



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

JUDICIAL REVIEW NO. 3 OF 2018

1. AHMED CHEGE GIKERA

2. HENRY WAINAINA WAKI HORO.....APPLICANTS

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

RULING

1. The ex parte Applicants are **Ahmed Chege Gikera** and **Henry Wainaina Wakihoro**. On 7/2/18 the court granted the second prayer in the ex parte Applicant's chamber summons filed on 23rd February 2018. The prayer was for leave to apply for an order of certiorari to remove into this court, for quashing, the proceedings in seven criminal cases before the Chief Magistrate's Court at Thika and Kiambu.

2. The 3rd prayer that the said leave operates as a stay of proceedings was not granted. The grounds upon which the chamber summons was premised are stated on the face of the chamber summons, in the statutory statement and verifying affidavits of the ex parte Applicants to be that:

a) Henry Wainaina Wakihoro (the 2nd ex parte Applicant) is a director and secretary of the Interested Party, **Githunguri Constituency Ranching Co. Ltd.**

b) The two Applicants were arrested and are being prosecuted by the Respondent in connection with matters which are of a civil nature.

c) The Applicants belong to one faction of the leadership of the Interested Party and are embroiled in a leadership wrangle with the Complainants in the impugned criminal cases who belong to or are members of the opposite faction of **Githunguri Constituency Ranching Co. Ltd** (hereinafter the Interested Party)

d) Despite the alleged offences falling under the jurisdiction of the **OCS Ruiru**, the criminal matters are being handled by the **OCS Kiambu**.

e) The ex parte Applicants believe that the 7 criminal cases amount to an abuse of the criminal justice system.⁶

f) proceedings in **Kiambu Chief Magistrate's Criminal case No.2779 of 2014** which are similar were quashed by **Odunga J** on 27th September 2014.

g) It is in the interest of justice that leave granted operates as a stay of the criminal proceedings.

3. On 8th February, 2018 counsel for the ex parte Applicants Dr. Wangai filed a certificate emphasizing the urgency of the matter and in particular, the 3rd order of the chamber summons. The court directed on the same date that service be effected for hearing in respect of the said 3rd prayer on 19/3/18. In the intervening period, the ex parte Applicants filed their substantive motion.

4. The Director of Public Prosecutions (DPP, Respondent) filed grounds in opposition to the stay prayer. To the effect that the court having declined the same had thereby pronounced itself and the ex parte Applicants were now seeking a review; that the prayer had been defeated by the inordinate delay as some of the cases were 3 years old and that some are nearing conclusion; that there was no material to justify the orders sought; that the decision by **Odunga J** had no bearing on the criminal proceedings the subject of the present application; that there was no leadership wrangle in the Interested Party and finally, that co-accused in the subject criminal proceedings are not party to the present application.

5. By an affidavit in Reply sworn by **IP Joseph Ngewa**, the County Criminal Investigating Officer, the DPP sets out the facts surrounding each of the criminal cases and their respective status. Disputing the existence of a leadership tussle in the Interested Party, the deponent states that there is no demonstration of a connexion through directorship or shareholding between the ex parte Applicants and the interested Party. Moreover, that the decision by **Odunga J** related to a different subject matter. He defends investigations carried out in connection with the criminal cases and the prosecution of the ex parte Applicants, and deposes that the present application before the court is an afterthought and is brought for the sole purpose of defeating the course of justice.

6. Through **John Maina Mburu**, the chairman of the Interested Party, the Interested Party swore an affidavit in opposition to the application and entire proceedings. Key depositions in the affidavit are that:

- a) The directorship of the Interested Party has been settled through an election pursuant to orders by **Mutungu J** (as he then was) and affirmed in subsequent legal proceedings, thus there are no leadership wrangles within the Interested Party.
- b) The criminal cases facing the ex parte Applicants arise not from alleged wrangles but criminal acts by the ex parte Applicants which were investigated by police and a decision made by the Respondent to mount prosecutions.
- c) The charges facing the ex parte Applicants, the complainants therein and circumstances in each case are different.
- d) The ex parte Applicants should not use the alleged leadership wrangles as a smokescreen to avoid prosecution.

7. By the time the application came up for hearing, both the Respondent and Interested Party had filed written submissions. The application was therefore canvassed on the basis of the said submissions as well as oral submissions on 18.6.18.

8. The respective submissions by the parties can be summarized as follows. The ex parte Applicants have contended that delay in bringing the suit was inconsequential in light of the illegality being challenged.

Counsel for the Applicants Dr. Wangai, submitted that the prayer for an order for stay of proceedings is issued at the court's discretion and that the stay sought will ensure that the substantive motion is not rendered nugatory. Dr. Wangai argued that the Applicant's right to pursue the instant application cannot be waived despite delay and in any event, the respondent will not suffer any prejudice if the criminal proceedings are stayed.

9. The Respondent filed their submissions on 12th July, 2018. They emphasized that the orders sought are equitable and delay defeats equity. It was submitted that the applicants have approached the court four years after the commencement of prosecutions. That no explanation has been proffered for the delay. They contended that the stage of the criminal proceedings is a relevant matter and that staying them would occasion prejudice to the Complainants. They stated that the decision of **Odunga, J** is not relevant to this case. They relied on the decision of the High Court in **Imaran Ltd and 5 Others v Central Bank of Kenya [2016] e KLR**.

10. Mr. Njenga, counsel for the Interested Party submitted that the order for stay of proceedings sought by the ex parte Applicants is a discretionary one. And that, for a criminal case to be stayed, the applicant must prove that the charges are unreasonable, or arise as a result of a conspiracy or are instituted for an ulterior motive. Counsel opined that the Applicants before court had not discharged the burden of proving any of the said grounds. Reliance was placed on the case of **Bitange Ndemo vs Director of Public Prosecutions & 4 others (2016) eKLR**. Counsel further contended that the charges are before a court of competent jurisdiction where the Applicants could challenge the validity of the charges. It was argued that the grant of leave to bring a Judicial Review application is not of itself a basis for stay of proceedings.

11. The court has considered the material canvassed by the parties in support of and opposition to the prayer for stay of proceedings pending in the lower court. At times, it did seem that the parties were arguing the substantive motion itself. Be that as it may, the parties agree that an order for stay of proceedings is granted at the discretion of the court. And secondly, that the criminal proceedings in the lower court have been ongoing, some of them for almost 4 years.

12. The ex parte Applicants' answer to the admitted delay in approaching this court is that the delay does not 'sanitise' an illegality. The court has perused the proceedings attached as **annexture 5**, to the Applicants' affidavit, the copies of charge sheets attached to the Replying Affidavit of the Interested Party and related depositions contained in the Respondent's Replying Affidavit. Apart from **Kiambu Chief Magistrate's Criminal Cases No. 242 and 627 of 2017** the remaining cases were filed between 2014 and 2016. That notwithstanding in **Kiambu Criminal Case No.627 of 2017** all prosecution witnesses have testified and the accused persons placed on their defence. Two witnesses have testified in **Thika Chief Magistrate's Criminal Cases No. 4899 of 2015 and No. 4499 of 2016**. The remaining cases have not proceeded to hearing as far as I can tell.

13. In light of the foregoing, fact that the decisions to prosecute the ex parte Applicants in five of the cases i.e. **Nairobi Criminal No. 1577 of 2014, Thika Criminal cases No. 4899/15, 4499/16, 4629/15 and Kiambu Criminal Case No. 1695/16** were made between 4 and 2 years ago, there ought to be some explanation for the ex parte Applicants' delay in bringing the present application. In the matters that have proceeded on to hearing, the accused persons are represented by counsel. A party who is seeking the exercise of the court's discretionary power in his favor ought to explain any delay on its part.

14. Although at present the courts no longer rigidly apply the requirement for the filing of judicial review applications within six months as stipulated in Order 53 rule 2 Civil Procedure Rules, the rationale and the principle behind the provision still subsists. A party who drags his feet over a long period, only to rush to court in the eleventh hour under certificate of urgency, without explanation will not be readily accommodated by the court of equity, as equity does not aid the indolent. In the absence of an explanation by the ex parte Applicants in this case for their inordinate delay in approaching the court, one may well be tempted to agree with the Respondent's contention that the present action is an afterthought, or worse, an attempt to defeat the course of justice.

15. Notwithstanding the granting of leave by the court, the decision whether or not to say proceedings is discretionary as Order 53 r 1 clearly provides. A successful applicant ought to demonstrate that the circumstances of his case call for such stay. At the same time, the court in determining the prayer for stay in a judicial review matter must be careful not to determine prematurely the merits of the substantive motion.

16. Based on the unexplained delay by the ex parte Applicants in bringing the present application, the fact that majority of the subject criminal cases have not been heard, and have been in court over several years, while hearing has commenced in three of them and one of these, to advanced stages, and in light of the nature and circumstances of this case, and for further reasons to be given in the final judgment, I am not satisfied that the ex parte Applicants' motion is at risk of being rendered nugatory if the stay order is denied. Or in other words, the court does not feel assured that this is a proper case for exercising its discretion in favour of the ex parte Applicants. Prayer 3 of the chamber summons filed on 23/1/18 is therefore rejected.

17. In order to expedite the hearing of the substantive motion, the court directs that:

- a) The ex parte Applicants do file and serve their skeletal written submissions thereon within 21 days of today's date.
- b) Upon receipt of the ex parte Applicants' submissions the Respondent and Interested Party do file and serve skeletal written their submissions within 21 days.
- c) The court will proceed to mention the matter to confirm compliance and to allocate a hearing date for the canvassing of the substantive motion.
- d) For this purpose the matter will be mentioned on 21/2/19.

Costs will abide the outcome of the substantive motion.

DELIVERED AND SIGNED AT KIAMBU THIS 16TH DAY OF NOVEMBER , 2018

C. MEOLI

JUDGE

In the Presence of:

For the ex parte Applicants – No appearance

For the Respondent – Mr. Ongira

For the Interested Party - No appearance

Court Clerk - Nancy