



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 376 OF 2011

HON. JAMES ONDICHO GESAMI..... PETITIONER

V E R S U S

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA ANTI-CORRUPTION COMMISSIONER....2ND RESPONDENT

COMMISSIONER OF POLICE..... 3RD RESPONDENT

RULING

1. By his Chamber Summons application dated 24th January, 2012, the petitioner sought various orders, prayer 1 and 2 of which were dispensed with on the 25th of January 2012. Prayer 3, which was urged before me on the 31st of January 2012 seeks an order:

‘THAT there be an order of stay of Kisumu CMCC Nos. 354 and 355 of 2011; Republic –vs- James O. Gesami for 14 days pending the hearing and determination of the Appeal against the ruling delivered by Justice Mumbi Ngugi on 20th January, 2012

2. The application is expressed to be brought under Rules 33 and 34

of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006** (the Gicheru Rules) **Article 159** of the **Constitution** and **Section 3A** of the **Civil Procedure Act** and all Other enabling provisions of the law.

3. Mr. Thiga for the petitioner submitted that the petitioner was seeking a stay of the two criminal cases against him in Kisumu being Criminal Case Nos. 354 and 355 of 2011 pending the hearing and determination of the appeal against the decision of this court made in this petition on the 20th of January 2012. The grounds for seeking the stay orders were that the applicant had decided to appeal against the decision and has filed a notice of appeal. If the order is not granted the criminal cases will proceed and the appeal will be rendered nugatory and the applicant stands to suffer irreparable loss.

4. Mr. Thiga submitted further that Rule 33 of the Gicheru rules allows the court, upon an informal application, to grant a stay for 14 days pending appeal. Rule 34 provides for the filing of an appeal which shall be governed by the Court of Appeal Rules. The definition of Appeal in Rule 2 of the Court of Appeal Rules includes an intended appeal.

5. Mr Thiga argued that the effect of the court's decision of 20th January 2012 dismissing the petition was to pave way for the two criminal cases to proceed. The petitioner would be subjected to the criminal process to his detriment. The petitioner is still urging his fundamental rights and freedoms and will do so once his appeal is in place. He submitted that it was therefore just and fair that the status quo be maintained pending the exhaustion of the process.

6. Mr. Thiga submitted further that under Article 23 of the Constitution, this court has wide jurisdiction in proceedings under the Bill of Rights. Article 23(3) gives the court wide powers to grant orders including the orders sought in this application. If the court does not grant the orders sought and the petitioner appeals and succeeds, his appeal will have been rendered nugatory. He had not annexed a memorandum of appeal showing the grounds of appeal as this was not necessary at this stage.

7. With regard to the submissions by the respondents, Mr. Thiga argued that they were technicalities which were locked out by Article 159(e) of the constitution. No authorities were cited to support the contention that the only options left to the petitioner were Order 42 of the Civil Procedure Code and Rule 5(2) (b), and the court should consider only the constitutional provisions. He also argued that the authorities cited by the 2nd respondent in opposing the application were distinguishable from the case before the court, and that a reading of Rule 33 of the Gicheru Rules and Article 23 would show that the court can make an order staying other cases that are the subject of the case before it and not just the judgment in question.

8. The respondents opposed the application and filed grounds of opposition dated 30th and 31st January respectively. Mr. Mule for the Director of Public Prosecutions submitted that a reading of Rule 33 of the Gicheru Rules confirms that this application can only be made immediately following the delivery of the ruling and that such orders can only be given for 14 days. The applicant's prayer No. 3 seeks stay for 14 days pending hearing of the Appeal.

9. Further, while the petitioner argues that the appeal will be rendered nugatory as the petitioner will be subjected to the criminal process, the court has dealt with the constitutional safeguards in its ruling dated 20th January 2012 and there were legislative safeguards under which the cases which the petitioner was seeking to stay would be conducted such as those contained in the Evidence Act, the Criminal Procedure Code and the Ethics and Anti-Corruption Act. Consequently, granting conservatory orders in this case would be an abuse of the court process.

10. Mr. Gikonyo for the 2nd respondent submitted that what is envisaged under Rule 33 of the Gicheru Rules is a stay for 14 days. He pointed out that immediately upon the delivery of the judgment on 20th January 2012 an informal application was made by Mr. Bwire for the petitioner which application was rejected. Once this provision of Rule 33 has been used by this court, it cannot be used again. This court therefore has no jurisdiction and is *functus officio*.

11. Mr. Gikonyo submitted further that in those circumstances, the petitioner's only option was to fall back on Order 42 of the Civil Procedure Code or Rule 5(2) (b) of the Court of Appeal Rules and file a formal application. The court could not grant the orders sought and he urged the court to dismiss the application.

12. With regard to the submissions by Mr. Thiga that the petitioner's appeal would be rendered nugatory and he would suffer irreparable loss, Mr. Gikonyo submitted that this was the threshold under Rule 5 (2) (b) and not under Rule 33 of the Gicheru Rules. He referred the court to the case of **Lawrence Sese Mosigisi-v- The Settlement Fund Trustees & Another Kisii High Court Civil Case No 31 of 2002** in this regard. He submitted that even going by the petitioner's own argument, he should have annexed a copy of the memorandum of appeal to support his argument that the appeal would be rendered nugatory. He also referred to the case of **Machira T/A Machira & Co. Advocates -v- East African Standard (2002) KLR 63** to support the contention that with regard to a formal application for stay, it is not enough to state that substantial loss will be suffered. The applicant must give specific details and particulars.

13. Mr. Gikonyo contended that the criminal process is a constitutional and legal process which cannot translate to irreparable loss and he referred to the case of **Thomas Patrick Gilbert Cholmondeley –v- Republic Criminal Appeal No. 116 of 2007**. He submitted that the court was in that case categorical that the criminal process should be protected from delays such as this.

14. Finally, he submitted that Rule 34 of the Gicheru Rules does not apply in this kind of application. It applies to proceedings falling under the Court of Appeal and has no relationship with rule 33. This court did not have jurisdiction to entertain this application as the issue of stay of the criminal cases was not an issue before the court. Rule 33 would only relate to appeal with regard to the judgment of the court.

15. I am grateful to the parties for their detailed and well argued submissions before me on this matter. However, my view of the matter is that I need not deal with the various arguments raised with regard to the intended appeal and the likelihood of loss to the applicant as my decision on the petitioner's application turns solely on the interpretation that is given to the court's powers under Rule 33 of the Gicheru Rules, which provides as follows:

'The High Court may upon an informal application immediately following the delivery of judgment or ruling grant a stay for fourteen days pending appeal.'

16. Two issues arise with regard to this rule. The first is what the stay provided for under the rule is intended to cover. In my view, this rule pertains to a stay of the ruling or judgment that a court has just delivered. It cannot by any stretch of the imagination apply, as the petitioner argues in this case, to staying proceedings before a different court even though those proceedings had given rise to the constitutional petition before the court.

17. The second issue is whether, once an informal application has been made under rule 33 and rejected, it is still open to the party dissatisfied with the decision to file a formal application for stay, as the petitioner has done in this case.

18. When the court delivered its ruling on the 20th of January 2012, Mr. Bwire applied for a stay to enable the petitioner file a formal application. The court pointed out then, and I believe still that this is the correct position on the matter, that there was nothing for the court to stay as its decision had been a dismissal of the petitioner's petition.

19. What was open to the petitioner then, and remains open to the petitioner now, is to move the appellate court for orders staying the prosecutions in the criminal cases in Kisumu. I agree with the respondents that this court became ***functus officio*** upon pronouncement of its judgment on 20th January 2012 and its subsequent ruling upon the informal application by the petitioner's counsel for a stay of the judgment.

20. With regard to the submissions by Mr. Thiga with regard to the wide powers of this court under the constitution, the arguments hark back to the arguments made before the court at the hearing of the petition and with respect to learned counsel, they will not be of much assistance to the petitioner at this stage.

21. In the circumstances I find no merit in the application and the same is dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 3rd day of February, 2012

Mumbi Ngugi
Judge