REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.149 OF 2016

BETWEEN

SPTE STEPHEN ODEDE…….…….…. PETITIONER/APPLICANT

AND

COURT MARTIAL AT KAHAWA GARISSON…….... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL …….……..... 2ND RESPONDENT

RULING

Introduction

1. This Ruling relates to an Application filed by the Petitioner/Applicant praying for orders that a stay of proceedings in **Court Martial Case No.5 of 2015: R v SPTE Stephen Ouma Odede** be granted pending the hearing and determination of his Petition which was filed together with the said Application.

2. The Application was premised on the grounds that:

"1) The Applicant herein is charged before the Court Martial sitting at Kahawa Garrison in Court Martial No.5 of 2015 R vs Spte Stephen Odede with the offence of desertion.

2. *Proceedings in the matter commenced on 20th January, 2015 following the convening of the Court Martial herein.*

3. *The matter proceeded with several Court attendances until 6th May, 2015 when the prosecution closed its case. The delay in the proceedings herein was occasioned by the Prosecution who kept applying for adjournments claiming the prosecution witnesses were out of jurisdiction; or at the instance of the court.*

4. *Following the close of the prosecution's case, parties were ordered to file submissions, subject to being availed the typed proceedings. The matter was fixed for mention on 21st May, 2015 to confirm whether typed proceedings would be ready. All the while, the Petitioner remained remanded.*

5. *In the intervening period, the Judge Advocate (Hon. Mrs. R. Kimingi) who had presided over the hearing was transferred. The Court reconvened on 15th October, 2015 following the posting of a new Judge Advocate (Hon. Ann Mwangi). Another 5 months was lost following closure of the prosecution's case.*

6. *On 15th October, 2015, parties attended Court when the Court directed that it's Ruling on whether the Petitioner had a case to answer would be delivered on 27th October, 2015.*

7. *On 27th October, 2015, the Court made a one line decision without giving reasons that the Petitioner had a case to answer and proceeded to put him on his defence. The matter was fixed for defence hearing on 23rd November, 2015 when the Petitioner sought and was granted time to appeal the Court's decision herein.*

8. *The Petitioner filed a notice of appeal; but later decided against appealing hoping to get a fair opportunity to rebut the prosecution's case during his defence.*

9. *The matter came up for defence hearing on 15th January, 2016 when the Petitioner applied to have the matter adjourned as his Defence Counsel was indisposed. The matter was adjourned to 10th February, 2016 at 2.00 p.m. as the Judge Advocate indicated she would not be sitting in the morning. Unknown to both the new Judge Advocate and the Counsel who held brief on this occasion, the Defence Counsel had communicated his difficulty in attending Court on Tuesday (afternoons), Wednesday and Thursday (afternoons) at the start of the prosecution's case and the Court and both parties had reached an understanding to proceed at all other times other than at these times on the stated days.*

10. *On 10th February, 2016, the Defence Counsel was not able to attend Court. The Petitioner applied for adjournment to a more convenient date and requested for the matter to be fixed for hearing on 4 consecutive days to enable the Petitioner proceed with the defence case. The Petitioner informed the Honourable Court that the Petitioner had 10 witnesses who were to travel from upcountry and requested Court to facilitate their access to the Court and to give 4 consecutive days to mitigate repeated travel costs.*

11. *The Court declined the application for adjournment and ordered the accused person to proceed with his defence; absent the Counsel who had proceeded with the hearing.*

12. *The Petitioner informed Court he was unable to proceed absent his Advocate and witnesses.*

13. *Without giving due consideration to the gravity of the sentence herein; and without considering the fact that the Petitioner always pressed for expedition in the conduct of the matter; and, without considering the length of time the hearing had been delayed at the instance of the prosecution and the Court; and, without heed to the need to secure [for] the Petitioner [a] fair hearing, the Court ordered the defence case closed and directed the prosecution to file written submissions.*

14. *On 25th February, 2016, the matter came up for mention to confirm filing of submissions by the prosecution. The Petitioner applied to Court to set aside the orders closing the defence case and ordering submissions, which application was dismissed.*

15. *On 31st March, 2016, the matter came up for mention on which date the prosecution served it's submissions upon the Petitioner; and, the Court fixed its judgment on 31st April, 2016.*

16. *By denying the Petitioner adjournment in the said most deserving and warranted of circumstances; by proceeding to direct closure of the defence case in these circumstances; and, by proceeding to fix the matter for judgment absent defence hearing, the Court Martial has violated*

the Petitioner's right to be heard contrary to the rules of natural justice; and the Petitioner's right to fair hearing under Article 50 of the Constitution.

17. *The Applicant's Petition raises substantive issues of law and facts and has high chances of success; and unless this instant application is certified urgent and orders sought therein granted, the Applicant is apprehensive that the Petition filed herewith will be rendered nugatory, his constitutional rights as an accused person infringed as the Court's judgment which may sentence the Petitioner to life imprisonment will proceed on 25th April, 2016.*

18. *It is in the interests of justice that there be a stay of proceedings in Court Martial Case No.5 of 2015: R vs SPTE Stephen Ouma Odede to obviate injustice that may be and continue to be suffered by the Applicant: and to enable the Honourable Court to justly and fairly consider the issues herein.*

19. *The Application has been filed with necessary dispatch."*

The Applicant's Case

3. In his Affidavit in support of the Application sworn on 14th April 2016 the Applicant deponed that he is employed by the Kenya Defence Forces as a Superintendent and prior to his arrest, was stationed at the Nanyuki Barracks.

4. The Affidavit in support of the Application raises the same issues set out in the grounds above and in his oral submissions Mr. Kaluma, learned Counsel for the Applicant stated that denial of an adjournment in a trial where the sentence on conviction is life imprisonment, was a serious violation of fundamental rights and freedoms. That no prejudice would have been caused to the Prosecution had the adjournment been granted and that his failure to attend the Court Martial on the day the adjournment was denied, was a matter well known to the Court Martial as he was engaged in his constitutional duties as a Member of Parliament.

5. While relying on the decision of **Peter Kariuki v AG [2014] eKLR,** Mr. Kaluma urged the point that the Application is merited and ought to be allowed as prayed.

The Respondent's Case

6. In opposing the present Application, the Respondents filed a Replying Affidavit sworn on their behalf by Lt. Col. Catherine Wanjiru Gichuki on 2nd April, 2016.

7. In her Affidavit Lt. Col. Gichuki deponed that the Application is both premature and meant to stop legitimate legal proceedings before the Court Martial. That whereas the trial of the Applicant began on 21st April 2015, it has been delayed largely because of actions of the defence led by Mr. Kaluma.

8. She further deponed that any other delay was occasioned by the transfer of the Judge-Advocate, Hon. Rosemary Kimingi and not the prosecution as alleged by the Applicant. In any event, that the present Judge-Advocate, Hon. Anne Mwangi, has expeditiously steered the trial and that on 13th November 2015, 2nd December 2015 and 19th January 2016, the defence was not ready to proceed with the hearing. Similarly on 10th February 2016, the defence was not ready to call its evidence and was granted the last adjournment in the mater.

9. It was her further deposition that on 16th February 2016, the Court Martial dismissed the defence's application for adjournment and considered that since it had no witnesses to call, its case was deemed as closed. Attempts at re-opening the defence case were also dismissed on 25th February 2016.

10. From the foregoing, her position was that at all times, the defence was given adequate time to prepare itself but instead engaged in delaying tactics for no known reason.

11. In addition to the above, Mr. Moimbo, learned State Counsel submitted that the Application was an abuse of Court process and relying on the case of **Kimathi v R [2013] eKLR** submitted that the discretion to grant or deny an adjournment was squarely the responsibility of the Court Martal.

12. Further, that absence of Counsel should not be an excuse to delay any trial and that following this Court's decision in **Nyambok v Court Martial, Nairobi H.C. Petition No.553 of 2015**, the grounds for grant of a stay order had not been met in the present case and that the Application should therefore be dismissed with costs.

Determination

13. From the foregoing, only one key issue emerges for determination namely; whether the Applicant has made out a case for the staying of his prosecution by the Court Martial pending the hearing of the Petition herein.

14. In that context, looking at the Application again, the orders of stay sought are in the nature of conservatory orders i.e. orders to maintain the status quo at the Court Martial and to stop it from proceeding with the trial. That is why **"stay"** in law is defined as **"the postponement or halting of a proceeding judgment or the like"** – See **Black's Law Dictionary, Eighth Edition** and **Rule 32 of Legal Notice No.117 of 2013. "Conserve"** on the other hand is defined as **"to protect from change, destruction or depletion"** – **Blacks Law Dictionary**.

15. In Civil Law, stay of proceedings is a matter of discretion and the grounds for stay include the fact that substantial loss may occur if the proceedings are concluded and that the suit challenging the continuation of proceedings may otherwise be rendered nugatory – See **Order 42**, of the **Civil Procedure Rules Rule 6** in cases of stay pending appeal.

16. In the context of **Article 23(3)** of the **Constitution,** stay orders such are now sought are therefore in the nature of conservatory orders to preserve the status of proceedings until the Petition is heard and determined. Whereas case law on conservatory orders seems to have crystalised in our realm, the same cannot be true as regards stay of proceedings pending finalisation of constitutional proceedings challenging other proceedings whether criminal or civil.

17. I will first address the principles in regard to the grant of conservatory orders as were outlined in the case of **Martin Nyaga Wambora v Speaker of The County Assembly of Embu and 3 Others, Petition No. 7 of 2014, where the Court stated that:**

[59] ***In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: "… [an applicant] must 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"***

[60] ***To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.***

[61] ***The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.***

[62] ***The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji and 2 Others, SCK Petition No 2 of***

2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that: "[86] 'conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes"

[63] ***Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest***."

25. I also note that in the case of **Judicial Service Commission v Speaker of the National Assembly and Another, Petition No.518 of 2013**, the Court was of the opinion that:

"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."

26. From the above expositions of the law and noting the nature of a stay order generally, it follows that a party seeking such an order must expect that it is granted as a matter of discretion and in exercise of such discretion, the Court must take into account *inter-alia* the following issues:

i) Whether an applicant has a *prima-facie*, arguable case with inherent merit or;

ii) Whether non-grant of the stay order would render the criminal, or civil or other proceeding nugatory or;

iii) Whether the public interest would be defeated by grant of the stay order.

27. If the above be the correct expectation of the law, it is also true that this Court cannot evaluate all the issues in contention within the Petition at this stage. Suffice it to say however, that the question whether an adjournment should have been granted by the Court Martial on 16th and 25th February 2016 is not an idle one and requires deeper interrogation at the hearing of the Petition.

28. In addition, it is not disputed that the Applicant is facing the charge of desertion contrary to **Section 74(1)** as read with **Section 74(2) (e)** and **3(a)(i)** of the **Kenya Defence Forces Act**. Such a charge carries a life sentence in prison if proved beyond reasonable doubt.

29. It is also uncontested that although the defence case was deemed as closed, neither the Applicant nor his intended witnesses testified and therefore only the prosecution's case is on record. To allow the trial to be concluded and sentence passed (even if favourable to the Applicant) would render the Petition nugatory to the prejudice of both parties.

30. On the public interest element, it is indeed true that following the decisions in **Kimathi (supra)** and **Nyambok (supra)** it is best that proceedings before the Court Martial are always expedited. However, even with the existence of **Article 24(6)** where rights of arrested members

of the Armed Forces may be limited, it is my view that no prejudice would be caused to the Respondents if the stay orders are granted and the hearing of the Petition expedited as was prayed for by Mr. Kaluma.

31. Lastly, I am aware of the dicta in **Saluni & Others vs Court Martial & Others Petition No.235 of 2014** that **"at times the public interest outweighs the perceived fears held by the individual citizens that their rights are about to be breached"**. My view in that regard is that each case must be looked at in its unique circumstances and the present case on the narrow issue whether an adjournment should have been granted to the Applicant because of the absence of Mr. Kaluma to attend to his parliamentary duties, ought to be investigated against the expectations of the Constitution and specifically the Bill of Rights.

Disposition

32.From the foregoing, I shall exercise discretion and order as follows;

a. **An order be and is hereby issued to stay proceedings in Court Martial Case No.5 of 2015, R v SPTE Stephen Ouma Odede pending the hearing and determination of the Petition herein.**

b. **The Petition shall be fixed for hearing expeditiously.**

c. **Costs shall abide the Petition.**

33.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Maumo for Applicant

Lt. Col. Gichuki for Respondents

Order

Ruling duly delivered.

Further Order

Hearing on 27/5/2016 at 12.00 p.m.

ISAAC LENAOLA

JUDGE