Tatu City Ltd & another v Ethics and Anti Corruption Commission & 5 others (Civil Application E213 of 2020) [2020] KECA 135 (KLR) (4 December 2020) (Ruling)

Tatu City Ltd & another v Ethics and Anti Corruption Commission & 5 others [2020] eKLR

Neutral citation: [2020] KECA 135 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E213 OF 2020

W OUKO, P, DK MUSINGA & W KARANJA, JJA

DECEMBER 4, 2020

BETWEEN

TATU CITY LTD ..... 1ST APPLICANT

KOFINAF COMPANY LTD ..... 2ND APPLICANT

AND

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

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

SG ..... 3RD RESPONDENT

CB RICHARD ELIS LTD ..... 4TH RESPONDENT

NCBA BANK KENAY PLC ..... 5TH RESPONDENT

AXIS REAL ESTATE LTD ..... 6TH RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling/order of the High Court at Nairobi (Justice Mumbi Ngugi, J.) delivered electronically on 22nd April, 2020 in HC Petition No. 37 of 2019)

Circumstances that a person who had filed a constitutional petition could not apply for stay of execution.

The main issues before the court were whether a petitioner that had filed a constitutional petition could apply for the proceedings to be stayed, and whether Supreme Court's decision to stay the effect of High Court and Court of Appeal decisions effectively reversed the legal landscape to the state before the Prof Ojienda decisions (Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR, and Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR) (decisions that provided for EACC to follow the procedural guidelines set out in the EACC Act in issuing

warrants and not the requirements under section 118 of the Criminal Procedure Code, as read with Section 180 of the Evidence Act). The Court of Appeal held that it was doubtful that the intention of the Supreme Court was to completely paralyze the functions of the 1st respondent (EACC) or to suspend the application of certain laws. The Court of Appeal further held that it could not be argued by the applicant that the appeal would be rendered nugatory if no order of stay was granted, when the very grievances in the intended appeal, that was, violation of the applicants' constitutional rights by the 1st respondent, would be the subject of determination in the petition and application for judicial review.

Reported by John Ribia

Civil Practice and Procedure *– stay of proceedings – application for stay of proceedings filed by a party that had filed a constitutional petition - whether a petitioner that had filed a constitutional petition could apply for the proceedings to be stayed – whether an appeal filed by the petitioner in a constitutional petition that sought to stay the very petition it field was arguable - Court of Appeal Rules, 2020 (Cap 9 Sub Leg) rule 5(2)(b)*

Statutes *– interpretation of statutes – interpretation of case law – interpretation of the EACC Act vis-à-vis the Criminal Procedure Code and the Evidence Act as it pertained the issuance of investigative warrants by the EACC - whether EACC in issuing warrants was to use the provisions under section 118 of the Criminal Procedure Code, as read with section 180 of the Evidence Act or the provisions of the EACC Act - whether the Supreme Court's decision to stay the effect of High Court and Court of Appeal decisions effectively reversed the legal landscape to the state before the Prof Ojienda decisions (Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR, and Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR) (decisions that provided for EACC to follow the procedural guidelines set out in the EACC Act in issuing warrants and not the requirements under section 118 of the Criminal Procedure Code, as read with section 180 of the Evidence Act).*

Brief facts

The appellant sought for the Court of Appeal to stay proceedings in a High Court petition in which it was the appellant. High Court Petition No 37 of 2019 was set to be heard back to back with High Court Judicial Review Application No 1 of 2019 on March 9, 2020. However, before that date, on March 6, 2020, the applicants sought leave to rely on the decision of the Supreme Court in the case of , where in granting the relief of stay of execution the Supreme Court held that the effect of the High Court and Court of Appeal decisions in the matter was stayed. Neither party to the appeal, nor any other person shall use, apply or in any way rely upon them until the appeal was heard and determined. It was the petitioner's contention that by that decision, the Supreme Court apart from directing the 1st respondent or any person not to rely on the decisions of both the High Court and the Court of Appeal also stayed the hearing of such similar cases. The petitioner informally applied to the High Court to stay the hearing of the petition and the application for judicial review until the decision of the Supreme Court in the matter was rendered. The High Court declined to stay the proceedings.

Aggrieved the appellant filed the instant appeal. The appellant contended that Supreme Court's decision to stay the effect of High Court and Court of Appeal decisions effectively reversed the legal landscape to the state before the Prof Ojienda decisions (, and) (decisions that provided for EACC to follow the procedural guidelines set out in the EACC Act in issuing warrants and not the requirements under section 118 of the Criminal Procedure Code, as read with Section 180 of the Evidence Act).

Issues

i. Whether a petitioner that had filed a constitutional petition could apply for the proceedings to be stayed.

ii. Whether EACC in issuing warrants were to use the provisions under section 118 of the Criminal Procedure Code, as read with Section 180 of the Evidence Act or the provisions of the EACC Act.

Held

1. For the court to grant the three possible reliefs under rule 5(2)(b) of the Court of Appeal Rules; (stay of execution, injunction and stay of further proceedings) the applicant must demonstrate that the appeal

or intended appeal raised arguable points and secondly, that the appeal or intended appeal would become otiose if the relief sought was not granted and the appeal was to succeed.

2. It was rare for the Court of Appeal to rule on the first limb of rule 5(2)(b) that the appeal or intended appeal was not arguable or simply frivolous. The petition and judicial review application were instituted by the applicants, the same parties, demanding that they be stayed. The High Court merely rejected the informal application to stay the hearing of the two applications before it. There were no positive orders capable of being executed or stayed by the Court of Appeal. But even if the court was to consider as positive the directions given that the two applications proceed to hearing, what would have been sought was stay of proceedings and not execution. Nothing much turned on that, bearing in mind that the considerations, whether the application was for stay of execution, injunction or stay of further proceedings, remained constant.
3. What was being challenged was the exercise of judicial discretion by the High Court. Without expressing any firm position, as the intended appeal was yet to be lodged and heard, the issued by the Supreme Court staying the effect of the High Court and Court of Appeal decisions, itself had the effect of turning back the clock to the period ante Prof Ojienda decisions of both the High Court and the Court of Appeal (Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR, and Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR) (decisions that provided for EACC to follow the procedural guidelines set out in the EACC Act in issuing warrants and not the requirements under section 118 of the Criminal Procedure Code, as read with Section 180 of the Evidence Act). It was doubtful that the intention of the Supreme Court was to completely paralyze the functions of the 1st respondent (EACC) or to suspend the application of certain laws. The Court of Appeal was hesitant, without being definitive, to conclude that the High Court missed that point.
4. The application sought to be stayed was brought by the applicants. Parties instituted actions to be heard, and to be disposed of expeditiously. That was what the Constitution and the oxygen principles ordained. It could not be argued by the applicant that the appeal would be rendered nugatory if no order of stay was granted, when the very grievances in the intended appeal, that was, violation of the applicants' constitutional rights by the 1st respondent, would be the subject of determination in the petition and application for judicial review.

Application dismissed with costs to the 1st respondent.

Citations

Cases

1. Ethics and Anti- Corruption Commission v Tom Ojienda, SC, t/a Prof Tom Ojienda & 1 Associates & 2 others; Law Society of Kenya (Amicus curiae) (Civil Application 21 of 2019; [2020] KESC 56 (KLR)) — Explained
2. Kinyanjui, Stanley Ng'ethe v Tony Ketter & 5 others (Civil Appeal 183 of 2013; [2015] KECA 790 (KLR)) — Explained
3. Obiri, Innocent Momanyi v Ethics & Anti Corruption Commission & another (Anti-Corruption and Economic Crimes Case 24 of 2019; [2019] KEHC 3951 (KLR)) — Explained

Statutes

1. Anti-Corruption and Economic Crimes Act (cap 65) — section 26, 27, 28 — Interpreted
2. Constitution of Kenya, 2010 — article 47 — Interpreted
3. Court of Appeal Rules, 2020 (cap 9 Sub Leg) — rule 5(2)(b) — Cited
4. Criminal Procedure Code (cap 75) — section 118, 120 — Cited
5. Evidence Act (cap 80) — section 180

Advocates

None mentioned

RULING

1. High Court Petition No 37 of 2019 was set to be heard back to back with High Court Judicial Review Application No 1 of 2019 on March 9, 2020. However, before that date, on March 6, 2020, the applicants' counsel sought leave to rely on the decision of the Supreme Court in the case of *Ethics and Anti- Corruption Commission v Tom Ojienda, SC, t/a Prof Tom Ojienda & 1 Associates & 2 others; Law Society of Kenya (Amicus curiae)* ,Supreme Court Civil Application No 21 of 2019, where in granting the relief of stay of execution of the decision of this court, the Supreme Court stated that;

> " ...the effect of the High Court and Court of Appeal decisions in this matter is hereby stayed. Neither party to this appeal, nor any other person shall use, apply or in any way rely upon them until the said appeal is heard and determined".

2. It was counsel's contention that by that decision, the Supreme Court apart from directing the 1st respondent or any person not to rely on the decisions of both the High Court and this court, also stayed the hearing of such similar cases. The two courts had held that investigations undertaken by the 1st respondent are an administrative function subject to the provisions of article 47 of the *Constitution*, and that in exercise of its mandate, the 1st respondent must at all times comply with the provisions of sections 26, 27 and 28 of *Anti-Corruption and Economic Crimes Act* by giving notice to suspects before undertaking such investigations; and that without, first giving notice to the person to be investigated, any warrants obtained from the Magistrates' Court pursuant to sections 118 of the *Criminal Procedure Code* and 180 of the *Evidence Act* to access and investigate bank accounts amounts to an abuse by the 1st respondent of its public powers and a violation of the suspect's constitutional rights to privacy, property, fair administrative action and fair hearing.

3. In the premises, counsel informally applied to the High Court to stay the hearing of the petition and the application for judicial review until the decision of the Supreme Court in the matter is rendered.

4. The 1st respondent was of a different view and maintained that the meaning ascribed to the order of the Supreme Court by the applicants was incorrect; and that the order did not stay all and every matter involving investigations by the 1st respondent.

5. The main contest therefore was in the interpretation of the word "effect" as used in the highlighted passage of the Supreme Court ruling reproduced above.

6. Having heard arguments on the effect of the Supreme Court ruling aforesaid, the court (Mumbi Ngugi, J.) rendered herself as follows

> "19. From the nature of the petitions and applications that have been presented in court, the 'effect' of the Ojienda decision, as appears to be the common understanding, is that whenever the EACC is carrying out an investigation with respect to corruption, including an investigation that entails inquiry into bank accounts, it must issue a notice under sections 26, 27 and 28 of *ACECA*, and that it cannot utilise the provisions of sections 118 and 120 of *CPC* and section 180 of the *Evidence Act*. This was the argument advanced to the court by the appellant in *Innocent Momanyi Obiri v Ethics & Anti-Corruption*

Commission another (2019)eKLR and was the basis of the decision of the High Court in *MWN v Inspector General of Police 4 others* [2019] eKLR.

20. To my understanding, this 'effect' is what the Supreme Court stayed in its ruling. In so doing, it restored the position that preceded the Court of Appeal decision in the the Prof Tom Ojienda case that had guided investigation and interpretation of challenges to warrants to investigate persons suspected of corruption and economic crimes-

    .....

    The principle that emerges from these decisions is that so long as the respondent follows the requirements with respect to obtaining search warrants, the court will be slow to find that the warrants are illegal or irregular.

21. In my view therefore, contrary to what counsel for the petitioners and the 2nd and 4th interested parties appear to understand from the decision of the Supreme Court, the court did not stay any decision in which the question of the applicable law that was at issue in the Prof Tom Ojienda case arises. Its decision did not have the effect of stopping the 1st respondent from carrying on its investigations where there was reason to believe that there was corruption or economic crime committed.

22. On the contrary in my view, what the Supreme Court did was allow the 1st respondent specifically and investigative agencies such as the police and the directorate of criminal investigations in general to apply before Magistrates' Courts for warrants under sections and 120 of the *CPC* and section 180 of the *Evidence Act*, as they used to do prior to the Court of Appeal decision in the Prof Tom Ojienda decision.

23. In the premises, I find no basis for staying the present proceedings. In accordance with the directions issued earlier, this petition shall proceed to hearing together with JR Application No 1 of 2019 which the present petition seeks to support".

7. This determination is what the applicants wish to challenge on appeal to this court but in the meantime, they have taken out a motion on notice under this court's *rule* 5(2)(b) seeking that the above orders be stayed "pending the lodging, hearing and determination of the intended appeal" challenging them.

8. The jurisdiction and principles that guide this court in determining matters brought pursuant to *rule* 5(2)(b), are now, as they say, old hat and the task of the court is elementary as summarized by the court in *Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 others*, Civil Appeal No 183 of 2013. Those principles are that, for the court to grant the three possible reliefs under that rule, stay of execution, injunction and stay of further proceedings, the applicant must demonstrate that the appeal or intended appeal raises arguable points and secondly, that the appeal or intended appeal will become otiose if the relief sought is not granted and the appeal was to succeed. Straight and simple.

9. Both sides in the instant application have gone on and on arguing the merit or demerit of the intended appeal, the petition and the judicial review application.

10. And so, the first question for us is whether the intended appeal is arguable. The grounds in support of the application and the draft memorandum of appeal provide the starting point in answering this question.

11. In the draft memorandum of appeal, like in the submissions, the applicants have argued that the learned judge made a mistake in failing to analyze, contextualize and appreciate the evidence adduced and arguments advanced by the applicants; that the judge erred in law and in fact by failing to fully analyze and consider the submissions by the applicants; that the learned judge failed to consider and acknowledge that the decision of the Court of Appeal in the Tom Ojienda case created inconsistencies in the interpretation and application of section 118 of the *Criminal Procedure Code*, section 180 of the *Evidence Act* and sections 26, 27 and 28 of *ACECA*; that the Judge failed to consider the impact the decision of the Supreme Court will have on the present case as the matter in the Supreme Court and matters before the learned judge address similar points of law; that the judge did not consider that the request for documents or information by the respondent was not only illegal from both an objective and a factual basis, but also likely to involve unwarranted invasion of privacy of the applicants or otherwise substantially prejudice their commercial interests; and that the judge erred in holding that the applicants had not proved their case on a balance of probability.

12. The 1st respondent's submissions, like the affidavit in reply, dwell mostly on matters whose determination is pending in the petition and judicial review application, save for the averment that the intended appeal is not arguable as the Supreme Court did not stay maters raised in the petition and in the judicial review application; that the order of the Supreme Court to stay " the effect of the High Court and Court of Appeal decisions....." was to restore the 1st respondent's powers to obtain information and documents using legislation and procedures that were available to it before the decisions of the High Court and this court in Prof Ojienda's cases; and that through the stay by the Supreme Court, the 1st respondent regained the liberty to elect the law and procedure to use for obtaining information and documents, depending on the circumstances of the investigations.

13. It is a rare thing for this court to rule on the first limb of *rule* 5(2)(b) that the appeal or intended appeal is not arguable or simply frivolous. This application presents one of those rare occasions. The petition and judicial review application were instituted by the applicants, the same parties, now demanding that they be stayed.

14. Secondly, the learned judge merely rejected the informal application to stay the hearing of the two applications before her. There were no positive orders capable of being executed or stayed by us. But even if we are to consider as positive the directions given that the two applications proceed to hearing, what would have been sought is stay of proceedings and not execution. However, nothing much really turns on this, bearing in mind that the considerations, whether the application is for stay of execution, injunction or stay of further proceedings, remain constant.

15. Thirdly, what is being challenged, from the grounds of appeal in the draft memorandum of appeal, is essentially the exercise of judicial discretion by the learned judge. Without expressing any firm position, as the intended appeal is yet to be lodged and heard, we are of view that the order issued by the Supreme Court staying the effect of the High Court and Court of Appeal decisions, itself had the effect of turning back the clock, so to speak, to the period ante Prof Ojienda decisions of both the High Court and this court. It is equally doubtful that the intention of the Supreme Court was to completely paralyze the functions of the 1st respondent or to suspend the application of certain laws. We are, therefore , hesitant, without being definitive, to conclude that the learned judge missed this point.

16. On the nugatory aspect, we reiterate that the application sought to be stayed was brought by the applicants. Parties institute actions to be heard, and to be disposed of expeditiously. That is what the *Constitution* and the oxygen principles ordain. Again, going by their own complaints as reflected in both the draft memorandum of appeal and the submissions, it cannot be argued that the appeal will be rendered nugatory if no order of stay is granted, when the very grievances in the intended appeal, that is, violation of the applicants' constitutional rights by the 1st respondent, will be the subject of determination in the petition and application for judicial review.

17. In the result, we find no substance in the instant application. It is accordingly dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF DECEMBER, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

JUDGE OF APPEAL