



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & ASIKE-MAKHANDIA, J.J.A.)

CIVIL APPLICATION NO. 274 OF 2018

BETWEEN

OSCAR KIPCHUMBA SUDI.....APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE'S ANTI-CORRUPTION COURT.....3RD RESPONDENT

(Being an application for stay of proceedings of the Chief Magistrate Anti-Corruption

Court ACC No. 14 of 2016 pending the hearing and determination of an appeal

from the judgment of the High Court of Kenya at Nairobi (Ongúndi, J.)

delivered on 27th July, 2017 in ACEC No. 11 of 2017)

RULING OF THE COURT

During the 2013 general elections, the applicant, who was then vying for a Kapsaret parliamentary seat, tendered a self-declaration form under the First Schedule of the Leadership and Integrity Act to the Independent Electoral and Boundaries Commission. Of relevance to this application was the disclosure he made regarding his academic qualification which gave rise to investigations of its authenticity by the 1st respondent.

Upon completion of its investigations, the 1st respondent forwarded a report of its findings to the 2nd respondent, who after evaluation of the same commenced criminal proceedings against the applicant in the Chief Magistrate's Anti-Corruption Court, ACC No. 14 of 2016. The applicant was charged with several offences ranging from forgery of an official document to providing false information.

In turn, the applicant filed a constitutional petition in the High Court, ACEC No. 11 of 2017, seeking *inter alia*, a declaration that his constitutional rights had been violated by the investigations and the subsequent criminal proceedings; compensation for the violation of his constitutional rights; an order of *certiorari* to quash the charges in ACC No. 14 of 2016; and an order of *prohibition* to stop the 2nd respondent from instituting any other criminal proceedings in respect of his academic qualification.

Ongúndi, J. in a judgment dated 27th July, 2017 found that the applicant had failed to demonstrate how the investigations violated his rights; and further that the 1st and 2nd respondents acted within the confines of their mandates. With that the learned Judge dismissed the applicant's petition.

Aggrieved by the above decision, the applicant has by the instant motion urged the Court to stay the proceedings in ACC No. 14 of 2016 pending the hearing and determination of the appeal against the impugned judgment. In his view, the appeal raises arguable issues as demonstrated in the draft memorandum of appeal annexed to the motion; and the appeal would be rendered nugatory should the criminal proceedings be allowed to proceed.

Save for the 1st respondent none of the other respondents responded to the motion. Opposing the motion, the 1st respondent argued that it lacked merit on the grounds that, the appeal was not arguable; that the appeal would not be rendered nugatory if the order sought is not granted; and that it was in the public interest for the prosecution of the applicant, who was then a state officer, to proceed to its logical conclusion. Furthermore, the trial before the Chief Magistrate's Court had already commenced wherein 7 out of 14 prosecution witnesses had already testified.

It is settled that our jurisdiction under **Rule 5(2)(b)** of this Court's Rules, which has been invoked by the motion, is discretionary. However, in order for us to exercise that power, the orders sought thereunder must be issued in relation to the decision or proceedings of a court which is the subject of an intended appeal or appeal to this Court. See **Benson Khwatenge Wafula vs. Director of Public Prosecutions; Ethics and Anti-Corruption &**

2 others (Interested Parties) [2020] eKLR. In any case, under **Article 164(3)** of the Constitution the Court has jurisdiction to hear only appeals from the High Court and any other court or tribunal. The court envisaged here are not the Magistrates' courts.

In this case, what the applicant seeks to be stayed are the criminal proceedings, ACC No. 14 of 2016, instituted and pending in the Chief Magistrate's Court. While it is not lost to us that the applicant had sought to challenge the constitutionality of the said criminal proceedings in the constitutional petition filed in the High Court, the said criminal proceedings are not the subject of the appeal before this Court. It is discernible from the notice of appeal dated 10th August, 2017 as well as the draft memorandum of appeal annexed to the motion, that the subject of the appeal is the High Court's judgment dated 27th July, 2017 which dismissed the applicant's constitutional petition. As such, we have no jurisdiction to stay the criminal proceedings in the Chief Magistrate's Court.

The applicant, having failed to satisfy the two limbs of **Rule 5(2)(b)**, we accordingly find no merit in the motion dated 24th September, 2018. It is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR