



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. CIVIL NO. 66 OF 2019**

**JENARO NAMU NJAMUMO.....PLAINTIFF**

**V E R S U S**

**JAMES KINYUA MWOBE.....RESPONDENT**

**RULING**

1. The applicant Jenaro Namu Njamumo has filed a Notice of Motion dated 23/9/19 for an order that proceedings in Kerugoya CMCC No. 139/18 be stayed pending hearing of H.C.R.A No. 40/2018.

2. The application is based on the grounds that the applicant was arrested and charged with the offence of obtaining money by false pretences from the respondent. He denied but after the trial he was convicted. The respondent filed a civil case to rely on the judgment in Criminal Case No. 454/2016 as the basis for suing the applicant in Kerugoya CMCC No. 139/18. That if the appeal succeeds there will be no basis the civil suit will have no basis.

3. The applicant has sworn an affidavit dated 23/9/19 in support of the application.

4. The respondent filed a replying affidavit sworn on 4/10/19. He deposes that the applicant has concealed material facts relating to the civil case. He deposes that the truth of the matter is that the applicant approached him and requested him for a loan of Kshs 300,000/- which he undertook to pay within One month. That if applicants failed to pay he would use his office to ensure that he would be given a tender for the supply of water pipes worth Kshs 2,800,000/- by Kirinyaga County as a way of repaying the debt. The applicant failed to repay the debt and the respondent lodged a complaint with police after which the applicant was arrested and charged and eventually convicted. That he never alleged that Kshs 280,000/- was a debt. These are some of the averments among others.

5. The application was canvassed by way of written submissions. I have considered the application and the submissions. The applicant was convicted for a criminal offence. He has proved that there is an appeal pending against the conviction. It cannot be stated that the conviction of the applicant is conclusive evidence that he was guilty of the criminal offence. **Section 47A of the Evidence Act** provides that such conclusion can only be arrived if the time limited for filing appeal has expired and no appeal was filed.

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

6. On the other hand there is no provision of law barring a person who has been acquitted of a criminal offence from being sued in a subsequent civil suit. So where a person is charged with obtaining money by false pretences and is acquitted, nothing bars the complainant from suing the person who was acquitted to recover the money alleged to have been obtained. This is so because the burden of proof in criminal matters is higher – beyond any reasonable doubts and in civil matters it is a balance of probabilities. **Section 193A of the Criminal Procedure Code** provides:-

***“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”***

7. The provision is mandatory and contemplates simultaneous and concurrent Civil and Criminal proceedings. In **Pet No. 232/2012 Teresia Wanjiku Mbau & Another –v- Director of Public Prosecution**. It was stated that:-

***“The law however, is clear on this, the pendency of a civil matter is not a bar to criminal prosecution as Section 193A of the Criminal Procedure Code clearly contemplates simultaneous and concurrent Civil and Criminal Proceedings.”***

8. There is therefore no law preventing the prosecution of the civil case simply because there is a pending criminal appeal whose outcome is yet to be known. Where the law has stated in express terms that the matter can proceed simultaneously and concurrently, there is no room for the court to exercise discretion. The applicant is seeking the discretion of this court to order stay of proceedings. Discretion can only be exercised based on evidence and in the interest of justice. There are no exceptional circumstances proved by the applicant upon which the court can order stay. The law must take its course. The application lacks merits and is dismissed.

**Dated at Kerugoya this 27<sup>th</sup> Day of February 2020.**

**L. W. GITARI**

**JUDGE**