



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 60 AND 61 OF 2014

(From the original Chief Magistrate's Court at Embu in Criminal Case No. 1433 of 2012, R. v. John Njagi Kiragu and Robert Kariuki Njagi)

ROBERT KARIUKI NJAGI1ST APPELLANT

JOHN NJAGI KIRAGU.....2ND APPELLANT

VERSUS

REPUBLICPROSECUTOR/RESPONDENT

NICHOLUS MURIUKI KANGANGI.....APPLICANT (INTERESTED PARTY)

RULING

1. The applicant/interested party (Nicholas Muriuki Kangangi) has applied through his notice of motion brought under Articles 2(5) and 159 (2) (d) of the 2010 Constitution of Kenya as read with all other enabling provisions of the law for the following orders:

1. An order certifying that the application is urgent and that it be heard *ex-parte* in the first instance.
2. An order for the grant of leave to appeal against the ruling and order of this court dated 6/4/2017.
3. An order to stay any further proceedings in this appeal pending the hearing and determination of the substantive appeals.
4. An order that the cost of this application be costs in cause.

The application is based on the following major grounds:

1. That he intends to appeal against the ruling and the decision of this court dated 6/4/2017 which dismissed his application dated 13/10/2015. In that application he had sought to be enjoined as an interested party in these appeals.
2. That he has lodged a notice of appeal.
3. That he has also stated that he does not have an automatic right of appeal.
4. That it will be in the interest of justice that his application be granted.

2. The application is based on his 11 paragraphs supporting affidavit. In that affidavit the applicant has averred that he has filed notice of appeal, which is annexed to the affidavit as annex “NMK 2”.

He has further averred that he has been advised by his counsel that he does not have an automatic right of appeal to the Court of Appeal and that is why he seeks leave of this court to do so. He has further averred that he is apprehensive that his intended appeal would be rendered nugatory in view of the directions in the matter. He has also averred that he has been advised by his advocate that he has an arguable appeal with substantial chances of success and that it is in the interests of justice that his application be granted. Finally, he has averred that he is positive that the court will grant the orders sought as a matter of course.

3. Counsel for the appellants/respondents has filed 3 grounds of opposition to his application.

4. The DPP has also opposed the orders sought by the applicant. His submission was that this type of application will open flood gates to 3rd parties seeking stay orders in criminal appeals. He further submitted that it is the function of the DPP to represent the public in criminal appeals. Additionally he submitted that there is no provision in law which permits a 3rd party to participate in criminal appeals. Finally, he submitted that this court by virtue of its ruling and order dated 6/4/2017 had closed the door for the appellant to participate in these proceedings.

5. I have considered the affidavit evidence and the submissions of counsel for the applicant. I have also considered the submissions and the grounds of opposition by the DPP. Finally I have considered the oral submissions by the DPP. In view of the foregoing matters, I find the following to be the issues for determination:

1. Whether or not the applicant has a right of appeal to the Court of Appeal.
2. Whether or not the applicant has *locus standi* in these two appeals.
3. Who should bear the costs of this application.

6. Issue No.1 – Whether the applicant has a right of appeal

I find that the applicant does not have a right of appeal whether by statute or rules of court. The provisions of the Constitution that counsel for the applicant has cited are not applicable to this application. I further find that any applicant who is seeking leave to appeal must point out the enabling statutory provisions or rules of court. There are no provisions in the Criminal Procedure Code that confer a right of appeal on the applicant. There are also no rules of court that enable him to file an appeal to the Court of Appeal from the ruling and order from this court. For example, section 75 (1) of the Civil Procedure Act (Cap 21) Laws of Kenya expressly provides for orders that are appealable as of right and those wherein orders are only appealable with leave of the court. The applicant was unable to point out any rule in the Criminal Procedure Code that enables him to appeal to the Court of Appeal either as of right or with leave of this court. In the circumstances, I find that the appellant has no right of appeal and therefore cannot seek leave to appeal in the absence of enabling legislation or rules.

7. 2nd Issue – Whether or not the applicant has *locus standi* in the 2 appeals

I find from the relevant provisions of the law that the applicant was not a party to the criminal proceedings in the trial court. I further find that he is not a party to the two appeals that are pending for hearing and determination in this court. I therefore find that he does not have *locus standi* to seek leave to appeal to the court of appeal.

8. Issue No. 3 Who bears the costs of this application

It is only in exceptional circumstances that an order for payment costs is made in criminal matters. It is not uncommon that costs are awarded in matters of contempt of court and in private prosecutions. The payment of costs may be granted in exceptional circumstances. I find that the applicant’s application is

not based on any statutory law. It is also not based on any rule of the court. I find that the application is an abuse of the court process

There will be no order as to costs in the light of the foregoing considerations.

Ruling delivered in open court this 17th day of January 2018 in the presence of Ms Nkurrenah holding brief for Mr. Anyoka for the applicant and Mr. Mukofu for the state and in the absence of Ms Were for the respondents.

J. M. Bwonwonga

Judge

17/1/2018