



REPUBLIC OF KENYA



**Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others
(Application 31 of 2019) [2020] KESC 71 (KLR) (30 April 2020) (Ruling)**

Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others [2020] eKLR

Neutral citation: [2020] KESC 71 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION 31 OF 2019

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ**

APRIL 30, 2020

BETWEEN

DR PETER AYODO OMENDA 1ST APPLICANT
NICHOLUS KARUME WEKE 2ND APPLICANT
CALEB INDIATSI MBAYE 3RD APPLICANT
ABRAHAM KIPCHIRCHIR SAAT 4TH APPLICANT
MICHAEL MAINGI MBEVI 5TH APPLICANT
GODWIN MAGAE MWAWONGO 6TH APPLICANT
BRUNO MUGAMBI LINYURI 7TH APPLICANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT
CHIEF MAGISTRATES ANTI-CORRUPTION COURT 3RD RESPONDENT

(Being an application for stay of execution of the decision of the Court of Appeal (Warsame, Asike-Makhandia & A.K. Murgor JJ.A) on 20th September 2019 allowing Civil Appeal No.313 of 2017 as well as setting aside the judgment of the High Court (G.V. Odunga, J) in Judicial Review Misc. Application No.198 of 2016 delivered on 20th December 2016)

Threshold to be met for the grant of orders of stay of execution at the Supreme Court.

Reported by Beryl Ikamari



Civil Practice and Procedure - stay of execution - threshold to be met for the grant of orders of stay of execution - whether applicants had met the threshold for the grant of orders of stay of execution at the Supreme Court.

Civil Practice and Procedure - record of appeal - omission of documents from the record of appeal - where the applicants sought leave to file the petition of appeal at the Supreme Court excluding the certified copy of the order and certified proceedings of the Court of Appeal in the first instance, without providing a basis for the application - whether leave would be granted.

Brief facts

The applicants were employees of the Geothermal Development Company Limited (GDC). They were members of the tender committee which conducted the tender process for of Rig Move Services for Menengai Geothermal Project. At the conclusion of the tender process they learnt the 1st respondent (the Ethics and Anti-Corruption Commission) recommended that they should face charges for irregularities arising from the tender process. In Anti-Corruption Case No. 20 of 2015, they were to answer to charges of wilful failure to comply with the law relating to procurement contrary to section 45(2)(B) as read with section 48(1)(A) of the Anticorruption and Economic Crimes Act, 2003 - (Count 1) and inappropriate influence on evaluation contrary to section 38(1)(b) as read with section 38(2)(a) of the Public Procurement and Disposal Act.

Through judicial review proceedings, the applicants challenged their prosecution. They were partially successful as orders of prohibition were granted to prohibit prosecution for count I. On appeal, the Court of Appeal set aside the High Court's orders and made the findings that the High Court had not exercised its discretion properly and that the decision to prosecute was not grossly unreasonable.

The applicants filed an appeal against the decision of the appellate court as of right under article 163(4)(a) of the Constitution. They also filed an application for orders of stay of execution of the decision of the Court of Appeal. The applicants also applied for leave to file the petition of appeal excluding the certified copy of the order and certified proceedings of the Court of Appeal in the first instance.

Issues

- i. What was the threshold to be met for the grant of orders of stay of execution at the Supreme Court?
- ii. Whether the court could grant leave, for an applicant to file the petition of appeal excluding the certified copy of the order and certified proceedings of the Court of Appeal in the first instance, without a basis being laid in the relevant application or the supporting affidavit.

Held

1. The application was unopposed but it was not automatic that the court would grant the orders sought. The court had to be satisfied on a *prima facie* basis that the application was meritorious and the prayers sought could be granted.
2. The applicant had demonstrated an arguable case which would be rendered nugatory in the absence of the court's intervention by way of granting the orders sought.
3. Rule 33(5) of the Supreme Court Rules granted the court power to direct which documents should be excluded from the record. Under rule 33(6) of the Supreme Court Rules, a supplementary record of appeal could be filed without leave within 15 days of lodging the record of appeal to include documents omitted from the record of appeal. The applicants did not invoke rules 33(5) or 33(6) of the Supreme Court Rules in seeking leave to file the petition of appeal excluding the certified copy of the order and certified proceedings of the Court of Appeal in the first instance. They did not address that prayer in the grounds on the application, the supporting affidavit or the submissions. Therefore, the court could not consider the prayer.

Application partly allowed.



Orders

- I. *The execution of the decision of the Court of Appeal [Warsame, Makhandia & Murgor JJ.A] in Civil Appeal No. 313 of 2017 delivered on September 20, 2019 was stayed pending the hearing and determination of the appeal by the Supreme Court.*
- II. *Costs to abide the outcome of the main appeal.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Supreme Court Act

Advocates

None mentioned

RULING

A. Introduction

- 1 The applicants were employees of the Geothermal Development Company Limited GDC . On 4th July 2012, GDC advertised for Tender No. REF. GDC/HQS/086/2011-12 for provision of Rig Move Services for Menengai Geothermal Project hereinafter referred to as “the Tender” pursuant to the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal Regulations 2006 culminating into signing of a contract as prescribed in the said Act and Regulations. On 29th October, 2015 and 30th October, 2015, after the conclusion of the tendering process, the applicants, who were members of the Tender Committee of GDC, aver that they became aware through social media, electronic media and the Daily Press that the 1st Respondent had recommended to the 2nd Respondent that the applicants, who were members of the Tender Committee be charged in court over irregularities in the tender process. They were subsequently arraigned before the Court in Anti-Corruption Case No. 20 of 2015, to answer to charges of; Willful failure to comply with the law relating to procurement contrary to section 45 2 B as read with section 48 1 A of the Anticorruption and Economic Crimes Act, 2003 - Count 1 ; and inappropriate influence on evaluation contrary to section 38 1 b as read with section 38 2 a of the Public Procurement and Disposal Act- Count 2 .
- 2 The applicants challenged their prosecution by instituting Judicial Review proceedings before the High Court seeking an orders prohibiting the respondents from prosecuting, sustaining, proceeding, hearing, conducting or in any manner dealing with or completing the hearing of the charges laid or proceedings conducted in the Anti-Corruption Case before the Chief Magistrates’ Court at Milimani Law Courts, Nairobi. The learned judge found that the consideration being used as a basis for the commencement of the criminal charges under Count I, was not a criterial provided for in the tender document and that to prefer charges against a person for not taking an action which would have amounted to a violation of an express provision of the law was clearly irrational. As regards Count II, the learned Judge held that it was not dealt with by the parties. In the end, the Judge partially allowed the application and granted an order of prohibition prohibiting the 2nd respondent from prosecuting the Anti-Corruption Case No. 20 of 2015 in so far as it relates to the applicants in Count I.
- 3 The 1st respondent successfully appealed the decision to the Court of Appeal. The appellate court found that the High Court judge had not exercised his discretion correctly as the Judge’s analysis and finding on Count I was aimed at investigating the correctness of the decision of the 1st and 2nd respondents which is not the essence of Judicial Review. Based on the material before it, the Court of



Appeal found that the decision to prefer charges against the applicants was not grossly unreasonable. The Court of Appeal thus set aside the High Court Judgment.

- 4 The applicants, aggrieved by the Court of Appeal decision filed an appeal, as of right, under Article 163 4 a of *the Constitution*, against the whole decision of the appellate court raising alleged constitutional grievances. Contemporaneous to the filing of the appeal, the applicants filed an application under Articles 163 3 b and 163 4 a of *the Constitution*, sections 15 2 , 21 2 and 24 of the *Supreme Court Act*, Rules 23 and 26 1 of the Supreme Court Rules 2012 and all other enabling provisions of the law seeking the following Orders:
- i That this Notice of Motion be certified as urgent and heard on priority basis spent .
 - ii That pending the hearing and final determination of the Appeal herein, this Honourable Court be pleased to grant the applicant a stay of execution of the decision of the Court of Appeal [Warsame, Makhandia & Murgor JJ.A] in Civil Appeal No.313 of 2017 delivered on 20th September 2019.
 - iii That the petitioner be granted leave to file this petition excluding the certified copy of the order and proceedings of the Court of Appeal in the first instance.
 - iv That costs be in the cause.
- 5 The application is supported by the affidavit of Peter Ayodo Omenda, the 1st applicant and is, inter alia, based on the grounds that the Court of Appeal determination puts the applicants’ personal freedom in jeopardy and requires urgent attention; that the appeal has a high probability of success as it raises arguable constitutional matters as listed on the face of the application and that the proposed appeal clearly involves the interpretation and application of *the constitution* entitling the applicant to move this Honourable Court as of right.
- 6 The application was certified urgent at the first instance when it was placed before a single Judge of this Court. The first prayer of the application is therefore spent and we proceed to address the other prayers.
- 7 Despite the applicants having been directed by the Honourable Deputy Registrar of this Court to file and serve their submissions within seven days from 22nd November 2019, the submissions were only filed on 10th March 2020. Indeed, the Honourable Deputy Registrar noted that the last directions had not been complied with. The 1st respondent on its part had filed a preliminary objection in the main appeal challenging our jurisdiction. This objection has been separately disallowed by this Court.

B. Applicant’s Case

- 8 The application is thus undefended. In their written submissions, the applicants argue that in a criminal case, the principles for grant of stay are such as those enshrined under Article 50. The applicants acknowledge the further test established by this Court in *Law Society of Kenya v Attorney General & Another Sup. Ct Appl. No. 4 of 2019 [2019]eKLR* by which an applicant is required to “put forward sufficiently convincing evidence of genuine conditions of urgency, merit and dispatch.” The applicants submit that they meet the test and the further test of having an arguable appeal as defined in *George Mike Wanjohi v Steven Kariuki & 2 others [2014]eKLR*. They submit that the appeal has a high probability of success as it raises arguable constitutional matters on the grounds listed both in the petition and on this application. They further submit that the appeal will be rendered nugatory if the orders sought are not granted as they stand to be deprived their freedom and liberty in circumstances where they have a proper defence and the prosecutorial discretion exercised by the respondents has been abused. On the other hand, they submit that there is no prejudice whatsoever to the prosecution if the matter is stayed, and that the equitable balance favours the applicants. The



applicants conclude that they meet the test established in *Wycliffe Oparanya Ambetsa v Director of Public Prosecutions Sup. Ct. Petition No.14 of 2016 [2017]eKLR* on the issue of arguability of the appeal in that the issues raised must rise beyond bare contestation of facts, or matters of ordinary law.

C. Analysis

- 9 Do the applicants satisfy the criteria for stay? This Court has authority to issue Orders for the preservation, in an interim period, of a subject-matter of appeal see *Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell, Supreme Court Applications Nos. 12 & 13 of 2012* . It is not automatic that for any unopposed application, the Court will as a matter of course grant the orders sought. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted see *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others Civil Application No.26 of 2018 [2018] eKLR* . The applicants' assertion is that the effect of the decision by the Court of Appeal is that they will be subjected to a criminal trial, a situation that will violate their constitutional rights to fair trial and equal benefits and protection of the law as more particularly set out in the petition of appeal.
10. We therefore find that the applicants have demonstrated an arguable case which would be rendered nugatory in the absence of our intervention by way of granting the orders sought. We shall not at this juncture delve into the merits of the applicants' argument as they will be addressed in the appeal itself.
- 11 On the applicants' prayer for leave to file the petition of appeal excluding the certified copy of the order and certified proceedings of the Court of Appeal in the first instance, we note that the appeal has already been filed being *Petition No.40 of 2019*. Rule 33 relates to institution of appeals and is to the effect that appeals shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal where the appeal is as of right. The certified decree or order as well as the record of proceedings are part of the mandatory contents of the record of appeal. Rule 33 5 grants the court power to direct which documents should be excluded from the record while Rule 33 6 allows the filing of a supplementary record of appeal, without leave and within fifteen days of lodging the record of appeal to include documents omitted from the record of appeal.
- 12 From the foregoing, we note that the applicants neither invoked our jurisdiction under Rules 33 5 & 33 6 nor gave any explanation or justification for the prayer sought. Neither the grounds on the face of the application, the supporting affidavit nor the submissions filed address this prayer. In the premises, we are unable to consider the prayer any further.

D. Determination

- 13 We therefore allow the application dated 25th October 2019 and filed on 29th October 2019 in the following terms:
14. The execution of the decision of the Court of Appeal [*Warsame, Makhandia & Murgor JJ.A*] in *Civil Appeal No.313 of 2017* delivered on 20th September 2019 be and is hereby stayed pending the hearing and determination of the appeal by this Court;
 - a Costs to abide the outcome of the main appeal.
Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2020.

D. K. MARAGA



**CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE OF THE SUPREME COURT
PRESIDENT OF THE SUPREME COURT**

P. M. MWILU

JUSTICE OF THE SUPREME COURT

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya

