



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E184 OF 2021

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE MAGISTRATE'S COURT AT MILIMANI.....3RD RESPONDENT

AND

EX PARTE: JAYESH UMEDLAL SHANGHAVI

AND

VICTORIA COMMERCIAL BANK LIMITED.....INTERESTED PARTY

RULING

1. The brief background of the matter before this Court is that the ex parte Applicant herein in its Chamber Summons dated 2nd December, 2021 sought for leave to apply for Judicial Review orders and in its Ruling dated 3rd February, 2021 this court granted prayers 2, 3 and 4 of the said application. The Court however, directed that prayer 5 of the said application reproduced below on leave to operate as stay be canvassed inter partes. That prayer reads;

“5. THAT leave so granted do operate as a stay of proceedings in Milimani Chief Magistrates Court Criminal Case No. E127 OF 2021 (Republic vs. Umedlal Shanghavi and Nina Jayesh Shanghavi) pending the hearing and determination of the Substantive Notice of Motion”

2. The said prayer is the subject of this Ruling. The 1st and 2nd Respondents filed a Replying Affidavit sworn on 20th December, 2021 and written submissions dated 20th December, 2021 while the Interested Party herein filed written submissions dated 19th January, 2022. The ex parte Applicant filed a further affidavit sworn on the 11th of February 2022.

3. The ex parte Applicant in his affidavit supporting the Chamber Summons dated 2nd December, 2021 averred that the decision to prosecute him had been made maliciously and if the said criminal proceedings were not stayed he was likely to suffer irreparable harm and injury.

4. The 1st and 2nd Respondents (hereinafter Respondents), in their Replying Affidavit sworn by Chief Inspector Abdullahi Arafti, a police officer with the Directorate of Criminal Investigations attached to Financial Investigations Unit, contended that the accuracy and correctness of the evidence of facts gathered can only be assessed and tested by a trial court and that at all material times the investigation and prosecution of the Applicant was carried out in accordance with the law.

5. The deponent also cited section 193 of the Criminal Procedure Code, which provides that the fact that any matter in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay, prohibition or delay in criminal cases.

6. In the ex parte Applicant's written submissions counsel contended that at this stage before granting the order sought the court must first consider whether the decision/ action sought has been fully implemented or is a continuing process as is the case before this court. To buttress this argument counsel cited the case of **Swift Energy Distributors Gas Limited v. Energy & Petroleum Regulatory Authority & Another; Abdi Ali Mohamed (Interested Party) [2020] eKLR**.
7. Learned counsel went ahead to submit that the stay sought herein is for the preservation of the status quo pending the hearing and determination of the ex parte Applicant's substantive motion and not to extinguish the criminal proceedings against the ex parte Applicant. On the guiding principles on issuance of stay orders counsel cited the case of **R(H) vs. Ashworth Special Hospital Authority [2003] I WLR 127**.
8. It was the ex parte Applicant's case that he has an arguable case and hence the court's decision to grant him leave to file the substantive motion. Counsel placed reliance on the case of **Taib A. Taib v. The Minister for Local Government & 3 Others Mombasa [2006] eKLR**. Further, that if the order sought herein is granted the Respondent's stand to suffer no prejudice. It was urged that if the stay is not granted and the ex parte Applicant emerges successful he will be left with a paper judgement. Counsel cited the case of **James Opiyo Wandayi v. Kenya National Assembly & 2 Others [2016] eKLR**.
9. Counsel submitted that in seeking judicial review orders the ex parte Applicant, has invoked this Court's jurisdictional control over tribunals and bodies such as the 1st Respondent herein. In addition, it was urged that the 1st Respondent's discretionary power to initiate any prosecution is not absolute and where appropriate the court may intervene. To buttress this argument counsel cited the cases of **Republic v. Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 Others [2016] eKLR** and **Republic v Director of Public Prosecution Ex parte Ahmed Chege Gikera & Another [2015] eKLR**.
10. In conclusion it was submitted that the prejudice the ex parte Applicant stands to suffer by being subjected to criminal proceedings that are likely to be quashed by this court outweighs the prejudice to be suffered by the Respondents and Interested Party waiting for the conclusion of the proceedings herein. Consequently, the ex parte Applicant urged that the court ought to order that the leave so granted does operate as a stay.
11. In the response, learned counsel for the Respondents submitted that the law enjoins the 1st and 2nd Respondent to ensure fair investigation, fair trial and to ensure that the citizens constitutional and fundamental rights are not violated. It was submitted that a complaint was received by the 2nd Respondent from the Interested Party and the same was investigated and the ex parte Applicant given an opportunity to be heard. There was reasonable suspicion that an offence had been committed and hence the decision to forward the file to the 1st Respondent's office where it was established that there was sufficient evidence to charge him.
12. It was contended that the ex parte Applicant has not demonstrated that the investigations were malicious, capricious, in bad faith, unreasonable or unfair to warrant the court's intervention. Learned counsel argued that the Respondents were aware that the criminal trial has far reaching consequences for the ex parte Applicant. However, public interest dictates that complaints to the police should be well investigated, sufficient evidence found and prosecution mounted to ensure a well-ordered society.
13. Learned counsel also argued that the ex parte Applicant was still enjoying his right of bail as well as the presumption of innocence and therefore he has not shown how he will be prejudiced if the order for stay is not granted.
14. The Interested Party herein also contended that the ex parte Applicant has not placed before this Court any evidence and/or material detailing what harm or injury he is likely to suffer if the proceedings in the lower court are not stayed. Counsel submitted that the grant of stay is an exercise of judicial discretion and is not dependent on whether a party has a prima facie or arguable case as alleged by the ex parte Applicant. In support of this position counsel cited the case of **AG v. Chief Magistrates, Milimani Law Courts & 3 Others Ex parte Mohan Galot [2018] eKLR**.
15. It was contended that the proceedings in the Lower Court are yet to commence and therefore the outcome of the said proceedings is not imminent. Counsel urged that the ex parte Applicant had not demonstrated to this court that the probability of a determination being made in the proceedings before a decision is rendered on the judicial review application is high. The cases of **Republic v. Richard Langat Kerich & 5 Others [2013] eKLR** and **AG v. Chief Magistrates, Milimani Law Courts & 3 Others Ex parte Mohan Galot** were cited in this regard.
16. Learned counsel argued that the prosecution in the lower court had lined up more than 4 witnesses and that there was no likelihood that the same would be concluded before the matter before this court as the same can be heard and determined within 3 months. Further, that if in the unlikely case the matter before the lower court is determined first the ex parte Applicant can always come back before the court to seek a stay.
17. In conclusion, learned counsel contended that the case of **Republic v Director of Public Prosecution Ex parte Ahmed Chege Gikera & Another [2015] eKLR** quoted by the ex parte Applicant was in regards to the application for judicial review orders and not leave operating as stay and as such the same does not apply to the instant case.

Analysis and Determination

18. I have considered the prayer that the leave granted herein operates as a stay of the ex parte Applicant's prosecution in the Magistrate's court, the affidavit evidence and learned submissions by counsel. Of determination is whether the ex parte applicant has achieved the legal threshold for the grant of an order staying the impugned prosecution pending the determination of the substantive motion herein.
19. The applicable law on whether leave so granted should operate as a stay is Order 53 Rule 1(4) of the Civil Procedure Rules, which provides as follows;

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

20. The issue before court is not a novel one. Maraga J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...I also want to state that in judicial review applications like this one the Court should always ensure that the ex parte applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore, where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant’s case is deserving of a stay order. The Ex-parte Applicant seeks:

“THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councillor in the Municipal Council of Mombasa.”

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orenge stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant’s application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councillor or to hold the elections or elect the Mayor of Mombasa.”

21. It is clear then that the main consideration in an application seeking orders for leave granted do operate as a stay is whether the proceedings would be rendered nugatory should stay not be granted.

22. In our instant suit, the Applicant seeks to stay the continued prosecution of a criminal trial that is already instituted against him. The mainstay of the application as gleaned from the pleadings is that the criminal proceedings arise from purely commercial transactions between the ex parte applicant’s company and Victoria bank Ltd. It is urged that the ex parte applicant and his co accused did not by false pretense, and with intent to defraud, induce the interested party to execute a first legal charge over all that property known as Crystal Edge Management Apartment 82 on LR No. 1870/11/253, General Mathenge Road Nairobi. The Interested Party is accused of using the criminal justice system to enforce a civil debt.

23. In response Chief Inspector Abdullahi Arafti has given a blow by blow account of how he conducted investigations and forwarded the file to The Director Public Prosecutions (DPP) for perusal and advice. Upon review of the file, the DPP formed the opinion that the evidence on record was sufficient to sustain the charge.

24. Suffice it to note that the court must at this stage tread with caution lest it veers off the mark and into merit evaluation of the evidence which naturally would be prejudicial to a fair trial in the court below.

25. I agree with Odunga J in his holding in **R vs Richard Kerich & 5 Others [2013] eKLR** that once the court has granted leave as in this case, the question of whether the Application is arguable becomes moot as that is the basis upon which leave was granted. The relevant consideration then becomes one centred on whether the substantive Motion would be rendered nugatory if stay is not granted. In the words of Odunga J in the above case;

“In my view, it is only when the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the court would stay the said proceedings the strength of the applicant’s case notwithstanding.”

26. The ex parte Applicant seeks to stay the criminal proceedings instituted against him in **Milimani Chief Magistrates Court Criminal Case No. E127 OF 2021 (Republic vs. Umedlal Shanghavi and Nina Jayesh Shanghavi)** which the Respondents herein have confirmed is still ongoing albeit in the early stages. There is no evidence that the decision of the Magistrate’s court is imminent. A criminal trial is not a one off event. There is no demonstration that the outcome of the substantive motion herein will be rendered nugatory. The applicant retains the right to approach this court should the decision in the magistrate’s court approach earlier than the determination of the substantive motion. I also factor in that, aware of this court’s schedules and diary, the Motion herein is likely to be determined in under 3 months making the chances of the outcome thereon being rendered nugatory remote.

27. I note that much of the submissions by the parties have been devoted to answering the propriety of the charges. I opt to steer clear of that

path as that is potent arsenal to be employed during the hearing of the substantive motion. Time is not yet ripe to consider whether the DPP exercised his powers under **Article 157** properly or whether the process of investigation contravened the principles of natural justice. That time will come.

28. From the foregoing, am of the considered view that a case for the leave granted herein to operate as a stay has not been made out. With the result that prayer 5 of the Chamber Summons dated 2nd December 2021 is declined.

Dated, signed and delivered at Nairobi 10th day of March, 2022

A. K. NDUNG'U

JUDGE