

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 406 OF 2001

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

KIPNG'ENO ARAP NG'ENY.....APPLICANT

AND

IN THE MATTER OF ATTORNEY GENERAL.....1ST RESPONDENT

KIPNG'ENO ARAP NG'ENY AND PAUL NDARUA....2ND RESPONDENT

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI

CRIMINAL CASE NO. 808 OF 2001.....REPUBLIC

RULING

In their application for leave to file an application for Judicial Review Proceedings, the applicants are at the same time asking for the leave to act as a stay of the criminal proceedings filed against them by the State.

Under Order 53 Rule (1) (4) of the Civil Procedure Rules under which the application is made, where leave to move for Judicial Review has been granted and the relief sought is an order for prohibition or certiorari if the court so directs the grant of the leave to move for Judicial Review operates as stay of the proceedings to which the Judicial Review application relates until the determination of the application or further order.

When the parties appeared before me on 30th April, 2001 I granted leave and directed that the Attorney General be served with the application so that if he found it necessary to appear on 3rd May, 2001 for the inter parties hearing on the question of Stay. Mrs. Oduor appeared on behalf of the Attorney General this morning and took the stand that due to the Ruling by the Court of Appeal in the Civil Application No. 81 of 2000 in which the court ruled that the application must be made Ex-Parte, they considered themselves without audience. In directing that the Attorney General be served, I was guided by the recent decision in R.V. Kensington and Chelsea Royal London Borough Council Ex Parte, Hammel (1989) 1 ALL ER 1202 where the English Court of Appeal held that unless the relief is of particular urgency the Judge should normally adjourn the application for an inter parties hearing. I had considered that since the Criminal Case is not to start until the 25th June, 2001. There was sufficient time for the Attorney General to be served without jeopardizing the reliefs sought. In this case it was further observed that it would be a good practice for the applicant to give the respondent notice of any ex parte application for interim relief so that he could be present and thereby give the need for two hearing.

I should perhaps point out that Rule 53 rule 10 of the English SCR is the equivalent of our Order 53 rule 1 (4) of the Civil Procedure Rules and that the law on Judicial Review applicable in U.K. is applicable here. I accept those views.

The leave in this case was granted on the basis that the material before the court showed that there was an

arguable case for granting the relief claimed by the applicant.

In their application, the applicants are asking for orders to prohibit their prosecution in Criminal Case No. 808 before the Chief Magistrate. In their application, the applicants are raising issues, which touch on their fundamental rights. These are issues, which will need to be gone into in the main application, and the outcome would affect the proceedings in the criminal case in the lower court. In such a case it would be against all common sense not to grant a stay of the criminal proceedings to await the outcome of the application in the High court. The grant of leave is recognition that the applicants have a case, which merits further examination by the court. I do not think there are any doubts in relation to the existence of a Judicial discretion to stay criminal proceedings to do what the justice of case demands.

For these reasons the grant of leave granted in this application shall operate as a stay. What this means is that the hearing of the criminal case number 808 of 2001 before the Nairobi Chief Magistrate shall be stayed until the application for the Judicial Review is heard and determined.

Dated and delivered at Nairobi this 3rd day of May, 2001.

Kasanga Mulwa

JUDGE