



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI. 113 OF 2016 (UR 90/2016)

**NATHIF JAMA ADAN
APPLICANT**

AND

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

ABDI SAHAL ALI.....2ND RESPONDENT

**MOHAMUD H. MOHAMED.....3RD
RESPONDENT**

**DR. SOFIA MOHAMED.....4TH
RESPONDENT**

**JAWAHIR KEYNANA.....5TH
RESPONDENT**

**RAHMA DEKOW.....6TH
RESPONDENT**

**KENETH RUTERE.....7TH
RESPONDENT**

MOHAMED HASSAN.....8TH RESPONDENT

**MOHAMUD ADEN BARE.....9TH
RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION.....10TH
RESPONDENT**

(Being an application for injunction pending the hearing and determination of an intended appeal against the Judgment and Order of the (Hon. Mr. Justice Weldon Korir) dated and delivered in Nairobi on the 19th April, 2016

MISC. CIVIL APPLICATION NO. 225 OF 2015

RULING OF THE COURT

Pursuant to leave granted on 15th July, 2015, the applicant herein filed a chamber summons application in the High Court under the provisions of **Order 53 Rule 1, 2 and 4** of the **Civil Procedure Rules** as well as **Sections 8 and 9** of the **Law Reform Act**. The Director of Public Prosecutions, was named as respondent.

The applicant sought the following orders:-

“1. That leave be granted to the Applicant to apply for an order of prohibition directed against the Respondent, prohibiting him and his agents, employees and servants from commencing, proceeding with charging, prosecution, and/or preferring any criminal charges against the Applicant before any competent court in Kenya in so far as the same relates to the procurement of ambulances by the County Government of Garissa from the Kenya Road Cross and its derivatives.

2. That leave be granted to the Applicant to apply for an Order of Certiorari to remove and bring to this Honourable Court for purpose of quashing the decision of the Respondent to charge and prosecute the Applicant.

3. That the leave so granted to the Applicant do operate as a stay of the decision by the Respondent to prefer, authorize, bless or give the go ahead for criminal charges to be preferred against the Applicant in relation to the ambulances procured from the Kenya Red Cross and its derivatives.”

The application was supported by the Statutory Statement and a verifying affidavit of **Nathif Jama Adan** filed on 15th July, 2015. In the main, the applicant’s complaint was that the respondent was intent on preferring criminal charges against him; that the intended criminal prosecution related to a restricted and direct procurement of ambulances by the County Government of Garissa; that the applicant is not a member of the Tender Committee; that the investigation on the matter was done at the behest of the Ethics and Anti-Corruption Commission under the direction and orders of a senior Jubilee politician; that the intended prosecution was *mala fides* and aimed at settling political scores.

Subsequently, the 1st – 8th Interested Parties (now the 2nd – 9th respondents) and the Ethics & Anti-corruption Commission (the then 9th Interested Party and now the 10th respondent) were brought on board.

The Director of Public Prosecutions opposed the application, vide a replying affidavit sworn on 20th July, 2015 by Hellen Kalem Mutellah, a prosecuting counsel. She refuted the averments made by the applicant and detailed what the respondent considered as misprocurement. She concluded :

Paragraph 15. “that the decision to charge was made independently based on sufficiency of evidence and the public interest underlying prosecution of corruption offences and were not instigated by anybody or institution as alleged by the applicant”

Abraham Kemboi, an investigator working with the Ethics and Anti-Corruption Commission, the then 9th interested party, swore an affidavit dated 14th August, 2015. He too, detailed what he considered misprocurement and the reasons for holding the applicant culpable.

The 1st to 8th interested parties were not opposed to the applicant's motion and hence did not file any affidavit.

The matter was heard by Korir, J, who in a judgment dated and delivered on 19th April, 2016 dismissed the applicant's motion. It is the said dismissal that provoked the Motion dated 6th May, 2016 before us which is predicated on a Notice of Appeal dated 26th April, 2016. In the Motion the applicant sought *inter alia*,

“(i) THAT this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 10th Respondents whether by themselves, agents, servants or any person purporting to exercise their authority, from causing the arrest, and/or charging of the intended Appellant/Applicant before any competent court in Kenya in so far as the same relates to the procurement of ambulances by the County Government of Garissa from the Kenya Road Cross and its derivatives pending the hearing and final determination of this application.

(ii) THAT this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 10th Respondents whether by themselves, agents, servants or any person purporting to exercise their authority, from causing the arrest, and/or charging of the intended Appellant/Applicant before any competent court in Kenya in so far as the same relates to the procurement of ambulances by the County Government of Garissa from the Kenya Road Cross and its derivatives, pending the hearing an final determination of an intended appeal.”

The Motion was supported by the affidavit of the applicant sworn on 3rd May, 2016. He deponed that following the dismissal of his application by the High Court, he is now exposed to a criminal prosecution on “... ***trumped up, baseless and irrational charges*** ...”; that his arraignment in court shall attract adverse publicity and the attendant stigma; that he is not a member of Garissa County Government Tender Committee; that the intended prosecution was shrouded with malice; that he has an arguable appeal and that it was in the interest of justice that the orders sought be granted.

During the plenary hearing before us on 24th May 2015 Mr. Tebino teaming up with Mr. Mude urged the applicant's case whilst Mr. Ashimosi on behalf of the 1st respondent and the 10th respondent opposed the Motion.

Mr. Tebino chose to address us on this Court's jurisdiction. It was his submission that the Notice of Appeal filed on 26th April, 2016 has clothed this Court with jurisdiction; that the crux of an application made under **Rule 5(2) (b)** is to preserve the *status quo*; that the application in the High Court was a Judicial Review matter and that the reliefs in a Judicial Review application are *mandamus*, *prohibition* and *certiorari*; that the enactment of the Fair Administrative Actions Act has expounded the scope of Judicial Review; that this Court exercises a supervisory role over the High Court and emphasized that in bringing the Motion the applicant is seeking an injunction in the nature of conservatory order and not an application for stay. Mr. Tebino relied on the authority of **Equity Bank Ltd v Westlink Mbo Limited, Civil Appeal No. Nai 78 of 2011 eKLR** for the proposition that this Court's jurisdiction in a Rule 5 (2) (b) application is both original and discretionary.

On his part, Mr. Mude urged us to find that the applicant has an arguable appeal which is far from being frivolous; that the criminal charges to be preferred against the applicant pre-suppose that he was a member of the Tender Committee as in Count 1 – it was alleged that the applicant abused his office for misprocuring ambulance services, an offence not capable of being committed by the applicant as he is statutorily barred from being a member of the Tender Committee. In count II, the allegation was that the applicant willfully failed to comply with the law relating to management of public funds, a charge that presupposed the applicant performed administrative functions, of which he did not. He could also not be culpable of failure to do prior planning as contemplated in Count III as he was not an administrator. It was his further contention that the applicant need not demonstrate that the appeal will necessarily succeed. For this proposition he cited the case of **Kenya Medical Lab Technicians & Technologists**

Boards v Prime Communications Limited [2014] eKLR.

On the nugatory aspect it was Mr. Mude's contention that if the criminal proceedings were to commence, the applicant's appeal would be rendered nugatory, as he would have been arraigned in court with a view to facing a criminal trial, the consequences of which are far reaching. He relied on the authority of **Alfred Mutua v Ethics & Anti-corruption Commission (EACC) & 3 Others [2016] eKLR** for the proposition that if criminal proceedings are to take place before the determination of an intended appeal against the dismissal of an application for *certiorari*, the appeal if successful would be rendered nugatory.

Mr. Issa for the 2nd – 8th respondents supported the Motion. It was Mr.

Issa's contention that the intended criminal charges will not see the light of day unless it can be demonstrated that the procurement was done in bad faith.

In opposing the appeal, Mr. Ashimosi submitted that although the applicant was not a member of the Tender Committee, he took over the tendering process and disregarded the Tender Committee. It was his view that the appeal was not arguable and neither would it be rendered nugatory, if stay is not granted. In support of his proposition that the appeal would not be rendered nugatory, Mr. Ashimosi relied on the authority of **Hemuth Rame v Republic Nai. Court of Appeal Criminal Application No. 1 of 2015 (UR 1/2015)** where this Court rendered itself as follows:

“We do not consider the grounds the applicant raises on appeal are arguable. If, as the applicant contends, he feels that he will not get a fair trial before the Chief Magistrate's Court, then the grounds he raises could well be good grounds on appeal to the High Court from whatever decision is reached by that court.

We also do not see how the appeal would be rendered nugatory. While the applicant contends that there will be an unwarranted loss of judicial time and resources should the criminal trial proceed and on the other hand should his appeal be successful. We disagree. It is the function and duty of criminal courts to try and determine cases before them. This Court will not interfere with the duty simply because there is a remote chance that the applicant's intended appeal may be successful.”

Further, that the applicant has no cause for alarm as the Constitution provides sufficient safeguards to protect the applicant's rights in a criminal trial. He cited the case of **Manilal Jamnadas Ramji Gohil v The Director of Public Prosecution, Nai Court of Appeal Criminal Appeal (Application) No. 57 of 2013** wherein while agreeing with the position taken by Achode J to the effect that:

“The sooner the applicant presents himself before the Court in [Criminal Case Number 2061 of 2009], the sooner he will get a chance to demonstrate to the court the malice with which he thinks the prosecution is tinged. His case is before a court of competent jurisdiction which is capable of discerning whether the case is merely being used as a tool to discriminate and oppress the applicant who is an innocent person, or indeed he committed a crime for which he ought to be punished.”

this Court stated:

“We would agree and add that the learned judge did say that the appellant can take his constitutional issues to the subordinate court. We are also of the view that the issues of malice and harassment that have been raised by the applicant can be raised during the trial in the subordinate court as defences. It is at this stage not possible to state that the applicant will not get a fair trial because there has been no evidence placed before us to indicate so.”

In a brief rejoinder, Mr. Tebino submitted that the nature of the conservatory orders being sought was for the maintenance of status quo and that there were exceptional circumstances meriting an order for

conservatory orders.

We have considered the Motion and the affidavits in support against the motion as well as the oral rival submissions and the record and the law.

Firstly, on the issue of jurisdiction urged by Mr. Tebino, we heard him say that inspite of the applicant's Judicial Review application having been dismissed and in view of this Court's position that there is nothing to stay following an order of dismissal, this Court is clothed with jurisdiction as this was a Judicial Review matter and not an application for stay per se.

With respect to the learned counsel, the issue canvassed by him is neither here nor there. The provision of Rule 5 (2) (b) for grant of an ***“order of stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just,”*** in our view, is applicable in Judicial Review matters.

The conservatory order being sought is under Rule 5 (2) (b) and we do not buy the argument that a Judicial Review application seeking conservatory orders is different and distinct from an application seeking an order of stay. This court has had occasion to pronounce itself in a matter where stay was sought after a dismissal of a Judicial Review application. In the case of **Devani and 4 others v Joseph Ngindari (Civil Application No. NAI 13 of 2004 (unreported))** an application was made under rule 5 (2) (b) of the Rules for interim stay of execution of a High Court/decreed which had dismissed judicial review proceedings under Order 53 of the Civil Procedure Rules, this Court stated:

“By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.

It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable.”

Similarly in the case of **William W. Wahome and the Registrar of Trade Unions & Others (Civil Appl. No. NAI 308 of 2005 (unreported))** this Court in reference to an application under 5 Rule (2) (b) for stay of execution of the ruling of the High Court that set aside the grant of leave to apply for judicial review, stated:-

“The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs.” (Emphasis added)

The above notwithstanding, and of much more fundamental, is whether this Court can grant an order of injunction in a judicial review matter? In **CORTEC MINING KENYA LIMITED V THE CABINET SECRETARY & 8 OTHERS NAI. C.A. NO. 111 OF 2015** this Court held:

“For starters, to grant an injunction would amount to giving a relief or remedy that was not even sought in the High Court in the first place. The High Court would only grant these three prerogative orders. It could not in the judicial review under Section 8 of the Law Reform Act grant an order of injunction such as is sought in the motion before us for the simple reason that injunction is not authorized by and falls outside the amplitude of the reliefs available under Section 8 of the Law Reform Act. An injunction is also not exclusively within the amplitude of public law remedies. But even more compelling is the fact that subsection (3) of Section 3 of the Appellate Jurisdiction Act requires this Court -

“in the hearing of an appeal in exercise of the jurisdiction conferred by the said Act to apply the law applicable to the case in the High Court.”

It is plain to see that in judicial review, the Court is concerned with public law remedies. An injunction is a private law remedy, and it can also serve as a public law remedy. However, in the context of judicial review, it is not available either in the High Court or in this Court on appeal under the Law Reform Act.”

This Court further stated:

“Moreover, if we were to grant the injunction sought, what implications would this have? First, it would boil down to this, that although the High Court declined to issue in the notice of motion by the applicant any of the public law remedies stipulated in Section 8 of the Law Reform Act, an injunction as a private law remedy by this court would in effect, (notwithstanding that the impugned decision made in the judicial review proceedings which is now the subject of the said appeal) revive the litigation that is already determined, in a context in which such injunction would not serve as a conservatory there being nothing to be conserved after dismissal of the judicial review proceedings. Secondly, such injunction would not serve to prevent the appeal from becoming nugatory as success in the appeal would not be turned into pyrrhic victory if injunction is not granted for the simple reason that revocation of the 1st respondent’s mining licence took effect on 5th August 2013 under the provisions of the Mining Act, Cap 306 of the Laws of Kenya. Thirdly, to restrain the 1st respondent by injunction in the manner sought in the motion would also be tantamount to going against an express provision of the law (to wit Section 8 of the Law Reform Act, Cap 26) without interrogating the matter as a public law issue. Fourthly, it would be an error not least because it would violate Section 3(3) of the Appellate Jurisdiction Act. There would be no legal justification for us to grant the injunction in judicial review proceedings.”

We too are of similar view that an injunction is not obtainable in the circumstances of the motion before us.

On arguability and as pointed out by Mr. Mude, in considering whether an arguable appeal has been made out (or not), it is not a requirement that there be a chain of arguable points as one arguable point is sufficient. (see **Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd Civil Application No. 345 of 2004.**) It is also sufficient that the arguable point need not be one which will necessarily succeed, but suffice to state that one which is not frivolous.

What we must as of necessity grapple with is whether the applicant has raised one such ground to demonstrate that he has an arguable appeal deserving a conservatory order whose effect is to maintain the status quo.

However, before we delve into the above issue, it would appear to us that there has been variance in the manner this Court has treated applications seeking orders to stay criminal prosecutions.

In the case of **Mary Ngechu v Attorney General & KACC, Civil Application No. Nai 157 of 2012**, this Court stated thus:

“There cannot be any doubt that this Court cannot stay criminal proceedings in the magistrate’s courts in the manner sought in this application because there is no jurisdiction to do so. This Court will issue and has issued as demonstrated by decisions we were referred to orders prohibiting magistrates courts from proceedings with criminal trials where it found evidence that the trial was actuated by malice and abuse of process; where such prosecution was in derogation of the applicant’s constitutional rights and instituted with the predominant and improper intent to harass and exert pressure on the applicant.”

In considering the above, this Court in its recent decision of **Eng. Michael Sistu Mwaura Kamau v**

Ethics And Anti-corruption Commission & Others Civil Application No. Nai. 173 of 2015 agreed with the above dictum and added

“... that each case is considered on its own merits. It is only in instances where there are trumped up charges, or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the applicant, that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice are met and to prevent the abuse of the process of the court as, indeed, this is a country that is governed under the rule of law and not the whims of the Director of Public Prosecutions, or any other person or authority.”

In the particular circumstances of this case, the applicant averred that he was not involved in the procurement processes of the county as he is statutorily barred from so doing. On the other hand, the 1st and 10th the respondents’ position is that the applicant disregarded the Tender Committee and bull-dozed the processes, in total disregard to the fact that he was not a member of the Tender Committee. These are therefore two divergent positions. Can it therefore be said that 1st and 10th respondents are actuated by malice and are abusing their authority? We do not think so. Indeed, we are of the considered view that there are sufficient safeguards in our law to protect the applicant and to ensure that he has a fair trial. Therefore, the applicant has absolutely no reason to fear as he will be vindicated by the trial court, if indeed he is not culpable. We say this because if the prosecution is malicious, the trial court should be able to find as much. It is important to point out that the applicant has not alleged any malfeasance against the trial court. It is also important to note that given the hierarchical nature of our courts, an appeal may be preferred against the findings of the magistrate’s court. It is therefore our position that in view of the contested facts in this case, it has not been shown with certainty that the intended prosecution is *mala fides*. And as stated above, the applicant has sufficient legal safeguards to protect him from witch-hunt, whether politically motivated or otherwise. Hence, we are not satisfied that the applicant has demonstrated an arguable appeal with chances of success.

On the nugatory aspect, whereas we do not underestimate the stigma that goes with arraignment of a criminal prosecution, the honour and the dignity of the applicant will be restored upon conclusion of the trial, or upon conclusion of an appeal, or upon successful conclusion of a case for malicious prosecution.

Accordingly, In our view, the appeal would not be rendered nugatory if an order for stay is not granted.

It is for the above reasons that we have come to the conclusion that this motion is for dismissal. It is hereby dismissed with costs.

Dated and delivered at Nairobi this 15th day of July, 2016.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR