



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 117 OF 2017

DAVID MWAURA NDURUHU.....PETITIONER/APPLICANT

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

-AND-

JOHN MWANGI KAMAU.....INTERESTED PARTY

RULING

1. The Applicant/Petitioner, David Mwaura Nduru, by way of a notice of motion application brought under a certificate of urgency on 7th December, 2020 seeks orders as follows:

a. THAT this Application be certified as urgent in the first instance.

b. THAT the warrant of arrest issued against the Applicant in Criminal Case No. 1611 of 2017, Republic v David Mwaura Nduru were contrary to the decree issued by this Honourable Court on 3rd September 2018 and the warrant be lifted pending the hearing and determination of this application.

c. THAT this Honourable Court be pleased to quash the Order issued by the learned magistrate Hon. E. Riany (SRM) on 12th November 2020 and reinstate the cash bail deposited by the applicant with the court.

d. THAT this Honourable Court do grant any other order it may deem fit in the interest of justice.

2. The application is grounded on the averment that the Respondent, the Director of Public Prosecutions, withdrew Thika Chief Magistrate Court Criminal Case No. 1611 of 2017 against the Applicant in his absence on 18th August, 2020 and a warrant of arrest was issued against him and his cash bail forfeited to the State. The Applicant asserts that the order is against and inimical to the orders issued by this Court (Mwita, J) on 31st August, 2018 prohibiting the Respondent from proceeding with the criminal case in which the Interested Party, John Mwangi Kamau, is the complainant.

3. The Applicant asserts that the Respondent and the trial Court ignored the order of this Court yet the same was on record. Further, that the Applicant subsequently filed revision proceedings before Kiambu High Court in Kiambu HCCR No. E024 of 2020 but the Court indicated that the appropriate forum for filing the application would be the Court that issued the prohibition order on 31st August, 2018. The Applicant claims that he is likely to be arrested anytime if the revision proceedings are not heard and determined expeditiously.

4. The Respondent and the Interested Party did not file any response to the application.

5. The Applicant through submissions dated 8th March, 2021 asserts that this Court is obligated under Section 346 of the Criminal Procedure Code to give him an opportunity to show cause why the order should not have been issued against him. Further reliance is placed on Article 165 (6) & 7 of the Constitution as granting this Court supervisory jurisdiction over subordinate courts.

6. The Applicant submits that neither he nor his advocate were notified that the matter was coming up for mention on 18th August, 2020 when the warrant of arrest was irregularly issued against him and the cash bail he had deposited in court forfeited. It is his case that he had been diligently attending court since the institution of the suit.

7. The Applicant contends that the actions of the Respondent and the trial Court contravened the order issued by this Court on 31st August, 2018 staying the proceedings pending the hearing and determination of Nairobi ELC Case No. 17 of 2014 which is still pending in Court. The Applicant submits that Article 50(2)(f) of the Constitution guarantees the right to fair trial whereas Section 82 of the Criminal Procedure Code provides for the power of the DPP to withdraw cases. The decisions in the cases of **Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission & 8 Others [2013] eKLR**; **Church Road Development Co. Ltd v Barclays Bank of Kenya Ltd (2007) eKLR**; and **Tatu City Ltd & 3 others v Stephen Jennings & 6 others [2016] eKLR** are cited as stating the law on the effect of an order staying proceedings.

8. The Applicant contend that the order forfeiting the cash bail to the State was made without giving the Applicant an opportunity to show cause why the order should not be made. It is therefore the Applicant's case that order was irregular and unprocedural as it was made in blatant disregard of the provisions of Section 131 of the Criminal Procedure Code and the rule of natural justice that requires that no one should be condemned unheard. Further, that the subordinate court's hands were tied by the decree issued by this Court to stay the criminal proceedings. The arguments are supported by the decisions in **Isaac Kiplangat Mutai v Republic [2013] eKLR** and **Office of the Director of Public Prosecutions v Jackson Murithi Akwalu [2020] eKLR**.

9. According to decree issued by this Court on 3rd September, 2018, the Respondent or any officer acting on his instructions was prohibited from proceeding with **Thika Criminal Case No 1611 of 2017** until the final determination of **Nairobi ELC Case No. 17 of 2014** which was pending before the Environment and Land Court. In the case of **Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR** it was determined that:

“50. The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial.”

10. The prohibition order issued by this Court was therefore issued within the law. Furthermore, under Article 165(6) the Constitution, this Court (the High Court) has supervisory jurisdiction over subordinate courts.

11. Despite the existence of the order directing the Respondent to keep off the criminal case, the Respondent went ahead to apply for and was granted an order withdrawing the criminal case against the Applicant under Section 87(a) of the Criminal Procedure Code pending the execution of a warrant of arrest against the Applicant.

12. Section 87 of the Criminal Procedure Code allows a public prosecutor, in a trial before a subordinate court, and with the consent of the court, to withdraw a criminal case at any time before judgment is pronounced. As per Section 87(a), if the withdrawal is made before the accused person is called upon to make his defence, he shall be discharged, but the discharge shall not operate as a bar to subsequent proceedings against him on account of the same facts.

13. The question therefore is whether the withdrawal of a criminal case is equivalent to proceeding with the matter. This question was answered in the case of **Tatu City Limited & 3 others v Stephen Jennings & 6 others [2016] eKLR** where it was held that:

“39. In accordance therefore to the definition of a proceeding, a Notice of Withdrawal of Suit as prescribed and provided under Order 25 rule 1 of the Civil Procedure Act, is a proceeding, as the same is prescribed by the law and procedure under the Civil Procedure Rules. By filing the Notice of Withdrawal of Suit, the Plaintiffs were seeking to exercise their right as prescribed by law of withdrawing any claims they may have made against any party to a suit.

40. Further, the filing of the Notice of Withdrawal was a proceeding, in the sense that in order for the Court to exercise its mandate and objective as provided under Sections 1A and 1B of the Civil Procedure Act, the Plaintiffs had to come before the it through a process prescribed by law under Order 25 rule 1 of the Civil Procedure Rules. The Notice in itself is not a proceeding; the process in which the said Notice is presented to the Court before it can be effected is what the proceeding is.

41. A proceeding is therefore, a process or an activity, prescribed by law or procedure, which seeks to invoke the power of the Court, or a tribunal as the case may be, to enforce a law, or obtain legal remedies pursuant to a law. The withdrawal of the suit was therefore, a step, or process properly defined under the phrase proceedings.”

[Emphasis added]

14. The Court in **Office of the Director of Public Prosecution v Jackson Murithi Akwalu [2020] eKLR** interpreted and applied the above-cited case as follows:

“12. Secondly there is no dispute of the fact that this court vide Constitutional Petition No. 7 of 2019 stayed the criminal proceedings in *Chuka Chief Magistrate's Court Criminal Case No. 852 of 2018* on 23rd July 2019 and 16th October 2019 pending the hearing and determination of the Constitutional Petition by the Respondent herein. The implications of the stay orders meant that the trial court could not proceed substantively in the criminal trial in that matter in anyway. This court is persuaded by the decision cited by the applicant in the case of *Tatu City Ltd & 3 others –vs- Stephen Jennings & 6 others [2016] eKLR* where the court defined what “proceedings” entailed and *inter alia* held as follows: -

“.....A proceeding is therefore a process of an activity prescribed by law or procedure which seeks to invoke the power of court or a tribunal as the case may be, to enforce a law or obtain legal remedies pursuant to a law. The withdrawal of the suit was therefore a step or process defined under the phrase proceedings.”

13. This court finds that the trial court's hands were tied by the orders of this court staying the proceedings and the only way it could handle that matter pending before it was through mentions just to check on the progress of the Constitutional Petition and whether this court would have rendered itself on the question of terminating the said proceedings. As a matter of fact termination of the said proceedings at the Chief Magistrate's court is one of the issues for determination in the pending Constitutional Petition. It was therefore wrong, improper and irregular for the Subordinate Court to proceed to terminate the criminal proceedings as doing so in my view is tantamount to insurping the powers and indeed jurisdiction of this court to determine whether or not there is basis to terminate the said proceedings. To that extent this court finds that the termination of proceedings by the trial court was illegal as it went against the stay orders issued."

[Emphasis added]

15. I am persuaded by the cited decisions that the withdrawal of the criminal case was a continuance of the proceedings as the application for withdrawal amounted to substantive proceedings in the matter and rendered the stay order issued by this Court of no use to the parties. The event upon which the stay was premised namely the hearing and determination of **Nairobi ELC Case No. 17 of 2014** had not occurred and the case could not be terminated without the consent of all the parties.

16. The Respondent did not respond to the application and it cannot be known what drove him to act in clear contravention of the order issued by this Court on 3rd September, 2018 staying the criminal trial before the Magistrate's Court at Thika. I therefore find that the application dated 7th December, 2020 has merit.

17. Although the Applicant averred that his cash bail was forfeited to the State by the Court, I do not see such order in the proceedings of 18th August, 2020. Therefore, the appropriate order, which I hereby issue, is the quashing of all the proceedings of 18th August, 2020 in **Thika CM's Court Criminal Case No. 1611 of 2017, Republic v David Mwaura Nduruhi**.

18. The parties are directed to bear own costs in respect to the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT