

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala & Lenaola, SCJJ)

CIVIL APPLICATION NO.2 OF 2020

—BETWEEN—

PRAXIDIS NAMONI SAISI.....PETITIONER

—AND—

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

ETHICS AND ANTI-CORRUPTION COMMISSION...2ND RESPONDENT

CHIEF MAGISTRATE ANTI-CORRUPTION COURT

AT NAIROBI.....3RD RESPONDENT

*Being an Application of conservatory orders staying the execution of the decision of the Court of Appeal (**Warsame, Makhandia and Murgor JJA**) of the **20th September, 2019** allowing Civil Appeal No.2 of 2017 as consolidated with Civil Appeal No.184 of 2016*

RULING OF THE COURT

A. INTRODUCTION

[1] This Application is dated 5th February 2020 and is premised on Articles 23(3), 25(a)(c), 27(1)(2), 28, 29(a)(d), 50, 157(b), (11), 159, 163(3)(b)(i) and 4(a) as

well as 259 of the Constitution, Sections 15(2), 21(2) and 24(1) of the Supreme Court Act, 2011 as well as Rules 2, 23 and 26 of the Supreme Court Rules 2012.

[2] The Applicant prays that, pending the hearing of Petition No.39 of 2019, a conservatory order be granted staying the execution of the Judgment and decision of the Court of Appeal (*Warsame, Makhandia and Murgor JJA*) in Civil Appeal No.2 of 2017 as consolidated with Civil Appeal No.184 of 2016.

[3] The twin appeals before the Court of Appeal originated from a Judgment delivered on 19th April 2016 by *Odunga J* in Miscellaneous Civil Application No.502 of 2015, ***Republic v. Director of Public Prosecutions & 2 Others Ex-Parte Praxidis Namoni Saisi***. In that matter, the Applicant had prayed for *inter alia* orders of *certiorari* to quash the decision of the 2nd Respondent to charge her with certain anti-corruption offences arising from tender No.REF.GDC/HSQ/086/201 r-12 awarded to Bonafide Clearing and Forwarding Company Limited. She was a member of the Tender Committee of the Geothermal Development Company at all material times hence her connection with the tender aforesaid.

[4] While *Odunga J* allowed the Applicant's application in its entirety, the said decision was overturned by the Court of Appeal hence the present appeal. We have separately rendered ourselves on our jurisdiction to determine the appeal (See ***Ruling on a Preliminary Objection within Petition No.39 of 2019 delivered simultaneously with this Ruling***).

B. SUBMISSIONS OF PARTIES

i) *The Petitioner's Submissions*

[5] In her submissions, the Petitioner urges the point that her application has met the principles for grant of an order of stay of execution as set out in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR which are that:

“(i) The appeal or intended appeal is arguable and not frivolous and that; (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. (iii) These principles continue to hold sway not only at the lower Courts but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added namely; (iv) that it is in the public interest that the order of stay be granted”

[6] In addition, the Petitioner submits that, should the criminal charges against her be pursued during the pendency of her appeal, the following consequences will be visited upon her:

- a) It will be impractical and to her detriment to construct her defence in the evolution of the trial where she is being required to defend herself for complying with the law and to answer non-existent offences;
- b) Her dignity, by being dragged through a lengthy criminal trial, is incapable of being repaired and/or restored if the appeal were to succeed;

- c) The shame, stigma inherent in the criminal prosecution proceedings against her, particularly for complying with the law, is incapable of being reversed if the appeal succeeds;
- d) The rights and fundamental freedoms upon which her appeal is founded will not be vindicated if the criminal trial continues and were to succeed;
- e) The right to fair trial and fair hearing, she contends, has been violated by purposeful abuse of the 1st Respondent's powers under Article 157 of the Constitution and if her appeal succeeds, that success will be valueless and meaningless;
- f) The continuation of the proceedings in Nairobi Chief Magistrates Court Anti-Corruption Case No.20 of 2015 where she was charged for offences, which do not exist in law given the material facts of the case, will greatly prejudice her and she will be required to defend herself; and
- g) Her right to fair hearing is greatly imperiled for defending herself for non-existent offences which cannot be reversed thus rendering the appeal nugatory if it succeeds.

[7] In support of her case, the Petitioner relies on our decisions in ***Board of Governors, Moi High School Kabarak & Anor v. Malcom Bell***, SC Application No. 12 and 13 of 2013 as approved in ***Nathif Jama Adam v. Abdikhai Osman Mohamed & 3 Others*** [2014] eKLR.

ii) The 1st Respondent's Submissions

[8] The 1st Respondent filed its submissions on 25th February 2020 and argues firstly that, relying on ***Gatirau Peter Munya, Board of Governors, Moi High School***, and ***Wycliffe Ambetsa Oparanya v. DPP*** [2016] eKLR, the

application has not met the principles for grant of stay orders as set out in those cases. That therefore the same ought to be dismissed with costs.

iii) The 2nd Respondent's Submissions

[9] On its part, the 2nd Respondent filed submissions on 28th February 2020 and while agreeing with the Applicant that the principles for grant of stay orders in this Court were laid down in **Gatirau Peter Munya**, argues to the contrary that the Applicant has failed to meet that test. Further, that there is no arguable appeal before this Court as all evidence placed before the Magistrate's Court shows that the Applicant is criminally culpable; that her case in any event remains uncompromised before the trial Court and therefore her appeal would not be rendered nugatory if the stay order is denied and lastly, that it is not in the public interest that the stay order be granted.

C. ANALYSIS AND DETERMINATION

[10] As agreed by the parties, in **Gatirau Peter Munya**, we stated that a party seeking stay orders must address the following issues:

- i) *Whether the appeal or the intended appeal is arguable and not frivolous;*
- ii) *That unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed will be rendered nugatory;*
- iii) *That it is the public interest that the order of the stay be granted.*

[11] The same principles have been applied in many other cases including **Board of Governors, Moi High School Kabarak** as well as **Nathif Jama**

Adam. As regards the present application, we have taken into account the submissions by the parties in reaching our decision and more importantly we note that the Applicant's appeal is related to, and connected with Petition No. 40 of 2019, **Dr. Peter Ajodo Omanda & 6 Others v. Ethics and Anti-Corruption Commission & 2 Others** as well as Application No.31 of 2019. In the said Application, the Applicants, who are all co-accused with the Applicant in the criminal case leading to the present Appeal, sought stay orders for reasons much the same as the Applicant's. The Respondents in that Application are the same Respondents as in the present matter and opposed Application No.31 of 2019 on the same grounds as in the present application.

[12] In a Ruling delivered on 30th April 2020, this Court stated thus:

*“[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 behoves 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' arguments as they will be addressed in the appeal itself".

[13] Without saying more, we adopt our reasoning in that Ruling as properly applicable to the present related application and will therefore find that, the Applicant has made out a case for grant of orders of stay of execution as prayed, until her Appeal is heard and determined.

[14] What of costs? This Court has previously settled the law on award of costs, that costs follow the event, and that, a Judge has the discretion in awarding costs. This was the decision in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others** **Petition No. 4 of 2012**; [2014] eKLR. This case remains the binding law on costs and in our view, each party should bear its costs of the present application.

D. ORDERS

[15] Consequently, and upon our findings above, the final orders are that:

- a) *The execution of the decision of the Court of Appeal [Warsame, Makhandia & Murgor JJA] 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.***
- b) *Each party shall bear its costs of the Application.***
- c) *Petitions Nos. 39 and 40 of 2020 are hereby consolidated and upon Directions being taken before***

the Deputy Registrar, the same to be heard and determined expeditiously.

[16] Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of September 2020.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT 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