedings.

11. In ground no. 10, and 12, the Petitioner asserts that the institution and maintenance of the **Criminal Case No. 1298 of 2012** violates his constitutional rights under **Article 27(1)** and further that his right to seek redress for contravention of his constitutional rights under **Articles 23, 27, 29, 48 and 49** will be rendered nugatory. The Petitioner has however, not demonstrated how his rights have been infringed upon.

12. A person claiming violation of constitutional rights must particularize how those rights have been

infringed upon. It is not enough to claim that an action violates those rights. Similarly, the Petitioners assertion in ground no. 13 that the Director of Public Prosecution has contravened **Article 157(6)** of the **Constitution** bears no merit. Article 157(6) makes provision for the powers of the DPP to exercise state powers of prosecution. The DPP, according to **Article 157(10)** of the Constitution, requires no consent from any person or authority to commence criminal proceedings.

13. The main issue that goes to the root of this Application in my opinion, is whether the criminal proceedings are likely to prejudice the civil dispute in **Civil Appeal No. 335 of 2012** and relatedly, whether the criminal proceedings have been instituted for the purposes of defeating the civil claim and are thus contrary to public policy.

14. Section 193A of the **Criminal Procedure Code** highlighted above gives light to the possibility of criminal and civil proceedings subsisting concurrently over the same or similar issues. An examination of the issues at hand manifests an intricate correlation of the issues in the different courts to the extent that the outcome of one matter will inadvertently impact on the other.

15. The subordinate court is inquiring into allegations of a criminal nature and it is my considered view that the process should not be halted on account of the civil appeal of which I am not seized. This is not to state that if the High Court which is seized of the civil appeal finds that the proceedings in CM Cr. 1298/11 in the subordinate court may embarrass the proceedings in the High Court Civil appeal No. 335/12, it cannot arrive at a different decision from mine.

For the foregoing reasons I decline to grant the orders sought.

The application stands dismissed.

SIGNED DATED and **DELIVERED** in open court this 25th day of **February 2012**.

L. A. ACHODE
JUDGE