



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 274 OF 2018

OSCAR KIPCHUMBA SUDI.....APPLICANT

VERSUS

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

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

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

(Application for stay of proceedings in 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 (Hedwig I. Ong'udi,J.) Dated 27th July, 2017

in

Anti-Corruption and Economic Crime Division Constitutional No. 11 of 2017)

RULING OF NAMBUYE, JA

The applicant was arraigned before the Chief Magistrates' court Nairobi vide Nai ACC No. 14 of 2016, with various criminal offences. He was aggrieved and moved to the High Court of Kenya, Anti-Corruption and Economic Crimes Division and unsuccessfully filed a Constitutional Petition Number 11 of 2017, challenging his then intended prosecution, dismissed by **Hon. Lady Justice Hedwig I. Ong'udi**, on 27th July, 2017.

Undeterred the applicant filed a Notice of Appeal dated the 10th day of August, 2017, intending to appeal against the whole of the intended impugned decision. It was not until the 24th day of September, 2018 when he filed a Notice of Motion dated the same date, predicated on Rule 5(2) (b) of the Court of Appeal Rules, substantively intending to seek an order for the stay of the hearing of proceedings in the Chief Magistrates' Court, Anti-Corruption case No. 14 of 2016, pending the hearing and determination of the intended appeal.

The application was placed before me, **Nambuye, JA** on the same date of the 24th day of September, 2018 for purposes of its certification as urgent, which request was declined. It is the refusal to certify the application as urgent that provoked the applicant's letter **Ref. No. TR/LR/OKS/818/2016**, dated 2nd October, 2018 addressed to the Registrar Court of Appeal, requesting for an *inter-partes* hearing on the issue of certification of the application as urgent pursuant to Rule 47(5) of the Court of Appeal Rules.

Directions were given to that effect. Parties accordingly appeared before me on the 11th October, 2018 and made oral representations with regard thereto. In his submissions before me, learned counsel **Mr. T.K. Ruto**, on behalf of the applicant relied fully on his affidavit filed in support of the certificate of urgency. In summary, **Mr. Ruto** deposed that the proceedings in the Chief Magistrates Court were mutually stayed pending the hearing and determination of the Constitutional Petition, which petition was heard and dismissed by the High Court on 27th July, 2017; that by reason of the said dismissal, the stay orders lapsed paving the way for the resumption of the hearing of the criminal case before the Chief Magistrates court initially slated for hearing on the 25th, 26th and 27th September, 2018 and subsequently rescheduled for hearing on the 17-18 January, 2019.

Further that the application is brought in good faith; that the lapsing of the stay orders in the Chief Magistrates' court exposed the applicant to prosecution which if allowed to proceed on to their logical conclusion, will be prejudicial to the applicant and will also render the intended appeal nugatory; that the intended appeal is arguable and raises serious issues of fundamental breach of the applicant's constitutional rights. Lastly, that the delay in the filing of the application was not deliberate as the same was occasioned by the failure of the trial Court to timeously furnish the applicant with a typed copy of the proceedings.

In opposition to the certificate of urgency, learned counsel **Mr. Ben Murei**, for the 1st respondent, submitted that there is nothing urgent in this application considering that the intended impugned Judgment was delivered way back on the 27th July, 2017; that no explanation has been given as to why the applicant had to wait for over a whole year to seek the Courts' intervention. Counsel therefore urged me to find that the application was brought in bad faith for the sole purpose of forestalling the intended hearing of the criminal case then slated for hearing in the very month of September, 2018. I was therefore invited to read mischief in the conduct of the applicant and affirm the order declining to certify the application as urgent.

Further that, no prejudice will be suffered by the applicant if the Criminal proceedings were to proceed to hearing to their logical conclusion as there are sufficient protective safeguards in built in the criminal justice process, which the applicant can avail himself of, should he ultimately feel aggrieved by the outcome of that process. Those highlighted include the right to fair hearing enshrined under Article 50 of the Constitution and the right to an appellate process.

Learned counsel **Miss Patrick Chibole**, for the 3rd respondent on the other hand, associated herself fully with the submissions of learned counsel **Mr. Ben Murei** for the 1st respondent. In addition, counsel reiterated that the application has been brought after an inordinate delay which has not been explained; that the application has been brought in bad faith; that no prejudice will be suffered by the applicant if the order declining to certify the application urgent were to be affirmed.

In reply to the respondents' submission, learned counsel **Mr. Ruto**, reiterated his earlier submissions and urged me to disregard the opposing submissions as advanced by the respondents as these touched on the merits of the application intended to be certified urgent.

My invitation to intervene on behalf of the applicant has been premised on Rule 47(5) of the Court of Appeal Rules. It simply provides as follows:

"The refusal by the Judge to certify an application as urgent under this rule shall not be subject to a reference to the Court under rule55, but the applicant may apply informally for the matter to be placed before a single Judge for hearing inter- partes.

I have considered my mandate as donated by the above sub rule in light of the rival submissions highlighted above. It is not disputed that the applicant has moved to seek the courts' intervention over one year since the intended impugned Judgment was handed down; that he did not require a typed copy of the proceedings to file the application he intends to have certified as urgent; that indeed the stay order granted pending the hearing and determination of the High Court petition lapsed upon the dismissal of the High Court petition; that the dismissal of the High Court petition paved the way for the fixing for hearing of the criminal case and which was fixed for hearing in September, 2018; and lastly, that the application for stay was filed few days to the dates then fixed for the hearing of the criminal case. Lastly, that the hearing of the criminal case has now been rescheduled for January, 2019.

I have given due consideration to all the above, in light of my mandate as donated by **Rule 47 (5)** of the Rules of the Court. It is my considered view that, after the hearing of the opposing representations on the issue of certification of the application as urgent it is my considered view, that I find no sufficient reasons for me to recall the order declining to certify the application as urgent. My reason for saying so is because, I take judicial notice of the fact that a criminal prosecution is not a process that is likely to be concluded on the date the hearing commences. It is a process likely to take some time. The applicant can in the meantime move with speed to process the filing of the intended appeal of which I was informed he was in the process of doing and then have it fast-tracked under the relevant practice directions procedures of the Court.

In light of the above reasoning, I find no basis for varying my earlier order of 24th September, 2018 declining to certify the application as urgent. It is accordingly affirmed.

Dated and Delivered at Nairobi this 26th day of October, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR