



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, ONYANGO OTIENO & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI. 244 OF 2010 (UR. 174/2010)

BETWEEN

NICHOLAS MURIUKI KANGANGI APPLICANT

AND

THE HON. ATTORNEY GENERAL RESPONDENT

(Application for stay of proceedings and execution pending the filing, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J.) dated 14th October, 2010

in

JUDICIAL REVIEW MISC. APPL. NO. 642 OF 2008)

RULING OF THE COURT

The applicant in this notice of motion dated and filed on 21st October, 2010, **Nicholas Muriuki Kangangi** is a police officer. The record shows that as he was in the course of investigating alleged commission of crimes by certain people, a complaint was raised against him and he was in turn arrested by the **Kenya Anti Corruption Commission** personnel and charged in the subordinate court with two counts of soliciting for a benefit contrary to **Section 39 (3)** as read with **Section 48 (1)** of the *Anti Corruption and Economic Crimes Act No. 3 of 2003*, and a third count of receiving a benefit contrary to **Section 39 (3) (a)** as read with **Section 48 (1)** of the *Anti Corruption and Economic Crimes Act No. 3 of 2003*. When he was called upon to plead to the offences, he raised constitutional issues claiming that his rights under the Constitution had been violated in that he was held in police custody for over 5 days without him being produced in court as required by the law, which delay was not explained; that he was taken to court by the Anti-Corruption officers contrary to **Section 35** of the *Anti Corruption Action No. 3 of 2003* which required the matter to be referred to the Attorney General first; that he was being unlawfully prosecuted by police officers who are not persons envisaged to prosecute under the *Anti Corruption and Economic Crimes Act – Act No. 3 of 2003*. The learned magistrate was at that juncture required normally, to see if there were constitutional issues raised which the High Court, being the Constitutional court could decide, and if so, to frame the same issue(s) for determination of the High Court. However, the subordinate court, instead of doing so, in a ruling delivered on 28th April, 2008, dismissed the complaints raised and directed the hearing to proceed. The applicant was not satisfied. He moved to the superior court through his advocates vide a letter dated 23rd May, 2008 seeking a revision of the subordinate court's ruling. That letter, together with the subordinate court's ruling were placed before Ojwang J. who, after hearing the applicant's counsel, Mr. Mogeni and Mr. Makura, the learned State Counsel who conceded the review application, allowed the review, making four orders the most important ones being that:

“1. The applicant shall forthwith and in any case within 14 days of the date hereof – lodge an application in the High Court on the relevant constitutional question.

.....

4. If the applicant will have filed an application in the High Court, in the terms of Order No. 1, then hearings before the learned magistrate shall remain in abeyance until the directions of the High Court are given”.

The applicant duly filed *Petition No. J.R. Misc. 642 of 2008* dated 21st October, 2008. That Petition sought seven declarations which were:

“(a) A conservancy order staying the prosecution of the Petitioner in the Nairobi Chief Magistrate’s Court Anti Corruption Case No. 3 of 2007.

- (b) A conservancy order (sic) staying further proceedings against the Petitioner in Nairobi Chief Magistrate's Court Anti Corruption Case No. 3 of 2007.
- (c) A declaration that the Criminal Case No. 3 of 2007 against the Petitioner and any other pursuant to the arrest and detention of the Petitioner is an abuse of the Criminal Process and that it is null and void.
- (d) A declaration that the detention of the Petitioner pursuant to the criminal complaint on 8th to 12th September, 2006 was a gross violation of the Petitioner's right to personal liberty as protected by Section 12 (1) and (3) of the Constitution of Kenya.
- (e) All such orders with and direction as are just and appropriate to safeguard the constitutional rights of the Petitioner and his fundamental rights under Section 71 to 84 of the Constitution.
- (f) All such orders as this Honourable Court shall deem just.
- (g) A declaration that the Respondents are liable to pay costs of this Petition".

That petition was heard by Wendoh, J. who, after perusing and considering written submissions together with oral submissions by counsel on both sides, in a judgment dated and delivered on 14th October, 2010 dismissed it with costs to the respondent. In dismissing the petition, the learned judge had this to say:

"In this case, I find that there was no unlawful arrest or detention and I find that the Petitioner has not proved that there was any violation of his rights as pleaded. I therefore dismiss the Petition with costs to the Respondent".

The applicant is still not satisfied with that decision. He has filed notice of appeal. We are told from the bar, and it is not disputed, that he has filed appeal against the judgment. In the meantime, he has come before us by way of this notice of motion filed pursuant to **Rule 5 (2)** which he erroneously refer to as **Order (5) (2)** and **Rule 74** of the Court of Appeal Rules, in which he is seeking three orders which are that:

“1. The application be certified urgent and the same be heard on priority basis.

2. This Honourable Court be pleased to grant a stay of proceedings in Nairobi Chief Magistrate’s Anti – Corruption Case No. 3 of 2007 pending the hearing and determination of the appeal on such terms as it thinks just.

3. The costs of and incidental to this application do abide by the result of the said appeal”.

The grounds cited in support of the application constitute one ground that is that the appeal is arguable. In support of that ground several reasons are itemized which are in a nutshell that the superior court failed to appreciate that there was unlawful arrest or detention which was not explained and these amounted to violation of applicant’s rights; that the superior court failed to find that the applicant’s arraignment in court by officers of the Kenya Anti Corruption Commission without first referring the matter to the Attorney General pursuant to the provisions of *Act No. 3 of 2003* and the repealed Constitution of Kenya was unlawful; and that in prosecuting the appellant without first complying with the legal provisions of the Anti Corruption Act and the Constitution, the appellant’s rights to liberty were being violated and would continue to be violated. We note that the applicant in his grounds in support of the application, a summary of which we have produced herein, did not state anything as to how the success, if any, of the appeal already filed, would be rendered nugatory, were we to refuse granting the application. However, in his address to us, Mr. Mogeni, the learned counsel for the applicant, who in effect mainly highlighted the grounds set out in the application, told us that the hearing of the criminal case has not commenced before the subordinate court. However, he said further that if the application is refused, the hearing would proceed, with chances of the applicant being convicted and sentenced to jail terms before his appeal is finalized with the result that even if the appeal were to succeed, he would have suffered nonetheless. Mr. Obiri, the learned State Counsel opposed the application citing the well known case of **Julius K. Mbugua vs. Republic**, *Criminal Appeal No. 50 of 2008* to demonstrate that this Court is reluctant in releasing suspects on grounds of alleged violation of their rights on account of detention in police custody beyond the period stated in the Constitution as there are other remedies stated in law to take care of such alleged violations which are civil in nature. He was of the view that the learned judge was perfectly entitled to dismiss the Review Application and the appeal brought against that decision is not arguable.

We have set out above the facts of the matter before us. The law that guides this Court in deciding a matter brought like this matter pursuant to **Rule 5 (2) (b)** of this Court’s Rules is now well settled. The applicant needs to demonstrate first that the appeal or the intended appeal, if one has not been filed, is arguable, that is to say, it is not frivolous. Second, if the appeal is arguable, then the applicant has to further demonstrate that, the success of the appeal, were it to succeed, would be rendered nugatory by our refusal of the application. We have considered the issues raised in the application which we are told are the same issues raised in the appeal. We do accept that the issues as to whether in law, the officers of the Kenya Anti Corruption Commission should arrest and directly produce into the court for purposes of prosecution, a suspect, without referring the matter to the Attorney General pursuant to the provisions of the *Kenya Anti Corruption Act – Act No. 3* is a matter that is arguable. In saying so, we are not in any way saying it is a matter that must succeed on appeal. All we are saying is that it is an issue that this Court needs to deliberate upon. We do not need more than one

arguable point as in law one arguable point is enough – see ***Judicial Commission of Inquiry into the Goldenberg Affairs & 3 others v. Kilach [2003] KLR 249 at page 264.***

On the nugatory aspect, much as we detest the delay that has been occasioned by the wrangles in court, we note that the applicant has all along acted promptly in pursuit of his legal rights. However, it is clear to us that should we reject this application, the proceedings in the subordinate court will proceed with the possible result that he may be sent to prison such that by the time his appeal is finalized, he will have suffered imprisonment, however short the term may be. In those circumstances, though there has been a delay in finalizing the criminal case, we are constrained to stay the hearing till the appeal already filed is finalized. In doing so, we are also anxious to have the criminal case heard and finalized as early as possible. That would only be accomplished if the appeal is finalized early. In the event, and to facilitate the same, we direct the Court of Appeal Registry to set down the appeal already filed for hearing on priority basis.

The sum total is that the notice of motion dated and filed on 21st October, 2010 succeeds. There shall be stay of proceedings in *Nairobi Chief Magistrate's Anti Corruption Case No. 3 of 2007* pending the hearing and determination of the appeal filed in this Court. The costs of this application to abide the outcome of the appeal.

Dated and delivered at Nairobi this 28th day of January, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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