



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 112 of 2006 (68/2006 UR)

KAMLESH MANSUKHLAL DAMJI PATTNI.....APPLICANT

AND

HON. ATTORNEY GENERAL.....RESPONDENT

(Application for stay/injunction of the prosecution or further prosecution of the applicant in relation to matters arising from the Goldenberg affair pending the hearing and determination of the intended appeal from the decision of the High Court of Kenya

Nairobi (Wendo, J) dated 22nd March, 2006

in

H.C.MISC. APPL. NO. 132 OF 2006)

RULING OF THE COURT

1. We have before us an application by way of notice of motion brought under *rule 5(2) (b)* of the Court of Appeal Rules (“the Rules”) dated 24th April, 2006 seeking an order as follows:-

“That this honourable Court be pleased to grant an injunction against any and all decisions taken by the Respondent, and/or the Commissioner of Police or any other authority, body or persons and each of them from arresting, preferring criminal charges against or prosecuting the applicant in connection with or touching upon any matter(s) the subject matter of the Report of the Judicial Commission of Inquiry into the Goldenberg Affair, Exchange Bank Limited or otherwise, until the hearing and determination of the applicant’s intended appeal.”

2. This application has a long history and concerns matters which have dominated the cause lists of many of our courts for over a decade. However, in this application, we are concerned only with the matters touching on the Report of the Judicial Commission of Inquiry into the Goldenberg Affair (“the Report”) which Commission was established on 24th February, 2003 under Gazette Notices Nos. 1237 and 1238 by H.E. The President. The Commission presented its Report on 3rd February, 2006 and the applicant is aggrieved by its decisions and findings and wants them quashed. He has, therefore,

petitioned the superior court for Orders of Certiorari to remove into that court the Report to quash those findings, comments, remarks and insinuations which the applicant alleges are adverse and damaging to him. The applicant also wants the respondent, the Commissioner of Police and all other authorities restrained through an order of Prohibition from arresting, charging or prosecuting him on any criminal charge arising from the said Report.

3. On 16th March, 2006 the applicant was granted leave by *Wendo, J.* to commence Judicial Review Proceedings. The grant of leave was also ordered to operate as a stay for a limited period of 7 days during which time the applicant was to file and serve the substantive notice of motion on the respondent.

4. On 22nd March, 2006, the applicant appeared before the same Judge, *ex parte* and confirmed to her that he had complied with the earlier order of filing the substantive notice of motion and sought to have the learned Judge to extend the Order of Stay granted on 16th March, 2006. The learned Judge, however, declined to do so.

5. Consequently, on 27th March, 2006, the applicant was arraigned before the Chief Magistrate before whom he pleaded not guilty on various criminal charges. He avers that the charges are grounded on the Report but the state says they emanate from independent investigation. The applicant was released on a bond of Shs.10 million with two sureties and the hearing of the case was scheduled to commence on 24th May, 2006, but, we issued a temporary order of stay on 25th May, 2006 pending the hearing of this application.

6. The application is supported by a lengthy affidavit sworn by the applicant **KAMLESH MANSUKHLAL DAMJI PATTNI** and there is a draft memorandum of appeal annexed as well. The application is opposed and during the hearing counsel for both the parties addressed us at length on the merits and demerits of the application.

7. As we have earlier stated, the application is premised on **rule 5 (2) (b)** of the Rules. The guiding principles that the courts have applied consistently when considering such an application are now well settled and these are that an applicant coming to court under that rule must demonstrate to the satisfaction of the court, first that the appeal or intended appeal is arguable, in other words, that the appeal or intended appeal is not a frivolous appeal. Secondly, the applicant must show that should the appeal or intended appeal succeed, the outcome would be rendered nugatory were the application to be refused. In the case of **RELIANCE BANK LIMITED (in liquidation) VS. NORLAKE INVESTMENTS LIMITED** – Civil Application No. Nai. 93 of 2002 this Court stated:-

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal;***
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction”.***

8. *Mr. Kilonzo*, learned counsel for the applicant, in his forceful but persuasive address, has urged us to accept that the intended appeal is arguable since the learned Judge of the superior court by refusing to extend the Order for leave to operate as a stay on 22nd March, 2006 had wrongly and capriciously exercised her discretion and by law, exercised the same injudiciously. Thus, the intended appeal will raise the fundamental issue of exercise of discretion by the superior court in a case where the individual seeks to enforce fundamental rights guaranteed under the constitution.

9. Further, *Mr. Kilonzo* submitted that he will argue in the intended appeal that a proper exercise of discretion requires that a Judge takes all relevant matters and factors into consideration in arriving at a decision, a fact that *Wendo, J* totally failed to do.

10. *Mr. Kilonzo* also submitted that the Judicial Review proceedings in the superior court and the intended appeal raise very fundamental issues of law as regards the law relating to the conduct of Statutory Commissions of Inquiry viz-a-viz the authority of the Courts of law over such commissions and the enforcement of the individual's right as guaranteed by the Constitution. He contended that as a result of the learned Judge's refusal to grant the extension as sought, the applicant had been compelled to plead and stand trial on new and fresh charges which were similar or substantially similar to old charges that have in the past faced him in the subordinate courts since June, 1994. *Mr. Kilonzo* averred that the trial of the applicant in such circumstances would be an abuse of the process of the court, oppressive and malicious, and it would not be in the public interest to continue with that prosecution.

11. On whether or not the result of the intended appeal, were it to succeed, would be rendered nugatory if the application was not granted, *Mr. Kilonzo* submitted that a criminal case involves the liberty of an accused and the success of an intended appeal would be of no use to him if he has already been convicted and is serving a sentence of imprisonment which involves loss of liberty.

12. *Mr. Kangatta*, learned counsel for the respondent, in opposing the application, vehemently maintained that there would be no arguable appeal since an appeal against the order of *Wendo, J* did not lie as of right in the absence of leave to appeal and since no leave had first been sought and obtained then the intended appeal was incompetent. He relied on the case of **GURDIAL SINGH DHILLON V SHAM KAUR AND OTHERS [1960] EA 795** which held that the words "an order made upon the hearing of the Originating Summons" must in the context of Order XLII of the Civil Procedure Rules, mean the order which is the adjudication upon the originating summons, that is, "a final order" which disposes finally of the rights of the parties. *Mr. Kangatta* contended that the Orders made by the learned Judge were incidental and interlocutory under O53 of the Civil Procedure Rules (prerogative orders) and were not appealable as of right. He argued further that by instituting the Judicial Review proceedings the applicant was in fact challenging the constitutional powers of the Attorney General as conferred upon him by section 26 of the Constitution.

13. *Mr. Kangatta* again submitted that as there was no proper application before the learned Judge, there would be no arguable appeal arising from what was done on 22nd March, 2006, as the superior court had become *functus officio*.

14. With respect, the contention by *Mr. Kangatta* that the intended appeal would not lie because no leave has been obtained would appear to be misplaced. All that is required before us at this state is a notice of appeal which gives us original jurisdiction to entertain this application which is expressly brought under **rule 5(2)(b)** of the Rules. It is not required that before one files a notice of appeal, one must have obtained the leave. One can file the notice of appeal and thereafter obtain the leave. Moreover, obtaining of leave is not a condition precedent to the filing of a notice of appeal.

15. We also think that *Mr. Kangatta* is not right in his contention that leave to appeal is required in order to appeal from an *ex-parte* order granting or refusing leave to apply for any of the Judicial Review Orders set out in Order 53, aforesaid. This legal issue has been succinctly dealt with by this Court in **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS VS. JOB KILACH** Civil Application No. 77 of 2003 (unreported).

16. It is apparent from the record that the superior court had made orders without assigning any reasons for doing so. It is averred that in acting the way it did it had occasioned the applicant grave injustice and contravened his sacrosanct constitutional rights. Whether the superior court had acted properly in making the orders it did is certainly not a frivolous matter but indeed a matter we feel will need to be ventilated fully in the intended appeal.

17. We are satisfied that the applicant has shown, *prima facie*, that he has serious questions of law for submissions to the Court in the intended appeal. Those questions are certainly not frivolous but weighty. Having so held we are now bound to consider whether the success of the intended appeal, if it succeeds, would be rendered nugatory if this application is refused.

18. We have carefully considered the application with the legal principles applicable when considering an application brought under **rule 5(2) (b)** of the Rules which we have set out hereinabove in mind. We have also considered the record, the arguments by learned counsel for both parties, the affidavit in support of the application and the order of the learned Judge of the superior court. In our view, this case has its own special circumstances and is of great public interest.

19. The whole purpose of the intended appeal is to ask this Court to grant orders that:

“The Order of stay granted to the applicant herein by the superior court on 16th March, 2006 in H.C. Misc. Application No. 132 of 2006 be ----- extended till the hearing and determination of the Judicial Review Proceedings in the superior court”.

20 As stated earlier in this ruling, the learned Judge on 22nd March, 2006 declined to grant the extension of the order granting leave to operate as a stay pursuant to the Chamber Summons dated 16th March, 2006 which had sought leave to apply for Judicial Review by way of orders of Certiorari and Prohibition. The question we pose is: what is there to be enjoined under the order of the superior court, the subject of the intended appeal? It is plain that the superior court merely declined to extend the order granting leave to operate as a stay. It is clear that it cannot be executed by any party in any way, probably save only for costs.

21 Our close examination of the order made on 22nd March, 2006 shows that the superior court has not ordered any of the parties to do anything, or to refrain from doing anything. There is in fact, nothing arising out of the superior court’s order for this Court, in an application expressed to be brought under **rule 5(2)(b)** of the Rules, to stay, enforce or restrain by injunction. In the case of **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES V ORANGA & OTHERS [1976] KLR 63**, money was raised in the Western Province to establish a college of technology. A dispute arose as to who was entitled to operate the bank account into which the money was paid. The applicant sued the respondents claiming that the money belonged to a particular college; the respondents claimed that it belonged to a different institute. The trial judge held that the applicant had failed to prove his case and dismissed the action with costs. The applicant appealed and, pending the appeal, sought a temporary injunction restraining the respondents from operating the bank account until the determination of the appeal and a stay of execution.

On Appeal, this Court held that notwithstanding **Order XXXIX, rule 1**, of the Civil Procedure Rules, the High Court had no jurisdiction in its appellate capacity to order a temporary injunction pending an appeal; accordingly, any such jurisdiction in the Court of Appeal must be derived from its power under **rule 5(1)** of its own rules to order a temporary injunction; but as there was nothing in the High Court judgment, other than an order for costs, to enforce or restrain by injunction, the court had no jurisdiction to make the order sought.

22. The applicant avers that unless we grant him the order he seeks he will be arrested and arraigned on various criminal charges before the Chief Magistrate and may be convicted and imprisoned. However, we do not subscribe to the perceived notion that courts in this Country convict accused persons without due process and on the basis of evidence which has not been lawfully obtained and established beyond all reasonable doubt. Moreover, there is also an elaborate appellate process in this Country.

23. On our part, it appears that what is now being asked of us is to stop the arrest of the applicant by the Commissioner of Police and his trial before the Chief Magistrate’s court on various specified criminal charges. This, in our view, is not directly connected with the order made by the superior court on 22nd March, 2006 – the subject matter of the intended appeal. We would, in the circumstances, decline to grant the order as sought in the application before us.

24. In the result this application fails and is ordered dismissed. The costs thereof shall be in the intended appeal.

DATED and DELIVERED at NAIROBI this 6th day of July, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR