



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC APPLICATION NO 94 OF 2015

GORDON MURIUKI NGATIAAPPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

AND

VIVO ENERGY KENYA LIMITED.....INTERESTED PARTY

R U L I N G

1. This is a ruling in respect of a Preliminary Objection by the interested Party whereby they are seeking to have the Notice of Motion dated 28th October, 2015 and filed on even date struck out for:

- (a) Lack of jurisdiction on the part of the court.
- (b) being bad in law and an abuse of the court process.

2 In the said Notice of Motion, the applicant is seeking to have the trial in Mombasa chief Magistrate's Court Criminal case Nos. 2900,1319,1320,1221 and 1322, all of 2015, stayed pending the hearing and determination of Civil appeal No 138 of 2015 in the Court of Appeal Nairobi.

3 According to M/s Murage for the interested Party and Mr Ouma and M/s Mwinyi for the Affected party, a preliminary objection has been raised against the hearing of the said Notice of Motion on following grounds;

(a) this application for an order of stay of the said Criminal cases should have been filed in the High court where the applicant filed Miscellaneous Judicial Review application No 243 of 2014 in Nairobi where he sought to prohibit the respondent herein with the Inspector General of the National Police Service from arresting or charging him with any criminal case (s) and the same was dismissed by Justice Odunga on 25.2.2014.

(b) that he should have sought to stay the criminal cases in an application when he filed the appeal against Justice Odunga's decision in the Court of Appeal civil case No 138 of 2015 in Nairobi, as is required under Section 15 (2) () of the court of appeal rules that such an application be anchored in a substantive suit or appeal.

(c) that the issue of whether or not the respondent should be restrained from arresting or charging the Applicant in the Criminal cases they intended to was dealt with.

Miscellaneous Judicial Review Application No 243 of 2014 in Nairobi by Justice Odunga and as such this court cannot deal with that what had already been dealt with by a court of concurrent jurisdiction (it lacks jurisdiction);

(d) that the Applicant has not demonstrated cogent reason why the respondent should not prosecute the cases against him or what prejudice he would suffer if the prosecution of these cases proceeded as what he is purporting to prohibit has already taken place.

(e) that the applicant is deemed to be forum shopping which is a gross abuse of court process meant to waste process judicial time.

4 In seeking to have the preliminary objection dismissed, Mr Munyale who was holding brief for Mr Mitey for the Applicant submitted that;

(a) the applicant is not asking this court to sit on an appeal in a matter which has been dealt with by Justice Odunga but is seeking to stay the proceedings before the magistrate's court in Mombasa pending the outcome of the appeal that is pending before the court of appeal.

(b) the reason the application was filed in Mombasa and not Nairobi is because he was arraigned before the court in Mombasa and not Nairobi, hence this court has jurisdiction to entertain his application.

(c) the applicant is not seeking to hinder the Director of Public Prosecution's work but is seeking to have the criminal case stayed briefly pending the determination of the court of appeal.

5 I have considered the arguments by both sides with regard to the preliminary objection raised by the interested party by going through the application by Notice of Motion dated 28th October, 2015 the supporting affidavit of Gordon Muriuki Ngatia and the replying affidavit by No 54427 Andrew Odeyo.

6 I find that indeed the Applicant filed a Judicial Review vide Miscellaneous Judicial Review Application No 243 of 2014 in Nairobi, seeking to prohibit the Respondent herein and the Inspector General of the National Police Service from arresting or charging him with any criminal case (s) and the same was dismissed by Justice Odunga who found the applicant had not made out a case to warrant the grant of the said order.

7 It also came out during the hearing of the preliminary objection that the Applicant had filed an appeal being Civil Appeal No 138 of 2015 in the Civil Appeal court in Nairobi, against the decision of Justice Odunga in Miscellaneous Judicial Review Application No. 243 of 2014.

8 In considering the preliminary objection, I have had to look into the application by Notice of Motion dated 28th October, 2015 and the arguments the applicant has advanced before this court in opposing the preliminary objection raised by the interested party.

9 In order to merit the orders sought in the application by Notice of motion, the applicant must show the reason upon which the same is premised.

10 This court has not been shown the nature and grounds of appeal which were filed in the Civil Appeal No 138 of 2015 against Justice Odunga's decision in Miscellaneous Judicial Review Application No 243 of 2014 Nairobi for this court to determine how they relate to the criminal cases that the applicants seeks to stay and what damage he stands to suffer.

11 The Applicant has also not demonstrated to this court how he stands to be prejudiced if the criminal cases he seeks stayed proceed to trial.

12 It is not enough to say that the criminal cases be stayed briefly pending the hearing and determination of the appeal the applicant has filed.

13 The applicant in miscellaneous Judicial Review Application No. 243 of 2014 sought to have the Respondent herein and Inspector General of National Police Service from arresting and charging him. He has , however already been charged vide Mombasa Chief Magistrate's court criminal cases Nos 2900,11319,1320,1321 and 132 all of 2015 since there was no order staying Justice Odunga's decision.

14 It would have been prudent for the Applicant to make the application to stay the proceedings in those cases before the Judge appealed from or by the Judge where leave to appeal is being sought (see Section 15 of part V of the court of appeal rules). And the execution of such orders would not be hindered by the appeal having been filed in Nairobi and the criminal cases being in Mombasa.

15 To proceed and determine the application by Notice of Motion dated 28th October, 2015 by the Applicant, would be tantamount to interfering with Justice Odunga's decision where orders to the orders being sought in this application came from a court of equal status to this court.

16 The court must protect its process from being abused by proceedings which are not based on reasonable grounds.

17 I am satisfied that the preliminary objection by the interested party and others is sound for the aforesaid reasons.

18 This court lacks jurisdiction to entertain the Notice of Motion application dated 25th October 2015 as it is a clear abuse of court process.

19 I therefore allow the preliminary objection and strike out the Notice of Motion dated 28th October, 2016.

Ruling, delivered, dated and signed at Mombasa this 15th day of September 2016.

D. CHEPKWONY

JUDGE

In the presence of:

No appearance for the Applicant

Mr Ayodo for Respondent

M/s Mutua for the Interested party

M/s Murage

C/clerk - Kiarie