IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), WARSAME & M'INOTI, JJ.A)

CRIMINAL APPLICATION NO. 7 OF 2018

BETWEEN

MICHAEL SISTU MWAURA KAMAU.....APPLICANT

AND

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

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

(Being an application for stay and injunction pending an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Hedwig Ong'udi,

J) dated 11th day of April, 2018 in

Criminal Revision No. 1 of 2018)

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RULING OF THE COURT

It is common factor that the applicant was under investigation by the Ethics and Anti-Corruption Commission (EACC) over allegations of corruption and that at the stage when the EACC report was forwarded to the Director of Public Prosecutions (DPP), the EACC had no commissioners in office. This notwithstanding, the DPP, acting on the aforesaid report proceeded to charge the applicant in Criminal Case No. 11 of 2015 with 5 counts as follows: willful failure to comply with applicable procedures and guidelines relating to the management of funds contrary to **section 45(2)(b)** as read with **section 48(1)** of the Anti-Corruption and Economic Crimes Act; three counts of abuse of office contrary to **section 101** and **102A** of the Penal Code; and giving a misleading document to a principal contrary to **section 48(1)** of the Anti-Corruption and Economic Crimes Act.

Aggrieved by the turn of events, the applicant filed a constitutional petition in the High Court, contending that the actions of the EACC and DPP contravened his right to fair administrative action under **Article 47** of the Constitution; and that by the EACC acting only after being directed by the Head of the State during his State of the Nation Address, it acted contrary to the provisions of **Article 79** as read together with **Article 249 (2)** of the Constitution. For these reasons, the applicant contended that the purported investigations and recommendation for his prosecution were null and void in law.

There were similar petitions like the appellant's to the High Court, namely, **Constitutional Petition No. 203, 305 & 324 of 2015** which were consolidated and heard together. They raised, in the main three issues, whether at time the EACC forwarded the report to the DPP it was properly constituted in the absence of the commissioners; whether the President's State of the Nation address on 26th March, 2015 amounted to an unconstitutional directive to EACC; and, arising from this, whether the intended prosecution was in violation of the petitioners' fundamental rights and freedoms.

The High Court (**M. Ngugi, Odunga and Onguto JJ.)** in dismissing the petitions concluded that;

> **"(a) We declare that subsequent to the resignation of the Chairperson of the Ethics and Anti-Corruption Commission, Mumo Matemu on 12 May 2015, the 1st respondent was not properly constituted in accordance with Articles 79, 249 and 250 of the Constitution and section 4 of the Ethics and Anti-Corruption**

Commission Act of 2012.

(b) We declare that the ultimatum issued by the President to the Ethics and Anti-Corruption Commission to ensure that the Director of Public Prosecutions received the subject files without delay and that the exercise should and must be concluded within 60 days was a clear violation of the provisions of Article 249 (2) of the Constitution.

(c) We declare that the Director of Public Prosecutions is at liberty to rely on any source of information in order to institute criminal proceedings whether the information emanates from the Ethics and Anti-Corruption Commission or not as long as the source is not declared to be unlawful.

(d) Save for the foregoing we dismiss the other prayers sought in the petitions.

(e) For the avoidance of doubt, we decline to prohibit the prosecution of the Petitioners, which we deem to be undertaken in accordance with the constitutional and legislative mandate of the Director of Public Prosecutions".

As would be expected, the applicant moved to this Court in Civil Appeal No. 102 of 2016 to set aside the decision of the High Court. The Court ultimately allowed the appeal; set aside the orders of the High Court dated 9th March, 2016 dismissing the appellant's petition, and substitute therefor an order allowing the petition. In doing so, it stated that;

"Having found that the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the appellant and having further found that indeed the DPP formed his decision to prosecute the appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC".

(Emphasis).

For avoidance of doubt the Court stressed that;

"This appeal succeeds on the technical ground that the EACC was not properly constituted at the time it completed the investigations and forwarded its report and recommendations to the DPP. From the foregoing anti-corruption constitutional edicts, the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law". (Emphasis).

It is this last statement that has been the bone of contention since the decision was rendered. For example, the respondents evinced their intention to challenge it in the Supreme Court, the applicant sought the settlement of terms of the decree, and the applicant has instituted contempt of court proceedings against the respondents and others. But for the present purpose, the applicant, relying on the decision of this Court, applied before the subordinate court where his trial was pending, to be acquitted because in his view this Court had permanently prohibited his prosecution in Anti-Corruption Case No. 11 of 2015.

In terminating the proceedings, the learned magistrate expressed the view that;

"….. in compliance with the decision of the Court of Appeal……the present proceedings against him are hereby declared terminated by an order of discharge, not acquittal…." (Emphasis).

The applicant was once again aggrieved by the failure of the magistrate to acquit him and applied to the High Court to exercise its revisionary powers under **Article 165(6)** of the Constitution and **section 362** of the Criminal Procedure Code. Upon consideration of this application and applying the principles that guide the court in an application under **section 362** aforesaid, the court (Ongudi, J) found no merit in the application which she dismissed saying;

"I have examined the record and find no apparent errors on the face of it. The issue raised by the applicant do not therefore involve any errors on the face of the record. They are about the interpretation of the judgment of the Court of Appeal and the law. The issue is whether the learned trial magistrate should have discharged or acquitted the applicant. That is not in the province of revision but appeal. I therefore decline to grant the orders sought and dismiss the application".

It is this decision that the applicant now wishes to challenge on appeal before this Court and has in the meantime taken out a motion under **Sections 3, 3A** and **3B** of the Appellate Jurisdiction Act and **Rules 1(2) and 5(2)(a)** of the Court of Appeal Rules to stay the *"decision/order of the High Court affirming the order made by the Chief Magistrate"* and that pending the hearing and determination of the intended appeal, *"a conservatory order…be issued prohibiting and restraining the respondents from investigating, arresting and charging the applicant afresh, on the basis of the Anti-Corruption Case No. 11 of 2015"*.

It is the applicant's contention that the intended appeal is arguable for the reasons that the refusal of the Chief Magistrate to acquit him was erroneously based on this Court's *obiter dictum* declaring that *"the parties are at liberty to proceed as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and the law";* that to re-arrest and prosecute him after this Court found that the charges were unconstitutional would be a violation of **Article 157(11)** of the Constitution that enjoins the 1st respondent, in the

discharge of his function, to have regard to public interest, the interests of the administration of justice and the need to prevent abuse of the legal process; that the learned Judge by failing to exercise her revisionary powers abdicated her role; that he will suffer double jeopardy in the fresh charges, having already been subjected to a trial, among other grounds.

The respondents have opposed the application in separate replying affidavits, the combined effect of which may be summarized thus: That following the events leading to the termination of the charges against the applicant, the DPP has registered fresh charges against him in Anti-Corruption Case No. 7 of 2018; that the prohibition granted by the Court in its judgment of 14th July, 2017 was only in relation to investigations and recommendations for prosecution not sanctioned by a properly constituted EACC; that the Court made it clear that nothing stopped a properly constituted EACC from proceeding as it deemed appropriate under the law; that the Court under **Rule 5(2) (a)** upon which the application is premised, can only grant bail or stay of execution of a warrant; that the High Court did not issue any order capable of being stayed; and the conservatory orders sought are not available as it is not directed at any order made by the High Court.

In determining this application, we bear in mind the following relevant principles. When dealing with a **rule 5(2) (a)** application, just like a **rule 5(2) (b)** application, the Court exercises a discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court. It follows that in such a case the Court makes no definitive or final conclusions of either fact or law at that stage, as doing so may embarrass the ultimate hearing of the main appeal. See **Stanley Kangethe Kinyanjui V Tony Ketter & 5 others** [2013] eKLR where these principles are comprehensively explained in relation to a **Rule 5 (2)(b)** application.

The next set of principles relate to **Article 165(6)** and **(7)** of the Constitution and **section 362** of the Criminal Procedure Code. The former stipulates that;

> **"165. (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**
>
> **(7) For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

On the other hand **section 362** of the Criminal Procedure Code, in more or less similar language as Article 165 aforementioned provides that;

> **"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court".**

Once more, by the foregoing provisions the High Court exercises discretion in considering whether proceedings or any finding, sentence or order passed by a subordinate court is correct, legal and proper. The High Court was to satisfy itself the applicant was entitled to a discharge and not an acquittal.

We remind ourselves that we are not dealing with the appeal and cannot express ourselves conclusively on the question. We must also point out that the principles to be considered in an application under **Rule 5(2) (a)** are not the same as those under **Rule 5(2) (b).** While we apply the twin principles in the latter being civil proceedings, in criminal proceedings under the former the Court considers whether to grant bail or stay execution of a warrant. Because of its relevance to the matter before us we reproduce **Rule 5(2)(a)** below;

> **(a) ….where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal"**

The applicant, in this application, has instead prayed for an order of stay of the decision and order of the High Court affirming the order made by the Chief Magistrate and a conservatory order prohibiting and restraining the respondents from investigating, arresting and charging the applicant afresh, on the basis of the Anti-Corruption Case No. 11 of 2015. The application has been brought and to some extent argued as if it is anchored on **Rule 5(2)(b).** Both on the grounds on the face of the application and the affidavit in support, the applicant has listed the reasons why he thinks the intended appeal is arguable and why it would be nugatory if the reliefs sought are not granted. The truth is that the application seeks reliefs which are not contemplated by **Rule 5(2) (a).** How, for instance can this Court prohibit or restrain the respondents from investigating, arresting and charging the applicant when that was not the question before the High Court? The jurisdiction of this Court is confined to hearing of appeals from the High Court, the courts of equal status and tribunals as prescribed by Parliament, and not from the Magistrates' court.

Secondly, by asking us to stay the orders of the High Court or to issue conservatory orders, it is presumed that the High Court made positive orders, yet all the learned Judge did was to reject the invitation to revise the orders of the Chief Magistrate. The rejection of that invitation is not a positive order. It is not capable of being stayed nor can we, in such application, prohibit and restrain the respondents from investigating, arresting and charging the applicant. We emphasis that the jurisdiction of this Court under **Rule 5 (2) (a)** in criminal proceedings pending the determination of the appeal is limited. It can only order that the appellant be released on bail or that the execution of any warrant of distress be suspended.

It is established by case law that the inherent powers of a court can only be invoked when there is no express provision in the law or rules

dealing with an issue. There is reason why the consideration in **5(2)(a)** and **5(2)(b)** are different. A party wishing to stay execution of an order or further proceedings or to restrain an action by an injunction in civil proceedings must move the Court under rule **5(2)(b)** and a party in criminal proceedings can only seek to be released on bail or to stay execution of a warrant under **5(2)(a)** and not vice versa.

Again, without expressing any firm view, the learned Judge considered the import of **sections 362** and **364** aforesaid, and explained that upon examining the magistrate's court record she found no impropriety or illegality to warrant correction.

The learned Judge further took into account the legal distinction between an acquittal under **sections 210** and **215** of the Criminal Procedure Code and a discharge under **section 87 (a)** of the Criminal Procedure Code and, in her view the decision of this Court only entitled the applicant to a discharge and gave reasons for that view. Although the question whether or not the learned Judge exercised her discretion judicially will be determined in the intended appeal, for our part, we can only say at this stage that this application is incompetent. Accordingly, we dismiss it. Costs to abide the outcome of the appeal.

Dated and delivered at Nairobi this 22nd Day of June, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR