



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 621 of 2005

REPUBLIC
APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT 1ST
RESPONDENT

THE ATTORNEY GENERAL 2ND
RESPONDENT

RULING

The application dated 1st November, 2005 seeks to set aside the order for leave and stay issued on 3rd May and extended on 3rd June, 2005.

It is supported by an affidavit of Gabriel Matiso Maanda sworn on 1st November, 2005.

The court had given leave for the ex-parte applicant to apply for an order of prohibition to prevent the Director of Criminal Investigations and the Attorney General from instituting criminal proceedings against Davanis Supplies Ltd, David K. Mudu and Evans Matunda in relation to any matter pertaining or touching on the property known as LR 25158 (Mavoko) and/or summoning, investigating, questioning or making enquiries against the applicants in relation to the said property.

The court upon granting leave also ordered that such leave does operate as stay. The grounds upon which the application for leave were based as per the statement were inter alia:-

1. The first respondents actions aforesaid are illegal highhanded and unjustifiable
2. The present dispute is purely civil in nature and has no criminal connotation and the First respondent should leave the parties thereto to ventilate their rights in civil court
3. The first respondent is evidently activated by extraneous motives and mala fides as there is already a civil suit in the High Court pertaining to the dispute herein which is still ongoing. The court considers it important to set out the order in extenso as follows:

(1) “that the applicants be and are hereby granted leave to institute judicial review proceedings against the director of CID and the Hon the Attorney General by way of orders of prohibition.

(2) That the leave granted herein do operate as stay of the decision of the Director of Criminal Investigation Department to institute and/or undertake criminal proceedings against the proposed applicants in relation to the property known as LR25158 (Mavoko) for 21 days only provided the stay does not extend to stopping the 1st respondent from continuing with investigations and inquiries concerning the matter

(3) That the respondents be at liberty to apply for discharge or lifting of the order for stay any time for good reasons

(4) That an order for stay be and is hereby granted until the determination of the main application which has now been filed.”

The application is opposed.

(1) On the ground that only the Director of CID or the Attorney General may apply to set aside on the wording of the order and the applicant claims only to be an interested party

(2) The applicant has no locus standi

(3) The application is grounded on Civil Procedure Rules and such rules are inapplicable in judicial review

(4) The court has no jurisdiction at this stage to set aside the order for leave having been acted upon by the subsequent filing of the Notice of Motion seeking the judicial review order of prohibition

(5) The IP is not interested in the subject matter in that it is the Hon. The Attorney General who has an interest in prosecutions in law in that only the Attorney General has interest in criminal proceedings

(6) That the grant of the order for leave and stay was grounded on HCCC 17/2000 is misplaced in that the foundation of the ex-parte applicant's case was capricious abuse of statutory and prosecutorial powers by the respondent

(7) That S 193A of the Criminal Procedure Code on duality of Civil and Criminal jurisdictions does not assist the applicant in that S 193 A cannot be used to prevent or stifle judicial review jurisdiction

(8) That the ex-parte applicant is not guilty of any material non disclosures because the fact of the applicants being registered owners of the Mavoko property was disclosed

(9) That the later application is an abuse of the court process as an earlier similar application dated 16th September, 2005 which had been filed as is still pending.

The ex-parte applicants had filed grounds of opposition on 22nd December, 2005 raising the same grounds as above except for the addition that the application is overtaken by events. The ex-parte applicants skeleton arguments filed on 16th March 2006 raise the same points.

The Attorney General filed skeleton arguments on 3rd February 2006 where the substantive ground is S 193A of the Criminal Procedure Act.

On 28th February 2006 the applicant (Interested Party) filed skeleton submissions and lists of authorities and contends:-

(a) That this court has jurisdiction to set aside and relies on the Court of Appeal decision of **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR AND OTHERS v JOB KILACH CA 77/2003**

(b) The applicant (Interested Party) has locus standi being the registered owner of property LR 25958 Mavoko which is the subject matter of the criminal proceedings and being the party affected by the order for leave as a complainant and further the ex-parte applicants did not serve the ex-parte order for leave and stay on the applicant/Interested party hence the delay in bringing the application and finally there can be no basis for the stay continuing in that HCC No 17/2000 has since been withdrawn by consent and the case formed the basis for the application for leave.

When the court set out the above somewhat lengthy background it was of the view that all the above points would call for determination. This was so until the court perused the proceedings in the lower court when it became clear to the court that on 25th May 2005 proceedings were instituted in Criminal Case No.1144 of 2005 in the Chief Magistrate's Court. However on 17th June, 2005 the proceedings were stayed to await the Judicial review proceedings.

It has not been demonstrated to this court when the ex-parte orders were served on the Director of CID and the Attorney General because if there is proof of service prior to the framing of the charges and the institution of the criminal proceedings both public officials would be in contempt of court. No application for contempt has been filed to date.

On the other hand if the ex-parte orders were never served on the said public officials and they went on to institute the proceedings there is actually no valid order staying the criminal proceedings. As a result it is the view of the court that the application to set aside has been overtaken by the events of the institution of the proceedings since the order obtained only restrained the institution of proceedings and this has already happened. It is clear from the statement that the relief sought was to stop the institution and not to stop an ongoing criminal case by way of an order of prohibition directed at those proceedings. An order of prohibition operates as to the future. Only an order of certiorari reaches out to the past. An order for leave cannot have a wider scope than what is contained in the statement. As the criminal proceedings had been stayed by the lower court, that court is now at liberty to proceed. I decline to set aside the order for leave but I hereby set aside the order that such leave do operate as stay for the reasons given above. It would not be proper for this court to labour in vain and for this reason the court will not determine the points as raised above. The order for leave shall remain in force.

In the circumstances I make no order as to costs.

DATED and delivered at Nairobi this 5th day of May 2006.

J.G. NYAMU

JUDGE