



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CRIMINAL APPLICATION NO. 292 OF 2020

IN THE MATTER OF NAKURU CMCR CASE NO. 3385 OF 2019

ASHESH MISHRA.....APPLICANT

VERSUS.

REPUBLIC.....RESPONDENT

RULING

1. In his Notice of Motion dated 27th May 2020 the applicant seeks the orders of this court thus;

a) There be stay of proceedings in NAKURU CMCR NO. 3385 OF 2019 pending hearing and determination of this application.

b) This court be pleased to call up, revise and vacate the order of HON. JB KALO (CM) made in NAKURU CMCR NO. 3385 OF 2019 R VS. ASHESH MISHRA rendered electronically via email on 22nd May 2020 dismissing the application dated 6th November 2019.

c) The court be pleased to grant such other or further orders that may deem appropriate.

2. The application is supported by the sworn affidavit of **Henry Opondo** counsel for the applicant sworn on the same date. The issues raised therein are clear and straight forward.

3. The applicant was charged with the offence of failing to comply with a lawful order contrary to **Section 137(b) of the Environment Management and Coordination Act (EMCA) of 1999 Cap 387 of the Laws of Kenya and Commencing a project without Environmental Impact Assessment contrary to Section 58(2) as read with Section 144 of EMCA of 1999.**

4. When the matter came up for plea the applicant sought stay of the charge and or plea or to have them withdrawn as it contravened **Sections 129(4) of EMCA of 1999** since there was an **Appeal Number 26 of 2019** pending before the NET Tribunal. The said appeal had been filed by Sojanmni Springfield limited a company in which the applicant was its employee.

5. The applicant has argued that he was a mere employee of the company and therefore he was not liable to be charged as he was not its director.

6. The applicant deponed that there was in any case a matter at ELC court namely **Nakuru case NO. 405 OF 2017** in which **Hon. OHUNGO J** had issued some stay orders.

7. The trial court having heard the parties declined to stop the criminal trail and ordered the applicant to take plea. This was therefore the basis of this application. The applicant in a nutshell prays that this court applies its supervisory jurisdiction to set aside the orders by the trial court.

8. The respondent did not file any response but it simply filed submissions in opposition to the said application. The applicant has equally filed the same as well as attendant authorities by each side. I shall take the issues raised by the parties in their submissions simultaneously as hereunder.

9. Authority to revise a decision or an order of the lower court or person or body exercising judicial or quasi -judicial jurisdiction lies with

the High Court by dint of **Article 165 (6) and (7) of the Constitution**.

10. The above mandate is further reinforced and operationalized by **Section 362 and 364 of the Criminal Code**. **Section 362 of the criminal procedure code** provides as follows:

“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 raised and as to the regularity of any proceedings of any such subordinate court”.

11. **Section 364 (1)** further provides: *“In the case of proceedings in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may –*

a. In the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and may enhance the sentence.

b. In the case of any other order other than an order of acquittal, alter or reverse the order.

12. The crux of the application herein is revision of the lower court’s decision dismissing the applicant’s application seeking to defer plea taking and withdrawal of charges which according to the applicant was erroneously dismissed as the status quo rule was ignored.

13. In order to exercise the powers under the aforesaid provisions, the court must be satisfied that the trial court acted upon a wrong principle and that there exists sufficient grounds to warrant revision or variation of such decision or order (**See R vs Jagani and Another (2001) KLR 590 and Samuel Njuguna Githinji vs R (1992) eKLR and R vs William Said Maghanga (2017 eKLR)**) where the court held that the High court should only review sentences, orders, findings or proceedings that are improper or illegal.

14. The applicant contended that he should not have been charged at the first place because there was an automatic stay of execution emanating from an appeal in the National Environmental Tribunal that is NET Appeal No. 26 of 2019. He stated that **section 129(4) of EMCA of 1999, Cap 387 of the Laws of Kenya** dictates that once an appeal is filed before the tribunal the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined. He further asserted that these offences directly relate to Nakuru ELC No. 405 of 2017 in which a stay of execution of the judgement was issued by Hon. Justice Ohungo on 20th November, 2019 and subsequently extended on the 19th December, 2019 pending directions or orders by the Court of Appeal.

15. The respondent on the other hand, contended that the NET Appeal No. 26 of 2019 had been compromised by a Consent Order dated 18th June 2020 in which there was a condition *“THAT the parties herein abide by stay orders granted in Nakuru ELC No.405 of 2017 on the 20th November 2019 until the determination of Nyeri Civil Appeal No. 239 of 2019.”*

16. The respondent further contended that the stay Order in Nakuru **ELC No. 405 of 2017** was reviewed by the very court by a Ruling dated **19th December 2019** and vacated its stay on all 14 limbs of the Judgment in that case except for limbs 11(partially), 12 and 13. Therefore, the Order requiring Sojanmni Springs Ltd to do all that was contained in the other 11 limbs of the Judgment in **ELC 405 of 2017**, was not stayed. In any event, even the 3 limbs that were stayed, the stay was only for a period of 6 months which period determined as at June 2020.

17. The court’s ruling of **19th December 2019** as relied upon by the applicant in its conclusion stated that;

i. This Court’s order of 20th November 2019 granting stay of execution of the judgment herein pending delivery of the ruling scheduled for 5th February 2020 is hereby reviewed.

ii. Temporary stay of execution of Orders number 11, 12 and 13 of the judgment herein is hereby granted. As regards order number 11, ONLY the portion of the said order that requires the 1st defendant to pay the plaintiffs the full value of the land that has been wasted is stayed.

iii. Temporary stay of execution of Orders number 11, 12 and 13 of the judgment herein is hereby granted. As regards order number 11, ONLY the portion of the said order that requires the 1st defendant to pay the plaintiffs the full value of the land that has been wasted is stayed.

iv. The order in (ii) above shall remain in force for only six months from the date of delivery of this ruling or until the Court of Appeal makes orders on the application for stay that is pending before it, whichever occurs first.

v. In view of this outcome, the ruling scheduled for delivery by this Court on 5th February 2020 shall only be in respect of Notice of Motion dated 23rd July 2019.

vi. The plaintiffs shall have costs of Notice of Motion dated 25th November 2019 as against the 1st defendant.”

18. Indeed, the orders of stay in Nakuru **ELC No. 405** were to lapse after six months of the date of the said ruling or until the Court of Appeal makes orders on the application for stay that is pending before it. The 6 months stay granted in the ruling on the three limbs has since lapsed and there is no evidence so far adduced in this court to confirm that the Court of Appeal pronounced itself on the application for stay that is pending before it. Consequently, the NET No. 26 of 2019 Appeal which the applicant would have found consolation in was settled by

consent of the parties and which consent has never been set aside.

19. The issue of whether the applicant was an employee or not or the managing director of the company in my view was an issue to be raised during trial. This court would be overarching if it delves into the same as it may prejudice the trial. In any case **Section 145 of EMCA** clearly sets out the parameters of persons or bodies who are considered culpable for an offence.

20. In the premises, this court does not find any reasons to quash or revise the trial courts findings. Let the applicant face his accusers in court and present his best defence as per the law established. The application is otherwise dismissed.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAKURU THIS 17TH DAY OF JUNE 2021.

H. K. CHEMITEI

JUDGE.