



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CR. APPL. NO. E029 OF 2021

SIMON CHEGE NJAU.....APPLICANT

VERUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

**Stay of criminal trial**

[1] The Notice of Motion dated 23<sup>rd</sup> September, 2021 was certified to be urgent. It seeks two significant orders; (1) release of the applicant on personal bond; and (2) stay of criminal case number NAROK CMCCRC NO. E1162 OF 2021 pending hearing an determination of NAROK HC Constitutional Petition No. E006 OF 2021.

[2] The motion is premised on grounds set out in the application and the supporting affidavit of the applicant and which were ably expounded by counsel for the applicant in her oral submissions in court.

[3] The major argument is that the applicant filed a constitutional petition number E006 OF 2021 on matter which are now directly in issue in CMCCRC NO E1162 OF 2021. The DPP which was already aware of the pendency of the petition went ahead and preferred the criminal charges in total *sub-judice rule*. According to the counsel the two should not run parallel to each other. The applicant also averred that the criminal charges are abuse of court process meant to intimidate and force him to withdraw the petition. He stated that he is still in custody as we speak and so he should be granted a personal bond as these cases are heard. Counsel referred the court to the petition.

[3] The DPP opposed the application. He stated that the applicant merely makes reference to the petition but it is not anchored in the petition. Mr. Ondimu, for the DPP further argued that sub-judice does not apply here. He did not see the need for this application, for the applicant has been granted a bond. He suggested that the applicant should apply for review of bond terms in the trial court- something he wondered the applicant has not done. He also took a swipe at the petition that it did not ask for stay of arrest. The defence counsel replied to this argument; that it was not necessary to apply for stay of arrest as the applicant was not under threat of arrest at the time. The DPP prayed for dismissal of the application.

**ANALYSIS AND DETERMINATION**

[4] The court will only stay a criminal trial if the trial is an abuse of court process, or is being used oppressively. A trial is an abuse of process if it has been instituted for collateral advantage other than bringing the culprit to justice. Instances of collateral advantages could be long and may include; to force a settlement of a contract or civil debt, or political score, or to persecute the accused or to regain a gift or to force withdrawal of or prevent taking of legal action, and so forth and so forth. A trial turns oppressive if it starts to trample upon the rights of the accused. Are there such obnoxious elements in this case?

[5] It seems the applicant is making a claim that, because there is an existing constitutional petition which is based on facts which gave rise to the criminal case, the criminal case instituted subsequently is sub-judice. The application of the rule on *sub-judice* in the sense proposed by counsel for the applicant is now restricted in light of the Bill of Rights especially the right to information and rights of victims of crime. Similarly, the section 193A of the Criminal Procedure Code permits concurrent litigation of criminal as well as civil or *sui generis* proceedings over same subject matter or issue. Thus, the argument is not a basis for stay of a criminal proceeding. See the section below: -

**193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.**

[6] See also *Kuria & 3 others vs. AG [2000] 2 KLR 69*. Except, however, in exercise of the power of prosecution, the DPP is guided by article 157(11) of the Constitution, in that: -

**157 (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.**

[7] In instituting criminal charges against a person, the DPP should act in good faith and be guided by public interest to bring criminals to justice as opposed to helping a complainant to gain collateral advantage. The DPP should also ensure that cases which meet the evidentiary threshold go to court to avoid persons being arraigned on flimsy charges. Here, investigations must be properly grounded such that the DPP is satisfied that a criminal offence has been committed and is supported by evidence which he honestly believes will sustain a trial and yield conviction.

[8] I do not find any cogent material for now to stay the criminal proceeding.

**Of procedural lapse**

[8] I note that the DPP seems to object to consideration of the petition on the basis that this application is independent of the petition filed by the applicant. Whereas the application was instituted as a miscellaneous application, it has a direct bearing to and is founded on the petition filed herein. Apt procedural rectitude would be that the application should have been filed in the petition. However, such mistake of counsel on a procedural matter should not disentitle the applicant remedy.

**Of free bond**

[9] Be that as it may, I have perused the petition and written communication between counsels for the parties it appears a vehicle belonging to the applicant was taken by the complainant as lien until the value of the gear box- the subject of the proceedings herein- is fully paid by the applicant. I do not wish to give any particular or legal scent to these events. The major concern is that the applicant is in custody for he has not raised the bond given by the trial court. The applicant has prayed to be released on free bond. I, do hear the DPP that the applicant should apply for review of the bond terms in the trial court. Whereas that is an option it is not the only way of applying for review of bond terms. The applicant may also seek review of orders of the trial court or appeal against the said order in this court. The circumstances of this case justified certification of the matter to be urgent. Accordingly, in the interest of justice, I call for the trial court's file to be submitted before this court within 2 days. Parties will then address the court on review of the bond terms on 13<sup>th</sup> October, 2021.

[9] For tidiness in procedure, I order this file be fastened in the petition file so that they are heard together. it is so ordered.

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE PLATFORM THIS 6TH DAY OF OCTOBER 2021**

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**F. GIKONYO M.**

**JUDGE**

**IN THE PRESENCE OF:-**

- 1. COURT ASSISTANT – KASASO**
- 2. NAMUNYAK COUNSEL FOR APPLICANT - PRESENT**
- 3. ONDEMA COUNSEL FOR RESPONDENT - PRESENT**