



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ACEC MISCELLANEOUS CASE NO. 23 OF 2020

H. E. HON. MBUVI GIDION KIOKO MIKE SONKO.....APPLICANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

AND

PETER MBUGUA KARIUKI.....1ST INTERESTED PARTY

PATRICK MWANGANGI.....2ND INTERESTED PARTY

WAMBUA NDAKA.....3RD INTERESTED PARTY

ANDREW NYASIEGO.....4TH INTERESTED PARTY

SAMUEL MWANGI NDUNGU.....5TH INTERESTED PARTY

EDWIN KARIUKI MURIMU.....6TH INTERESTED PARTY

LAWRENCE MWANGI MUKURU.....7TH INTERESTED PARTY

PRESTON MWANDIKI MIRITI.....8TH INTERESTED PARTY

HARDI ENTERPRISES LIMITED.....9TH INTERESTED PARTY

TODDY CIVIL ENGINEERING LIMITED.....10TH INTERESTED PARTY

ANTHONY MWAURA NG'ANG'A.....11TH INTERESTED PARTY

ROSE NJERI NGANGA.....12TH INTERESTED PARTY

ARBAB AUTO LIMITED.....13TH INTERESTED PARTY

ROG SECURITY LIMITED.....14TH INTERESTED PARTY

HIGH ENERY PETROLEUM LIMITED.....15TH INTERESTED PARTY

ANTHONY OTIENO OMBOK ALIAS JAMAL.....16TH INTERESTED PARTY

RULING

The applicant, **H. E. HON. MBUVI GIDION KIOKO MIKE SONKO** has moved this court by way of an amended Notice of Motion dated 17.11.2020. The initial application was dated 11.9.2020. The application is brought under section 362 of the criminal Procedure Code and Articles 35, and 50(4) of the constitution of Kenya. The application, on the face of it seeks several prayers, being:-

- i) That this Honourable court be pleased to issue an order setting aside, vacating and or reviewing its order issued on 14.1.2020 pending the hearing and determination of this application.***
- ii) That is the alternative, this honourable court be pleased, to stay the execution of its order issued on 4.1.2020 pending the hearing and determination of this application.***
- iii) That this Honourable court be pleased to issue an order staying the proceedings in Nairobi Anti-Corruption case numbers 31/2019, 32/2019 and 1/2019, Republic Versus Mbuvi Gidion Kioko Mike Sonko and others, and all consequential orders arising therefrom pending the hearing and determination of this application.***
- iv) That this Honourable court be pleased to issue an order staying the proceedings in the 3 above named cases, and all consequential orders arising therefrom.***
- v) That this Honourable court be pleased to finds and determine that the respondents have failed to comply with the rules and directions on disclosure and discovery of evidence in the above 3 cases.***
- vi) That this Honourable court be pleased to compel the respondents to fully comply with the rules and directions on disclosure and discovery of the evidence in this 3 named cases.***
- vii) That in its supervisory jurisdiction over subordinate, this court be pleased to call for the record and entire proceedings pending before the Chief Magistrate's court at Nairobi (3 anti-corruption cases named above) and make such orders or give such directions appropriate to ensure the protection of the applicant's rights under Article 50(3) of the constitution for fair hearing and for the ends of justice.***
- viii) Lastly that this Honourable court be pleased to issue any such orders as it may deem just and expedient to ensure the ends of justice are met.***

The applicant's application has been supported by the Affidavit originally sworn on 11.9.2020. the applicant has also filed a supplementary affidavit sworn on 9.11.2020. When the matter came up for hearing, Dr. Khaminwa just made short submissions in which he adopted the pleadings that had been placed on record by the applicant. He only re-iterated that under Article 50(2), a dispute ought to be decided in a just and fair manner, and in a public hearing.

The affidavits filed by the Applicant brings out the case of the Application. It is the contention of the Applicant that the order issued by the Court on 14.1.2020 were as follows;-

- Witness protection orders are hereby granted for the protected witnesses statements be redacted.***
- Witness protection orders be and are hereby granted for the protected witnesses to testify in a closed session.***
- Witness protection orders be and are hereby granted for the protected witnesses to use pseudonyms during the hearing of their evidence.***
- Witness protection orders be and are hereby granted for the protected witnesses to use witness box during the taking of their evidence.***

It is the applicant's case that some of the documents and witness statements supplied had been fundamentally redacted, leaving no substance for the defence in the same. It was however, noted that the essence of redaction is to hide the identity of or to protect the witness, and not to prejudice the accused in the preparation of his defence. That the manner in which the documents have been redacted have violated the requirements of Article 50(2)(b) of the constitution. The applicant maintains that the redaction of witness statements should exclude witnesses. Personal details such as names and addresses among other particulars but that the accused should at all times have the substance of the evidence to be adduced at the trial. Further, the applicant submitted that the copies submitted are not of the originals, and were not paginated.

In the supplementary affidavit filed on 16.11.2020, the applicant has raised issues with the manner in which the 3 cases have been carried out at paragraph 27, and maintained that the Respondents have abused and deliberately interpreted the orders of 14.1.2020, to the detriment of the appellants. The applicant prayed that this application be allowed.

In the filed submissions, the applicant relied on a number of decided cases,

- i) High Court Miscellaneous Criminal Application No. 345/2001, George Ngothe Juma & 2 others Versus Attorney General, that failure to disclose statements/or exhibits in advance and their use at the trial may lead to material irregularity in the course of the trial.***
- ii) Court of Appeal Criminal Appeal No. 116/2007 Thomas Patrick Gilbert Cholmondeley Versus Republic, that there is a duty on***

the part of the prosecution to disclose to an accused person the evidence they intend to bring before the court in support of the charge.

iii) Dr. Alfred Mutua Versus EACC & others, Court of Appeal No. 31/2016 (NAI), that an affront to the rule of law..... to render nugatory an order of the court whether real or anticipatory.

The 1st Respondent, the EACC has opposed this application and has duly filed a replying affidavit and list of authorities. The salient factors raised in the affidavit of Idris Garane, for the 1st respondent were basically that the Honourable court in issuing the orders of 14.1.2020 was duly satisfied and convinced with the provisions of Article 50 of the Constitution of Kenya and Section 4(3)(a)(b) and (c) and 5.16 of the Witness Protection Act, Cap 79. That pursuant to this order and directions of the Hon. Ogoti, Chief Magistrate, the 1st Respondent proceeded to redact the descriptive parts of the statements. That the unredacted evidence of the protected witnesses have always been supplied to the applicant and the others 36 hours before the hearing and several witnesses have already testified and cross-examined in the 3 cases named.

The 1st respondent maintained that the issues of case management which can be dealt with by the trial court. That the court must balance the rights of the applicant with those of the witnesses. And also that the applicant has not demonstrated any violation of his rights.

1st Respondent relied on the following authorities in support of its submissions:-

- i) Republic versus Kelvin Ouma Odhiambo and 4 others (2018)eKLR, that Article 50(1) to (7) is not to be read in isolation, but alongside Article 50(8), which envisages Protection of witnesses and vulnerable persons.
- ii) Republic versus Doyo Galgalo & 3 others (2019)eKLR, that in a free and democratic society, protection of witnesses or vulnerable persons is a justifiable measure and therefore not a violation of the right to fair trial.
- iii) Thuita Mwangi & 2 others Versus EACC & 3 others (2013)eKLR, that disclosure is a continuous process throughout the trial.
- iv) Michael Sistu Mwaura & 12 others Versus EACC & 4 others (2016)eKLR, that stay of Criminal Proceedings can only be issued in exceptional circumstances.

The 1st Respondent urged that this application be dismissed.

The 2nd Respondent, the Director of Public Prosecutions, has also opposed this application and duly filed its submissions and list of authorities. First, it was noted that this application is only seeking to hoodwink and arm twist the court into staying the trials before the lower courts. That the applicant has filed multiple suits including petition No. E024/2020 (Machakos) and Petition No.'s 36/2019, 381/2019 and 24/2020, which is an abuse of the process of the court. She relied on Republic Versus Paul Kihara Kariuki, Attorney General and 2 others, ex parte Law Society of Kenya (2020)eKLR, and Nyanza Garage Versus Attorney General, HCC 450/93 and Edward R. Ouko Versus Speaker of the National Assembly (2017)eLKR.

That the 3 trial courts have gone through an extensive disclosure process and considered to protect witnesses. That pursuant to Article 50(9), the Victim Protection Act, no. 14/2014 was enacted for protection of witnesses, victims of crime and abuse of power.

Counsel also submitted that under Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the considerations are not in favour of the applicants' application.

On supervisory jurisdiction of the court, counsel relied on Republic Versus Perry Kusangara and others, HCCR No. 4/2020, in which the Hon. Justice Mwangi, held that a balance has to be struck in the exercise of Constitutional jurisdiction to ensure there is no appearance that its object is to micromanage the trial court's independence in conduct and management of its proceedings and that supervisory jurisdiction should not be used as a short cut for an appeal where circumstances for appeal clearly pertain and are more appropriate.

I have considered this application, affidavits filed by the parties, submissions filed, authorities relied on and also the oral submissions made by the 3 respective counsel for the parties in court on 23.2.2021. This application is clearly hinged on the ex parte orders made by the court in Miscellaneous Criminal Case No. 1 of 2020, which orders have been reproduced hereinabove. These are the orders that the applicant seeks to have set aside, stayed and or reviewed.

In determining the issues herein, the first issue of paramount importance is that of the position of witness protection. Article 50 in its various sub-articles guarantees an accused person the right to fair hearing. At sub-article 2(c) and (d), the right to adequate time and facilities to prepare a defence, and the right to public trial before a court established under the constitution, which seems to be the contested rights in this application are clearly anchored. At sub-article 8, the constitution states, thus;

“This article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality public order or national security”.

The deduction that I reach from all these are that whereas Article 50 of the constitution guarantees and declares the rights to fair hearing for an accused person, the same articles also declares that the same rights guaranteed may be limited where it is justifiable, for protection of witnesses, vulnerable persons, morality, public order or national security.

At sub-article (9) the constitution declares that parliament shall enact legislation providing for the protection, rights and welfare of victims of offences. Parliament accordingly enacted the Witness Protection Act, chapter 79 Laws of Kenya (Act No. 2/2010). The pre-amble to this statute clearly addressed the utility and the necessity of the law on witness protection. It states;

“An Act of Parliament to provide for the Protection of Witnesses in Criminal cases and other proceedings to establish a Witness Protection Agency and provide for its Powers, Functions, Management and Administration, and for connected purposes”.

The issue of witness protection in criminal cases is one that is well grounded on both the constitution of Kenya and the relevant legislation, the Witness Protection Act, Cap 79 Laws of Kenya. This can only mean that the issue of witness protection is cardinal and key in ensuring fair administration of justice, especially in criminal cases like in our instant case.

At section 4(3) of the said Act, amongst the orders that the court may issue with regard to witness protection are, the holding in camera or closed sessions, the use of pseudonyms, the redaction of identifying information, the use of video link or employing measures to obscure or distort the identity of the witness. The rule allows for any other such measures. These are the same orders that this court issued on 14.1.2020, subject of this application.

The said orders were issued upon consideration by the court, under section 16, of the vulnerability of the specific witnesses.

Both the applicants and Respondent's sides have appreciated and acknowledge this position. At paragraph 14 of the affidavit of the Applicant of 11.9.2020, reproduced as paragraph 64 in the amendment, the applicant has deponed as to the knowledge that the essence of redaction is to hide the identity of or protect the witness. At paragraph 17 (reproduced at paragraph 68), the applicant again depones as to the knowledge that redaction of witness statements should include witnesses's personal details such as names and addresses.

To that extent, the applicant has not raised any issue with the manner in which the court issued the orders of 14.1.2020, the legality or propriety of the same. The said orders, legal as they are, remain valid.

The application of the protection orders vis-à-vis the rights of an accused person to fair trial (Article 50) is therefore a balancing act. The trial court, must judiciously ensure the rights of an accused of fair trial are upheld, while at the same time also ensure the protection of the witnesses, victims and vulnerable persons. As the Hon. Justice Mwangi held in the case of ***Republic Versus Perry Kasangara and others***, observed above, the balance has to be struck in the exercise of Constitutional Jurisdiction to ensure that there is no appearance that its object is to micromanage the trial court's independence in conduct and management of its proceedings. I am guided by this finding.

In the case of ***In the Matter of the Application for witness Protection (2014)eKLR***, the Hon. Justice Isaac Lenaola (as the then was, dealt with this issue and held at paragraph 6, that;

“The redacting of witness statements to exclude the witness personal details such as the name, address and other personal particulars does not in my mind amount to a contravention of the provisions of Article 50(2)(1). The accused will have the substance of the evidence to be adduced at the trial which is a tenet of protection accorded by this provisions”.

The Judge went on to hold the same view on the issue of pseudonyms.

And in the case of ***Dennis Edmond Apaa and 2 others Versus EACC and Another, (2012)eKLR***, the Hon. Justice D. S. Majanja, on his part, held;

“The Cholmondeley case does not support the proposing that all the witnesses and evidence must be disclosed in advance at the trial. The case of Republic Versus Ward (Supra) cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout trial. Furthermore, the words of Article 50(2)(1) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and the right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it”.

I share the same opinion that the duty of a trial court is to ensure that the accused, in realization of the rights under Article 50(2)(1), has access to the facilities (sic statements within reasonable time as to prepare his defence. As to what would constitute reasonable time, this will depend on the circumstances of each case. For our case, it is in reference to witnesses under protection.

A number of factors have come up during the hearing of this application, relevant in the determination of this application. It is on record that the trial court conducted detailed pre-trial conferences regarding these 3 case of the applicant. The pre-trial conferences were conducted in the presence of the applicant and his advocates. There is nothing on record as to any objections raised by any of the parties as to the directions the trial court gave from the pre-trial conference. One of the directions given was that the applicant would be supplied with the unredacted witness statements of the protected witnesses 36 hours before the hearing. This order has been carried out. It is also agreed that at least some evidence have been taken by the trial courts in the 3 cases. For case number 31/2019, unredacted witness statements of PW1 and 4 have been supplied and PW1 and PW2 have testified and duly cross-examined. For case No. 1/2020, PW1 to PW7 have already testified and duly cross examined.

The net effect of this is that the directions given by the trial court have accorded the applicant the opportunity to have accuses to even the unredacted evidence of the witnesses under protection. The fact that the cases have progressed well with several witnesses heard so far can only point to the reality that the 36 hours period ordered by the trial court is reasonable. Otherwise how else would the defence carried out cross-examination on the evidence of the witnesses?

Now to the procedures of the application itself. It appears to this court that the applicant's heart and mind by this application, is not settled on whether he is challenging and seeking for revision of the orders of this court issued on 14.1.2020, or whether this application targets the orders of the trial court. Why do I say this? This application is brought under section 362 of the Criminal Procedure Code. This provision gives the High Court Supervisory powers of revision over the subordinate courts. However, the prayers on the application seek revision of this court's orders of 14.1.2020. this cannot be. This court cannot and does not have any jurisdiction to review, revise or set aside its own orders under the named section 362 of the criminal Procedure Code.

Section 362 of the Criminal Procedure Code states;

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any of the proceedings in any such subordinate court”.

For this court to judiciously exercise its revisionary powers under the above section, it is imperative that the applicant moving the court, or the court, acting “suo moto” must be convinced of the incorrectness, illegality or impropriety in the order or finding of the lower court. The applicant herein has failed to show any. On my part, I have failed to see any too. This court therefore refrains from, as I hereby do, issuing any orders that could relate to the pre-trial conference directions issued by the trial court.

As to the orders of stay of the lower court proceedings. Prayers 2, 3 and 4 of the application, all seeking stay pending determination of this application, are spent now that this application has been heard. These orders can therefore not issue. For prayer 5, the applicant has simply sought for orders of stay of the lower court proceedings in the 3 cases. It does not pray what the order of stay sought intends to achieve. It would be improper and illegal for this court to issue such as blanket order of stay since an order of stay must only and can only issue subject to some action. No such action or activity has been pleaded herein.

For prayers 6 and 7, as already shown above, this court finds no justifiable reason for interfering with the orders issued by the trial court out of the pre-trial conference. Issuing such orders would be tantamount to this court imposing itself and micromanaging the proceedings before the lower court.

In all, I do not find any merit in the application of the applicant originally dated 11.9.2020 and later amended and dated 17.9.2020.

I dismiss the same wholly, orders accordingly.

D. O. OGEMBO

JUDGE

5.3.2021

Court:

Ruling read out in open court (on-line) in the presence of Ms. Maina for 1st Respondent, Ms. Wangai and Ms. Thuguri for 2nd Respondent, and Ms. Brenda Wekesa for Dr. Khaminwa for the applicant.

D. O. OGEMBO

JUDGE

5.3.2021

Ms. Wekesa:

We ask for 30 days leave to appeal. Also copy of the ruling.

Ms. Maina:

No objection. We also need copy of the ruling.

Ms. Wangai:

We also do not object.

Court:

Leave to appeal granted to the applicant for 30 days. The proceedings and ruling to be prepared. Copies of the same to be availed to the parties upon payment of requisite fees.

D. O. OGEMBO

JUDGE

5.3.2021