



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CRIMINAL APPLICATION 35 OF 2020**

**JAMES THUO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. James Thuo the accused in Mombasa County CR. Case No. 162 of 2020 came to this court under Certificate of Urgency seeking pursuant to Article 165(7) of the Constitution of Kenya 2010 seeking that the court calls for record of proceedings in Mombasa County CR. Case No. 162 of 2020 and make appropriate orders to the extent of quashing and nullifying the charges and proceedings as void also initio. The Applicant also sought that the court be pleased to order that his cash bail be returned.

2. The Application was premised on the grounds that the charges and proceedings emanated from another by the County Government Department of Transport and Infrastructure directed to Pearl Beach Apartments owned by Central Bank of Kenya Pension Scheme to the Central Bank Pension ordering them to paint the building white and Egyptian blue.

3. The applicant argued that the decision to charge him was in contempt and violation of orders staying implementations of the notice by the County Government Dept. of Transport and Infrastructure issued by Ogolla J in High Court Mombasa No. 186 of 2018 on 12/7/2018 and consumed on 23<sup>rd</sup> July 2020.

4. The application was also supported by the affidavit of applicant sworn on 11<sup>th</sup> September 2020 and a further affidavit sworn on 4<sup>th</sup> day of November 2020 annexing the ruling in Petition No. 186 of 2018 granting conservatory orders staying the implementation and enforcement of the decision of the County Government contained in the impugned notice pending the disposal of the Constitutional Petition No. 186 of 2018 or until such other or further orders of the court.

5. Applicant on the further supporting affidavit averred that by the time of this evident and prosecution on 21<sup>st</sup> February 2020 the notice had already been stayed and prosecution was unflagrant contempt of the court's order issued in High Court Petition No. 186 of 2018.

6. In reply to the Application Kennedy Oruko in Replying Affidavit sworn on 10<sup>th</sup> November 2020 averred that by the time that applicant was charged Mombasa County prosecutions still had delegated authority to conduct prosecutions. That on 14<sup>th</sup> August 2020 they received a letter from the County Attorney of Mombasa informing them of the ruling issued on Petition No. 186 of 2018 and directing them to stay all pending prosecutions under Section 126 (c) as read with Section 164 of the Public Health Act and also not to initiate any future prosecutions pending the determination of the constitutional petition (Annexure K01).

7. He also went further to say that DPP revoked appointment of Mombasa County Prosecutions vide Kenya Gazette Notice No. Vol CXXII-159-K02 and proceedings taken over by Office of Director of Public Prosecutions on 1/10/2020. That the criminal charge against Applicant was stayed pending the hearing and determination of the petition No. 186 of 2018 In consideration that the Respondent has admitted having preferred charges against the applicant when there were interim orders.

8. In Petition No. 186 of 2018 staying the implementation of Notice issued by 1<sup>st</sup> Respondent and which stay orders were confirmed by a ruling delivered on 23<sup>rd</sup> July 2020 this court finds that the charging of the applicant was void also initio and therefore the charge against him is not only stayed but withdrawn under Section 85(1) Criminal Procedure Code.

9. In event that the constitutional court in Petition No. 186 of 2018 allows the implementation of the Notice by the County Government then the 2<sup>nd</sup> Respondent will be at liberty to bring back to court the same charges against the applicant. For now, the cash bail deposited by the applicant should be refunded back to him forthwith.

10. Order accordingly.

**Dated, signed and delivered online by MS TEAMS, this 10<sup>th</sup> day of December 2020**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**