REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO.54 OF 2006

CHRISTOPHER NDARATHI MURUNGARU ..... PLAINTIFF

AND

THE KENYA ANTI-CORRUPTION COMMISSION ..... 1ST DEFENDANT

HON. ATTORNEY GENERAL ..... 2ND DEFENDANT

RULING

In a ruling I delivered yesterday 2/2/2006 in the afternoon I disallowed prayer 2 of the application by way of a chamber summons dated 1st February 2006. The ruling speaks for itself. However its fate was sealed on two grounds namely that it was incompetent and even if the court invoked the wide powers it has under s 84(2) of the Constitution for the purpose of enforcing and securing the enforcement of any of the chapter 5 provisions on fundamental rights and freedoms, a conservatory order could not be made in the terms sought or at all for the reason that at that time the court after taking into account several considerations which were powerfully articulated by counsel for the opposing sides came to the tentative conclusion that what was threatened was the applicant being asked by the 1st respondent namely the Kenya Anti Corruption Commission (KACC) to assist in the investigations as per the letters exhibited to court. After placing the applicants alleged violations or contraventions as enumerated in the O.S with the public interest issues or values of crime detention, prevention and control I concluded that the balance titled heavily in favour of not granting any conservatory order or the "automatic" order sought in the prayer.

This afternoon the learned Senior Counsel for the applicant, Mr Paul Muite has made an oral application for stay pending appeal against the ruling I gave yesterday. He has cited in support of his application for stay the case of ERINFORD PROPERTIES LTD v CHESHIRE COUNTY COUNCIL [1974] 2 ALL ER 448 and the local case of MADHUPAPER INTERNATIONAL LTD v KERR (1985) KLT 840. The ratio in both cases is that where a Judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant and injunction pending an appeal against the dismissal it is not necessary for the applicant to apply to the Court of Appeal and that there is no inconsistency in granting such an injunction after the dismissal. This then is the ratio in the two cases cited.

On the other hand Prof Githu, the learned counsel for the 1st respondent has argued that the court should note that the two decisions relates to injunctions and not a stay as in this case and further that at page 846 of the Madhupaper case the learned Judges of the Court of Appeal did indicate that there are exceptions to the ratio in these terms:

"**There are cases however where it would be wrong to grant an injunction pending appeal. They would include where the appeal is frivolous or to grant it would inflict greater hardship then it would avoid. And there will be others which we have not expressed yet."**

Prof Githu also submitted that the case before the court is not a fit one and even if the ratio were to apply outside the sphere of injunctions this case leans heavily in falling within the exception as set out in the quotation above.

Mr Mungai for the Attorney General the 2nd respondent adopted Githu's submissions but added that in view of the fact that one of the grounds for the failure of prayer (2) was its incompetency the ratio in Madhupaper or Erinford cases did not apply.

I have given this matter serious thought and reflection and I must state at the outset that I am bound by the rule of precedent to bow to the Court of Appeal's findings in the Madhupaper case. The first bow is the fact that unlike the Erinford case I have allowed arguments on the application for stay interparties. It is however clear to the court that the two cited cases are distinguishable from the case I am handling for the following reasons:

1) The considerations which go into whether or not a court should grant an injunction are different from those relating to the grant of conservatory orders. Section 84 does not lay or prescribe the conditions and for this matter the court does have considerable latitude on whether or not to grant conservatory orders. In other words the court has to exercise its discretion based on the peculiarities of the case before it. Indeed in striking the balance I alluded to yesterday I did exercise my discretion taking into account the factors I considered material.

In this regard, lest I be misunderstood I claim no infallibility – I have in my career granted stays or injunctions pending appeal of my decisions.

The Erinford decision does not also apply to cases where the applications are incompetent such as the case before me or to cases where a Judge considers the grounds of the intended appeal frivolous.

2) Both cases emphasise that the rule on the grant of injunctions pending appeal is not cast in stone and that they have specifically stated exceptions such as hardship cases – where such an injunction would cause greater harm than it would avoid.

I believe that the court is not being technical about this matter and fully agrees with the learned Senior Counsel Paul Muite that the OS does raise various constitutional points for argument but this can properly be taken care of by fast tracking of the hearing of the Originating Summons and one of the reasons for the mention this morning was to do exactly that – this court sees no immediate threat or violation in the intended investigations and there is nothing to prevent counsel from moving the court as the events unfold – the doors of the court will remain open as they always do to all litigants on certificates of urgency.

Yesterday I gave a ruling based on the interplay of the two competing ideologies in our criminal justice system namely the need to balance the demands of due process with those of crime detection, prevention and control and nothing has changed since yesterday.

On balance, I incline to the view that the grant of a stay in the circumstances would cause greater hardship to the law enforcement agencies and inhibit the workability of their strategies. At this time and an age which has a technology which could not have been imagined only two decades away any delay in the conduct of investigations especially financial could result in the outcome being defeated – by say a swift wire transfer of any funds to destinations immune to any court tracing orders or the destruction of evidence in a manner defying reconstruction just give two hypothetical examples not related to this case.

In conclusion I should point out that this court values and cherishes fundamental freedoms and rights and would be in the fore front in securing and defending them. In all humility I was among the first Judges to give conservatory orders under s 84 of our Constitution – refer to the Milimani Court jailed lawyers – I

have also granted a habeas corpus order and bail – and also given a conservatory order against a deportation order. It is in this light that I salute the ruling of my brother Justice Ibrahim in the case cited and when he says that injunctions can be granted under s 84.

Even in Madhupaper case the Court of Appeal did not grant the injunction in favour of the receiver continuing to take care of the business. We are therefore not obliged to continue with black lettering of precedents but we must endevour to do justice in each case that comes before us with its own peculiar facts. The age of creating new jurisprudence for our age and time has dawned and we have an obligation to create that jurisprudence. Thus I have determined this matter on the basis of two equally important ideologies in one criminal future system. Moreover our jurisprudence I dare say must again bring the public interest consider actions to the fore.

In the result the oral application for stay is refused or declined.

Costs shall be in the cause.

It is so ordered.

Dated and delivered on 3rd February, 2006.

J.G. NYAMU

JUDGE