



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 330 OF 2018

SPEEDEX LOGISTICS LIMITED.....1ST PETITIONER

SURESH NARAN VARSANI.....2ND PETITIONER

HARJI MAVJI KERAL.....3RD PETITIONER

VERSUS

THE DIRECTOR OF CRIMINAL INVESTIGATIONS....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE KENYA BUREAU OF STANDARDS.....3RD RESPONDENT

AND

TIRE WORLD LIMITED.....INTERESTED PARTY

RULING

1. This ruling is in respect to the application dated 27th September 2018 brought under Articles 20(2) 22(1) 23(1) b, c, of the Constitution and Rules 4, 13, 23(1) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice procedure Rules, 2013 (*Mutunga Rules*). For the purposes of this ruling, the applicant sought orders that:

1. That pending the hearing and determination of this petition or until further orders of this court, a temporary conservatory order be and is hereby issued prohibiting the 1st and 2nd respondents whether by themselves and or their officers, agents, servants or anybody acting under them from investigating, arresting, maintenance and continuance of any criminal charges Criminal Case No 1782 of 2018 and or instituting any such fresh investigations, charges based on the importation of tyres, tubes and flaps vide entry No. 2018EMA6830850 into Kenya.

2. The application is supported by the 2nd petitioner's affidavit sworn on 27th September 2018. The gist of the applicant's case is that following an inquiry by the 3rd respondent among other government agencies into a allegations that substandard goods had been imported into the Kenyan market, the 2nd respondent found the applicants criminally culpable and initiated criminal proceedings against them in Criminal Case No. 1782 of 2018 on 2 counts of connivance to commit an offence under Section 9(3) (b) of the East African Community Customs Management Act No. 1 of 2005 and willful disobedience of statutory duty contrary to Section 130 of the Penal Code.

3. At the hearing of the application, parties agreed, by consent, that the arguments and ruling in this application applies to a similar application dated 28th September 2018 in Petition No. 332 of 2018 in which similar orders have been sought.

4. Mrs Gichuru, learned counsel for the applicants submit that under Article 157(II) of the Constitution, the Director of Public Prosecution (DPP) is required to exercise his mandate with due regard to public interest, the interest of administration of justice and the need to avoid abuse of legal process. According to the applicants, the Director of Public Prosecution had abused the legal process by initiating criminal proceedings against them. Counsel referred to the decision in the case of **Republic vs Director of Public Prosecutions & Another Ex-parte Geoffrey Mayaka Bogonko & Another [2017] eKLR** where it was held that a criminal trial can be interfered with if found to be an abuse of process.

5. On proof of prima facie case counsel submitted that even though the petitioners were only clearing agents, they had been charged with the offence of willful neglect of statutory duty and conspiracy to import substandard goods despite the fact that the 3rd respondent had issued a Certificate of Conformity in respect to the said goods after they arrived in the country. The applicant's case was that it was the duty of the 3rd respondent to ensure that the standards of the requisite standards of goods were met.
6. Counsel submitted that the charge of willful disobedience of a statutory duty was brought under a non-existent law and was thus a non-existent offence thereby showing that the intended prosecution was an abuse of the court process. He argued that the applicants were charged for actions which did not fall within their mandate and that the charges against the applicants were oppressive as they would occasion loss of business, reputation, and rampant violation of constitutional rights.
7. Counsel urged the court to allow the application for conservatory orders staying the proceedings to ensure that justice is done to all parties including the respondents who will be at liberty to continue with their case should the petition be disallowed.
8. Counsel also submitted that the bail terms that may be imposed on the petitioners may include the confiscation of passports an eventuality that could negatively affect the petitioners whose core business of imports and clearing agency require frequent travels to other jurisdictions.
9. The respondents opposed the application through the replying affidavit of the prosecution counsel, **Wesley Nyamache**, dated 2nd October 2018. **Mr. Akula**, learned counsel for 2nd respondent submitted on the conditions to be met by an applicant seeking conservatory orders and highlighted the said conditions to be proof of a prima facie case, irreparable loss, enhancement of constitutional rights, and public interest. According to the respondents, the applicants did not prove any of the said conditions so as to warrant the issuance of the orders sought. Counsel submitted that the respondents had established, through the averments in the replying affidavit and through documentary evidence, that the goods that were the subject of the proceedings before the magistrates court were substandard and that the Director of Public Prosecution was therefore justified in initiating the said criminal proceedings.
10. It was submitted that it is the public interest that consumers are protected from consuming substandard goods. Counsel further argued that the validity of the charge sheet was a matter that could only be determined before the trial court.
11. Mr. Kinyanjui, learned counsel for the respondent submitted that the petitioners had not established that the intended prosecution was frivolous or an abuse of the court process. He relied on the decision in the decision in the case of **Ezekiel Waruinge vs Director of Public Prosecution [2017] e KLR**. Counsel further submitted that the court ought to be reluctant to halt proceedings where the Director of Public Prosecution is exercising his constitutional mandate as that would go against the public interest and good order.
12. It was the respondent's case that the applicants had not demonstrated that their rights to fair trial had been violated and that mere publicity cannot warrant the grant of stay of proceedings. The respondents maintained that proceedings of this kind should be concerned with checking the legality of the process taken by the Director of Public Prosecution before the trial court and not the merit of the decision made by the Director of Public Prosecution to charge a suspect in court.
13. Counsel argued that granting the conservatory orders sought will affect the rights of the applicants' co-accused before the trial court as not all the accused persons are parties to the instant proceedings.

Determination

14. I have considered the pleadings filed herein, the rival submissions made by the parties' advocates together with the authorities that they cited. I note that the pertinent issue for determination is whether the applicants have made out a case to warrant the issuance of the conservatory orders. The gist of the applicants' case is that in instituting the criminal proceedings, the respondents had violated their constitutional rights and that the said proceedings amounted to an abuse of the due process of court.
15. It has severally been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and is in fact forbidden from making any definite and conclusive findings on either fact or law. I will therefore not make any determinations on matters of fact or law as that would have the effect of prejudicing the hearing of the main Petition.
16. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice.
17. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General Nairobi** Petition No. 16 of 2011 **Musinga, J** (ahtw) stated that:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

18. In a majority decision in the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held as follows:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the 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 powers 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 inaction or omission.”

19. Similarly, in **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows in regard to Conservatory orders:

“Conservatory orders in my view 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 are 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.”

20. Upon finding that a prima facie case has been established, the court then decides whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights. Flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory and lastly the court must ensure that the conservatory orders fulfill the public interest dogma as was observed by the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others [2014] eKLR** when the court stated:-

“Conservatory Orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the “prospects of irreparable harm occurring during the pendency of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”.

21. At this nascent stage of proceedings, this Court is alive to the fact that it is not dealing with the petition but an interlocutory motion for conservatory orders. The Court must therefore be guided by the principles stated in the above cited decisions in deciding whether or not to grant conservatory orders.

22. Starting from the question of whether the applicants have established a *prima facie* case I find that it has been held that a *prima facie* case is not a case which must succeed at the hearing of the main case but is rather a case which is not frivolous. In other words the applicants need to demonstrate that their case discloses arguable issues, and in this case, arguable Constitutional issues.

23. The applicants claim is that they did not commit the offences that they have been charged with before the criminal court and that they were charged with an offence that does not exist. To my mind, the mere fact that a person has been charged in court or that the said charges are unlikely to culminate in a conviction does not in itself amount to a violation of a constitutional right. My take is that the legality of the said charges or their success thereof is a matter that can only be determined by the trial court.

24. Article 157(1) of the Constitution establishes the office of the Director of Public Prosecution while Article 157(6) stipulates that:

The Director of Public Prosecution shall exercise State powers of prosecution and may-

- a) ***institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed***
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***
- (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).***

Article 157(10) on the other hand stipulates that:-

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

25. Under Article 157(11) of the Constitution, in exercising the powers conferred to him under the Constitution, the DPP is required to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. In the instant case, apart from the applicants’ claim that the charges leveled against them were not viable, no material was placed before me to show that the DPP acted outside or contrary to the provisions of Article 157 of the Constitution. This court is of the view stopping the intended criminal proceedings, in the circumstances of this case, will be tantamount to usurping the mandate of the DPP who is, by dint of the provisions of the Constitution, under a duty to perform the functions of his office with due regard to public interest, administration of justice and the need to avoid abuse of the legal process. In my very humble opinion, the reasons advanced by the applicant for challenging the decision by the Director of Public Prosecution to charge them before the criminal court could as well form a basis of their defence during the trial and do not meet the threshold of the circumstances under which a court can stay such proceedings.

26. Needless to say, it is expected that the applicants will be subjected to a fair trial before a court of competent jurisdiction where they will be able to raise any objections that they may have to the validity of the charges or the weight of the prosecution's case. The applicants did not state that they will not be able to receive a fair hearing before the trial Court. The criminal justice system in Kenya is structured such that every accused person has a right to a fair trial and this is a guaranteed right enshrined in the Constitution. I therefore do not find that there is any reason to doubt that the trial court will not adhere to the provisions of Article 50 of the Constitution with respect to a fair trial. In the case of **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR** it was held:

“Our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquittal are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.”

27. When rejecting a similar application for stay of criminal proceedings in the case of **Republic vs Director of Public Prosecution & Another Ex-parte Geoffrey Mayaka Bogonko & Another** (supra) Odunga J. observed as follows:-

“The circumstances under which the court will grant stay of a criminal process in these kinds of proceedings are now well settled. The court ought not to usurp the constitutional mandate of the Director of the Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legality recognized aim.”

28. Guided by the dictum in the above cited case, one can in the same vein say that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of conservatory orders which can, in the circumstances of this case, only be issued when it has been established that the prosecution amounts to a violation of constitutional rights. It is noteworthy that in initiating the criminal proceedings against the applicants, the DPP is performing his constitutional functions and he cannot therefore be faulted, at least at this early stage of the said proceedings, from charging the applicants in court.

29. Turning to the issue of irreparable loss, the applicants submitted that the charges brought against them were oppressive and would occasion them loss of business, reputation and amount to rampant violation of their constitutional rights if the conservatory orders sought are not granted. My finding however, is that litigation in any form presents an inconvenience to the litigants in one way or the other and that such inconvenience cannot be a basis for staying court proceeding. I am guided by the decision in the case of **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** wherein it was held that:

“Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigors of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”

Similarly, in the case of **Jago vs. District Court (NSW) 106** the court observed that:

“.. it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a lofty aspiration but it is not the law.”

30. Taking a cue from the above cited decisions, I find that the mere fact that the criminal trial may give an accused person bad publicity or negatively affect his business is not a sufficient reason to stay the criminal proceedings. I further find that in determining whether or not to grant conservatory orders, the court is under a duty to balance the interests of the applicants as private citizens to conduct their business unhindered as against the wider public interest to protection from substandard or harmful goods. I note that the subject matter of the impugned proceedings before the trial court is the claim of importation of substandard goods. This court notes that the issue of importation of substandard and/or harmful goods has, in the recent past, been the subject of intense public debate and concern and without passing judgment or blame on any party to these proceedings, I find that it would not be in public interest to stay proceedings relating to the issue of substandard goods.

31. Having considered the Notice of Motion dated the 27th of September 2018 and having regard to the findings and observations that I have

made in this ruling and without saying much at this interlocutory stage lest I run the risk of determining issues that are ideally the preserve of the court that will eventually hear and determine the main petition, I find that the applicants have not made out a proper case for the grant of the orders sought and the order that commends itself to me is the order to dismiss the instant application with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 5th day of October 2018

W. A. OKWANY

JUDGE

In the presence of

Mrs Gichiru & Mwangi for the applicants

Mr Kinyanjui, Miss Mwia & Patel for the respondents

Court Assistant – Kombo