



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CIVIL APPLICATION NO. 68 OF 2014 (UR NO. 47/14)

BETWEEN

CROSSLEY HOLDINGS LIMITED.....APPLICANT

AND

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

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

MIWANI SUGAR COMPANY (1989) LIMITED.....3RD RESPONDENT

(Being an Application for restoration and re-hearing of the appeals herein Civil Appeal No. 1 of 2013, Director of Public Prosecutions- v- Crossley Holdings Limited & 2 Others and Civil Appeal No.2 of 2013 Ethics and Anti-Corruption Commission -v- Crossley Holdings Limited and 2 Others from the Judgment of the High Court of Kenya at Kisumu (Ali-Aroni,J)

Dated 18th May, 2012

in

H.C. MSC. APPLICATION NO. 12 OF 2010)

RULING OF THE COURT

1. On 15th January, 2010, the Ethics and Anti-Corruption Commission (the Commission) published its fourth quarterly report for the year 2009 covering the period of 4th October, 2009 to 31st December, 2009 in Kenya Gazette Notice No.353 of 2010. The relevant portion of that Gazette Notice alleged that in a purported execution of a court decree, Crossley Holdings Limited (the applicant) fraudulently acquired the ownership of a public piece of land comprising 9,394 acres and valued over Kes. 2 billion belonging to Miwani Sugar Company (1989) Limited [in receivership]. Pursuant to the Commission's recommendation based on that report, the Attorney General instructed the Director of Public Prosecutions (DPP) to charge a number of personalities including the applicant and its directors for various offences.

2. In its notice of motion dated 23rd October, 2014, the applicant alleged, inter alia, that having already

been condemned unheard, it was unlikely to get a fair trial. It therefore sought orders of certiorari to quash the decisions of both the Commission and the Attorney General to prosecute it and prohibition to prohibit the DPP from proceeding with any criminal prosecution against it

3. In her judgment delivered on 18th May, 2012 in that judicial review application, the Hon. Lady Justice Ali-Aroni acceded to the applicant's pleas and quashed the decisions of both the Commission and the Attorney General to prosecute it and by an order of prohibition restrained the DPP from prosecuting it.

4. Aggrieved by that decision, the DPP and the Commission respectively filed Civil Appeal Nos. 1 and 2 of 2013 before this Court naming the applicant as the respondent and Miwani Sugar Company (1989) Limited as well as the Attorney General as interested parties. Those appeals were consolidated when they came up for hearing on 19th June, 2014. Upon satisfying itself that the applicant's counsel had been served with the hearing notice for that day, this Court went ahead and heard the appeal ex-parte and delivered its ruling on 23rd October, 2014 allowing it.

5. On the same day, the applicant filed this application under the provisions of **Section 3A** of the Appellate Jurisdiction Act and also under **Rules 42, 47 and 102 (2)** of the Court of Appeal Rules and sought orders of stay of this Court's said Judgment and/or an order restraining the DPP from proceeding with any criminal proceedings against it, its Directors and/or employees pending the inter-partes re hearing and determination of the two appeals. It also sought any other or further relief that this Court may deem fit to grant.

6. Basing his submissions on the averments in the affidavit of Sukhwinder Singh Chatthe, a Director of the applicant, sworn on 23rd October, 2014 in support of this application, Mr. Gichaba, learned counsel for the applicant, submitted that the applicant did not know of the hearing date of the two appeals, the hearing notice having been served upon its erstwhile firm of advocates, Messrs Wangai Nyuthe & Company Advocates. In support of that argument, counsel referred us to a letter dated 24th June, 2014 from that firm admitting that they had indeed been served with a hearing notice but failed to appear because they thought the applicant, having not got in touch with them for quite some time, had instructed other counsel to handle the matter on its behalf. Mr. Gichaba therefore pleaded with us not to punish the applicant for a mistake committed by its counsel and instead urged us to allow this application and re-hear and determine the appeals on merit.

7. Messrs Sirtuy, Murei and Bundotich, learned counsel for the respondents submitted that this application has no merit and even if it is granted, it will serve no useful purpose because the applicant has not sought the Vacation or the setting aside of this Court's judgments on the two appeals. They therefore urged us to dismiss this application with costs.

8. We have considered the application, the averments in the supporting affidavit as well as the submissions by counsel on both sides. It is clear to us that for undisclosed reasons the applicant lost touch with his advocates. That notwithstanding, we find that Messrs Wangai Nyuthe advocates, being on record for the applicant and having been served with the hearing notice, should have at the very least informed the applicant of the hearing date but they did not. That notwithstanding and the matters giving rise to this application being criminal in nature with penal consequences, we are of the view that though the applicant has not conducted itself diligently in this matter, it should be heard on the two appeals. Consequently we allow this application and direct that the two appeals be re-heard inter-partes within **sixty** days. Pending the re-hearing and determination of those appeals, we hereby restrain the DPP from proceeding with any criminal charges against the applicant, its Directors and/or its employees. As it is the applicant and its erstwhile advisors who failed to attend court during the hearings of the appeal thus necessitating this application, we order that the applicant pays the costs of this application to the respondent and the interested parties.

DATED and Delivered at Kisumu this 5th day of February ,2015

D.K.MARAGA

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JUDGE OF APPEAL

F.AZANGALALA

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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

