



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Constitutional Petition 156 of 2011**

**IN THE MATTER OF ARTICLES 3,19,21,22,23,15 AND 165 OF THE CONSTITUTION OF  
KENYA 2010**

**MARY NGECHI NG'ETHE ..... PETITIONER**

**-VERSUS-**

**THE HON.THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE KENYA ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

The Petitioner had asked this court to put to an end the criminal proceedings that had been instituted against her. It was her considered view that the Respondents had lost or compromised their rights to prosecute her after she had made a full and true disclosure of facts pertaining to the procurement and purchase of L.R. No. 14759/2, by the City Council of Nairobi. That land was intended for use as a cemetery.

By a judgment date 28<sup>th</sup> March 2012, this court dismissed the petition.

The Petitioner was dissatisfied with the said Judgment. Therefore, she lodged an appeal before the Court of Appeal.

The petitioner has also filed an application before the Court of Appeal for stay of the criminal proceedings until her pending appeal is heard and determined. That application is **MARY NGECHI NG'ETHE Vs. THE HON. ATTORNEY GENERAL & ANOTHER, CIVIL APPLICATION NO. NAI 157 of 2012.**

Whilst waiting for the Court of Appeal to hear and determine the application for stay of criminal proceedings, the Petitioner has brought another application before this court, seeking an interim stay of the same criminal proceedings.

It is the contention of the Petitioner that there is a gap in the law pertaining to the period between the grant of an order by the High Court, and the time when the dissatisfied party obtains relief from the Court of Appeal.

How does that gap come about?

The Petitioner points out that the High Court is authorized to grant an order of stay for 14 days pending an appeal. Therefore, it is the Petitioner's contention that the framers of the legislation must have contemplated that the 14 days period during which a stay would be in place, was sufficient to enable the party intending to appeal, to have obtained appropriate interim relief from the appellate court.

However, in reality, the appellate court is not able to adjudicate on applications that fast. Consequently, as had happened in this case, the interim orders for stay of proceedings lapsed before the Court of Appeal had dealt with the application filed before it.

The interim orders were originally made on the same date when the court dismissed the Petition. At that stage, the Petitioner's advocate, Mr. Kibe Mungai, asked this court to grant a stay of the petitioner's prosecution:

***“pending the filing of a formal application before the Court of Appeal.”***

Although the respondents and the interested parties opposed the application, this court did grant an order in the following terms:

***“There shall issue forthwith a stay of prosecution of the***

***petitioner (only) in ACC No. 19/2010 and ACC No. 20/2010, for the next 14 days, pending the lodging of a formal application for stay pending appeal. The said formal application is to be made before the Court of Appeal.”***

After that order lapsed, the petitioner moved the court for an extension of the same. On 16<sup>th</sup> April 2012, Warsame J. gave an order in the following terms;

***“Matter certified as urgent and leave to be heard during the current vacation is granted. Order to allow the applicant to proceed to the Court of Appeal and obtain an order of stay of the earlier order lapsed last week; I grant an order for stay for a period of 14 days within which the applicant shall seek and obtain an order of stay. It means there is no need to prosecute the applicant's Chamber Summons dated 13<sup>th</sup> April 2012. There was no possibility of an extension before the High Court in the event the applicant fails, by any chance, to seek and obtain stay pending appeal. Costs in the cause.”***

Within 14 days of that order, the stay lapsed. It is common ground that on 15<sup>th</sup> June 2012 the proceedings in ACC No. 20/2012 went on. The case was then adjourned to 18<sup>th</sup> June 2012.

The petitioner finds herself between a rock and a hard place. Her application for stay of prosecution is pending before the Court of Appeal. Meanwhile, the stay orders which she had received from the High Court had lapsed. That means that there was no bar to the prosecution of the petitioner.

In the circumstances, the petitioner submitted that the High Court had an obligation to offer her protection in the interim.

Her reasoning was that the court's overriding concern was to ensure that the appeal pending before the Court of Appeal was not rendered futile.

The first respondent was represented by Mr. Okello, learned state counsel. He took the position that this court was already *functus officio*, after it granted to the petitioner an interim order, staying the criminal proceedings.

Mr. Okello submitted that the only recourse available to the petitioner is to seek an order of stay from the Court of Appeal.

In any event, the petitioner is faulted for bringing ACC No. 44/2010 into this Petition, whereas that case was never a part of the original Petition.

A close scrutiny of the application reveals that there is no relief sought in relation to ACC No. 44 of 2010.

The petitioner was compelled by an order of the trial court, to give evidence in ACC No. 44 of 2010. Having done so, the petitioner feels that she cannot expect a fair trial from that court, because she still believes that she ought not to be both an accused and a witness in cases emanating from the same set of facts.

This court has already dismissed the petition. That decision opened the way for the respondents to prosecute the petitioner, if they were so minded.

Those proceedings would not be in ACC No. 44 of 2010, as the petitioner is not an accused person in that case.

That notwithstanding, the petitioner has constitutional safeguards to have a fair trial. Pursuant to **Article 50 (2) (1)**, the petitioner has a right to refuse to give self-incriminating evidence.

Furthermore, pursuant to **Article 50 (4) of the Constitution**

***“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”***

Therefore, I still hold that by allowing the criminal proceedings to go ahead would not be prejudicial to the petitioner.

But I am not infallible. I recognize that there is a possibility that the appellate court could overturn my verdict. It is in acknowledgement of that fact that I readily granted a temporary stay of the criminal proceedings, so that the petitioner may have the opportunity to canvass her application before the Court of Appeal, for stay pending appeal.

In similar vein, Warsame J. also granted a stay for 14 days.

During the period when the stay was in place, the petitioner was supposed to have moved the Court of Appeal on her application for stay pending appeal.

The petitioner did file her application before the Court of Appeal, seeking stay. However, her only practical problem is that the said Court did not move quickly enough, to enable the petitioner prosecute her application whilst the interim orders of the High Court were still in force.

Is that reason enough to warrant a further stay of the criminal proceedings?

Mr. Mubea, learned advocate for Mr. John Gakuo, (who is the 2<sup>nd</sup> accused in ACC No. 20 of 2010), reminded this court that his client was entitled a speedy trial. The delay in the trial was prejudicial to his client.

I was therefore asked to uphold the rights of the 2<sup>nd</sup> accused by letting the trial proceed.

Of course, every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay. The rationale for that right readily comes to mind, as with each passing day when a person has a criminal charge hanging over his head, his mind remains unsettled.

Any hurdles that stand in the path of the expeditious disposal of a criminal trial is to be frowned upon.

I am alive to the fact that Mr. Gakuo could possibly seek to have the case against him separated from the petitioner's case. But, as the Attorney General submitted, such separation would also give rise to logistical difficulties, as the facts giving rise to the three cases are the same.

The most efficacious manner of achieving justice for all the accused persons would be to have the cases heard as one. Each party would thus have his or her say under one umbrella, resulting in a composite assessment of all the evidence relating to all the parties.

At the same time, it is evident that Mr. Gakuo is a respondent to the application of the petitioner. By virtue of that fact, his answer to the application is in the nature of a shield, as opposed to a sword.

A shield is used by a person who is protecting himself from an attack, whilst a sword is used by the person launching the attack.

Of course, the person protecting himself may also apply the element of an attack as a mechanism for defence. But a shield alone is not a weapon that can advance an attack.

The point I am advancing is that the respondents cannot use their shields against the application herein, to also attack the petitioner.

The petitioner's sword is aimed at confronting her own trial. The trial of the other accused persons ought therefore not to be confronted by a weapon not directed at them.

In effect, if the petitioner were to persuade me to temporarily halt her trial, this court would not give an order that was all encompassing, so as to stop the trials of the other accused persons.

Has the petitioner persuaded the court to either grant another interim order of stay or to review its earlier order?

The petitioner concedes that **Rule 33** of the "Gicheru Rules" comes into play immediately after the court makes its determination of an application. The same court may still grant an interim relief, pending further action which the unsuccessful party may take before the appellate court.

The petitioner did invoke that rule, and this court granted interim relief.

After the said interim relief lapsed, the petitioner moved the court for yet another interim relief. Warsame J. granted another interim order.

The two interim orders were clothed with wordings which made it crystal clear that the reliefs were for limited periods of time. The said periods of time were deemed by the court to be sufficient to enable the petitioner to move the Court of Appeal.

The petitioner has already lodged an application for stay of the Criminal trial: that application is before the Court of Appeal. This court was informed that the application was filed under a Certificate of Urgency. Therefore, the petitioner ought to have taken steps to persuade the Court of Appeal that her application was urgent.

The petitioner should also have sought to persuade the Court of Appeal to grant conservatory orders.

To my mind, it is ill-advised for a party who has moved up to an appellate court to revert to the court appealed from, seeking interim relief after the said court had already given an interim relief in the first instance after it determined the case.

It is prudent for the appellate court to assess for itself, the sense of urgency in the matter placed before it. It is also prudent that that appellate court should be the forum for determining whether or not any conservatory order should issue pending either the substantive hearing of the application before it, or

even pending the determination of the appeal itself.

I therefore decline the petitioner's request for an order of stay to stop the criminal proceedings in ACC No. 19 of 2010 and ACC No. 20 of 2010.

I also find no basis in law or in fact to warrant a review of the orders made on 28<sup>th</sup> March 2012.

In the result, if the Court of Appeal has not granted any order for the stay of the criminal cases to which the petitioner is a party, (as one of the accused persons), the cases may now proceed to trial.

I only reiterate that during the said trials, the learned trial magistrates must take all appropriate steps to ensure that the petitioner's constitutional rights to a fair trial are scrupulously safeguarded.

Each party shall meet his or her own costs of the application.

**Dated, Signed and Delivered at Nairobi, this 25<sup>th</sup> day of October, 2012.**

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**FRED A. OCHIENG**

**JUDGE**