



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GITHINJI, WAKI, J.J.A. & DEVERELL, AG. J.A.
CIVIL APPLICATION NO. NAI.74 OF 2005
BETWEEN

BERKELEY NORTH MARKET1ST APPLICANT

BERNARD NTHULI2ND APPLICANT

EZEKIEL NANDAMA3RD APPLICANT

AND

ATTORNEY GENERAL1ST RESPONDENT

THE MAGISTRATE COURT KIBERA 2ND RESPONDENT

THE REGISTRAR OF SOCIETIES3RD RESPONDENT

THE CRIMINAL INVESTIGATIONS DEPT.....4TH RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nairobi(Mr. Justice Visram) dated 8th December, 2004 in

H.C. MISC. NO. 448 OF 2003)

RULING OF THE COURT

This application is under rule 5 (2)(b) of the Court of Appeal Rules. The application seeks to stay the proceedings in a criminal prosecution against the applicants, pending an appeal from the dismissal of a judicial review application for orders of prohibition and certiorari seeking to prohibit the prosecution and quash the charge sheets in the criminal proceedings. The superior court (Visram J.) dismissed the application for judicial review in a Judgement dated 8th December 2004. Notice of appeal was duly lodged on 16th December 2004.

The criminal proceedings are now fixed for hearing on 29 June 2005.

The applicants submit that if the criminal proceedings come to hearing prior to the determination of in the intended appeal against the dismissal of the application for certiorari the appeal, if successful, will be rendered nugatory.

We consider that on this aspect the applicants are correct. This is because if the appeal is allowed and the charge sheets and the convictions, if any, are quashed, the appeal will be nugatory since, irrespective of the result of the criminal proceedings, the applicants will have been forced to undergo the anxiety and

adverse publicity that inevitably flows from being tried for a criminal offence.

It is also necessary, as has been held in numerous decisions of this Court, for the applicants to satisfy us that the intended appeals are not frivolous or are arguable.

It is unfortunate that we do not have before us either the charge sheets in the criminal proceedings or much detail as to the precise nature of the alleged false statement made by the applicants. However it is not in dispute that the applicants have been charged with offences under section 129 of the Penal Code. Section 129 reads as follows: -

“Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause the person employed in the public service:-

(a) to do or omit anything which the person employed in the public service ought not to do or omit if the true state of facts respecting which such information is given were known to him; or

(b) to use the lawful power of the person employed in the public service to the injury or annoyance of any person, is guilty of a misdemeanor and is liable to imprisonment for three years.

The facts giving rise to the charge are well set out in the judgment of the superior court (Visram J.) as follows:-

“Sometime between 1994 and 2002, the applicants were officials of the Kenya Church of Christ (hereinafter referred to as the “Society”). It is not disputed that the Society is a society registered under the Societies Act. On 14 February 2000 one of the applicants (i.e. Mr. Hackett) wrote a letter to the Registrar General of Societies enclosing a copy of the revised constitution of the Society and a copy of the minutes of a Special Annual General Meeting held on 30th December 1999 to facilitate the amendment of the society’s constitution. Based on that communication, the registrar general approved the amended constitution and communicated this fact to the Society vide his letter of 15th March, 2000. One year later, some of the members of the Society wrote to the Registrar stating that the amendment of the constitution was illegal as there was no annual general meeting called for that purpose as required in law. The complaining members took the position that no meeting of the society was held on 30th December 1999. It appears that in fact there was no meeting on 30th December, 1999 and this is admitted in a letter dated 21st August 2001 signed by all the applicants.

Faced with the controversy above, the Registrar of Societies was left with no option but to cancel his approval for amendment of the Society’s constitution.

As a result of these matters, the applicants were charged with the offence of giving false information to a person employed in the public service contrary to section 129 of the Penal Code. That charge is the basis of their prosecution in the Chief Magistrates Court.”

The superior court came to the conclusion that, on the facts of this case, there was insufficient ground for interfering in the State’s decision to prosecute. When the matter came before us there was no appearance for any of the four respondents although they were duly served, so we did not have the benefit of their submissions.

The main argument in support of the application, put forward by learned counsel for the applicants **Ms. K .D. Kilonzo**, was that if false information was given by an office bearer in a registered society contrary to **section 129** of the Penal Code, that office bearer should not be prosecuted. It is the society, which is criminally liable, and not the office bearer. She also urged us to find that the prosecution was an abuse of the process of the courts as it was alleged by the applicants that it was brought as a result of internal disputes amongst members of the society. It was thus a civil dispute which had been resolved by the

Registrar of Societies before the prosecution was instituted.

At this stage, on an application to stay criminal proceedings it is not for this Court to make a final determination: we only need to be satisfied that a sole bonafide contention is not unarguable or frivolous. While by no means sure at this stage what the answer should be, we are not of the view that the contention is so weak as to be characterised as frivolous.

Further we do not consider that there will be any significant prejudice to the respondents if the stay sought is granted. If the appeal is dismissed and the criminal case goes to trial, it is unlikely that there will be difficulty over witnesses in a case of this nature.

For these reasons we allow the application with costs to be in the appeal.

Accordingly it is hereby ordered that the proceedings in the Chief Magistrates Court at Kibera in **Criminal Case No. 1712 of 2003 being the Republic vs Berkely North Hackett and Bernard Nthuli and Criminal Case No. 2681 of 2003 being the Republic vs Ezekiel Nandama** be stayed pending the hearing and determination of the intended appeal by the applicants against the judgement of the High Court in **Miscellaneous Cause No 448 of 2003 Berkely Hackett and two others vs The Attorney General and three others.**

Dated and delivered at Nairobi this 6th day of May 2005.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR