Mburugu v Republic (Miscellaneous Application 2 of 2023)
[2023] KEHC 3817 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3817 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

MISCELLANEOUS APPLICATION 2 OF 2023

M MUYA, J

APRIL 27, 2023

BETWEEN

DANIEL MBURUGU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The notice of motion application dated the 25th day of January, 2023 seeks the following orders.

    1. Spent

    2. Spent

    3. That the Honourable court be pleased to stay the Criminal proceedings or suspend the sentencing of the applicant on the 9th February 2023 or any other date in the chief magistrates court Nanyuki Criminal Case No.1929 of 2017 *Republic v Daniel Mburugu* pending the hearing and determination of High court at Nanyuki criminal appeal No.4 of 2023 *David Mburugu v Republic*

2. This application is expressed to be brought under Section 357 (I) of the *Criminal Procedure Code*.

    Which provides:-

    > "After the entering of an appeal by a person entitled to appeal, the High court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties or, if that person is not released on bail shall at his request order that the execution of the sentence or order appealed against shall be suspended pending, the hearing of his appeal."

Provided that where an application for bail is made to the Subordinate Court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a Subordinate Court may appeal against refusal to the High Court and notwithstanding anything to the contrary in Section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in Chambers

3. The grounds are that:-

   (a) The applicant has preferred an appeal and the court is yet to determine the proprietary of the Criminal Proceedings wherein the applicant is facing a jail term.

   (b) That the applicant has been in part possession of the suit land being parcel reference No.9831/14 Buuri investments Limited Since 1995. The owner is the complainant in the Criminal Case No.1929 of 2017 Republic v Daniel Mburugu the subject of this application.

   (c) That, the applicants has lived occupied, extensively developed Parcel ref. No. 9831/14 Buuri investment Limited for 27 years and has acquired a legal right over the same in a claim for adverse possession which is pending for hearing and determination before the judge of the environment and Land Court in Nyeri being Nyeri ELC Case No.E002 of 2023.

   (d) That the trial Court did not appreciate the right of the applicant to be on the land and therefore misdirected itself and if the proceedings are let to run further the applicant shall suffer irreparably as the land in his possession shall be leased without affording him an opportunity to ventilate his case.

   (e) That it is fair, just and equitable that this application is allowed in the interest of Justice in the Spirit of the right to fair hearing as envisaged in the |Constitution of Kenya.

4. This application is opposed on the following grounds:-

   (i) That the application lacks merit, is mis-conceived and unsubstantiated.

   (ii) That the trial in the Nanyuki Chief Magistrates Criminal case no.1929 of 2017 from which the applicant is appealing against is yet to be concluded and this application is premature.

   (iii) That the applicant has not met the threshold for grant of the order of stay of the delivery of the pending sentence in Nanyuki chief Magistrates Criminal Case number 1929 of 2017.

   (iv) That the applicant has not demonstrated that he has attained the two requirements for the grant of the order of stay sought as set out in the court of appeal case of Perry Mansuk Kamangara & 3 others v Dpp [2021] e KLR

   (v) That the applicant has not demonstrated that his intended appeal is arguable or that it will be rendered nugatory if the stay orders sought are not granted.

   (vi) That the applicant has not and cannot demonstrate the existence of any error or impropriety of the sentence to warrant grant of the orders sought are granted.

   (vii) That the application lacks merit, and it should be dismissed.

Respondents Submissions

5. It is the contention by the Respondents that Section 357 (1) of the *Criminal Procedure Code* can only come into effect after sentencing has been done.

The Respondents rely in the case of *Giddy Mwakio and another v Republic* (2011) e KLR where the Court of Appeal held:

"An order for stay of proceedings, particularly stay of Criminal Proceedings is made sparingly and only in exceptional Circumstances"

6. The Respondent also places reliance in the case of *Kenya Wildlife Service v James Mutembei* [2019] e KLR. Where Gikinyo J. reiterated the fact that there must be exceptional circumstances for a court to grant a stay of proceedings more so in Criminal matters.

7. Reliance is also placed in the case of *Ibrahim Samon Ali v Republic* [2021] e KLR, Where it was observed:-

In such an application, the applicant has the burden of establishing that the appeal has high chances of success or has a high likelihood of serving a substantial part of the sentence before hearing the appeal. It is the contention by the Respondent that the applicant has not demonstrated that the appeal has high chances of success.

8. The court of appeal in the case of *Perry Mansuk Kansangara and 3 others v Dpp* [2021] e KLR It was held:- we have considered all the material before us, and the applicable law. In considering the application we eschew delving into the substantive matters that are for decision by the bench that will hear the main appeal. All we need to do now is to consider whether based on the material placed before us and applying the guidelines and the law which is already settled in this area, the applicants have demonstrated that their appeal is arguable and secondly whether if the order of stay sought is not granted their intended appeal will be rendered nugatory were the appeals to succeed.

Applicants Submissions

9. It is the contention of the applicants that they have demonstrated that he is likely to suffer immense prejudice as the appeal would be rendered nugatory if the orders sought are not granted and that the prejudice the applicant is likely to suffer will be irreversible unless the orders sought are granted.

That the applicant was convicted for the offence of forcible detainer contrary to section 91 as read with section 36 of the *Penal Code*.

10. An outline has been proffered at length of the findings of the learned trial magistrate in contrast to her final finding of proof of forceful detainer. Counsel for the applicant places reliance in the case *Samson Kipusi and Another v Republic* [2020] e KLR cited in the case of *Edapal Ekai v Republic* [2018] where it was held:- A literal reading of Section 91 of the *Penal Code* shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that:-

(i) A Person has actual possession of land

(ii) The Person has no right over the land

(iii) The Act of possession is against the interests of the legal owner, or the person legally entitled to the land and

(iv) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of peace.

11. Reliance is placed in the case of *Prasul Jayantialal Shah v R* [2022] e KLR as argued *Supra*

Analysis and Determination

12. Upon considering all the issues adduced in this application I deem it necessary from the outset to determine whether this application is premature on account of the fact that whereas there is conviction there is no sentencing yet against the applicant.

13. A close reading of Section 357 (i) of the *Criminal Procedure Code* is to the effect that :-

> "After the entering of an appeal by a person entitled to appeal, the High Court, or the Subordinate Court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal."

14. In the Supreme Court case of *Francis Karioko Muruatetu & Another v R*. 2017 e KLR It was held:- "Pursuant to Section 216 and 329 of the *Criminal Procedure Code* Mitigation is Part of the trial process. If Mitigation is part of the trial process, then it follows that conviction which takes place before mitigation must similarly be part of the trial process"

In the present application the arrest of the proceedings are at the conviction stage before Sentencing.

Going by the Muruatetu case mitigation is part of the trial process. Mitigation comes after sentencing which must also be taken as part of the trial process.

15. In the Court of Appeal case of *Joram, Mwenda Guantai v the Chief Magistrate* Nairobi Civil Appeal No.228 of 2003 [2007] 2 EA LTD

It was held:- The High Court has inherent Jurisdiction to grant an order of prohibition to a person charged before a Subordinate Court and Considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexations, the Judge has the power to intervene and the High Court has an inherent duty to secure fair treatment for all persons who are brought before the court or to a Subordinate Court and to prevent an abuse of the process of the Court"

16. Are there in existence exceptional circumstances in this application to call for the arrest and or stay of proceedings pending appeal?

There is an appeal pending hearing and determination. The appellant has annexed to his application the petition of appeal, the Judgment in the lower court and has given a breakdown of the learned trial Magistrate's findings before the conviction of the applicant.

At this stage of proceedings this Court is not required to delve itself into the substantive issues of the appeal but it's bound to satisfy itself that there are arguable grounds in the appeal.

I have duly perused the Judgment of the lower court and I am satisfied that there are good and arguable grounds. It's instructive to note that there is pending before the "Environment and Land Court in Nyeri a suit Nyeri ELC No. E002 of 2023 which the learned trial Magistrate was made aware. This is a high Court matter which would invariably settle the issue of ownership.

17. If the application before this court is not granted will the applicant suffer irreparable loss or damage?

The applicant is awaiting Sentencing. He has instituted a Suit in the Environment and Land Court in Nyeri over the land in question. In the event of Imprisonment he will lose the opportunity to ably represent himself in that suit. In the event the applicant in this application is sentenced to

imprisonment and the Environment Court determines that he has a right of ownership to the land in which a conviction was based against him, this is a scenario that would amount to an abuse of the court process.

This scenario was envisaged by the court of appeal in the case of *Joram Mwenda GuantaI v Chief Magistrate Supra*.

18. I am of the considered view that this court has the power and duty to secure fair treatment for all persons, where the prosecution amounts to an abuse of due process of the court.

I am satisfied that the application has merit and it is allowed as prayed.

RULING READ AND DELIVERED IN OPEN COURT AT NYERI THIS 27TH DAY OF APRIL, 2023.

HON. JUSTICE MARTIN M. MUYA

JUDGE

In the presence of:

Mr Mwanzia.....Applicant

.....Respondent

Court Assistant: Kinyua