



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: TUNOI, ONYANGO OTIENO & AGANYANYA, JJ.A.
CIVIL APPLICATION NO. NAI 95 OF 2010 (UR 70/2010)

BETWEEN

JUSTICE SAID JUMA CHITEMBWE..... APPLICANT

AND

EDWARD MURIU KAMAU
STEPHEN KIPKENDA KIPLAGAT
KENYA ANTI CORRUPTION COMMISSION
THE HON ATTORNEY GENERAL
SENIOR RESIDENT MAGISTRATE, ANTI CORRUPTION COURT,
NAIROBI.....RESPONDENTS

(An application for stay of proceedings in Anti-corruption Case No. 36 of 2009 pending in the Chief Magistrate's Court Nairobi in an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Khaminwa, J) date 20th April, 2010

in

HCMISC.APPLN. NO. 128 OF 2010)

RULING OF THE COURT

The applicant, **JUSTICE SAID JUMA CHITEMBWE**, moves the Court for two substantive orders, namely:

“2. **THAT** this Honourable Court be pleased to vary and/or rescind in part, the stay orders granted by this court on 11/06/2010 which stayed the entire criminal proceedings pending before the Nairobi Chief Magistrate Anti-corruption Court case number 36 of 2009.

3. **THAT** this Honourable Court be pleased to order that the stay orders granted by this Honourable Court on the said 11/06/2010 remain in place only with respect to the original Applicants herein, EDWARD MURIU KAMAU and STEPHEN KIPKENDA KIPLAGAT and cease to continue to have effect in the Nairobi Chief Magistrate Anti-corruption court case number 36 of 2009 as against the Applicant in this application, Justice Said Juma Chitembwe.”

On 11th June, 2010, this Court differently constituted issued the following order:

“ORDER

This application was listed to be heard together with Civil Application No. NAI 112 of 2010 and set for hearing this morning. The Court has only been able to partly hear Civil Application No. NAI 95 of 2010. It accordingly appears that the Court will not be able to conclude even the hearing of this application.

In the circumstance both applications are adjourned to a date to be fixed at the registry. In the meantime the hearing of Criminal case due for hearing on 15th to 17th June 2010 is stayed pending the completion of the hearing and determination of both applications. The criminal case whose hearing we stay is Nairobi Chief Magistrate’s Anti corruption Court Case No. 36 of 2009.

Another date to be taken at the registry for hearing on priority basis.”

The applicant complains that the orders of stay were made *ex parte* as against his interests since he had not filed any judicial proceedings in the superior court; that he was not even a party to the applications lodged by **Edward Muriu Kamau** and **Stephen Kipkenda Kiplagat**, the 1st and 2nd respondents respectively; and that he is also not a party to the intended appeal. Moreover, he had not been served with the notice of appeal; and above all, the 1st and 2nd respondents were not asking for blanket orders.

Mr Gatonye, the learned counsel for the applicant, has vigorously submitted before us that the order granted by the Court has seriously prejudiced the applicant in that he has to wait for the 1st and 2nd respondents to exhaust the lengthy legal processes in the appellate court before the trial begins and thus denying the appellant his constitutional right to a fair and expeditious trial. Mr Gatonye has further urged that due to the applicant’s position as a Judge of the superior court, it is in his interest and also in great public interest that the trial in Chief Magistrate’s Court proceeds expeditiously to enable him know his fate; and probably, resume his duties. Mr Gatonye averred that there is great public interest in the trial since the officers of the Kenya Anti-Corruption Commission (KACC) arranged the whole process of the applicant’s arrest and arraignment in court in such a manner that it received the widest possible access to print and electronic media.

The learned counsel for the 1st and 2nd respondents, Mr Makori and Mr Njuguna, respectively, do not oppose the application. So are the learned counsel for the Law Society of Kenya and the interested party, Mrs Rachael Lumbasyo, Mr Njuguna and Mr A B Shah, respectively.

However, Mr Olola and Mr Monda, the learned counsel for the KACC and the Attorney General, respectively, have strenuously opposed the application. They argue that a variation of the stay order to allow the applicant to be tried separately would not only be costly in terms of expenses and judicial time but would also greatly prejudice the proper prosecution of the charges facing all accused persons in the subordinate court. Further, the two counsel contend that the essence of the charges facing the applicant and his co-accused is that all of them were acting in concert in a common enterprise and it is, therefore, right and proper that they should jointly be charged and jointly tried.

It is an indisputable fact that the stay order of 11th June, 2010, was obtained *ex parte* without the presence and representation of the applicant. It was made without hearing him and in his ignorance. He avers that had he been notified of the application by the 1st and 2nd respondents, he would have opposed it. It is obvious that the consequence of the said order is that the criminal proceedings against the applicant have been halted indefinitely, presumably, until his co-accused would have tried their fate in this Court and possibly in the yet to be formed Supreme Court. The applicant, an employee of the Judicial Service Commission, would remain suspended from his duties while his status and situation lie in limbo. Although the orders made by the Court were only interim orders as the matter before it was part heard, the Court nonetheless made an order that has greatly prejudiced the applicant.

It is the basic tenet of our law that no man or woman may be condemned unheard. As the cardinal rules of natural justice were breached by the order of stay granted on 11th June, 2010, it has to be varied to exclude the applicant.

Article 50 (2) (e) of the Constitution guarantees the applicant the right to a fair trial, which includes the right to have the trial begin and concluded without unreasonable delay. Thus, the applicant can say to the prosecutor: *you charged me before court on 28th December, 2009, more than 15 months ago. I have not impeded the trial in any way. Why are you not commencing the hearing?*

On the other hand, the Court has to consider the apprehension by the prosecutor that as the applicant has been jointly charged with three other accused persons in a conspiracy charge the same cannot be heard separately in the interest of justice. In our view, this fear is misplaced. Though it is desirable where there is a charge of conspiracy against two alleged conspirators, say A and B, that they should be tried together, however, if for any reason this cannot be, then if A pleads guilty or is found guilty there is no reason why his conviction must be set aside if B on his later separate trial is acquitted. See **R V SHANNON [1974] 2 ALL ER 1009. RUSSELL ON CRIME (11th Edn. p. 50)** states:

“As a matter of procedure it would seem that if A be indicted and tried alone for conspiring with others, he could be lawfully convicted, though the others referred to or included in the indictment had not appeared or pleaded, or were dead before or after the indictment was preferred, or before they pleaded not guilty, or were subsequently and separately tried.”

On these authorities, therefore, we would think that the prosecutor’s apprehension is misconceived, though he would obviously be inconvenienced, but, inconvenience per se cannot frustrate the criminal proceedings against the applicant and his co-accused.

With the advent of the overriding objective, the court must swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it. See **KENYA PIPELINE CO LTD V S M GITHUNGURI, Civil Application No NAI 300 of 2010 (Unreported)**. This behoves us to approach the matter before us with a sense of balance or proportionality. This, in turn, means that we must apply or invoke the principle of proportionality so as to avoid any injustice in the circumstances presented before the Court. In applying this principle, where individual liberty and public interest are concerned, one would be minded to apply the maxim propounded by **Jeremy Bentham** [1748-1832], a famous English philosopher and social reformer and the founder of utilitarianism, which demands that each action be judged by its utility, that is to say, its usefulness in bringing about consequences of a certain kind so as to achieve *“the greatest good of the greatest number”* and that *“that action is best which procures the greatest happiness for the greatest numbers”*.

It is quite clear to us that the criminal proceedings against the applicant is a matter of great public interest and therefore, a proper prosecution of the charges against the applicant and others should not be impeded or prejudiced. Also, on the other hand, the applicant should not be made to suffer uncertainty and delay in trying him. This would prejudice him and serve to undermine his career as a judge.

Taking everything into account, especially the importance of the case, the complexity of the issues in application, we think that the balance tilts in favour of granting the prayers sought by the applicant.

In the result, we allow the application and grant orders Numbers 2 and 3 as sought in the Notice of Motion dated 6th September, 2010 and lodged in the court on 16th September, 2010.

It follows, therefore, that stay orders granted by this Court on 11th June, 2010, are varied to the extent that they remain in place only in respect of the 1st and the 2nd respondent, Edward Muriu Kamau and Stephen Kipkenda Kiplagat, respectively, and shall cease to continue to have effect as against the applicant, **Justice Said Juma Chitembwe**.

The applicant shall have the costs of this application as against the 3rd and 4th respondents only.

Dated and delivered at Nairobi this 13th day of April, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR