



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 7 OF 2009 (UR/2009)

STANELY MOMBO AMUTI.....APPLICANT

AND

KENYA ANTI-CORRUPTION COMMISSION.....RESPONDENT

(An application for injunction from the ruling and order of the High court of Kenya

at Nairobi (Waweru, J.) 21st November, 2008

in

H.C.C.Suit No. 488 of 2008 (O.S.)

RULING OF THE COURT

We have before us an application by way of Notice of Motion dated **21st January 2009** brought under **Rules 5(2)(b)** and **42** of the Court of Appeal Rules (*The Rules*) in which the applicant **Stanley Mombo Amuti** seeks mainly two orders to be issued against the respondent Kenya Anti-Corruption Commission. The third order sought in the application, was for certification of the application as urgent. That order is spent as the application was duly certified urgent and was heard under certificate of urgency. The two orders sought are:

“2. That this Honourable Court be pleased to issue an order for injunction against the respondent, Kenya Anti-Corruption Commission do release forthwith to the applicant all his personal belongings, documents, money, title deeds, cheques, licences and all other documents as enumerated in the inventory lists dated 2nd July 2008 and undated Inventory List of 46 items confiscated by the respondent.

3. That the respondent do pay the costs of this application in any event.”

The application is based on several grounds a summary of which is that on **1st July 2008**, the respondent, through its officers raided the applicants office and matrimonial home and took therefrom all documents, personal belongings, cash Kshs.4,308,000/=, cheques, title deeds in respect of his various immovable properties, licenses, and several other documents and personal effects which the respondent has refused to return to the applicant despite requests for

their return; that on **9th July 2008**, the respondent wrote to the applicant requiring the applicant to account for the source of his wealth as his assets were suspected to be disproportionate to his salary income; that the applicant, by dint of his properties having been so removed, was deprived of his ability to effectively explain the sources of his wealth, much as he made an attempt to do so as the explanation the respondent sought had to be supplied in law and the applicant, though deprived of his material properties that would have helped him to explain the same, had to make good with what was available to him, and provide the explanation required. Further grounds were that the applicants intended appeal from the decision of the superior court (*Waweru, J.*) was arguable and the learned judge made several errors in law and in fact in his ruling, the subject of the intended appeal and secondly that the results of the intended appeal, were it to succeed, would be rendered nugatory if we refuse to grant this application. The application was supported by a lengthy affidavit sworn by the applicant which we perused and have considered.

The respondent opposed the application and relied on a replying affidavit sworn by Mr. Anthony Kahiga, an investigator attached to the respondent commission. Again, in summary, the respondent contends in that affidavit that the respondent's team is investigating allegations of corruption against the appellant buttressed with allegations that he was in possession of unexplained assets disproportionate to his known income; that the orders sought, being the same prayers that were before the superior court and were denied, would in effect and in law determine the intended appeal and so is an abuse of the court process and that upon receipt of the complaints that applicant was in possession of assets which were disproportionate to his known income, the respondent applied and obtained warrants from a court of law to search the applicant's office and residential premises and to investigate the applicant's bank account. Whereas the respondent does not deny searching the applicant's offices and home and taking away the alleged items, it states that it did all that pursuant to powers donated to it by the provisions of Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003. It states that it carried out the alleged searches pursuant to court orders it obtained for the same search and power to take away the items which it deemed relevant to its investigations in regard to corruption offences alleged against the applicant; that Notice served upon the applicant pursuant to section 26 of the Act was served after analyzing the documents recovered in the process, and that the applicant has challenged one of the courts orders made in Chief Magistrate's Court Miscellaneous Criminal Application No. 96 of 2008 but has not challenged the orders obtained for the search and seizure of the items complained of in **Miscellaneous Application No. 106 of 2008** and which are the relevant items in this matter. It states further at paragraphs **16, 21 and 22** that respondent is preferring criminal proceedings as well as civil proceedings against the applicant and seeks to retain the items seized which will be used as exhibits in both cases. As for documents seized, the respondent's response is that it has supplied the applicant with relevant copies of the same and so the applicant would not be prejudiced in preparing its defence on the matters that may be raised in the courts. The respondent ends that affidavit by stating that the legality or otherwise of the seizure of the applicant's documents and the complaint as to whether the applicant was given reasonable opportunity by the respondent to answer the allegations made against him were matters that the superior court fully ventilated and it came to a decision on the same.

At the hearing of the application, Mr. Ahmednasir Abdullahi, the learned counsel for the applicant submitted at length that the intended appeal would be arguable and pointed out a number of issues he felt would be arguable points when the superior court's ruling is analysed and evaluated. First, he submitted that whether money falls under section 2 of the Anti-Corruption and Economic Crimes Act is an arguable point, but in his view, money cannot be an unexplained asset and so the respondent had no power to seize money as was done in this case. He went further to submit that the respondent, had no power under the Act to seize anything in a civil matter and certainly could not seize private assets. His third arguable point was that the entire action of the respondent against the applicant was in breach of **section 55** of the Anti-Corruption and Economic Crimes Act as the applicant was not afforded reasonable opportunity to explain his wealth before his properties were seized. In any case, he contended,

the Notice to furnish a statement of property pursuant to **section 26** of the Anti-Corruption and Economic Crimes Act dated 9th July 2008 and addressed to the applicant by the respondent was a notice issued under **section 26** and not under **section 55**. That letter showed, according to Mr. Abdullahi at paragraph 2, that a determination that the applicant's wealth was disproportionate to his income had been made. That approach is not dealt with by **section 26** as that is a preserve of **section 55**. He submitted that it could never be reasonable for the respondent to start off by seizing applicant's property and then seek explanation later. That action made it impossible for the applicant to supply effective explanation as the documents he would rely on were not in his hands at the time the explanation was sought. In his view that action which he termed injustice should not have been condoned by the superior court, and that was the fourth arguable point in the intended appeal. On the nugatory aspect, Mr. Abdullahi submitted that the results of the intended appeal, if it succeeds, will be rendered nugatory on account that there will be no fair trial as the action of the respondent as endorsed by the superior court, gave the respondent special status. He ended by asking us to treat the case as unique and address it as such noting that the applicant needs his money, title deeds, licenses and other materials seized so as to mount his defence.

Mr. Angote, the learned counsel for the respondent, on the other hand argued that the intended appeal would be frivolous as the applicant's documents, money and other items were taken away by the respondent pursuant to a court order made in Chief Magistrate's Court **Miscellaneous Criminal Case Number 106 of 2008**, which order was never challenged by the applicant by way of an application for Judicial Review as the applicant did in respect of another order issued in Chief Magistrate's Court **Miscellaneous Criminal Case No. 96**; That in effect meant, according to Mr. Angote, that, the seizure of the applicant's relevant items had the sanction of law as the order of the Chief Magistrate is still valid. Secondly, Mr. Angote maintained that, in any event the subject items were required as exhibits for an intended criminal case and Originating Summons already filed in the superior court, both against the applicant. He stated further that the applicant has been supplied with the copies of all documents seized leaving only money, the amount of which the applicant is fully aware. Thus, according to Mr. Angote, the applicant would not be in anyway hampered in the preparation of his case. Lastly Mr. Angote submitted that the orders cannot be available as granting them would in effect mean determining the intended appeal as the intended appeal would be against the orders refusing injunction which injunction is the order being sought in this application so that once it is granted, then there would be no more appeal to be determined. As for the alleged conflict between the provisions of **sections 26** and **55** of the Anti Corruption and Economic Crimes Act, Mr. Angote's view is that there is no conflict as the respondent's director, in seizing the properties, was seeking evidence to enable him form an opinion, as he must do, on whether the applicant's income was disproportionate to his wealth, and it was after forming that opinion that the applicant would be asked to explain the source of his wealth. In this case, the applicant was not in anyway prejudiced as he was able to give a lengthy explanation in response to the letter seeking such explanation. There were other submissions made by Mr. Angote which are in the record but which we have not set out here as we did not deem them necessary when considering the nature of the application before us.

The facts giving rise to this application are straight forward, brief and undisputed. The respondent is a body charged, under the Anti- Corruption and Economic Crimes Act, **Act No. 3 of 2003** with the duty, among others of stamping out corruption in the country. We resist the temptation to go into how it does that work. From the record, it would appear that from information received by the respondent, it suspected that the applicant's wealth did not reflect his income during a particular period. It applied to court for warrants to search the applicant's office and residential premises and also it applied for another warrant to investigate the bank accounts of the applicant. The court issued the two warrants in the two separate applications. The applicant challenged the issue of warrants in respect of the banks but the one in respect of the search for the office and residential premises remained unchallenged. Search was carried out in the applicant's offices and home and several items as are in the record together with some cash were seized and taken away by the respondent. That was on 1st July 2008. On 9th

July 2008, the respondent wrote a lengthy letter to the applicant under section 26 of the Anti-Corruption and Economic Crimes Act, 2003 signed by the Director of the respondent. In that letter, the respondent set out several properties allegedly belonging to the applicant which were seized by the respondent and stated *inter alia*:

“Now therefore take notice that under section 26 of the Anti Corruption and Economic Crimes Act, 2003, you are required to furnish to the Kenya Anti Corruption Commission, within 14 days of service of this notice a written statement on the following properties belonging to you and which you acquired between 1992 and June 2008.”

As we have stated, a full and detailed list of the properties formed part of that letter. At the end of it a penal notice was cited. The applicant replied to that letter vide a letter addressed to the Director of the respondent Commission by his advocates and dated **18th July 2008**. That letter stated at paragraphs 4 and 5 as follows:

“In order to comply with your request, it is in our considered opinion, that it is only fair and equitable that the Commission returns to him all documents and money that were seized from the lawful custody of our client.

We also note that your letter under reference is pursuant to section 26 of the Anti-Corruption and Economic Crimes Act, 2003. Seizure of documents and money belonging to a private citizen are sacrosanct, and no provision of the Act allows you to act in the very prejudicial manner the Commission has acted.”

Vide a letter dated 25th July 2008, the applicant's advocates acknowledged that they had obtained copies of the court orders the respondent used in seizing applicant's properties and forwarded applicants answers to the letter from the respondent seeking explanation on his wealth. That explanation we note was fairly detailed. Thereafter, there were several exchanges of correspondence and other proceedings not relevant to this particular application. On **2nd October 2008**, the applicant filed Notice of Motion dated **30th September 2008** in the superior court. It sought Orders that:-

“1. The Court be pleased to order by mandatory injunction that the plaintiff (sic) herein, Kenya Anti-Corruption Commission do release forthwith to the applicant herein all his personal belongings, documents, money, title deeds, cheques, drivers licences and all other documents as enumerated in the Inventory Lists dated 2nd July 2008 and the undated Inventory lists of 46 items that were confiscated by the plaintiff.

2. That pending compliance with the order hereinabove the suit and all further proceedings be stayed.

3. That the suit herein be struck off with costs to the defendant/applicant.”

That application was placed before Waweru, J of the superior court, who after full hearing made an order allowing the first prayer partly and only to the extent that the respondent was ordered to supply the applicant with good copies of all documents, including title deeds, cheques, and other documents enumerated in the two inventories mentioned in that application within seven days of the date of that ruling. The learned Judge however refused to strike out the suit as prayed for and refused to order release of cash to the applicant. The applicant felt aggrieved by that ruling. He intends to appeal against it and he thus moved to this court and filed Notice of Appeal dated **24th November 2008** in which he intends to appeal against the whole of Waweru, J's ruling. In the meantime, as we have stated above he has come to this court for the order reproduced above.

We do not apologise for going into details as we have done above. We do agree with Mr.

Abdullahi, that this is a rather unique matter. Unique in that, though civil in nature, it involves an Act that incorporates criminal aspects as well. Unique in that the application in the superior court and the application before us are as to the main aspects similar. Unique in that the main order sought in the superior court and before us are both mandatory orders which in law are given only in special circumstances, see **Halsbury's Laws (4th Edition) paragraph 948**. We felt it necessary therefore to set out the above facts for full understanding of the entire application and the decision of the court.

The Notice of Motion is brought under **Rule 5(2)(b)** of this Court's Rules. The jurisdiction that this Court exercises under that rule is both original and discretionary. For the applicant to succeed in the application, he must in law satisfy two principles. These are first, that the intended appeal is arguable, i.e. that it is not frivolous and secondly, that if the application is not granted, the success of the intended appeal, were it to succeed, would be rendered nugatory. Both principles must be satisfied for the order to issue. There are several decisions of this Court in support of the above legal principles, for example, **Trust Bank Limited and Another vs. Investach Bank Ltd and 3 others, Civil Application No. Nai. 258 of 1999** (unreported), and **Ruth Nyambura Chuchu & Others vs. Stephen Mungai Githu alias Stephen Gathoga Chuchu, Civil Application No. NAI 87 of 2008** (unreported).

We have anxiously considered the Notice of Motion with the above legal principles in mind. We have considered the legal argument as to whether the Anti-Corruption and Economic Crimes Act donates the power to search the offices and residential houses of a person the respondent suspects of having wealth beyond his income within a certain time, and to seize his properties before seeking explanation from the same person and the effect of such a provision if it is indeed entrenched in the Act. We have considered the application that was before the superior court and which was refused and the fact that the same application is the one essentially before us save for two prayers and the effect of allowing the same application upon the entire case. We have considered the argument that the items seized will be required by both sides for the intended criminal case and the already filed Originating Summons and the undisputed fact that copies of the subject documents have been released to the applicant while some items such as cash have not been released to the applicant and the effect of that aspect on the entire case. Lastly, we have considered that the seizure of the subject items was done pursuant to a valid court order which has not been challenged through the proper legal channel. We cannot make any conclusive decisions on all the above for fear of prejudicing the intended appeal as in any case, this is not the forum for final decision on the above. However, we accept that the intended appeal is arguable.

The next principle we have to be satisfied upon is, as stated above, whether if we refuse the application, the success of the intended appeal, if it succeeds, will be rendered nugatory. Mr. Abdullahi urges us to look at the uniqueness of the case, and says further that the success of the intended appeal, if it succeeds, will be rendered nugatory because there will be no fair trial as the respondent, by retaining the items seized, will have been given special status and as the applicant needs all his resources including money to mount a defence. We have considered these submissions, the nature of the case as well as the law. In our view, we cannot appreciate the argument that by our refusal to grant this application, the applicant will not have fair trial in respect of the case already filed against him by way of originating summons and in the criminal case which the respondent is threatening to prefer against him. It is not in dispute that the items seized from the applicant's office and home were all entered in various inventories and are well known to both parties. The applicant is not claiming that any of the items seized are not reflected in the letter dated **9th July, 2008** from the respondent's director to the applicant. There is no claim that any of those items have been in any way tampered with such that they could interfere with the evidence to be adduced against the applicant or by the applicant by way of inaccurate documents being produced. Indeed, the applicant admits that copies of all documents seized had been surrendered to him in compliance with the superior courts' order the subject of the intended appeal. As for cash, the parties are in agreement as to the exact amount that was taken. The applicant has not stated in what way he will be inconvenienced in

his defence if it is not returned to him immediately. The applicant gave a lengthy explanation in response to the letter of **9th July, 2008** (*supra*) and ended up saying he was grateful for the opportunity afforded him to explain his wealth. Provisions are available in our laws that would entitle an accused in a criminal case to have access to copies of documentary evidence proposed to be adduced against him well before the trial commences and as to civil litigation, there are procedures for production and inspection of documents intended to be used as exhibits during the hearing of a matter before the hearing commences. In these circumstances and as the amount of money that was seized is not in dispute, we do not appreciate in what way the respondent would be said to have been given a special status. If the intended appeal succeeds, the items seized will be returned to the applicant. If the intended appeal succeeds before the threatened criminal case and the originating summons are heard, the applicant will have them, and, so will not be prejudiced in his case. If on the other hand the intended appeal and originating summons are, or either of them is heard before the intended appeal succeeds, then the applicant who already has copies of all documents and knows the amount of cash seized will use the same copies in his case as he has not complained of them having been tampered with and will be entitled to see the originals at the time of hearing when the same will in law be produced, in case there are any difficulties raised by the fact that only copies were available. In either case, we do not see how the success of the intended appeal, were it to succeed, would be rendered nugatory.

The sum total of the above is that, the applicant has not satisfied us on the second principle and that being the case, the application cannot succeed. It is dismissed with costs to the respondent. Orders accordingly.

Dated and delivered at Nairobi this 20th day of February, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR