2-17-2012

Kenya Litigation - Civil Application Nai 275 of 2011

Truth, Justice, and Reconciliation Commission

IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 275 OF 2011 (UR. 179/2011)

BETWEEN

THE ATTORNEY GENERAL …….. 1ST APPLICANT

MINISTER OF STATE FOR PROVINCIAL

ADMINISTRATION AND INTERNAL SECURITY ……. 2ND APPLICANT

AND

THE KENYAN SECTION OF THE

INTERNATIONAL COMMISSION OF JURISTS ……. RESPONDENT

(Application for stay of proceedings and execution of the Ruling of the High Court of Kenya at Nairobi (Ombija, J.) dated 28th November, 2011

in

H.C.MISC.CRIMINAL APPLICATION NO. 685 OF 2010

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RULING OF THE COURT

On *20th December, 2011,* this application by way of Notice of Motion dated *6th December, 2011* was placed before us for determination. The application was stated to have been brought under ***Rule 5(2)(b)*** and ***47*** of the Court of Appeal Rules. In the motion, the two applicants (*The Attorney General – 1st applicant and Minister of State for Provincial Administration and Internal Security – 2nd applicant*) sought the following orders:-

"1. That there be an interim order of stay of execution of the ruling pending hearing and determination of this application.

2. That pending the lodging, hearing and determination of the intended appeal herein there be a stay of execution of the ruling delivered by the Superior Court (Hon. Mr. Justice R.N.O. Ombija

on 28th November, 2011 in Nairobi HCC Misc. Appl.No. 685 of 2010)

3. That pending the lodging, hearing and determination of intended appeal herein, there be a stay of proceedings in Nairobi HCC Misc. Appl. No. 685 of 2010 pursuant to the ruling delivered by Hon. Mr. Justice N.R.O. Ombija dated 28th November, 2011."

The application which was supported by the affidavit of Mr. Thuita Mwangi, the Permanent Secretary Ministry of Foreign Affairs, was brought on the following grounds:-

1. ***The Applicants' appeal is arguable, not frivolous and has high chances of success on the following grounds namely:-***

i. *The learned Judge misinterpreted the role of the High Court vis a vis the International Criminal Court in applying Article 2(6) of the Constitution of Kenya and the International Crimes Act.*

ii. *The application before the Judge of the Superior Court was not a proper case for application of International Customary Law; and universal jurisdiction.*

iii. *The Learned Judge failed to appreciate that the immunity of a serving Head of State is guaranteed under the general rules of International Law which are part of our laws by virtue of Article 2(5) of the Constitution, whereas Article 2(6) qualifies any Treaties to ratification before becoming part of the laws of Kenya.*

iv. *That whilst the Learned Judge was correct in finding that no one is immune from International Court Jurisdiction under Article 27, he failed to consider provisions of the Rome Statute relating to immunity from execution in respect of sitting Heads of State preserved under Article 98 of the Rome Statute hence his ultimate finding was wrong.*

v. *It is not evident on what provision of Kenyan law the Learned Judge invoked the jurisdiction of the court to issue the provisional warrant of arrest to the extent that Articles 2(5), 2(6) of the Constitution only regulate the relationship between International Law (customs and Treaty law) and National Law.*

vi. *The learned Judge by accepting that the Court had jurisdiction in the absence of invocation of any specific provision of the Constitution or statute, he assumed the role of an International Criminal Court Judge, which is an improper conflation of Kenyan Law and International Law (Rome Statute).*

vii. *By allowing the Applicants locus to present the application for a provisional arrest warrant the Learned Judge misapplied the provisions of section 32 and 29 of the International Crimes Act which state that only the Minister can present the application.*

viii. *That by not considering Article 98 the Judge disregarded delicate issues of immunity of a sitting Head of State; he failed to consider the provisions of our law; The Privileges and Immunities Act and first schedule to the Act Article 31 of the Vienna Convention.*

ix. *The issues before the court were not justiciable as they involved the Political question doctrine or the Act of State Doctrine which question the court is not the best forum to address.*

2. ***The Applicants are apprehensive that should the stay of execution and proceedings***

sought not be granted the relationship between Kenya *(sic)* ***will irretrievably break down.***

3. ***The matter is of great public importance.***

4. ***There are serious questions of applicability and interpretation of international law for determination by the court at hearing of the appeal."***

Before the commencement of the hearing of application, Mr. Nderitu, the learned counsel for the respondent, the Kenya Section of the International Commission of Jurists, raised a preliminary objection to the application. It was that preliminary objection that was heard on that day – *20th December, 2011*. This ruling relates to that preliminary objection.

It was Mr. Nderitu's submission that the proceedings relating to this application and by extension the intended appeal were by their nature criminal proceedings. It was further submitted that the order sought relates to a warrant of arrest. Mr. Nderitu drew our attention to the fact that this application was brought under ***Rule 5(2)(b)*** of this Court's Rules which rule, in his view, has no application in Criminal proceedings. For that reason, Mr. Nderitu was of the view that the application was incompetent.

The second limb of Mr. Nderitu's submissions was that after the establishment of the offices of the Attorney General and Director of Public Prosecutions, it is only the Director of Public Prosecutions who can file a notice to appear and make an application of this nature.

For the foregoing reasons, Mr. Nderitu concluded his submissions by stating that the application is void *ab initio* and should be struck out.

In response to the foregoing, Ms. Kimani, the learned counsel appearing for both respondents submitted that in the High Court proceedings both respondents were named as such and they responded to the summons. Ms Kimani pointed out that the Attorney General and the Minister, were not accused persons or suspects. It was further submitted that the Attorney-General was entitled to appear as a named respondent and principal adviser to the national government. Ms. Kimani therefore asked us to reject the preliminary objection.

Mr. Kibe Mungai who appeared for an interested party addressed the court for a considerable time in opposing the preliminary objection. He more or less adopted the submissions of Ms. Kimani but went on to argue that the proceedings were neither criminal nor civil. It was Mr. Mungai's further submission that ***Article 258*** of the Constitution relates to enforcement of the Constitution and that proceedings for enforcement are neither criminal nor civil. Finally, Mr. Mungai submitted that if the preliminary objection is upheld, then it would mean that a serious wrong would remain unaddressed for a considerable period.

The main point raised in this preliminary objection relates to the role of the Attorney General in these proceedings. It was Mr. Nderitu's submission that as these are criminal proceedings then under the Constitution the respondent should have been the Director of Public Prosecutions and not the Attorney General. Our simple answer to that contention is that in the High Court it was the applicant who named the Attorney General as a respondent and the Attorney General responded to the Summons accordingly. It is therefore rather interesting that the same applicant should be objecting to the participation of the Attorney-General in this matter. The subject matter in these proceedings is a warrant of arrest in respect of ***President Omar Ahmed Hassan Al Bashir*** (*Omar Al Bashir*). The respondents, as correctly pointed out by both Ms. Kimani and Mr. Mungai are neither accused persons nor suspects. The proceedings are in respect of the enforcement of the warrant of arrest by the Minister of State for Provincial Administration and Internal Security. Apart from being named as the 1st respondent, the

Attorney General is the principal legal adviser to the Government of Kenya.

Article 156(4)(a)(b) of the Constitution of Kenya provides:-

"(4) The Attorney-General-

a. *is the principal legal adviser to the Government;*

b. *shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings."*

In view of the foregoing, we are satisfied that the Attorney General is a proper party to these proceedings and we accordingly find no merit in the preliminary objection. As the proceedings are neither Criminal nor Civil, we see no wrong in bringing the application under ***Rule 5(2)(b)***. We therefore dismiss the objection.

Dated and delivered at NAIROBI this 17th day of February, 2012.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR