



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO 50 OF 2012

AFRICAN CENTRE FOR RIGHTS AND

GOVERNANCE (ACRAG).....1ST PETITIONER

JOHN MUCHINA.....2ND PETITIONER

JOHN MUCHIRI.....3RD PETITIONER

ELIZABETH WANJIKU.....4TH PETITIONER

VERSUS

NAIVASHA MUNICIPAL COUNCIL.....RESPONDENT

RULING

(Application to stay a sentencing hearing pending appeal over an order holding the applicants to be in contempt of court; application allowed).

1. The application before me is that dated 5 September 2018 and filed on 7 September 2018. It is an application said to be brought pursuant to the provisions of Section 33(3) of the Contempt of Court Act, Act No. 46 of 2016 and Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya and all other enabling provisions of the law. The main prayer sought in the application, is for this court to stay further contempt proceedings against the Governor, Nakuru County, and the County Executive Officer in charge of Environment, Natural Resources, Energy and Water, pending the hearing and determination of an intended appeal on my ruling delivered on 11 July 2018, through which I found the two officers to be in contempt of court.

2. By way of background, the petitioners filed this suit, alleging that the respondent has illegally converted into a dumpsite, the land parcel Naivasha/Maraigushu/ Block11/4(Karai). The petitioners averred that the continued use of the said land as a dumpsite, was infringing on their constitutional rights to a clean and healthy environment. I heard the petition and delivered judgment on 31 May 2017 vide which I allowed the petition. In my judgment I made orders inter alia, declaring that the operation of the dumpsite is illegal. I gave the respondent time to regularize its use, failure to which, the dumpsite would have to be closed. Through an application dated 23 October 2017, the petitioners contended that the respondent has failed to abide by the terms of the judgment and wished to have the Governor of Nakuru County, the County Executive Officer in charge of Environment, Natural Resources, Energy and Water, and the Chief Officer in charge of Environment, Natural Resources, Energy and Water, cited for contempt. I heard the contempt application and delivered a ruling on 11 July 2018, vide which I held the Governor and the County Executive Officer to be in contempt of court. I then gave directions on mitigation and fixed the matter for 27 September 2018 for a sentencing hearing. I heard this application on 18 September 2018, and reserved the ruling for today, and in the meantime, I made orders staying the sentencing hearing.

3. In this application, the applicants have mentioned that they are aggrieved by the ruling of 11 July 2018 and that they have preferred an appeal. They thus wish to have further proceedings, that is, the sentencing hearing, stayed, until the appeal is determined. It is their view that unless a stay is granted, the appeal may be rendered nugatory.

4. The petitioners have opposed the application through filing of Grounds of Opposition in the following terms :-

(i) That the applicants have failed to purge the contempt herein and as such they ought not to be heard.

(ii) That no good reason has been shown as to why the applicants have failed to obey and implement this court's orders of 31st May

2017.

(iii) *That the rule of law has been deliberately undermined.*

(iv) *That the applicants have not demonstrated and/or shown that they have an arguable appeal.*

(v) *That the applicants have not demonstrated and/or shown whether the intended appeal would be rendered nugatory were the orders sought denied.*

(vi) *That the instant application is premature and predicated on fear, speculation and conjecture, with regard to the looming mitigation and sentencing.*

5. I took in brief submissions from Mr. Ondieki, learned counsel for the applicants, and Mr. Magata, learned counsel for the petitioners, and I have taken note of these in arriving at my decision.

6. I have already, in my ruling of 11 July 2018, held the applicants to be in contempt of court and what is pending is a sentencing hearing. I have seen that the applicants have filed a Notice of Appeal against my ruling of 11 July 2018 which held them to be in contempt of court and it is not for this court to curtail the applicants' right to contest the ruling. Much as this court is of the opinion that the conduct of the applicants does not warrant them any reprieve, I would not wish to stand in the way of the applicants, who are of the view that they ought not to have been held to be in contempt. It is their right to prefer an appeal, and whether or not their appeal is merited, will have to await the decision of the appellate court. The sole question is whether I should allow a stay of proceedings, or proceed to sentencing. Mr. Magata, in opposing the application, argued that nothing stops the applicants from proceeding with the appeal even after sentence. That indeed is correct but a look at precedent reveals that courts are more inclined towards staying the sentence pending hearing, of the appeal.

7. Neither counsel referred me to any authorities, but I have, in my research, seen that the Supreme Court, in the case of ***Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2014)eKLR***, (ruling of 29 December 2014), did make orders staying a mitigation and sentence hearing pending an appeal on the order that held the applicants to be in contempt of court. In allowing the stay orders, the Supreme Court reasoned as follows at paragraph 66 of the decision :-

[66] Indeed, if this Court declined to maintain the status quo, the High Court would proceed to take mitigation, and then sentence the applicants. There is a likelihood, in that case, that the applicants would be incarcerated, and the substratum of the appeal-cause would have been spent. In the event that this Court eventually finds in favour of the applicants, it would be impossible to compensate them by way of costs. In the alternative, if the Court finds in favour of the respondents, no harm would have been occasioned to them.

8. Similarly, the Court of Appeal, in the case of ***National Bank of Kenya & Another vs Geoffrey Wahome Muotia, Court of Appeal at Nairobi, Civil Application No. NAI 283 of 2015 (UR 241/2015), (2016)eKLR***, did issue orders of stay of proceedings before mitigation and sentence, pending an appeal against the order that held the applicants in contempt. The Court reasoned as follows :-

*If we do not grant the orders of stay of proceedings sought herein, it is very likely that the proceedings in the High Court will continue, with the result that some officers of the applicant company may be sentenced, which sentence may entail a loss of liberty. In that event, any intended appeal from the impugned ruling will therefore have been rendered nugatory. Similar circumstances were obtaining in ***Rev. Jackson Kipkemboi Koskey & 7 Others V Rev. Samuel Muriithi Njogu & 4 others [2007] eKLR (Civil Application No 311 of 2006)*** wherein the Court adopted with approval the sentiments expressed in ***Stanislaus Nyagaka Ondimu v Kalyasoi Farmers Co-Operative Society & Others Civil Application No. Nai. 337 Of 2005 (unreported)*** where this Court stated that:*

“...we are of the view that this is a proper case in which we should exercise our discretion in favour of the applicant. It cannot be denied that to refuse the application would render the intended appeal nugatory since the applicant is likely to have served the six months jail sentence by the time his appeal comes up for hearing.”

9. I stand guided by the above decisions. If I do not grant a stay as sought by the applicants, I will indeed proceed to sentence the applicants and such sentence may involve a suppression of their liberty. In the event that they succeed on appeal, then they will have suffered a sentence which they ought not to in the first place.

10. I will therefore allow this application and do order a stay of the sentencing hearing, pending determination of the appeal.

11. Costs of this application shall be costs in the appeal.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 4th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms. Auta holding brief for Mr. Nyamumbo for the applicants.

Mr. Magata for the petitioners.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU