



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 255 OF 2014

REPUBLIC.....APPLICANT

VERSUS

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

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

MILIMANI CHIEF MAGISTRATES COURT.....3RD RESPONDENT

Ex-parte

MIDLANDS LIMITED

JUNGHAE WAINAINA

RULING

On 30th June, 2014 I granted leave to Midlands Limited (the 1st Applicant) and Junghae Wainaina (the 2nd Applicant) to commence judicial review proceedings and seek certain orders against the Director of Public Prosecutions (the 1st Respondent), the Ethics & Anti-Corruption Commission (the 2nd Respondent) and the Milimani Chief Magistrate's Court (the 3rd Respondent).

The applicants had in the same application prayed that the grant of leave do operate as stay of the proceedings in Milimani Chief Magistrate's Court ACC No. 4 of 2014. This is the prayer which came up for hearing *inter partes* on 3rd July, 2014 and is the subject of this ruling.

Mr. Mbugua for the applicants submitted that the principles governing the grant of leave operating as stay were stated by Wakiaga, J in **GIKANDA FARMERS COOPERATIVE SOCIETY LTD & OTHERS v COMMISSIONER OF COOPERATIVES & ANOTHER [2014] eKLR**. The main principle is that stay will be granted to ensure that the claimant's application will not be rendered nugatory by the acts of the respondents during the pendency of the application. Counsel for the applicants submitted that the moment the Court establishes that a claimant has an arguable case, then stay should issue if the judicial review proceedings will be rendered nugatory by the continued acts of the respondents.

Ms Obuo and Mr. Ruto for the 1st Respondent and the 2nd Respondent respectively strongly opposed the application. Ms. Obuo argued that the purpose of these judicial proceedings is to stall the criminal trial

in the magistrate's court. She contended that the applicants were charged in March, 2014 and they only waited until about a week from the commencement of the criminal trial before filing this matter. She contended that the applicants have had sufficient time within which to file this application but they did not do so. She veered into the realm of the substantive notice of motion by stating that there is no evidence that the respondents exceeded their mandate in having the applicants charged.

Mr. Ruto supported the arguments of counsel for the 1st Respondent.

In deciding whether to stay proceedings, the Court has to be careful so as not to stray into the substantive application. At this stage the Court is only required to balance the interests of all parties and arrive at an appropriate decision guided by the facts of the case.

In **TAIB A. TAIB v MINISTER FOR LOCAL GOVERNMENT & 3 OTHERS [2006] eKLR**, D.K. Maraga, J (as he then was) observed that:

“I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited.”

Indeed the Court will not hesitate to grant stay if failure to do so will make the judicial review proceedings of no use. At the same time, the conduct of the parties must also be taken into account.

The Court should exercise caution before granting stay in criminal proceedings. This principle was recently restated by the Court of Appeal in the case of **MANILAL JAMNANDAS RAMJI GOHIL v DIRECTOR OF PUBLIC PROSECUTION, Nairobi Criminal Appeal (Application) No. 57 of 2013** when the Court observed that:

“We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances. See Goddy Mwakio & Another v Republic [2011] eKLR where this Court, in illustration of this point, stated that:

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.”

It must be remembered that the 1st Respondent is constitutionally mandated to prosecute criminal offences whereas the 2nd Respondent is statutorily empowered to detect, investigate and recommend for prosecution corruption related offences. They should be given room to carry out their roles and it is only in situations of clear abuse of power that they should be prevented from carrying out their duties.

That calls for examination of the circumstances of this case. The applicants were charged in Court in March, 2014 but they only approached this Court one week to the trial. The trial is scheduled for 7th and 8th of this month. The applicants' counsel claimed that they took almost four months to prepare this application because they needed to gather the necessary material. That is not a good reason for failing to file this application in good time. It is assumed that the respondents have also prepared themselves for the criminal trial and any stay granted at the eleventh hour will only serve to disrupt their programmes. The applicants delayed in coming to Court and one is tempted to agree with the 1st and 2nd respondents that their intention is to scuttle the trial.

In any case it is unlikely that the trial will be conducted and concluded on the scheduled dates. There is therefore sufficient time to hear and determine this application before the criminal trial is concluded. This matter will therefore not be rendered nugatory if the trial is not stayed.

In my view, the balance of convenience tilts in favour of not staying the criminal trial. The prayer for stay of the criminal trial lacks merit and the same is dismissed. However, there is need to hear the substantive notice of motion on priority basis. In the circumstances, I will at the time of delivering this ruling proceed to issue the necessary directions.

Dated, signed and delivered at Nairobi this 4th day of July, 2014.

W. KORIR,

JUDGE OF THE HIGH COURT