



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CRIMINAL APPLN. NO. 39 OF 2013

WYCLIFF O. AMBETSTAPETITIONER/APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

Introduction:

1. By a Notice of Motion dated 02/04/2015, the Petitioner/Applicant herein invoked Article 159 (1); (2) (b) and (d) of the Constitution and Rule 32 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules, 2013 (L.N 117/2013) and all other enabling provisions of the law in seeking the following Orders:-
 1. *The application be placed before the judge for perusal and be certified urgent for hearing on priority basis.*
 2. *Pending inter parties hearing the orders of this Honourable Court ealier issued staying the proceedings before Butere Senior Principal Magistrate's Court Criminal Case No. 122 of 2013 Republiuc vs. Wycliffe Oparanya Ambetsa remain in force or be extended.*
 3. *In the alternative to prayer 2 above, this Honourable Court do grant interim order staying the proceedings in Butere Magistrate's Court Criminal Case No. 122 of 2013 pending inter parties hearing of this application.*
 4. *At the hearing of the application and upon the said hearing, this Honourable Court do grant an order further staying the proceedings in Criminal Case No. 122 of 2013 before the Senior Resident Magistrate Butere until the final hearing and or determination of the appeal at the Court of Appeal.*
 5. *Costs occassioned by this application do abide the outcome of the appeal.*
2. The application was premised on six grounds appearing on the body thereof and tailored as follows:-
 - a. *This Honourable Court delivered its ruling on the petition on the 19th March, 2015 which was against the applicant.*
 - b. *In exercise of his right under the law, the applicant instituted appeal against this Honourable Court's decision to the Court of Appeal which appeal is now pending.*
 - c. *It will be just for the proceedings in the lower court to be stayed to allow the applicant to prosecute his appeal at the Court of Appeal.*
 - d. *If the proceedings in the lower court are not stayed and the said court proceeds with the trial of the applicant, the purpose of the appeal, which is to quash the criminal trial in the lower court, shall be defeated and the said appeal rendered nugatory.*

- e. *Embarrassment is sure to arise if, in the end, the applicant succeeds in his appeal.*
- f. *Given the nature of the application, the orders sought are in the best interest of justice and any delay in disposing off the application will visit an injustice to the applicant as the lower court is eager to proceed with the trial of the applicant on the basis of charges whose validity is the subject of the appeal.*

The application was further supported by the Affidavit sworn by Rawlings Liluma Musiega on 02/04/2015.

3. This application was strenuously opposed through the Grounds of Opposition dated 14/04/2015.
4. On 20/05/2015, the application was heard intrer-parties resulting to this ruling.

Analysis and determination:

5. Before I venture into the merits or otherwise of the application, there is an issue which appears to be a preliminary one which I will deal with first. It is the issue on whether this Court upon delivering its judgment on 19/03/2015 became *functus officio* hence lacking any jurisdiction to deal with the current application. The Respondent's Counsel relied on the Court of Appeal decisions in **Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 former Employee of Telkom Kenya Limited) (2014) e KLR** and **Diella Muricho Muriuki vs. Timothy Kagandu Muriuki & 6 others (2013) e KLR** in support of the argument.
6. The Petition herein was brought under, among other provisions, Articles 22, 23, 47, 50 and 259 of the Constitution of Kenya, 2010. Pursuant to Legal Notice No. 117 issued on 28/06/2013, the Honourable Chief Justice of the Republic of Kenya made rules governing the conduct of constitutional petitions. They are called "**THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**") which I shall hereinafter refer to as "**the Rules**". Rule 3 thereof provide as follows:-

"3 (1) These rules shall apply to all proceedings made under Article 22 of the Constitution.

(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under article 48 of the Constitution.

(3) These rules shall be interpreted in accordance with article 259 (1) of the Constitution and shall be applied with a view to advancing and realising the –

- a. *rights and fundamental freedoms enshrined in the Bill of Rights; and*
- b. *(b) values and principles in the Constitution.*

(4) The court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

(5) For the purpose of furthering the overriding objective, the court shall handle all matters presented before it to achieve the

- a. *just determination of the proceedings;*
- b. *efficient use of the available and administrative resources;*
- c. *timely disposal of proceedings at a cost affordable by the respective parties; and*
- (d) *use of appropriate technology.*

(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the court to further the overriding objective of these rules and in that regard to –

a. participate in the processes of the court; and

(b) comply with the directions and orders of the court.

(7) The court shall pursue access to justice for all persons including the –

(a) poor;

(b) illiterate;

(c) uninformed;

(d) unrepresented; and

(e) persons with disabilities

(8) Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

7. As earlier on noted, the Petition having been brought under Article 22 of the Constitution therefore has the full application of the Rules aforesaid. **Rule 32** thereof state as follows:-

“32 (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

8. As the Rules provide for stay pending appeal, it cannot be rightly said that this Court on the delivery of the judgment on 19/03/2015 became **functus officio**. Infact this Court has jurisdiction to entertain an application for stay pending appeal aforesaid either informally at the delivery of judgment or thereafter upon filing of a formal application within 14 days of the decision appealed against or within such time as this Court may direct. Further this Court has powers under **Rule 3 (8)** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. That contention therefore fails.

9. There is also the argument by the Respondent that this Court having declined to allow the Petition cannot now entertain the current application. This Court too shares a contrary opinion. That is premised on the fact that the prayers sought in the Petition are not the same as those sought in the current application. This Court has not expressed its views on the current application before. Whereas the Applicant sought to stop the entire prosecution before the lower Court in the Petition, the current application only seeks to stay the prosecution of that case pending a legal finding by a higher Court of the land. I therefore reiterate that the application is properly before Court and this Court is vested with appropriate jurisdiction to deal with the same.

10. I will now consider the merits or otherwise of the application. The matter before Court involves a Constitutional Petition brought on the allegations that the Applicant's rights as described in the

Bill of Rights were infringed.

11. The conditions to be considered in the granting of stay order/conservatory orders pending appeals in such constitutional matters are now firmly settled. The Supreme Court of Kenya has sufficiently pronounced itself in the much celebrated cases of **Gatirau Peter Munya - vs- Dickson Kithinji & 2 others, SC Application No. 5 of 2014** and also in the case of **Anami Silverse Lisamula - vs- I.E.B.C and 2 others Constitutional Petition No. 9 of 2014**.

The conditions include the following:

- a. Whether the appeal or intended appeal is arguable and not frivolous;
- b. Unless the order of stay sought is granted, the appeal or intended appeal, were it eventually to succeed, would be rendered nugatory,
- c. It is in the public interest that the order of stay be granted.

12. This Court wishes to hasten that although the above cases dealt with the issues of Election Petitions, the analysis on the factors to be considered in granting of stay orders pending appeal remain relevant to the circumstances of this case since the preferred appeals dealt with issues on constitutional interpretation and application.

13. Let us therefore look at the said conditions herein below:-

a. **Whether the appeal or intended appeal is arguable and not frivolous:**

14. The Applicant filed a Notice of Appeal on 20/04/2015. He intends to appeal against the entire judgment of this Court. In other words, the Applicant is still of the view that his rights as enshrined in the Constitution remain infringed by the decision of this Court and seeks a further interpretation of the Constitution. To me, that is a sound ground which makes the intended appeal arguable and not frivolous. I do buttress my view with the Supreme Court's finding in the case of **Amani Silvester Lisanda vs. I.E.B.C. and 2 others, Constitutional Petition No. 9 of 2014** where the Court clearly expressed itself as follows:-

'40. As to whether a party has formed a base for his appeal to have met the arguability test this Court in the Peter Munya case stated that the least a party needs to show is that his appeal has taken a trajectory of constitutional interpretation or application.

41. From the foregoing, the Applicant cites what he deems to be constitutional violation which was controverted by the said Respondents. These issues in our view are merited constitutional questions that cannot be wished away without the benefit of a hearing. They are by no means frivolous.

42. We are of the opinion that the issues raised by the petition are prima facie, arguable; and it is equally clear to us that the relevant questions have constitutional dimensions as was deemed in George Mike Wanjohi -vs- Stephen Kariuki, SC Civil Application No. 6 of 2014." (emphasis added).

The above analysis therefore squarely befits the matter herein given that the intended appeal raises relevant questions which have constitutional dimensions.

b. **Would the appeal be rendered nugatory if orders of stay were not granted?**

15. The Respondent firmly argued that the appeal can not be rendered nugatory at all in the event the orders are denied since the Applicant can raise all the issues before the lower court and has as right of appeal althrough to the Supreme Court. To the Respondent, the application is seeking to bar the Director of Public Prosecutions from exercising his constitutional duties. The Applicant holds a contrary view. To him, the hearing of the case before the trial court before concluding the

appeal will deprive him the opportunity to interrogate the fact that the Respondent can not prosecute him hence the need to bar the hearing of the case before lower court. The Applicant further contends that he would have been taken through the trial process and even if he succeeds in the appeal, that will only be for academic purposes as his rights would have already been infringed.

16. The Petition has attacked the entire process of coming up with the criminal charges against the Applicant. The challenge ranges from investigations to prosecution. This Court therefore agrees with the Applicant that if no stay is granted, the trial which is scheduled for early July 2015 will proceed on and to that extent the intended appeal shall remain nugatory such that even if the same succeeds, the Applicant would have already been taken through the criminal process. This Court is therefore reminded of the finding of the Supreme Court in the case of **Fredrick Otieno Outa vs. IEBC & Others, SC Application No. 10 of 2014** when the Court stated that:-

“49. It can’t be affirmed that at this stage that the success of one or other of the grounds of appeal should result in an overturning of the Court of Appeal’s decision, it is foreseeable that the Applicant’s success on some part of his petition could lead to an overturning of the decision, as regards the nullification of the election. Thus, it would be judicious to issue an order of stay, to preserve the substratum of the appeal.”

c. **Is it in public interest that the orders of stay be granted?**

17. The criminal case before the lower court is on an assault upon one John Ojwang Waka. It was allegedly committed on 17/08/2008. But due to various reasons as dealt with in the judgment of this Court, the prosecution of the case is yet to kick off. Whereas the complainant has been awaiting for justice on his part since that time, the duty to so prosecute the alleged offence has remained with the Police in carrying out investigations and with the Respondent in prosecuting the case in Court. The Applicant argues in the Petition that the conduct of the Police and the Respondent infringes upon his rights and the Constitution since the intended trial has not met the constitutional expectations hence ought to be terminated.

18. **Article 10** of the Constitution calls upon all state organs, state officials, public officers and all persons to uphold our national values and principles of governance. The Police and the Respondent are not an exception and in the event the appeal succeeds the Appellate Court shall give the necessary remedies. As this Court stated in the case of **ERNEST IKOHA & 18 OTHERS VS. THE COUNTY GOVERNMENT OF KAKAMEGA, HIGH COURT PETITION NO. 12 OF 2014**, I do reiterate that:-

“..... It is in pulic interest that the orders sought herein do issue to accord the applicants an opportunity to further interrogate the Respondent’s actions before the appelalte Court.”

19. But, this Court is not blind to the Complainant’s expectation that justice shall be done and more so expeditiously. It appears that when the Applicant obtained the conservatory orders in 2013 he did not move with speed to seek the determination of the Petition upto 2015; two years down the line. That is why the Respondent now fears that granting a further stay will further lead the Applicant to the slumberland and to the total detriment of the complainant herein since justice has to be done to both parties. That fear, is not far-fetched. I have seen that a Notice of Appeal was filed on 20/03/2015 and proceedings and the judgment sought by the Applicant’s Counsel’s letter dated 20/03/2015 and a deposit of Kshs. 500/= made to this Court accordingly. The decree of this Court was issued on 15/05/2015. The Applicant’s Counsel in his argument before this Court stated that he was intent on complying with the 60-days’ window period from the time he filed the Noticve of Appeal to the filing the Record of Appeal so that the matter can be dealt with by the appellate Court. This Court hopes that the Applicant will stand alive to that indication. However this Court shall equally make orders to cushion the Applicant from delaying the matter further.

Disposition:

20. Upon therefore considering the relevant legal aspects and the circumstances surrounding the application at hand and the Petition at large, this Court makes the following orders: -

- a. *That there be a stay of the proceedings in Criminal Case No. 122 of 2013 before the Senior Resident Magistrate Court at Butere Republic vs. Wycliffe Oparanya Ambetsa, pending the hearing and determination of the intended appeal.*
- b. *The Applicant shall take urgent steps towards the hearing and determination of the intended appeal by filing an appropriate application for the consideration by the Court of Appeal on whether the intended appeal ought to be heard on priority basis and which said application shall be filed within the next 15 (fifteen) days of this ruling and in default thereof Order (a) above shall stand discharged and the Notice of Motion dated 02/04/2015 deemed dismissed with costs.*
- c. *Cost of the application shall be in the appeal.*

DELIVERED, DATED and SIGNED this 1st day of July, 2015

A. C. MRIMA

JUDGE