



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI

ACEC Misc. Criminal No. 28 Of 2019

The Director Of PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

FERDINAND NDUNGU WAITITU.....1ST RESPONDENT

FAITH NJERI HARRISON.....2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....5TH RESPONDENT

BANKING FRAUD UNIT.....6TH RESPONDENT

RULING

1. Through a Notice of Motion dated 20th June 2019 filed under certificate of urgency pursuant to Articles, 22, 25, 159, 164, 165 and 169 of the Constitution, rules 4, 6, 21, 23, 24 and 25 of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013, Sections 81, 362 and 364 of the Criminal Procedure Code, the DPP herein referred to as the applicant, sought orders as follows:

1. Spent.

2. That there be a stay of the proceedings in the Kiambu Miscellaneous Criminal Application No. 222 of 2019 pending the hearing and determination of this application.

3. That this honourable court be pleased to call for the records of Kiambu Miscellaneous Criminal Application No. 222 of 2019 so as to satisfy itself as to the correctness, propriety and legality of the proceedings therein.

4. That this honourable court be pleased to transfer the Kiambu Miscellaneous Criminal Application No. 222 of 2019 to the Nairobi Chief Magistrate's Court, Anti-Corruption Division or any other court of competent jurisdiction.

5. That the honourable court makes any other order that it deems fit.

2. The application is premised upon grounds set out on the face of it and an affidavit sworn on 20th June 2019 by Victor Juma Owiti prosecution counsel office of the DPP. Upon being served, the respondent filed a replying affidavit sworn on 21st June 2019. The application was certified urgent and interpartes hearing set for 20th June 2019. The matter came for hearing before my sister Hon. Ngugi who disqualified herself for personal reasons. She then referred the file to this court for hearing and determination.

3. When the parties appeared before me for directions, Mr. Kiprono holding brief for Mr. Havi for the 1st and 2nd respondents told the court that the application for revision has since been overtaken by events as the suit giving rise to the impugned ruling the subject of the revision

application herein has been withdrawn and therefore nothing left for revision. Learned counsel urged the court to mark the matter as settled.

4. In response, Mr. Owiti for the state confirmed the suit before Kiambu Law Courts has since been withdrawn but insisted in proceeding with the hearing of the application only in respect of prayer three which according to him is still alive matter. The court then reserved a ruling for directions on whether the application is still alive in view of the withdrawn suit before Kiambu Law Courts.

5. Briefly, the 1st and 2nd respondents had on 23rd May 2019 approached the Chief Magistrate's court Kiambu Law Courts vide Misc. Application No. 222/2019 seeking to be admitted to anticipatory bail which orders were granted by Hon. Khaemba on the same day. Aggrieved by these orders, the applicant filed the instant application arguing that the magistrate acted without jurisdiction as he had no powers to grant anticipatory bail and that he was not a gazetted anti-corruption court.

6. It is common ground that the suit culminating to the impugned ruling the subject of the revision application herein is no longer subsisting. The question that begs for an answer is, whether the orders sought are still relevant in the circumstances.

7. The application before me in my understanding is in two faces. Firstly, it is more of seeking a constitutional interpretation and judicial review order challenging a magistrate's jurisdiction in granting anticipatory bail. Secondly, whether the magistrate a non-gazetted officer in handling anti-corruption matters was authorized to handle an anti-corrupt matter and therefore improperly acted hence committed an illegality capable of revision under Section 362 and 364 of the CPC.

8. The issue of constitutional interpretation as to who between the High Court and the lower court has powers to grant anticipatory bail is a separate subject which could be dealt with as constitutional reference. However, in the context of this application, under Section 362 and 364, revision can apply if the impugned orders are subsisting.

9. The essence of Article 165 (6) and (7) of the Constitution is for the High Court to exercise supervisory jurisdiction over subordinate courts, any person or body exercising quasi-judicial function, is, to make orders or direction for the fair administration of justice. Section 362 of the CPC further clothes the High Court with powers to call for and examine the records of any criminal proceedings from the lower court to satisfy itself as to the legality, correctness or propriety of any finding as to sentence, order recorded or passed and as to the regularity of any proceeds.

10. The key question is, is there a subsisting order capable of being revised or set aside? The answer is no. The exparte orders issued on 23rd May 2019 have since lapsed and are no longer in force following the withdrawal of the suit by the 1st and 2nd respondent. There is nothing in place or alive to revise.

11. In the circumstances, I am in agreement with Mr. Kiprono that the application before me is overtaken by events and the same is spent. For those reasons, the hearing of the revision application before me will be hypothetical, academic adventure and an exercise in futility.

12. For the above reasons stated the application dated 20th June 2019 is spent and the same is marked as settled.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY, 2019.

J.N. ONYIEGO

JUDGE