



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 347 OF 2009

MOHAMED KORIOW NURAPPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE KENYA ANTI-CORRUPTION COMMISSION2ND RESPONDENT

THE CHIEF MAGISTRATE’S COURT, MAKADARA3RD RESPONDENT

(An application for stay of proceedings in an intended appeal from the order of the High Court of Kenya at Nairobi (Lady Justice Wendoh) dated 23rd November, 2009

in

H.C.MISC. CAUSE NO. 800 OF 2007)

RULING OF THE COURT

The motion before us invokes not only **rule 5(2) (b)** of the rules of this Court (the Rules) but also **sections 3A and 3B** of the **Appellate Jurisdiction Act** (the Act) which are relatively recent amendments by Parliament. The substantive orders sought are in these words:

“2. That this Honourable Court be pleased to issue an order that the order made by the Honourable Mrs. Justice Wendoh on 23rd November, 2009 vacating or setting aside the orders made by the Honourable Justice Osiemo on 16th August, 2007 be stayed pending the hearing and determination of an intended appeal against the whole of the ruling and order made by the Honourable Mrs. Justice Wendoh on the 23rd November, 2009 in High Court Miscellaneous suit No. 800 of 2007.

3. That this Honourable Court be pleased to grant a stay of proceedings in High Court Miscellaneous

Cause No. 800 of 2007 pending the hearing and determination of the intended appeal.

4. That this Honourable Court be pleased to make such other or further orders as this Honourable Court may deem just to grant.”

At the hearing of the application, prayer 3 was abandoned, thus leaving prayer 2 for stay of execution. We believe prayer 4 is predicated on **sections 3A** and **3B** of the Act which sections introduced the overriding objective of civil litigation and have been construed and applied by this Court in several decisions since their enactment. In **City Chemist (NBI) & 2 others v. Oriental Commercial Bank Ltd Civil Application No. Nai. 302/2008 (ur)** this Court referred to the parentage of the “*overriding objective*” in England since 1999 and stated:

“It was tailored to enabling the court to deal with cases **justly** which includes as far as practicable:

“(a) *ensuring that the parties are on an equal footing;*

(b) saving expenses;

(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(v)

(e) ensuring that it is dealt with expeditiously and fairly; and

(f) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

Those are not pious aspirations and the court has a duty to give them operational effect. That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”

One well established principle in applications under **rule 5(2) (b)** is that in order to persuade the court to exercise its discretion in his favour, the applicant ought to show that he has an arguable appeal, or differently put, that the intended appeal is not frivolous, and secondly, that if the order sought is not granted, the intended appeal, if successful, would be rendered nugatory. Those principles were not ousted by the amendment to the Act but were enriched and broadened by bringing to bear the authority of the court as guided by the provisions of the two sections.

A short background to the application is necessary.

The applicant **Mohamed Koriow Nur** (Nur) was arrested on 15th March, 2007 and was arraigned before Makadara Chief Magistrate’s Court on three counts, under the **Anti Corruption and Economic Crimes Act**, of offering a bribe to, and actually bribing, an investigating officer of the Kenya Anti

Corruption Authority (KACC). He pleaded not guilty and was released on bond. The case was scheduled for hearing on 6th August, 2007 but on 27th July, 2007 - 10 days before the hearing - Nur sought to challenge the propriety of those charges and so he instituted judicial review proceedings under **Order 53** of the Civil Procedure Rules seeking orders of *certiorari* to quash the proceedings before the Chief Magistrate and the decision of the Attorney General to prosecute him. He also sought orders of prohibition against the Chief Magistrate, the Attorney General and KACC. The superior court, Wendoh J, heard the *ex parte* chamber summons for leave and granted it on the same day. She declined, however, to grant an order, as sought, that the grant of leave shall operate as a stay of all proceedings before the Chief Magistrate. Instead, an order was made that the substantive notice of motion be filed and served within 15 days failing which the order for leave would be vacated automatically.

Nur was aggrieved by the order rejecting his prayer for stay and therefore filed a notice of appeal on 30th July, 2007 to challenge it in this Court. That appeal is still pending. In the meantime, the notice of motion was filed in the superior court and served on 30th July, 2007 and leave was obtained to have it heard during the court vacation. It was set down for hearing on 6th August, 2007. Come that day, the matter was not listed for hearing but Nur, through his advocates, obtained an *ex parte* hearing date for 15th August, 2007 and ought to have served the other parties with hearing notices. Only KACC was served with the hearing notice for that date and, in any event, the matter was not listed in the cause list.

In the meantime, the criminal case at Makadara was scheduled for hearing on 17th August, 2007. Nur and his advocates appear to have panicked at the imminence of that hearing before his motion was heard. The advocate, one Martin Munyu, swore an affidavit on 15th August, 2007 to certify that the notice of motion was urgent and ought to be heard before the criminal case otherwise the orders of prohibition sought in the motion would be rendered nugatory. He went before the vacation Judge, Osiemo J, and informed the Judge that the motion had been set down for hearing by consent of all parties but there was no appearance from the respondents. He then applied for an order of prohibition to restrain the Chief Magistrate from continuing with the trial until the motion is heard and determined. Osiemo J obliged, and after noting that a stay was declined at leave stage and that the other parties had not attended court despite having taken the date by consent, issued the order of prohibition.

Upon being served with the order, KACC was incensed because the order was not only obtained through a misrepresentation that the hearing date had been obtained with the consent of the other parties but also because there was already an existing order of a Judge of co-ordinate jurisdiction refusing stay of the criminal proceedings. They filed a motion of their own on 27th August, 2007 seeking to set aside Osiemo J's order *ex debito justitiae*. Before that application could be heard, Nur filed yet another notice of motion on 14th September, 2007, this time invoking constitutional provisions and seeking several declarations to the effect that the provisions of **Order 53 rule (4)** of the Civil Procedure Rules relating to stay do not limit the powers of the High Court under **section 65** of the Constitution and that the authority of the High Court to issue any orders, writs or directions or to supervise subordinate courts was unlimited. The motion was argued before Wendoh, J, who in a ruling made on 23rd November, 2009 made findings that the applicant abused the court process by misrepresenting the facts before Osiemo J that there was a consent hearing date for the original notice of motion when that was not correct. The purpose was to obtain orders through the back door and in exercise of the court's inherent power to protect its dignity and process, Wendoh J. set aside the orders issued by Osiemo, J. The order of Osiemo J was also for setting aside since he could not sit on appeal against the refusal by a court of concurrent jurisdiction which had refused to grant an order for stay against the criminal trial. In the end the application was dismissed as there was nothing constitutional about it. Wendoh J stated:

“I find no constitutional issues raised. Instead the applicant wants to mix up Judicial Review and Constitutional jurisdictions yet he came by way of Judicial Review to which he has to confine himself. By filing the various applications, the applicant seems to be intent on derailing and stalling the process all together.”

The learned Judge also disqualified herself from hearing the matter further since the applicant had called for her disqualification on the ground that she would be biased.

Again, Nur was dissatisfied with those findings and he has filed a notice of appeal. In the meantime, as stated earlier, he seeks an order of stay of the order of Wendoh J which set aside the order of Osiemo J.

Learned counsel for Nur, Mr. J. M. Macharia, submitted that the intended appeal is arguable as it will be argued, *inter alia*, that there was no power for the court to issue substantive orders and then disqualify itself; that Osiemo J was exercising inherent powers of the court and did not issue the orders through misrepresentation; that it was erroneous to hold that constitutional issues could not be raised in a Judicial Review application; and that it was erroneous to vilify the applicant for seeking to stop his criminal trial when the law allowed such process. As to the nugatory aspect Mr. Macharia submitted that if the order is not granted the applicant will undergo an expensive trial while on the other hand the prosecution will suffer no prejudice since the criminal case will still continue if the intended appeal fails.

In response to the application, learned counsel for KACC, Mr. Murei, submitted that there was a clear violation of the court process and it was right for the court to proceed *suo motu* to protect its dignity; that Osiemo J was not invoking any inherent jurisdiction under the Constitution or any other law but was responding to the misrepresentation that the other parties had failed to attend court for hearing of the motion when that was not true. All that could have been sought by counsel before Osiemo J was an urgent hearing date for the motion. In any event, he submitted, the orders of Wendoh J took effect immediately and cannot be stayed unless there was a successful appeal setting them aside. As for the nugatory aspect he submitted that there were still substantive applications pending before the superior court through which the applicant can obtain orders on merit, and therefore the success of any intended appeal cannot be rendered nugatory. There is thus no prejudice caused in refusing to grant the order even if it was capable of grant, which it is not. In all these submissions, Mr. Murei was supported by learned counsel for the Attorney General and the Chief Magistrate, Mr. Mule.

For our part we think it may well be an uphill task for the applicant to persuade the appellate court that the appeal is meritorious, but that is not within our province to determine with finality. Nor do we have the intention to analyse the grounds put forward by the applicant at any length. We shall assume without deciding that the intended appeal is not frivolous, involving as it does the construction of constitutional provisions. The applicant may have his day in court. We do not however entertain similar doubts as regards the nugatory aspect of the matter. As correctly pointed out by Mr. Murei, the main notice of motion filed by the applicant is still pending hearing before the superior court and has been outstanding for the last three years. There is no order for stay of proceedings before the superior court and the applicant withdrew his prayer for such order. There is also another motion by KACC which is pending hearing. The result of the intended

appeal notwithstanding, the applicant has the opportunity to urge those matters and obtain relief, if he can, and in our view therefore the nugatory aspect of the application has not been met.

In the result we order that the application be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 5th day of March, 2010.

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR