REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JR. MISC.APPL. CASE NO.9 OF 2015

IN THE MATTER OF: ARTICLE 23, 25, 27, 50, 157 AND 165 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTIONS 4 & 5 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

BETWEEN

PERES NYAKERARIO MOSE…….……EXPARTE/APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION……...……..…….……..1ST RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION…….……2ND RESPONDENT

TRANSITION AUTHORITY…….……..1ST INTERESTED PARTY

NYAMIRA COUNTY PUBLIC SERVICE BOARD……...…..……..2ND INTERESTED PARTY

RULING

Introduction

1. In its judgment delivered on **27th January 2016**, this court dismissed the Applicant's Motion dated 7th September 2015. In the said application, the applicant herein sought orders of certiorari to quash the 1st

Respondent's decision to charge and prosecute her together with orders of prohibition directed against the 1st Respondent prohibiting him or his agents from commencing criminal proceedings against the Applicant before any court in Kenya in respect to the sourcing of insurance covers for 15 motor vehicles for Nyamira County Government.

2. The Applicant herein, being aggrieved by this court's said decision has filed a Notice of Motion dated **2nd February 2016** brought under **Order 42 Rules 1, 2, 3, 4** and **5** of the **Civil Procedure Rules** seeking the following orders:

1) THAT the instant Application be certified as urgent and heard exparte in the first instance.

2) THAT pending the hearing and determination of this Application, there be a stay of execution of the judgment of Lady Justice Frida Okwany delivered on 27th January 2016 at the High Court in Kisii, that is, the Respondents be estopped from arresting, preferring, authorizing, blessing or giving the go ahead for criminal charges to be preferred against the Applicant or charging the Applicant in relation to the sourcing of insurance covers for 15 vehicles for Nyamira County Government.

3) THAT pending the hearing and determination of the Applicant's Appeal, there be a stay of execution of the judgment of Lady Justice Frida Okwany delivered on 27th January 2016 at the High Court in Kisii, that is the Respondents be stopped from arresting, preferring, authorizing, blessing or giving the go ahead for criminal charges to be preferred against the Applicant or charging the Applicant in relation to the sourcing of insurance covers for 15 vehicles for Nyamira County Government.

4) THAT the costs of this Application and the interest thereon be provided for.

5) Any other and further relief that this honourable Court may deem fit and just to grant in the circumstances.

3. The application is supported by the affidavit of **PERIS NYAKERARIO MOSE** and grounds on the body of the application which were expressed as follows:

1) By an order issued by Justice David Majanja on 2nd September 2015, the court ordered inter alia:

> ***"That the leave so granted to the Applicant do operate as a stay of the decision of the 1st Respondent to prefer, authorize, bless or give the go ahead for criminal charges to be preferred against the Applicant in relation to the sourcing of insurance covers for 15 vehicles for Nyamira County Government."***

2) By the judgment of Honourable Lady Justice Frida Okwany delivered on 27th January 2016 at the High Court in Kisii, the learned Judge dismissed the Ex Parte Applicant's substantive Notice of Motion Application dated 7th September 2015 effectively vacating the stay order that had been issued by Justice David Majanja.

3) There is an imminent risk that the Respondents will arrest the Applicant herein and charge her on 9th February 2016 with offences she did not commit.

4) If stay pending appeal is not granted, the Applicant stands to suffer substantial loss and the intended appeal would be rendered and academic exercise.

5) This application for stay pending appeal has been brought at the earliest opportune moment and without any inordinate delay whatsoever.

6) The applicant has already lodged a Notice of Appeal with this Honourable Court which Notice

of Appeal is deemed as an appeal for purposes of a stay pending appeal.

7) The applicant has a strong and arguable appeal with an overwhelming chance of success.

8) It is in the best interest of justice that the Applicant is granted stay pending appeal so that she can have an opportunity of arguing the merits of her appeal at the Court of Appeal.

4. In her affidavit, the Applicant repeats the grounds already stated on the body of the said application and adds that on **29th January 2016**, the 2nd Respondent's officers arrested her in Nairobi in relation to the sourcing of insurance covers for 15 vehicles for Nyamira County Government whereupon she was released on a cash bail of Ksh.100,000/= and that she is slated to take plea before the Kisii Chief Magistrate's Court on **9th February 2016**.

5. She further deposed that there was an imminent risk that the Respondents will arrest her and charge her on 9th February 2016 with offences she did not commit. According to the applicant, she stands to suffer substantial loss and her appeal and the instant application will be rendered nugatory if the orders sought are not granted.

6. The Applicant added that her application had been brought without any inordinate delay and that she had a strong and arguable appeal with overwhelming chances of success.

Lastly, the Applicant deponed that her application ought to be allowed in the best interest of justice.

1st Respondent's Grounds of Opposition

7. In opposition to the application, the 1st Respondent filed grounds of opposition dated 5th February 2016 in which it stated as follows:

1) The court having dismissed the Applicant's Judicial Review Application, vide its Judgment dated 27th January 2016, it did not grant any positive orders. The negative orders, to wit, dismissing the Judicial Review Application, are incapable of being stayed.

2) The requisite condition(s) to persuade court to grant stay have not been met. Even if Stay Orders are not granted, that will not render their Appeal nugatory.

3) The Applicant has not demonstrated overwhelming changes of success of his Appeal by pointing out what is out rightly wrong in the Honourable court's Judgment delivered on 27th January 2016.

4) In as far as this matter is concerned, the Hon. court is Functus Officio pursuant to **Section 8 (3)** and **(5) of the Law Reform Act, Chapter 26 of the Laws of Kenya**, thus lacks jurisdiction."

8. The 1st Respondent also filed a list of authorities dated 5th February 2016.

2nd Respondent's Grounds of Opposition

9. Similarly, the 2nd Respondent also filed its list of authorities and grounds of opposition expressed as follows:

"1. **This Court in its judgment delivered on 27th January 2016 did not make any order that is capable of being stayed by an order of stay of execution. In dismissing the Applicant's judicial review application, the Court did not grant any positive order in favour of the Respondents which is capable of execution.**

2. **The Applicant has not demonstrated how she stands to suffer substantial loss if the order**

sought is not granted."

10. The Applicant's said application was on **3rd February 2016** certified as urgent and thereafter listed for interpartes hearing on 5th February.

11. On **5th February 2016**, counsel for all the parties argued the application by way of oral submissions.

Applicant's Submissions

12. On behalf of the Applicant, Mr. Mokua advocate submitted that this court has jurisdiction to grant the orders sought by virtue of the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules**.

13. Mr. Mokua further submitted that the Respondent's claim that there were no positive orders capable of being stayed was incorrect since the order issued on **2nd September 2015**, granting the Applicant leave to file Judicial Review proceedings also operated as stay and had the effect of staying the arrest and institution of criminal proceedings against the Applicant and therefore subsequent dismissal of the Applicant's substantive motion meant that the said orders of stay had been vacated.

14. Mr. Mokua added that the Applicant was due to take plea in the criminal case on 9th February 2016 and therefore the orders of 27th January 2016 were positive in nature to the extent that they had the effect of allowing the Respondents to arrest and charge the Applicant.

15. It is for the above reasons that the Applicant held the view that the court could issue an order of stay of execution and injunction.

16. On the contention that the Applicant had not made out a case to warrant the grant of orders of stay, the Applicant submitted that she had filed the said application timeously and without unreasonable delay. She added that she would suffer substantial loss of great magnitude if she took plea on 9th February 2016 as her appeal would then be rendered nugatory since the prosecution process would be irreversible in the event she succeeded on appeal while on the other hand, the Respondents would not be prejudiced in any way whatsoever if her appeal did not succeed as they would still be able to arrest and charge her in court.

17. The Applicant submitted that the substantial loss to be suffered by her if she took the plea will be in the form of her interdiction from work whereupon her employer, the County Government of Nyamira, would put her on half salary and will not get a substantive replacement for her position and that if her prosecution ended in an acquittal, she will be reinstated and paid her full salary. In this regard, the Applicant submitted that the scale of balance tilted in her favour.

18. The Applicant further submitted that she was ready to furnish security for costs that the court would deem fit and that her intended appeal had overwhelming chances of success.

1st Respondent's Submissions

19. Mr. Imbali, advocate for the 1st Respondent opposed the Applicant's application on the grounds that the Applicant's substantive application dated **7th September, 2015** was wholly dismissed with no substantive positive orders being issued and that as such, there was no order capable of being stayed by the instant application.

20. As regards the order issued by Majanja J, on **2nd September 2015** for leave to file application for Judicial Review which leave operated stay of arrest and prosecution of the Applicant, the 1st Respondent's advocate submitted that the stay was effectively vacated when the Applicant's substantive application was dismissed and as such, there were no orders to be stayed.

21. The 1st Respondent submitted that the Applicant's appeal will not be rendered nugatory because the

Applicant would still be entitled to pursue the same and in the event that the appeal succeeded, then the intended or ongoing prosecution could still be terminated.

22. Mr. Imbali further submitted that the court became *functus officio* upon delivering the judgment on 27th January 2006 by virtue of the provisions of **Section 8(3) and (5)** of the **Law Report Act** and thus, the only recourse available to the Applicant was to go to the Court of Appeal and that if this court allowed the instant application, it would be overstepping its mandate since the Application's prosecution before the lower court had already been initiated.

23. The 1st Applicant added that the only reason plea had not been taken by the Applicant before the lower court was because the Applicant was reportedly indisposed and the trial court was then engaged in other judicial duties/functions outside the court station.

24. The 1st Applicant's counsel further submitted that it was a high time that the Applicant submitted herself to the inevitable prosecution process so as to clear her name in a speedy and fair trial before a court of competent jurisdiction. The 1st Applicant relied on the cases cited in the list of authorities. The Applicant urged the court to disallow the Applicant's application.

2nd Respondent's Submissions

25. The 2nd Respondent similarly opposed the Applicant's application while relying on its grounds of opposition filed on 5th February 2016 and the list of authorities filed on the same.

26. Mr. Waudo, counsel for the 2nd Respondent submitted that this court did not grant any positive orders capable of being stayed by the instant application. On this point, Mr. Waudo relied on the case of **R. –vs- Commissioner of Lands Exparte Chase Properties Ltd and 2 others [2014] eKLR**, **R –vs- Commissioner for Investigations and Enforcement ex parte Wanainchi Group Kenya Ltd [2014] eKLR**, and **R –vs- Nairobi County Government Ex parte Nuclear Investments Ltd [2015] e KLR 27 and 28**.

27. The 2nd Respondent reiterated that the Applicant had not shown that she would suffer any substantial loss if the orders sought were not granted and that the reasons advanced by the Applicant's counsel were not canvassed in the Applicant's sworn affidavit, but were given by the Applicant's counsel from the bar without any formal substantiation as is required by the law.

28. Similarly, while Mr. Waudo for the 2nd Respondent conceded that the application was filed within reasonable time as is required by the law, he took issue with the fact that the Applicant did not canvass her ability and willingness to furnish security for costs as a condition for stay in her affidavit in support of the application as a condition for stay as is required by the law.

29. Mr. Waudo, counsel for the 2nd Respondent further submitted that while this court's orders can be stayed, the said stay can only be granted where there are positive orders capable of being executed in which case the court would be granting orders that a party does or refrains from doing anything capable of being stayed which was not the case in the instant application as what the court did was to dismiss the applicant's substantive application for Judicial Review.

30. Mr. Waudo further submitted that the earlier orders by Justice Majanja made on 2nd September 2015 were temporary in nature pending the filing and determination of the substantive Judicial Review application and that the issue previously before this court was not whether the applicant should be arrested and charged for abuse of office but whether the process of investigations was irregular.

31. On the issue of substantial loss being suffered by the Applicant if she is arrested and charged the 2nd Respondent's advocate submitted that the averment was made from the bar and not in an affidavit as is required by the law. Furthermore, Mr. Waudo submitted that there would be no substantial loss to the

Applicant if she succeeded in her appeal as by law and logically her prosecution, if still pending, would be halted and she would then be paid all her dues held pending the outcome of her prosecution with the option of the suing the Respondents for damages for malicious prosecution if she deemed it fit.

32. The 2nd Respondent sought the dismissal of the Applicant's instant application.

The Applicant's Rejoinder

33. On jurisdiction, the Applicant submitted that the court had jurisdiction to grant a stay of execution or review upon rendering a judgment. On the contention that the court did not issue any positive orders capable of being stayed, the Applicant's counsel submitted that the authorities that the Respondents sought to rely on were distinguishable from the instant case as the prayers in the authorities relied upon were completely different from the prayers sought in the instant case.

The Applicant added that in the instant case, she all along had a stay pending the filing and determination of the Judicial Review proceedings as opposed to the cases quoted by the Respondents.

34. The Applicant contended that all the authorities cited by the Respondents emanated from the High Court and are thus persuasive and not binding on this court. The Applicant concluded that she was agreeable to a conditional stay within the time frames to be set by the court.

Analysis and Determination

35. I have considered the Applicant's application the affidavit in support thereof and annextures. I have also considered the Respondent's grounds of opposition, the parties submissions and the authorities cited, and come to the conclusion that the issues to be determined are as follows:

a) Whether this court has jurisdiction to grant the orders sought.

b) Whether the Applicant has made out a case to warrant the grant of orders for stay of execution and/or injunction.

c) Whether the orders granted by this court on 27th January 2016 were positive orders capable of being executed.

36. On Jurisdiction, it is contended by the Respondents that after determining the substantive motion for Judicial Review, the court became *funtus officio* and cannot grant the orders sought in the instant application. In the case of **Ryan Investments Ltd & Another –vs- The United States of America [1970] E.A. 675** it was held that **Section 3A of the Civil Procedure Act** is not a provision that confers jurisdiction on the court but simply reserves jurisdiction which is inherent in very court.

37. This position was further fortified in the case of **Equity Bank ltd –vs- West Link Mbo Ltd [2013] KLR** in which it was held, that inherent power is the authority possessed by the court without its being derived from the Constitution or Statute.

38. In the case of **Nakumatt Holdings Ltd –vs- Commissioner of Value Added Tax [2011]** the Court of Appeal held that the superior court had the residual power to correct its own mistakes in the exercise of its inherent jurisdiction, where a remediable mistake is shown to have been committed. It was further held that **Section 3A of the Civil Procedure Act** does not strictly apply to Judicial Review proceedings by conferring inherent jurisdiction on the court but only reserves the same.

39. In respect to the instant case, my view is that where orders granted by the High Court, whether on Judicial Review or any other civil proceedings are capable of being executed, the same are amenable to stay of execution.

My opinion is supported by the Court of Appeal's decision in the case of **Republic –vs- University of**

Nairobi Civil Application No.Nai.73 of 2001 (CAK) [2002] 2 EA in which the Court of Appeal granted a stay of execution in respect of an application arising a Judicial Review decision in which the High Court ordered the university to "*convene the necessary Disciplinary Committees where students concerned shall be tried, paying attention to the matters raised in the ruling*."

40. In that University of Nairobi case (*supra*), the Court of Appeal noted that there was no prayer for an order of mandamus to warrant the grant of the said order. The Court of Appeal further observed that while the High Court could quash the decision of the university, it was debatable if the court could direct the manner in which the university could thereafter conduct its affairs and that unless the orders of stay sought were granted, the students risked being expelled or suspended by the university acting in compliance with the said order.

41. From the decision of the Court of Appeal in the above quoted case of **R –vs- University of Nairobi** (*supra*) I similarly hold the view that where the decision or order appealed from is capable of being executed, then that is a positive order for which a stay of execution may be granted.

42. In the instant case, the judgment against which the applicant intends to appeal was simply a dismissal of the Applicant's application for Judicial Review. None of the parties to the judicial review application was ordered to do or not to do anything capable of being stayed through the orders that the applicant seeks in the present application.

43. Case law is awash with decisions to the effect that where a High Court has dismissed a judicial review application, the High Court does not grant any positive orders to the Respondents that are capable of being executed. See **Mombasa Sea Port Duty Free Ltd –vs- Kenya Ports Authority Civil Application No.Nai 242 of 2006**, **William Wambugu Wahome –vs- Registrar of Trade Unions & others Civil Application No.Nai 308 of 2005**, **Yagnesh Devani & Others –vs- Joseph Ngindari & 3 others civil Application No.Nai 136 of 2004**.

44. I similarly hold the view that where the court does not grant a positive order capable of being executed, a party cannot approach the court under **Order 42 Rule 6** of the **Civil Procedure Rules** because clearly the bottom line is that there would be no orders capable of being stayed. See **Western College of Arts and Applied Sciences –vs- Oranga & Others [1976] KLR 63**.

45. The Applicant, has in her instant application and submission alluded to the fact that since she had prior to the filing of the substantive application obtained leave to file the Judicial Review application and that there was an order that: "*the leave so granted do operate as a stay of the decision of the 1st Respondent to prefer, authorize bless or give the go ahead for criminal charges to be preferred against the Applicant in relation to the sourcing of insurance covers for 15 vehicles for Nyamira County Government*." The dismissal of the Applicant's subsequent Notice of Motion had the effect of vacating the stay order that had been previously issued.

46. It is therefore by virtue of the fact that the Applicant had leave to institute judicial review application and the said leave operating as a stay that makes the Applicant believe that even on appeal, she could still be entitled to the stay.

47. My opinion is that the life span of stay that accompanied the leave granted to file for judicial review was up to the date of the determination of the substantive motion after which the leave and stay lapsed. Following the dismissal of the Applicant's Notice of Motion, the parties reverted back to the original positions that they were at before the filing of the judicial review application and at that point, save for the orders for costs, there are no other orders that are capable of being stayed.

48. I believe that if indeed the intention of the law makers were that the leave and stay granted prior to the filing of the substantive motion could be carried over up to the appeal stage by way of a further stay pending the appeal, then the statute would have made a specific provision to that effect.

In my view therefore, the Applicant's contention that this court can grant her a stay of execution pending

appeal is not anchored on any law or logic.

49. In **Muhamed Yakub & Anor. –vs- Mrs. Badur Nasa Civil Application No.Nai 285 of 1999** it was held that stay of execution is not available where the application for stay is directed to a decision against which the intended appeal is not directed.

50. The Applicant had contended that the authorities relied on by the Respondents were High Court cases which were only persuasive and not binding, I still hold that there are numerous decisions of the Court of Appeal in which it has consistently held that no order of stay of execution can be made where the High Court only dismissed an application for judicial review. In this regard, I refer to the case of **Devamix & 4 others –vs- Joseph Ngindafi & 3 others CA No.Nai 136 of 2004** in which the High Court dismissed an application for judicial review and the applicant applied under **Rule 5(2) (b)** for stay of execution of the order of the High Court. It was held that the application was incompetent. The court had this to say:

> **"By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the Respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application."**

51. In **Exclusive Estates Ltd –vs- Kenya Posts and Telecommunications Corporation and Another [2005] I EA 52**, the Court of Appeal had the following to say regarding the issue at hand:

> **"The stay of execution envisaged by rule 5 (2) (b) of the rules of this court is the execution of a decree or order capable of execution in any of the methods stipulated by Section 38 of the Civil Procedure Act.**
>
> **A 'decree holder' as defined in Section 2 of the Civil Procedure Act:**
>
> **"means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order."**
>
> **The order which dismissed the suit was a negative order which is not capable of being executed."**

52. More examples can be found in the following cases; **Republic & 4 others –vs- Water Board and 3 others CA No.308 of 2008, FRS –vs- JDS CA No. Nairobi 114 of 2012 (UR 89/2012), FXS Scientific Ltd –vs- Kenya Revenue Authority & Anor. CA 260 of 2012** and **Maranga Rucha & Another –vs- Attorney General & 10 others CA No.180 of 2013 (UR 127/2013, Metro Pharmaceutical Ltd –vs- Kenya Revenue Authority CA No.Nai 131 of 2012**.

53. Having made a finding on the twin issues of this court having jurisdiction to grant the orders sought but that there were no positive orders granted on 27th January 2016 whose execution is capable of being stayed, I now turn to the question of whether or not the Applicant has made out a case to warrant the grant of the orders of stay of execution and injunction sought.

54. On stay of execution **Order 42 Rule 6** of the **Civil Procedure Rules** states as follows:

> ***"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***
>
> ***(2) No order for stay of execution shall be made under sub rule (1) unless:***

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

55. It was conceded by the Respondents that the Applicant's instant application was brought within a reasonable time and that the arguability of the intended appeal would be the preserve of the Court of Appeal to determine.

56. The Respondents however took issue with the Applicant's contention that she would suffer substantial loss unless the orders sought were granted. The Applicant, in her affidavit, did not show/demonstrate the nature of the substantial loss that she would suffer if the stay orders sought were not granted. The Applicant merely alleged that she would suffer substantial loss without any substantiation. In his submissions, the Applicant's counsel, Mr. Mokua, informed the court that the Applicant risked arrest and prosecution by the Respondents if the orders sought were not granted and this would lead to her interdiction whereupon she would be put on a half salary pending the outcome of the criminal proceedings.

57. Mr. Mokua further added that it is in the event of an acquittal, then the Applicant would resume work and be paid all her salary due.

58. Firstly, I do not accept the Applicant's counsel's attempt to explain/address the issue of substantial loss from the bar as the same ought to have been stated by the Applicant herself in her sworn affidavit in support of the application.

Secondly, I find that the issue of interdiction of a public officer following the institution of criminal charges is a normal legal requirement applicable to all public servants facing criminal charges and does not constitute any substantial loss whatsoever as the Applicant would upon acquittal be entitled to reclaim her former position at work with full salary and benefits that may have been with held or accused during her trial.

59. The Applicant herself conceded in her submissions that her employer would not appoint any substantive holder of her office pending the outcome of her trial.

60. In my view, the mere institution of criminal charges against any person does not connote the guilt of that person as every accused person is deemed innocent until proven guilty and if the applicant's position is that she is innocent, then in the fullness of time, she would be able to clear her name in the intended criminal proceedings.

Having considered the application herein, it is my view that the same lacks merit and cannot succeed.

ORDER

61. In the circumstances, I find no merit in the Notice of Motion dated **2nd February 2016** and the same is hereby dismissed with costs.

62. It is so ordered.

Dated, signed and delivered in open court this 8th day of February 2016

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Muhindi for the 1st Respondent

- Mr. Waudo for the 2nd Respondent.

- Mr. Magara for the Applicant

- Omwoyo: court clerk