REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 6 OF 2019

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3) (D) 2, 10, 19, 20 (1) (2) (3), 21 AND 22 (D), 27, 28, 47, 49, 50 (2) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE (CAP 75 LAWS OF KENYA) AND

IN THE MATTER OF THE FAIR ADMINISTRATIBE ACTION ACT (2015)

AND

IN THE MATTER OF THE PETITIONER

BETWEEN

STEFANO UCCELLI .....PETITIONER/APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE COURT MALINDI & 3 OTHERS.... RESPONDENTS

AND

ISAAC RODROT .....INTERESTED PARTY/APPLICANT

CORAM: Hon. Justice R. Nyakundi

Gichuki Karuga Advocates for the Applicant

Miss. Sombo for the 2nd Respondent

Ruth C. Lutta for the 1st, 3rd and 4th Respondent

Kibunja Advocates for the Interested party

Ndegwa Kiarie Advocates for the Interested party

RULING

The petitioner **Stefano Uccelli,** was indicted before the Chief Magistrate Malindi in **Criminal Case No. 609 of 2019** with the offence of perjury contrary to Section 108 (1) of the Penal Code.

In the chamber summons dated 26.8.2019, the petitioner moved to the High Court under Certificate of Urgency seeking the following orders:

1.The petitioner herein is an Italian National who only understand basic English therefore, not well versed or conversant with the two official languages of the Honorable trial Court that is English and Swahili.

2. The charges preferred against the petitioner were read in English whereby a Plea of NOT GUILTY was entered and the Honorable trial Court ordered that he should be released on a bond of Kshs.30,000/= and a cash bail of Kshs.60,000/=.

3. The petitioner was taken to the Court Basement Cells not understanding what transpired in Court including his admission on the aforesaid Bond Terms forcing him to request the police officer to return him to the Court.

4. They found that the Court Session has ended and he requested the Court Clerk that he wants audience with the Presiding trial Magistrate who was by then in the chambers.

According to grounds on the body of the application and affidavit in support, the petitioner alleges that the state case before the trial Court was conducted in English language and by virtue of being of Italian descent he did not appreciate and able to follow the proceedings. That the inability to understand the charges read in English was immediately brought to the attention of the trial Magistrate on the same date of the Plea. That the Plea was again read and explained to him in English language upon which a plea of guilty entered. Subsequently, the petitioner avers that the trial Magistrate convicted him of the offence with a sentence of a fine of Kshs.10,000/= in dispute one month imprisonment.

That for the purposes of the Law the pleas of guilty entered against an accused are equivocal particularly on grounds that he did not understand English which was the language of interpretation.

Further, according to the petitioner, the conviction and sentence was unfair and an abuse of the Court process meant for the sole purpose of harassing and intimidating him not to disown a written statement containing a forged signature that was being used against his co-director **Isaac Rodrot** in **Criminal Case No. 394** before Chief Magistrate Court at Malindi**.**

That the applicants are apprehensive that the 2nd and 3rd respondents may re-open the prosecution case in **Criminal Case No. 394** and use the record of proceedings in **Criminal Case No. 609 of 2019** as evidence to the detriment of the accused.

That it is only fair that a temporary injunction be issued to stop the 2nd and 3rd respondents from using the said records of proceedings whose constitutionality and legality have been challenged in Court until the final verdict is granted.

That it will be a traversity of justice causing great irreparable harm and prejudice to the applicant herein if the 2nd and 3rd respondents are allowed to use the records in **Criminal Case No. 609 of 2019** in any other litigation in a Court of Law.

The other procedural history of the material is clearly deposed in the affidavit of the petitioner. The 1st, 3rd and 4th respondents filed grounds of opposition dated 3.10.2019 and a further set of grounds addressing the application dated 8.10.2019. As averred by the respondents each denied any allegations of harassment and intimidation leveled by the petitioner. According to the respondents, the petitioner has not satisfied the criteria of being granted the conservatory orders with regards to the exercise of powers by the DPP. Reference was made to the provisions of Article 157 (6) of the Constitution.

In determining the non-sustainability of the application the authorities of **Anarita Karemi Njeru v A. G. [1979]** and **Giella v Cassman Brown [1973] EA 358** were cited for legal proposition on lack of precision upon the which violations or infringement, the petitioners alleges are at stake in contraventions of the constitution.

Secondly, that the inference of a prima facie case, or irreparable harm suffered may not be compensated by way of general damages has not been discharged by the petitioner. That even in absence of the above laid grounds, the balance of convenience is not in favor of the petitioner. The 1st respondent counsel on her part also filed grounds of opposition dated 7.10.2019. The thrust of the arguments ventilated in the grounds of opposition, the application were:

- **That the criminal proceedings in Criminal Case No. 609 of 2019 have been determined by the court.**
- **That in so fat as Criminal Case No. 609 of 2019 is concerned the matter is res judicata and are incapable of being re-opened by way of a petition.**

Similarly, the interested party **Hans Juergen Langer** also filed an affidavit weighted against the application by the petitioner. According to the interested party disposition there a close causal connection between the dispute involving **Salama Beach** ownership and the Criminal offence facing the petitioner. In his affidavit the interested party deponed that what emerges from this petition is evidence derived from the petitioner's own authorship.

With these affidavits in support and counter arguments, the petitioner counsel filed written Submissions. **Mr. Karanja** in his submissions challenged the constitutionality of the record of proceedings in Criminal Case No. 609 of 2019 which proceedings have been impugned by the petitioner for being fatally defective under Article 50 of the Constitution on the right to a fair hearing. In support of this contention, legal counsel sought to rely on the dictum in the following cases **R v Abdi Ibrahim Owl [2013] eKLR, Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR, Nicholas Reuben Nyamai T/a Nyamai & Company Advocates v Timothy Nduvi Mutungi [2014] eKLR** and **Paul Wanjau v Gathuthi Tea Company Ltd & 2 Others [2016] eKLR**

The learned counsel found the facts of the case to have significantly satisfied the following conditions for this Court to issue an interlocutory injunction:

a). Prima facie case being the serious arguable issues to be tried at the main hearing of the petition.

b). That the petitioner will suffer irreparable harm if the Court does not move to issue interlocutory injunction pending the outcome of the petition.

c). At the petition level the balance of convenience tilts in favor of the petitioner.

Analysis

The jurisprudence on conservatory orders and injunctions reliefs is now settled with various authorities and doctrinal principles. From the point of view of the petitioner it is important to proof all the three elements to warrant an order of stay of proceedings. See the principles on **Giella v Cassman Brown (supra), Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (supra).**

This motion by the petitioner as expressed on grounds stated and the submissions by both the petitioner's and respondents' counsels raises one fundamental issues at the interlocutory stage. Whether the petitioner has satisfied the criteria to stay the ongoing proceedings in Criminal Case No. 394 of 2016 and use of the proceedings in Criminal Case No. 609 of 2019. How the court should exercise discretion in respect of an application for stay of proceedings.

The jurisdiction of the court is donated by Article 165 (3) of the constitution as read in conjunction with Article 23 (3) of the constitution on protection of rights and fundamental freedoms. The general principles that can be deduced as governing the issue of stay of proceedings in the form of conservatory order in this petition are as laid down in the case of **Centre for Human Rights and Democracy & another v the Judges and Magistrates vetting Board & 2 Others** that:

> **"Where a legal wrong or legal injury is caused to a person or to determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has power to grant appropriate reliefs so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by in action or omission."**

The court in **Judicial Service Commission v Speaker of the National Assembly [2013] eKLR** discussed this issue in depth where it reasoned as follows:

> **"Conservatory orders are not ordinary civil law remedies but are remedies provided for under the constitution, the Supreme Law of the Land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."**

Although the plain import of the language of the application by the petitioner is expressed to be brought under Order 40 Rule (1) (2) of the Civil Procedure Rules apparently flowing from the constitutional petition accompanying the text in support of stay of proceedings, it squarely is a matter for interim conservatory orders.

What essentially the petitioner is looking for are conservatory orders with regard to the trial court not to proceed with hearing and determination of the criminal case until the petition is heard and determined. Thus, a careful review of the court's position on the position of conservatory orders indicates that the jurisdiction is to be exercised when the ends of justice of the case so requires. If the conservatory order will cause any injustice to the respondents by depriving them of their legitimate right to access court sought in the criminal proceedings, this court may not reasonably exercise discretion to violate that constitutional right.

It is well established that even though interim conservatory orders operate personam never the less by implication interfere with the jurisdiction of another constitutional organ created under Article 50 (1) of the Constitution. This exercise of discretion to grant interim relief of preserving the substratum of the suit pending proceedings in another court must be exercised with caution. The textual legal proposition was also stated in **Halsbury's Laws of England, Volume 37, 4th Edition, at paragraph 442,** it is stated:

> **"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt, ought not to be allowed to continue."**

The consideration advanced by the applicant relate to restraining the respondents from using the record of proceedings in Criminal Case No. 609 of 2019 as evidence in any proceedings in any court of law pending the hearing and determination of the petition.

It was contended that such an action may re-open the prosecution case in **Criminal Case No. 394** at the Chief Magistrate's court in Malindi. More fundamental however, is the constitutional authority with central governance and power of the Director of Public Prosecution under Article 157 (6) (10) & (11) of the Constitution to initiate, continue or terminate criminal proceedings against any person without the direction, or control of any person or authority.

The trial being impugned is empowered to draw from Article 50 (1) of the constitution in its exercise of powers to adjudicate over the

competing rights between the applicant, the victim and the state. We are not told that the trial as intended would deny the applicant his constitutional right to a fair trial as stipulated in Article 50 (1), (2) (a – q), (3) & (4) of the Constitution. The threshold issue is whether the trial Magistrate's court has the legal tools to determine the right under Article 50 (4) on evidence obtained in a manner that violates right or fundamental freedom in the bill of rights for it to be excluded for use and application if that evidence would render the trial unfair.

What was the nature of the offence with which the state is prosecuting before the trial court? At the hearing under Article 50 (1) of the constitution the court will have the jurisdiction to entertain the petitioner on any preliminary objections as to the admissibility of evidence lined up by the 2nd respondent and the right to challenge such evidence rests with the petitioner. That being the case the petitioner has the right to apply for exclusion of any evidence in violation of his right to a fair trial. Moreover, the petitioner has not demonstrated the prejudice or detriment which will be occasioned if interim conservatory orders are declined before the criminal trial is determined on the merits. The nature of the relief sought obligates the court to exercise any such jurisdiction sparingly.

As I understand the situation, the case before the Magistrate's court deals with criminal proceedings between the state and the defendant. The rule applicable is that only the Director of Public Prosecution as a guardian of the public interest can sue on behalf of the public for purposes of furthering the administration of criminal justice. The position in this country is very clear that the right to a fair hearing under Article 50 in such proceedings is guaranteed and the petitioner would have an opportunity to ventilate his case within the scope of this provisions.

In relation to this aspect of the case, my attention was drawn to the principles in **Giella (supra)** and **Mrao Limited (supra).** The applicant did not offer any evidence to show that there is a valid prima facie case in place to limit the pending proceedings at the trial court nor was there evidence that the refusal of an injunction would cause some irreparable harm which outweighs the public interest. On the other hand, the balance of convenience does tilt in favor of the respondents.

Having said so, and for the reasons stated above the preconditions for grant of conservatory and injunction orders as set out by the courts in **Judicial Service Commission (supra) and Centre for Human Rights and Democracy & another (supra), Mrao Limited (supra)** have not been met by the petitioner.

The application is therefore refused and dismissed. Costs of the application to abide the outcome of the petition.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE