REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. JR. 424 OF 2014

IN THE MATTER OF AN APPLICATION BY SENATOR JOHNSON NDUYA MUTHAMA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 10, 47, 50, 73 AND 157 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 6(A) & (B), 16(1), (2) & (3), 29(1), (2) 3, 301 2 AND 34(1)(A), (B) & (C) OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF THE SPECIAL ISSUE OF THE KENYA GAZETTE VOL. CXVI-NO, 102 OF 27TH AUGUST 2014

AND

IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT ANTI-CORRUPTION CASE NO. 19 OF 2014

BETWEEN

REPUBLIC…….…….....……..APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

HON. PAUL KIBUGI MUITE SC…….....…..2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE….4TH RESPONDENT

THE CHIEF MAGISTRATE'S COURT(NAIROBI)…….....5TH RESPONDENT

EX PARTE - SENATOR JOHNSON NDUYA MUTHAMA

RULING

1. On 3rd November, 2015 I delivered a judgement in this matter in which I dismissed with no order as to costs, the ex parte applicant's application in which he was seeking the following orders:

> **1. An order of certiorari to remove into the High Court and quash the decision of the 1st Respondent contained in the Special Issue of the Kenya Gazette Vol. CXVI-No. 102 of 27th August 2014 Gazette Notice No. 5959 appointing Paul Kibugi Muite S.C to be a public prosecutor for purposes of criminal cases and all legal proceedings arising or connected with the following inquiry files:**
>
> **1. CCIO Nairobi Area Inquiry File No. 20/2013;**
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> **2. Police Case File No. Cr. 121/761/2009;**
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> **3. CID HQs Inquiry File No. 96/2008; and**
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> **4. KACC/FI.INQ/96/2010**
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> **2. An order of certiorari to remove into the High Court and quash the decision of the 1st Respondent made on or about 26th April 2014 or on any date between March 2014 and 27th August 2014 identifying, instructing and appointing Paul Kibugi Muite S.C to review, advice and/or in any manner handle the file(s) relating to or connected with investigations into matters touching on Malili Ranch Limited or any investigations into allegations of offences connected with the sale and/or purchase of land between Malili Ranch Limited and the Government of Kenya;**
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> **3. An order of Certiorari to remove into the High Court and quash the decision of the 2nd Respondent made on or between 27th August 2014 and 29th August 2014 to commence proceedings, prosecute, summon and/or cause the Applicant to be summoned and charged for the purpose of prosecution in Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others.***
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> **4. An order of certiorari to remove into the High Court and quash the decision(s) of the 3rd Respondent contained in the charge sheet dated 27th August 2014 Police Case No. 121/272/2014 charging the Applicant alongside others with offences and counts contained in the said Charge Sheet.**
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> **5. An order of prohibition directed to the 1st Respondent prohibiting him from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Other* whether by himself or through any other public or private prosecutor.**
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> **6. An order of Prohibition directed to the 5th Respondent prohibiting the 5th Respondent from carrying out and/or proceeding with Nairobi Chief Magistrate's Court Anti-Corruption Case No. 19 of 2014 – *Republic v Julius Maweu Kilonzo & 8 Others* and/or any further proceedings arising from or connected with the following inquiry files:**
>
> **1. CCIO Nairobi Area Inquiry File No. 20/2013:**
>
> **2. Police Case File No. Cr. 121/761/2009;**

3. **CID HQs Inquiry File No. 96/2009; and**

4. **KACC/FI/INQ/96/2010**

2. Immediately after the delivery of the judgement, **Dr Khaminwa**, learned counsel for the applicant applied for copies of the judgement and the proceedings. Learned Counsel further applied for the continuation of the stay of the proceedings before the trial court with the effect that the said proceedings do not take off at all.
3. In support of his application learned counsel took the Court through the issues which the applicant intends to appeal against and averred that the intended appeal would assist in expounding on the Constitution for the sake of posterity's benefit.
4. The application was opposed by **Mr Ashimosi** learned counsel for the 1st, 3rd and 4th Respondents who submitted that even during the hearing of these proceedings the Court only stayed the prosecution of the proceedings before the trial court by the 2nd respondent but did not stay the said proceedings absolutely. He disclosed that the hearing of the said case is now fixed for 26th January, 2016 which is sufficient time for the applicant to apply for stay before the Court of Appeal. It was his view that the orders granted herein being negative in nature, are incapable of being executed hence stay ought not to be granted.
5. On his part, **Mr Esmail**, learned counsel for the 2nd Respondent submitted that this Court is *functus officio* having found that there is no basis upon which to stay the criminal proceedings. In his view what was being sought was a permanent stay yet once the matter is dismissed there is nothing to be stayed.
6. In his rejoinder **Dr Khaminwa** submitted that it would take some time before proceedings are availed to the applicant. According to him, under Article 50 of the Constitution the right to a hearing encompasses the right to be heard on appeal and reiterated that the issues to be canvassed on appeal are weighty. In his view this Court is not *functus officio* but has wide discretion and ought not to tie its hands.
7. I have considered the foregoing. **Dr Khaminwa** addressed this Court at length on the issues the applicant intends to advance on appeal. I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds. However under Order 42 rule 6 of the ***Civil Procedure Rules***, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal.
8. In this case however, in exercising my discretion on costs, I did appreciate that some of the issues raised herein are novel. I therefore cannot say that the intended appeal is frivolous. That is as far as I can go on that issue.
9. It is clear that all that this Court did in the judgement against which the Applicant intend to appeal was to dismiss the Applicant's application for judicial review. There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for judicial review, the superior court does not grant any positive order in favour of the Respondents which is capable of execution. See **Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004**, **Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006** and **William Wambugu Wahome vs. The Registrar of Trade Unions & Others Civil Application No. Nai. 308 of 2005.**
10. To dispel the notion that the above thinking was only sound before the current Constitution was promulgated in **Kwench Limited vs. Nairobi City County & 2 Others Civil Application No. Nai. 106 of 2014,** the Court of Appeal on 10th October, 2014 expressed itself as follows:

"On the second limb on whether the success of the intended appeal would be rendered nugatory if the order sought is not granted, it is our view that this aspect has not been established. The reason for this is that, having regard to the impugned ruling before us, it is questionable whether or not there is any order capable of being stayed by this Court, save for costs. What is apparent from the ruling of the High Court under Judicial review is that, the learned judge limited his determination to the definition of an author of a nuisance within the meaning of the Public Health Act, and whether the 3rd respondent's decision to issue an *Exparte* Notice to the applicant as the author of the nuisance was correct, but did not go on to consider the merits of the case. He left those for determination by the magistrate's court. In the ruling, the court did not order the applicant to do or abstain from doing any act for which a stay order would be efficacious. Considering that the learned judge only gave an opinion, after which a negative order of dismissal was issued, we find that there was nothing capable of being stayed."

11. It is therefore my view that unless the Court grants a positive order a party may not invoke the provisions of Order 42 rule 6 of the ***Civil Procedure Rules***. I have however read the decision in **Berkeley North Market and Others vs. Attorney General and Others [2005] 2 EA 34** in which the Court of Appeal allowed an application for stay notwithstanding the fact that the decision intended to be appealed from was a decision dismissing an application for judicial review. However, the Court did not seem to have addressed its mind to the decisions referred to hereinabove. In the absence of that, this Court has no benefit of what the Court's view would have been had it addressed itself to the aforesaid authorities. I am therefore of the view that in light of the recent decision cited hereinabove decided by a bench in which there was one Judge who also sat on the bench which decided the **Berkeley's Case**, I am free to follow any of the conflicting decisions and I choose to follow the most recent one in **Kwench Limited vs. Nairobi City County & 2 Others** (supra).
12. Having so held I am of the view that this Court cannot invoke its inherent jurisdiction to grant orders of stay when the authorities hold otherwise.
13. That however is not the end of the matter. This Court no doubt has the power under Article 23 of the Constitution to grant conservatory orders. Whereas I agree that the provisions of Article 23 can only be invoked in situations where Article 22 applies, a determination of whether the issues in question fall under Article 22 cannot be determined simply on the basis of whether the proceedings are judicial review application or constitutional petition. The Court in determining such issue must look at the substance rather than the form of pleading. In this case the substance of the applicant's case is that his right to fair trial is likely to be violated. Whether that issue is brought by way of judicial review application or a constitutional petition it is clear that it is an issue which touches of the fundamental rights and hence a Bill of Rights issue. It follows that conservatory orders can if merited be properly granted.
14. On the circumstances in which a conservatory order will be granted, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to 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."

15. Clearly therefore in an application for conservatory order as opposed to an application for stay pending an appeal, the existence of a *prima facie* case plays a central role in the Court's determination without which the order sought may not be granted. A conservatory order is meant to preserve the *status quo* since as was held by a majority **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

16. In this case, if I understood the submissions made on behalf of the applicant correctly, he is seeking conservatory orders to restrain the Respondents from proceeding with the criminal proceedings before the trial court.
17. This Court however can only grant conservatory orders in respect of the orders against which an appeal is directed. In other words conservatory orders would only have the effect of preserving the *status quo* rather than granting fresh orders which confer benefit on the applicant which the applicant was not enjoying before the decision intended to be appealed against was made.
18. It is true that on 17th December, 2014, I expressed myself as follows:

"Accordingly while not directing that the leave herein shall operate as a stay of the proceedings in question, I direct that the grant of leave herein shall operate as a stay of the applicant's prosecution by Hon. Paul Muite, SC pending the hearing and determination of the substantive application filed herein or until further orders of this court."

19. Accordingly the only competent conservatory order I can grant is one restraining the prosecution of the Applicant by the 2nd Respondent rather than issuing a blanket order staying the prosecution as a whole.
20. I have already found that the issues raised are not frivolous. However, at this stage a Notice of Appeal is yet to be filed. The Applicant however has 14 days from the date of the decision intended to be appealed against to intimate his intention to do so.
21. If a stay is not granted, the prosecution of the Applicant by the 2nd Respondent will no doubt proceed. If eventually the Court of Appeal finds that the 2nd Respondent ought not to have prosecuted the Applicant, the trial may well start *de novo*. Precious judicial time would have been wasted in the process. In **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** the Supreme Court expressed itself as follows:

"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold 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 applicant's case for orders of stay. Conservatory orders consequently, should be granted on the *inherent merit* of the case, bearing in mind *the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*."

22. On the other hand if the Court grants the conservatory orders and the prosecution of the applicant proceeds and is determined without the input of the 2nd Respondent, the decision of the Court of Appeal might well just be an academic exercise. In considering whether or not to grant conservatory order therefore, it is my view that the principle of proportionality plays a crucial role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these

circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

23. Having considered this application and doing the best I can in order to give the Applicant an opportunity to ventilate his appeal before the Court of Appeal, I hereby grant a conservatory order restraining the 2nd Respondent from undertaking the Applicant's prosecution for a period of four months pending the hearing of the intended appeal or further orders of either this Court or the Court of Appeal. The conservatory orders issued herein will of course be on condition that a Notice of Appeal is lodged as prescribed under the Court of Appeal Rules.
24. For avoidance of doubt let the typing of the proceedings be expedited and furnished to the parties at their own costs. As the appeal lies as of right there is no need for this Court to grant leave.
25. It is so ordered.

Dated at Nairobi this 9th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Kaminwa & Mr Ndubi for the Applicant and holding brief for Mr Oluoch

Mr Ndolo for Ms Kethi Kilonzo for the Applicant

Mr Ashimosi and Mr Ondimu for the 1st, 3rd and 4th Respondents

Mr Esmail for the 2nd Respondent

Cc Patricia