IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI, O-ODEK, JJ.A.) CIVIL APPLICATION NO. NAI 31 OF 2016 (UR 22 OF 2016)

BETWEEN

DR. ALFRED MUTUA ..... APPLICANT

AND

THE ETHICS & ANTI-CORRUPTION COMMISSION

(EACC) ..... 1ST RESPONDENT

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

THE INSPECTOR GENERAL OF NATIONAL

POLICE SERVICE ..... 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL …….. 4TH RESPONDENT

(Being an application for injunction pending hearing and determination of an intended appeal from the Ruling and Orders by the High Court of Kenya, Nairobi (Lenaola, J) delivered on 5th day of February 2016

in

PETITION NO. 320 of 2016)

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RULING OF THE COURT

1. The applicant, **Dr. Alfred Mutua**, made an application to this court on 12th april 2016 by way of a notice of motion dated 7th April 2016 seeking, inter alia, orders that –

(i) (Spent)

(ii) pending the ruling of the Court in respect of the Notice of Motion dated 10th February, 2016, conservatory orders be granted restraining the 1st and 2nd respondents whether by themselves, agents, servants or any person purporting to exempt their authority, from causing the arrest, and/or charging of the intended appellant/applicant in any Court based on the procurement of

Motor Vehicles subject of the 1st respondents inquiring No.EACC/R/INQ/51/2014

(iii) That this Honourable Court be pleased to make such orders as may be appropriate in the preservation of the subject matter hereof and to ensure that the ruling scheduled for 6th May, 2016 is not overtaken by events, and/or rendered nugatory.

(iv) That the costs of this application be in the cause."

2. The main ground for making the application is founded on the fact that the court has heard an application dated 10th February 2016 by the applicant whose ruling is scheduled to be delivered on 6th May 2016. In that application, the applicant sought conservatory orders to restrain the Ethics and Anti-Corruption Commission (**EACC**), Director of Public Prosecutions (**DPP**), the Inspector General of National Police Service (**IG**) and Attorney General (**AG**) who are the **1st, 2nd, 3rd and 4th respondents** respectively, from causing the arrest, charging, and arraignment of the applicant in any court on the basis of the procurement of motor vehicles that are the subject of the 1st respondent's **Inquiry No. EACC/F1/INQ/2014**. The court did not make any interim orders in the application to stop the arrest and arraignment of the applicant pending delivery of the ruling on 6th May 2016.

3. In the application before us, the applicant avers in the supporting affidavit that notwithstanding the fact that this court's ruling on the orders sought as aforesaid is due for delivery on 6th May 2016, the 1st respondent is intent on arraigning the applicant in court on charges relating to the procurement of motor vehicles, the subject of the 1st respondent's aforesaid inquiry (NO. EACC F1/INQ/2014) in respect of which the Court shall rule on 6th May 2016. That this is so is manifested by the fact that officers of the 1st respondent led by Chief Inspector Livingstone Waihenya summoned the applicant to their offices on 7th April 2016 and took his finger print impressions and read a charge and cautionary statement to him. He denied having committed the offences alleged in the charge. The applicant avers that he was given bail of Shs.100,000/= and directed to appear before the Chief Magistrate Court on 13th April 2016 to answer charges of (i) abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003, and (ii) willful failure to comply with the law relating to Procurement contrary to Section 45 (2)(b) as read with Section 48 (i) of the Anti-Corruption & Economic Crimes Act, No.3 of 2003.

4. The 1st respondent's intention to arraign the applicant in court as aforesaid precipitated this application.

5. When the application came up for hearing on 18th April 2016, learned counsel **Mr. Kioko Kilukumi** and **Wilfred Nyamu** appeared for the applicant and learned counsel **Mr. Ben Murei** appeared **for the 1st respondent**. The second respondent was represented by learned counsel **Mr. Njagi Nderitu** while learned counsel **Ms Wambui Nganga** appeared for the **3rd and 4th respondents.** Learned counsel **Dr. Khaminwa** appeared for the **Interested Party, Senator Johnstone Muthama**.

6. Mr. Kilukumi submitted that the 2nd respondent is intent on arraigning the applicant in court. Relying on the applicant's affidavit in support of the application, Mr. Kilukumi pointed out that the court is yet to rule on whether to make orders stopping the prosecution of the applicant pending appeal. The 1st and 2nd respondents' counsel were in court during the hearing of the application seeking conservatory orders to stop the prosecution of the applicant and are aware that the ruling in that application was reserved for delivery on 6th May 2016. It was Mr. Kilukumi's submission that the 2nd respondent's intended move to arraign the applicant in court is an affront to the rule of law.

It was further his submission that unless the intended arraignment of the applicant is stopped, the court ruling scheduled for delivery on 6th May 2016 shall be rendered nugatory. Counsel submitted that the effect of the intended action will be obliterate the substratum of the application. He referred us to the Nigerian Court of Appeal decision in the case of **Olusi & Another versus Abanobi & Others** [suit No.CA/B/309/2008] in which the court opined that -

"it is an affront to the rule of law to disobey or render nugatory an order of Court whether real or anticipatory. Furthermore, ... that parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity. Thus, in that case the Lagos State Government was held to be wrong to have ordered caterpillars into the land in dispute..... while the parties were waiting for the outcome of an injunctive remedy on which they had invited the Court to adjudicate."

7. Mr. Kilukumi referred us to **Article 10** of the Constitution and emphasized that all State organs, State Officers, public officers and all persons whenever any of them applies any law is bound by national values and principles which include adherence to the rule of law. It was Mr. Kilukumi's submission that the 2nd respondent is pulling the carpet from under the feet of the court and thus attempting to put the court in a state of hopelessness. To obviate the disappearance of the substratum, he contended, a party must be stopped by an order of status quo or an appropriate order. To buttress his submission, Mr. Kilukumi cited the decision of the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development** [CA/A/165/2005] in which the Court held that –

"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgment or order."

8. The dispute in that case related to land. The court held that there was need for appropriate orders until the dispute between the parties was determined. Mr. Kilukumi further referred us to another Nigerian decision of the High Court in Kaduna in the case of **Econet Wireless Limited versus Econet Wireless Nigeria Ltd and Another** [FHC/KD/CS/39/2008] where an application equivalent to an application under our rule 5(2)(b) of this Court's Rules was made by Econet Wireless Nigeria Limited for injunction to restrain Econet Wireless Limited and Another from asserting and enjoying any rights arising from declaratory orders in the judgment delivered in the suit pending the outcome of the appeal by Econet Wireless Limited and for stay of execution of the orders in the judgment pending the outcome of the appeal. In the Nigerian context, an applicant for an order of stay or injunction pending appeal had to show special or exceptional circumstances why the order should be made. The court held that this involves -

"... a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court, especially an Appellate Court, a situation of complete helplessness or render nugatory any order of the Appellate Court or paralyze in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the Applicant succeeds in the appeal, there could no return to the status quo."

9. It was pointed out by Mr. Kilukumi that if the applicant is arraigned in court, the situation can never be reversed. Stigma and adverse publicity, he said, would ensue. The decision of this court in **Berkeley North Market & 2 Others versus Attorney General and 3 Others** [Civil Application No. Nai 4 of 2005] was referred to by counsel to demonstrate that where an appeal has been filed against a decision dismissing a judicial review application seeking prohibition and certiorari to quash a charge-sheet in criminal proceedings –

"if the appeal succeeds and the charge sheet and conviction, if any, are quashed, the appeal will be rendered nugatory since, irrespective of the result of the criminal proceedings, the applicant/s will have been forced to undergo the anxiety and adverse publicity that inevitably flows from being tried for a criminal offence."

10. In the **Berkeley's** case (supra), this court ordered stay of the proceedings in the Chief Magistrate Court at Kibera pending the hearing and determination of the intended appeal by the applicants against the judgment of the High Court.

11. Counsel for the applicant further relied on the decision in **Gatirau Peter Munya versus Githinji and The Independent Electoral and Boundaries Commission (IEBC) and Another** [Supreme Court Application No.5 of 2014] and urged us to apply the principle in it to the instant case. In that decision, the Supreme Court stated with regard to conservatory orders –

> ***"conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case, or "high probability of success" in the applicant's case for orders of stay.***
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> ***Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.***

12. The decision in **Hassan Nyanje Charo v Khalib versus Mwashetani & 3 Others** [Supreme Court Civil Application No.14 of 2014] was referred to us by counsel for the applicant to show that the Supreme Court has held that where there is a court proceeding pending, a further and similar application for determination of the same question is wrong. The court stated –

> ***"even though the Constitution had granted the court jurisdiction to entertain the application for certification, ... considering the pendency of the same application at the Court of Appeal, the Supreme Court for the sake of good order and good governance declined to entertain the applicant's application."***

That decision, said Mr. Kilukumi, is analogous to and depicts a situation similar to that in the instant case. For that reason, submitted counsel, the instant application ought to be allowed and the orders prayed for granted.

13. In conclusion, Mr. Kilukumi submitted that a party who makes a decision of the court nugatory interferes with the other party's right to fair trial. He urged that as the applicant's application seeks orders to stop the respondents from arraigning him in court the applicant's right to fair hearing will be interfered with if he is arraigned in court before a determination in the matter has been made. This court, he said, has inherent jurisdiction to ensure that the ends of justice are met and its processes are not abused. The integrity of judicial process, he contended, must be protected. If the ruling due for delivery on 6th May 2016 is overtaken by events on account of the 1st and 2nd respondent's action/s, it will cease to be effective and will be rendered irrelevant and this will destroy the integrity of the process. Further, counsel submitted, the principle that emerges from the case-law cited shows that if there is a pending court decision, a party should not do anything that would jeopardize or prejudice the substratum of the issue to be determined.

14. It was brought to our attention by **Mr. Nyamu**, the learned counsel appearing with Mr. Kilukumi for the applicant, that the petition in the High Court which was due to be heard on 14th April, 2016 did not proceed and that hearing was deferred to 27th May, 2016.

15. **Miss Wambu Ng'ang'a,** learned counsel for the 3rd and 4th respondents, supported the application and lamented that the ruling scheduled for delivery on 6th May 2016 will be rendered an exercise in futility unless the actions of the 1st and 2nd respondents are thwarted.

16. **Mr. Murei**, learned counsel for the 1st respondent opposed the application. He contended that the application is an abuse of the process of the court because prayer No.1 in the application was also in the application whose ruling is scheduled to be delivered on 6th May 2016.

17. On the merits, Mr. Murei referred us to the replying affidavit of the 1st respondent. He contended that if the applicant is arraigned in court before the delivery of the ruling on 6th May 2016, this court can issue consequential orders to stop criminal proceedings and that that way, the appeal shall not be rendered nugatory. He pointed out that the filing of an appeal does not operate as a stay. On the authorities referred to by the applicant's counsel, Mr. Murei submitted that they can be distinguished. It was his contention that inconvenience that the applicant may suffer as a result of being arraigned in court cannot render the ruling nugatory.

18. On his part, **Mr. Njagi Nderitu**, the learned counsel for the 2nd respondent associated himself with the submissions of the 1st respondent's counsel and further contended that the application must fail because this court, having declined to give interim orders sought in the notice of motion whose decision is scheduled to be delivered on 6.5.2016, is *factus officio* and cannot grant the same orders that are prayed for in the instant application;that this application is an abuse of the process of the court; that this court cannot sit and revisit its own decision in a matter in which it is *factus officio*; that prayer 2 of the application does not make sense; that the ruling pending delivery on 6th May, 2016 has nothing to do with the arrest and arraignment of the applicant in court; that this court's order stopping the arraignment of the applicant on 13.04.2016 was erroneous; that the 2nd respondent is empowered by statute law to approve investigations (which he did in the applicant's case) and to recommend that the applicant be charged; that the applicant's alleged suffering or inconvenience or stigma that may result from being arraigned in court cannot constitute a justified excuse or ground; that the applicant shall receive fair hearing in the criminal trial following arraignment; that the applicant would still have recourse to damages in a civil suit; and that damage would not be irreparable. Counsel further submitted that the authorities cited by the applicant's counsel from Nigeria are not binding on this court and further that the application does not seek orders not to be arrested and charged in court and that for that reason, it is fatally defective. Counsel urged us to dismiss it.

19. **Dr. Khaminwa**, learned counsel for the 2nd interested party, opined that the authorities cited by the applicant's counsel relate to civil litigation and are not of any help, except one, **Olusi & Another v Abanobi** (supra). Counsel contended that the orders sought, if granted, would not be in tandem with the provisions of the Constitution. He contended that the court can instead grant the applicant, ***suo moto***, anticipatory bail as it has powers to do so.

20. In reply, **Mr. Kilukumi** pointed out that the ruling pending delivery has direct bearing on the instant application; that the applicant is not seeking orders to stop an ongoing prosecution; that he seeks orders to restrain the respondents from arraigning him in court; that the process of prosecution has not commenced as no plea has been taken; that the applicant seeks to pre-empt illegality; that the 2nd respondent will not suffer by waiting until the ruling is delivered on 6th May, 2016.

21. We have perused the application including the supporting affidavit and the replying affidavits by the 1st and 2nd respondents. We have also given due consideration to the submissions of counsel for the parties.

22. The issue for our determination is whether a case has been made out for the grant of the orders sought.

23. The ruling scheduled to be delivered on 6th May 2016 shall determine whether the applicant is entitled to orders to stop his prosecution pending an appeal in relation to the procurement of motor vehicles that are the subject of the inquiry No. EACC/F1/INQ/51/2014 by the 1st respondent. The 1st and 2nd respondents are intent on arraigning the applicant in court to answer criminal charges arising from that inquiry. If the applicant is arraigned before the Court has determined whether the applicant is entitled to the orders to restrain the respondents from arresting, charging and prosecuting him, the decision of the Court on 6th May 2014 shall certainly be rendered futile. In our view, the court process and decision to be made on 6th May 2016 shall become the object of ridicule. Already the 1st and 2nd respondents, though aware of the fact that a ruling is scheduled for delivery on 6th May 2016 proceeded on 7th April 2016 to

read a charge and cautionary statement to the applicant and to admit him bail to appear in court for arraignment on 13th April 2016, now past. The court stopped the arraignment pending this decision.

24. All the parties in the instant application and in the motion whose determination is scheduled to be make on 6th May 2016 are subject to **Article 10** of the **Constitution** by dint of their being State organs, or State officers, or public officers. They are therefore enjoined to adhere to the national values and principles which include the rule of law, equity and social justice. The Constitution is the Supreme law of Kenya and it binds all persons (and all State organs at both levels of government). The right to a fair trial is the entitlement of every person. Indeed the constitutional right to fair hearing is embedded in Article 50(1). Of the four fundamental rights and freedoms that cannot be limited or abrogated, the right to a fair hearing is one. It is enshrined in Article 25(c). The applicant has a petition in the High Court challenging the intended criminal prosecution against him. The High Court declined to grant conservatory orders to stop his prosecution. Consequently, the applicant appealed the decision to this Court by giving a notice of appeal dated 8th February, 2016. The record of appeal is yet to be filed. It is in the intended appeal that the applicant made his application dated 10th February, 2016 seeking the aforesaid orders in respect of which this Court shall on 6th May 2016 determine. Meanwhile, the 1st and 2nd respondents are intent on proceeding with prosecution of the applicant as is manifested by their actions on 7th April 2016. It was on account of events of 7th April 2016 that the applicant rushed to this Court and made the instant application.

25. The exercise by the 2nd respondent of his prosecutorial powers under the Constitution must accord with the Constitution and in particular the national values and principles under Article 10, recognizing that the right to a fair trial is the right of every person.

26. The 1st and 2nd respondents are alive to the fact that this Court shall deliver on 6th May 2016 a ruling on the applicant's notice of motion dated 10th February 2016. Is it proper for the respondents or any of them be to proceed with the prosecution of the applicant before the ruling scheduled for 6th May 2016 is delivered? The Supreme Court in **H. N. Charo versus K. Mwashetani & 3 Others** underscored the need to maintain good order and good governance and declined to proceed to hear an application for certification under Article 163(4) (b) because there was pending in the Court of Appeal a similar application seeking certification under the same Article.

27. This Court, in **Civil Application No. NAI 74 of 2005 [Berkeley North Market and 2 Others versus Attorney General & 3 Others** held as correct the view that if criminal proceedings come to hearing prior to the determination of the intended appeal against the dismissal of the application for certiorari, the appeal, if successful, will be rendered nugatory. The Court held that this is so as shown in paragraph 9 above.

28. The duty of the Court is to dispense justice to parties in accordance with the Constitution and the law. It is to the Constitution, statute law, common law and equity, that parties in court peg their claims and found their rights and seek reliefs and enforcement. The Constitution requires court proceedings to be conducted with integrity. Actions or omissions that undermine the integrity of court process are antithetical to the letter and the spirit of the Constitution. Parties in court proceedings cannot be allowed to breach or pooh-pooh or render futile, meaningless or nugatory orders of the court for the simple reason that this bears directly on and is an affront to the rule of law which the court is enjoined to uphold for the benefit of society. The respondents have submitted to the jurisdiction of this court. They are bound by national values and principles enshrined in Article 10 of the Constitution. They are subject to the rule of law. This Court is cognizant of the fact that it is enjoined to interpret and enforce the law to give efficacy to the rule of law. It has inherent jurisdiction to make orders to meet the ends of justice. The issue is of public interest. It is in public interest cases that conservatory orders are granted, the court being the conservator for the benefit of society including the parties before it. The passage in the case of **G. P. Munya v. D. M. Kithinji & 2 Others** (supra), quoted in paragraph 11 above shows the characteristics of conservatory orders.

29. We are in agreement with the reasoning and decision of the High Court of Nigeria in Kaduna in the case of **Econet Wireless** (supra) in which the court opined that in cases where there is –

> ***"an attempt to destroy the subject matter or to foist upon the court a situation of complete hopelessness or to render nugatory any order of the court or to paralyze in one way or other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds in the appeal, there could be no return to the status quo, the Court ought to grant stay."***

Although stay is not the order that the applicant seeks in the instant case, the effect is the same.

30. If this Court does not restrain the respondents from arraigning the applicant before delivery of the ruling on 6th May 2016, the substratum of the application shall be destroyed. As rightly pointed out by Mr. Kilukumi, the 1st and 2nd respondents will have managed to pull the carpet from under the feet of the court. This court cannot countenance the attempt by the 1st and 2nd respondents to render its orders futile. The authority vested in the court is derived from the people of Kenya for whose benefit the rule of law is enshrined in the Constitution. We have a duty to uphold, promote and protect the rule of law. In exercising judicial authority, we are enjoined to observe the principles enshrined in Article 159 (2) (d) & (e) of the Constitution which include the principles that the purpose and principles of the Constitution shall be protected and promoted and justice shall be administered without undue regard to procedural technicalities.

31. This Court has jurisdiction to grant orders under rule 5(2)(b). It also has inherent power under rule 1(2) of the Court of Appeal Rules, 2010 to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It has power to make necessary conservatory orders to enable it to discharge its mandate effectively within the jurisdiction vested in it. It is in public interest that it does so and this accords with the letter and spirit of the Constitution.

32. In the result, we find merit in the application. We allow it. We order that the applicant shall not be arraigned in any court to answer criminal charges based on the procurement of motor vehicles that are the subject of the 1st respondent's inquiry NO. EACC/R/INQ/51/2014 before the delivery of the ruling on the applicant's notice of motion dated 10th February 2016 which was presented to this Court on 11th February 2016. Each party shall bear its own costs.

Dated and delivered this *22nd day of April 2016*.

E. M. GITHINJI

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JUDGE OF APPEAL

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

J. O-ODEK (PROF)

…….....…..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR