



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, J. MOHAMMED & OTIENO-ODEK, J.J.A)

CIVIL APPLICATION NO. 45 of 2016 (UR 34/2016)

BETWEEN

DAVID KIPRUTO CHINGI.....1st APPLICANT

MARWA FADHILI CHACHA.....2nd APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1st RESPONDENT

THE SPECIAL MAGISTRATE ANTI-CORRUPTION

COURT OF KENYA NAIROBI REGISTRY.....2nd RESPONDENT

THE ETHICS & ANTI-CORRUPTION

COMMISSION (EACC).....3rd RESPONDENT

(Being an application under Rule 5 (2) (b) of Court of Appeal Rules for stay of Execution of the Judgment/Order of the High Court of Kenya Constitutional and Judicial Review Division ( Lenaola, J. )

in

JUD. REV. MISC. APPL. Nos. 375 of 2013 and 362 of 2013

AS CONSOLIDATED WITH

JUD. REV. APPL. Nos. Nos. 363 of 2013 and 405 of 2013)

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RULING OF THE COURT

- 1. By a Charge Sheet dated 2nd October 2013, the two applicants together with four others were arraigned before the Special Magistrate Anti-Corruption Court and charged in Anti-Corruption Cases Nos. 12 and 18 of 2013 with offences disclosing four counts namely: conspiracy to defraud contrary to Section 317 of the Penal Code; willful failure to comply with the applicable law relating to the procurement of services contrary to Section 45 (2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act; abuse of office contrary to Section 46 as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act and obtaining money by false pretences contrary to Section 313 of the Penal Code.
2. Upon being arraigned, the applicants filed a Judicial Review Petition before the High Court

seeking an order of *certiorari* to bring before court and quash criminal proceedings in Anti-Corruption Cases Nos. 12 and 18 of 2013. The applicants further sought prohibition orders to restrain and or prohibit the court from continuing with proceedings in Anti-Corruption Cases Nos. 12 and 18 of 2013 and to prohibit the respondents from instituting similar proceedings on the same facts.

3. Upon hearing the parties, the trial court (Lenaola, J.) dismissed the Judicial Review application. In dismissing the applications, the learned judge held that the applicants had failed to demonstrate that the criminal cases against them were instituted for other purposes other than the genuine enforcement of the law; that the applicants failed in their duty to demonstrate that there was abuse of court process in the institution of criminal charges; that the applicants said nothing on how the Director of Public Prosecution (DPP) failed in his duty; that the applicants' argument that they had not committed any offence because they had been cleared by other state agencies apart from EACC cannot be determined by the High Court by virtue of **Section 89 (5)** of the **Criminal Procedure Code** and it is only the trial court that can determine whether the facts and evidence as presented disclose that an offence had been committed; that allowing the applicants to challenge the evidence of the DPP before the High Court would amount to pre-empting the DPP's case by setting out the applicants' defence and accepting it as true; that such arguments can only be made in the right forum which is the trial court. The trial judge observed that all grounds raised by the applicants in the Judicial Review application touching on the issue whether the DPP had exercised his powers within the four corners of the Constitution can only be determined by the trial court as that is the court designed to test the veracity of the evidence tendered against the applicants.
4. Aggrieved by the dismissal of their application, the applicants lodged a Notice of Appeal and filed before this Court a Notice of Motion dated 24<sup>th</sup> February 2016, seeking *inter alia* the following orders:

*“a. That this Honourable Court be pleased to grant an order staying the Ruling and order made by Hon. Lenaola, J. on 10<sup>th</sup> July 2015.*

*b. That this Court be pleased to issue an order of injunction restraining and or prohibiting the Special Magistrate's Anti-Corruption Court from continuing with the proceedings in Anti-Corruption Cases Nos. 12 and 18 of 2013 against the applicants and to restrain the respondents from instituting similar proceedings based on the same or allied facts until this appeal is heard and determined.*

*c. An order for stay of execution pending the lodging, hearing and determination of an intended appeal against the orders of Lenaola, J. delivered on 10<sup>th</sup> July 2015.”*

5. The applicants contend that they have an arguable appeal and unless stay is granted, the respondents are likely to proceed with criminal prosecution before the lower court. The grounds in support of the application as stated on the face of the Motion and in the supporting affidavit are *inter alia* that:

*“a. The learned judge erred in law and fact in failing to recognize that the applicants were expressly protected from criminal liability by dint of Section 138 of the Public Procurement and Disposal Act; Section 13 of the National Hospital Insurance Fund Act and Article 236 of the Constitution.*

*b. The judge erred in relying on the repealed Section 35 of the Anti-Corruption and Economic Crimes Act to send the applicants to face criminal charges.*

*c. The judge erred and failed to appreciate that the respondents did not have jurisdiction under Articles 79 and 80 of the Constitution to fish and file charges outside Chapter Six of the Constitution.*

d. The judge erred in failing to appreciate the applicants had been cleared of any wrongdoing by other government agencies including the Attorney General, the Efficiency Monitoring Unit and the Civil Servants and Disciplined Forces Medical Scheme.

e. The judge failed to appreciate that no offence had been disclosed given that bank guarantees had been issued to cover the contracts and sums in issue.

f. The judge failed to take into account that Parliament is yet to enact a law on procurement in accordance with Article 227 of the Constitution and this leads to a presumption that there is a lacuna in the law relating to procurement procedures.

g. That the trial court's decision was against the weight of evidence placed on record.”

6. At the hearing of this application, the applicants were represented by learned counsel Mr. Makori Omboga while the 1<sup>st</sup> respondent was represented by learned counsel Mr. F. S. Ashimosi and the 3<sup>rd</sup> respondent by learned counsel Mr. Ben

Murei.

7. Counsel for the applicants reiterated the grounds in support of the application as deposed in the supporting affidavit of Mr. David Kipruto Chingi. He submitted that the instant application seeks prohibitory orders to restrain and or prohibit the respondents from continuing and prosecuting Anti-Corruption Cases Nos. 12 and 18 of 2013. A draft Memorandum of Appeal was attached to the supporting affidavit. Counsel submitted that the intended appeal was arguable and shall be rendered nugatory if the orders prayed for are not granted. He submitted that the applicants are questioning the mandate of the 3<sup>rd</sup> respondent to investigate offences outside Chapter Six of the Constitution; that the powers of the 3<sup>rd</sup> respondent are as per **Section 11 (d)** of the **Ethics and Anti-Corruption Act** which restricts the powers to offences related to **Chapter six** of the Constitution; that the 3<sup>rd</sup> respondent did not and does not have the mandate to investigate offences under the Penal Code or procurement laws; that **Section 35** of the **Ethics and Anti-Corruption Act** cited and relied upon by the trial court and the respondents was repealed; that **Section 5** of the **Public Procurement and Disposal Act** stipulates that in case of conflict with any other written law, the **Public Procurement Act** prevails; it was submitted that **Section 138** of the **Public Procurement Act** insulates the applicants from any criminal liability and the section prevails over the provisions of the **Penal Code** and the **Ethics and Anti-Corruption Act**; that the respondents did not observe the rules of natural justice in the discharge of their functions; that **Articles 75 (2) (a)** and **236** of the Constitution were violated; that the applicants being public officers can only be subjected to disciplinary process and not criminal prosecution. Counsel submitted that the intended appeal shall be rendered nugatory if prosecution of the applicants is allowed because no offence had been disclosed and the applicants are protected from criminal prosecution by **Articles 75 (2) (a)** and **236** of the Constitution and **Section 138** of the **Public Procurement and Disposal Act**.
8. In support of the application, counsel cited various cases such as: **Prof. Njuguna Ndungu -v- Ethics & Anti-Corruption Commission and 3 Others**, Civil Application No. NAI 304 of 2014; **Joram Mwenda Guantai -v- The Chief Magistrates Court**, Civil Appeal No. 228 of 2003 and **Neill -v- Antrim Magistrates Court and Another** (1992) All ER 846. Counsel urged this Court to follow the decision in ***Prof. Njuguna Ndungu Case (supra)*** and grant conservatory orders restraining the respondents from continuing with the criminal prosecution of the applicants pending the hearing and determination of the intended appeal. Counsel in citing the decision in ***Joram Mwenda Guantai (supra)*** urged this Court to find that the continued prosecution of the applicants would be oppressive and vexatious and would amount to abuse of the court process as the criminal charges against them have been wrongly brought in violation of **Articles 75 (2) (d)** and **236** of the Constitution as read with **Section 138** of the **Public Procurement and Disposal Act**.

9. Learned Counsel Mr. Ashimosi for the 1<sup>st</sup> respondent in opposing the application urged that the intended appeal was neither arguable nor could it be rendered nugatory if the orders sought were not granted. At the outset, he submitted that the trial court dismissed the application for judicial review and the stay order sought in the instant application is stay of negative orders; that this Court cannot stay negative orders. Counsel submitted that Section 35 of the Ethics and Anti-Corruption Act has never been repealed and the said Section should be read with **Section 11 (d)** of the **Ethics and Anti-Corruption Act**; that the DPP's constitutional mandate to prosecute criminal offences is vide **Article 157** of the Constitution; that there is no evidence that the DPP has abused or wrongly exercised his power and mandate in charging the applicants; that the charges as drawn in the charge sheet are lawful and no arguable point is disclosed in the charge sheet. Counsel emphasized that the applicants have not demonstrated the nugatory aspects of the intended appeal; that plea has been taken by the applicants in the criminal cases and trial is due to commence on 30<sup>th</sup> March 2016; that there has been inordinate delay in bringing the instant application; that the trial court delivered its ruling on 10<sup>th</sup> July 2015 and the present application was filed on 25<sup>th</sup> February 2016; that the inordinate delay is a deliberate effort to derail and stall the criminal cases that are scheduled to commence on 30<sup>th</sup> March 2016. Citing the case of **Mary Ngethe -v- The Attorney General & Another, Civil Application No. NAI 157 of 2012** counsel submitted that the intended appeal shall not be rendered nugatory if the criminal proceedings are neither stayed nor prohibited.
10. Learned counsel Mr. Murei for the 3<sup>rd</sup> respondent opposed the application submitting that this Court had no jurisdiction under **rule 5 (2) (b)** to stay criminal proceedings. He distinguished the **Prof. Njuguna Ndungu Case (supra)** urging that the Prof. Njuguna case relied on broad principles of law and he had not been charged with a criminal offence in contrast to the instant case where the applicants have been charged and have taken plea; counsel reiterated that there has been inordinate delay in bringing the present application; that from the charge sheet, there are sufficient issues for the criminal court to delve into. He submitted that the intended appeal shall not be rendered nugatory and if at all the appeal were to succeed, the magistracy proceedings shall be terminated. Counsel cited the case of **Helmuth Rame -v- R Criminal Application No. 1 of 2015** where this Court stated that an intended appeal shall not be rendered nugatory if criminal proceedings are not stayed; the Court expressed the view that even if the proceedings before the criminal court were not stayed, the applicant still has an avenue of appeal before the High Court and should it be found that the applicant will have been subjected to an unfair trial, then he has a remedy in damages. Counsel submitted that **Section 35** of the **Ethics and Anti-Corruption Act** had not been repealed in its entirety as only Part III thereof was repealed.
11. We have considered the application, the grounds in support thereof, the replying affidavit, submissions by counsel and the law. For the applicant to succeed, he must satisfy the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838** and **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088.**
12. In **Equity Bank Limited -vs- West Link MBO Limited- Civil Application No. 78 of 2011** this Court stated that the true nature of an application under **Rule 5(2)**
- b. is an interlocutory application in an appeal pending before this Court; and that **Rule 5 (2) (b)** is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter in order to ensure a just and effective determination of appeal. In the instant case, a notice of appeal has been filed and a draft memorandum of appeal is attached to the supporting affidavit.
13. In **Hon. Peter Anyang Nyongo & Two Others vs. The Minister for Finance & Another, Civil Application No. Nai. 273 of 2007 (unreported)** it was stated:

**“It is trite law that this Court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5 (2) (b). It is apparent that under Rule 5 (2) (b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction, and a stay of further proceedings. This Court has consistently construed Rule 5 (2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.” Two principles emerge from a consideration of Rule 5 (2) (b) and the two authorities to wit, that, the jurisdiction of the court under Rule 5 (2) (b) is restricted to decisions made in Civil Proceedings and that the reliefs sought must relate to the decision of the superior court in its original or appellate jurisdiction.”**

14. Our perusal of the draft Memorandum of Appeal reveals that *prima facie* there are several arguable points to be urged in the intended appeal. For instance, it is arguable whether **Section 138** of the **Public Procurement and Disposal Act** confers protection to the applicants; it is also arguable whether **Articles 75 (2) (d)** and **236** of the Constitution protect the applicants from criminal prosecution; it is also arguable whether the 1<sup>st</sup> respondent can investigate offences outside the scope of **Chapter Six** of the Constitution. We are satisfied that the intended appeal is arguable.

15. Despite the foregoing, we note that the prayer for stay in the instant application is for stay of execution of a Ruling dismissing an application for orders of *certiorari* and prohibition. This Court has often times stated that stay of execution cannot be granted when the intended appeal is against a negative order. In **Devani & 4 Others -v- Joseph Ngindari & 3 Others, Civil Application No. 136 of 2004**, it was stated:

**“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which was capable of execution. If the order is granted, it will have an indirect effect of reviving the dismissed application. This the court cannot undo at this stage what the superior court has done. It can only do so after hearing the appeal.”**

16. In **Western College of Arts & Applied Sciences v. Ornaga & Others (1976) KLR 63** this Court held that the Court has no jurisdiction to issue stay pending appeal where there was nothing in the order of the High Court that can be enforced. On our part, being satisfied that the instant application is seeking stay of negative orders, the application is bound to fail.

17. We remind ourselves that the decision to grant or not to grant a stay order is a decision made in exercise of discretion by the trial court. In the instant case, the intended appeal is a challenge on the exercise of discretion by a trial court. The Supreme Court in **Teachers Service Commission -v- Kenya National Union of Teachers & 3 Others, SC Application No. 15 of 2015** expressed the view that a court lacks jurisdiction to entertain an application challenging the exercise of discretion by another court.

18. Despite the foregoing, we note that the instant application is also seeking an order to stay proceedings in the Anti-Corruption Case Nos. 12 and 18 of 2013. This is a prayer for conservatory orders pending the hearing and determination of the intended appeal. The gist of the application is that the applicants are seeking stay of criminal proceedings. In **Uwe Meixner & Another -v- The Attorney General, Civil Appeal No. 131 of 2005**, this Court expressed itself thus:

**“The criminal trial process is regulated by statute, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards...to be observed in respect of both criminal prosecutions and during trials.”**

19. The applicants contend that their criminal prosecution violates **Articles 75 (2) (d)** and **236** of the

Constitution to the extent that as public officers, they should be subjected to disciplinary and not criminal processes. *Prima facie*, it is arguable whether **Articles 75 (2) (d)** and **236** confer immunity to public officers against criminal prosecution. Be that as it may, in a persuasive authority, the High Court in **Kuria & 3 others -v- Attorney General (2002) 2 KLR 69**, observed that it is not enough to simply state that because there is an existence of a civil dispute, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. In yet another persuasive authority, the High Court in **George Joshua Okungu & Another -v- Attorney General Petition No. 227 and 230 of 2009**, opined that the fact that facts constituting the basis of criminal proceedings may similarly be the basis for civil suit is not a ground for staying the criminal process.

20. In seeking to stay criminal proceedings in Anti-Corruption Cases Nos. 12 and 18 of 2013, the applicants submitted that the 3<sup>rd</sup> respondent had no mandate to act as it did and that the Director of Public Prosecution had not properly exercised his powers under **Article 157** of the Constitution. In the Kenya Constitution, the Office of Director of Public Prosecution is an independent office with clearly defined functions. In principle, it is not the work of the courts to interfere with other State Organs unless it can be shown that they violate the Constitution; each State Organ must be allowed to function without interference. (See **Judicial Service Commission v. Speaker of the National Assembly and 8 Others, Nairobi HC Petition No. 518 of 2013**). It is the duty of this Court to protect not only the functional, administrative and operational independence of the Office of Director of Public Prosecution but also to protect the applicants and ensure that in exercise of his functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

21. In the case of **Peter O. Ngoge vs. Francis Ole Kaparo and Others, SC Petition No. 2 of 2012**, the Supreme Court observed that in the interpretation of any law, the guiding principle is that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law.

22. We note that the applicants have already been charged and the criminal trial is scheduled to commence on 30<sup>th</sup> March 2016. Guided by the Supreme Court dicta in ***Peter O. Ngonge Case, (supra)*** we are of the view that the trial Magistrate's Court has the professional competence to consider and evaluate any constitutional issues that may be urged and any applicable defence that may be raised. As correctly stated by this Court in ***Uwe Meixner Case (supra)*** it is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. We adopt and apply the dicta by this Court in **Helmuth Rame -v- R Criminal Application No. 1 of 2015** where it was stated that an intended appeal shall not be rendered nugatory if criminal proceedings are not stayed because should it be found that the applicant will have been subjected to an unfair trial, then he has a remedy in damages.

23. In totality, we are of the view that the intended appeal shall not be rendered nugatory if stay of proceedings and conservatory orders are not granted. The present application seeks to stay a negative order which we cannot do. Accordingly, we find that the Notice of Motion dated 24<sup>th</sup> February 2016 has no merit and is hereby dismissed with costs.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2016***

**P. M. MWILU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**