



**Cheruiyot & another v Republic (Criminal Appeal
E028 of 2023) [2024] KEHC 9769 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E028 OF 2023**

RL KORIR, J

JULY 3, 2024

BETWEEN

RAYMOND CHERUIYOT 1ST ACCUSED

DAVID KIMUTAI 2ND ACCUSED

AND

REPUBLIC PROSECUTION

RULING

1. The two Accused (Applicants) filed a Notice of Motion Application dated 13th July 2023 which sought the following Orders:-
 - I. Spent.
 - II. Spent.
 - III. Spent.
 - IV. That this Honourable Court be pleased to grant a temporary stay of Defence hearing proceedings in Bomet Principal Magistrate's Court Criminal Case Number 3393 of 2019 pending the hearing and determination of the Appeal dated 5th June 2023.
 - V. The costs of this Application be provided for.
2. The Application was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Victor Kiamba Advocate on 13th July 2023.



The Applicants' case.

3. The Applicants stated that the Bomet Magistrate's Court in Criminal Case Number 3393 of 2019 in which they are the Accused persons, delivered a Ruling on 25th May 2023 where the trial court ruled that the matter should proceed to defence hearing. That they were aggrieved by the said Ruling.
4. It was the Applicants' case that they had since filed an Appeal against the impugned Ruling and that the Appeal had a high chance of success. That if this court does not grant the stay order, the purpose of the Appeal would be defeated and rendered nugatory.
5. The Applicants stated that the Appeal had been filed timeously and without delay. That they would suffer irreparable prejudice if the stay order was not granted.

The Response

6. The State filed its response through the Grounds of Opposition dated 10th November 2023 and supporting Affidavit of Kiarie Eric Waweru, Prosecution Counsel dated 14th November 2023. The Prosecution stated that Bomet Principal Magistrate Court Criminal Case Number 3393 of 2019 was handled by Hon. K. Kibellion before he was transferred. That Hon. Kibellion had ruled that the Accused had a case to answer and was transferred when the matter was ready for defence hearing.
7. It was the Prosecution's case that Hon. Rabera took over the matter and directions under section 200 of the *Criminal Procedure Code* were issued where the Accused were informed of their rights. That Hon. Rabera ruled under section 200 of the *Criminal Procedure Code* that the trial should continue from where it had reached. It was the Prosecution's further case that the Accused did not appeal or apply for revision of the Ruling which placed them on their defence.
8. The Prosecution stated that the Applicants would still have their day in court and they would be allowed to mount their defences. That they would suffer no prejudice. The Prosecution further stated that the matter had been pending since 2019.
9. It was the Prosecution's case that the Application lacked merit and was meant to delay the criminal matter before the trial court.

The Applicants' submissions

10. Through their submissions dated 17th November 2023, the Applicants submitted that this court had power to stay criminal proceedings. That such power was discretionary and would be granted in exceptional circumstances. They relied on *Goddy Mwakio & another v Republic* (2011) eKLR, *Kenya Wildlife Service v James Mutembei* (2019) eKLR and *Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170*.
11. It was the Applicants' submission that the exceptional circumstances in their case was that the trial court incorrectly ruled that there were no typed proceedings on record. That they had applied for typed proceedings and had been issued with a receipt. It was their further submission that they were in possession of typed proceedings and it was a shock to them when the trial court held that there were no typed proceedings.
12. The Applicants submitted that the court at this stage should not be concerned with the merits of the Appeal but only whether the Appeal would be rendered nugatory if the stay orders were not granted. That they had an arguable appeal and they relied on *UAP Insurance Company Ltd v Michael John Beckett* (2004) eKLR. The Applicants further submitted that if the defence hearing proceeds then their Appeal would be rendered nugatory.



13. It was the Applicants' submission that it was not their intention to delay the matter. That they should be accorded a fair trial.

The Respondent's submissions

14. The Respondent submitted that the Applicants had been personally informed of their rights under section 200 of the *Criminal Procedure Code* and they indicated that they wanted the matter to start afresh.
15. It was the Respondent's submission that the Applicants had been placed on their defence by the initial trial Magistrate and at no point did the Applicants appeal that decision. That it could be inferred that they were ready and willing to defend themselves.
16. The Respondent submitted that any prejudice to be suffered should be real, demonstrable, and clear and should not be imagined. That the Applicants had failed to demonstrate any prejudice they would suffer if the matter proceeded from where it had reached. The Respondent further submitted that the Applicants remained innocent until proven guilty and they had an opportunity to clear their names if the matter proceeded.
17. It was the Respondent's submission that the Applicants did not indicate that they wanted to recall any of the Prosecution's witnesses.
18. The Respondent submitted that the criminal case was an old matter as begun in the year 2019. That under Article 50 of the *Constitution* of Kenya, trials should be concluded without unreasonable and undue delay and the same right extended to the complainants or victims who were desirous of justice. The Respondent further submitted that the present Application was meant to frustrate the course of justice and further delay the matter.
19. It was the Respondent's submission that under section 200 of the *Criminal Procedure Code*, a succeeding Magistrate has the discretion to allow the request by an Accused to begin the matter de novo or to proceed from where it had reached. They relied on *Rosslyne v Republic* (2022) eKLR. It was their further submission that the present Application lacked merit and ought to be dismissed.
20. I have read through and carefully considered the Notice of Motion Application dated 13th July 2023, the Respondent's Grounds of Opposition dated 10th November 2023, the Respondent's Supporting Affidavit dated 14th November 2023, the Applicants' written submissions dated 17th November 2023 and the Respondent's undated written submissions. The only issue for my determination was whether Bomet Principal Magistrate's Court Criminal Case Number 3393 of 2019 ought to be stayed pending the hearing and determination of the Applicants' Appeal dated 5th June 2023.
21. The principles of stay of criminal proceedings was aptly captured in detail by Mativo J. (as he then was) in *Nicholas Mwaniki Waweru & another v Attorney General & 5 others* (2017) eKLR where he held:-

“The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India in a recent decision revisited the law on the issue and held that ‘these powers should be exercised sparingly and should



not carry an effect of frustrating the judicial process.’ The said court delineated the law in the following terms:-

“The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it ‘soft-pedal the course of justice’ at a crucial stage of proceedings.....The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of the power of the court, but the more the power, the more due care and caution is to be exercised in invoking these powers”

Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to ‘stay’ an indictment or stop a prosecution in the magistrates courts if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court. The leading case on the application of abuse of process remains *Bennet v Horseferry Magistrates Court & another*. The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

- i. Where it would be impossible to give the accused a fair trial; or;
- ii. Where it would amount to a misuse/manipulation of process because it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

The above categories are not mutually exclusive and the facts of a particular case may give rise to an application to stay involving more than one alleged form of abuse, and that staying a proceeding is a discretionary remedy and each case will depend on its set of facts and circumstances. Chris Corns in his Article entitled *Judicial Termination of Defective Criminal Prosecutions: Stay Applications*” argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

- i. When the continuation of the proceedings would constitute an ‘abuse of process,’
- ii. When any resultant trial would be ‘unfair’ to the accused, and
- iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.”



22. The Court of Appeal in *Manilal Jamnandas Ramji Gobil v Director of Public Prosecution* (2014) eKLR held:-

“.....We are mindful that an order staying criminal proceedings would be granted only in the most exceptional of circumstances. See *Goddy Mwakio & Another v Republic* [2011] eKLR where this Court, in illustration of this point, stated that:

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”.

23. Further, the Court of Appeal in *Juma v Republic* (Criminal Application E035 of 2022) [2023] KECA 557 (KLR) (12 May 2023) (Ruling) held:-

“To benefit from the discretion of the Court the applicant must satisfy the Court that first, his appeal is an arguable one, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory. These principles are now well settled in a host of the decisions of this Court including *Trust Bank Limited and Another v Investech Bank Limited & 3 Others* (Civil Application No. Nai 258 and 315 of 1999 (unreported)...”

24. A brief background in this matter was that the two Accused (now Applicants) were charged in Bomet Principal Magistrate’s Court Criminal Case Number 3393 with six counts of offences to wit; intermeddling with the deceased’s property contrary to section 45(1) as read with section 45(2) of the *Law of Succession Act*, fraudulently procuring the registration of a document related to land contrary to section 157(1) (c) (i) of the *Land Act*, forgery of Will contrary to section 350 of the *Penal Code*, making a false document contrary to section 347 of the *Penal Code*, uttering a false document contrary to section 353 of the *Penal Code* and forgery of an official document contrary to section 351 of the Penal Code.

25. The matter came up for plea taking on 1st October 2019 where both Applicants took plea. Upon substitution of charges, fresh pleas were taken on 5th March 2020. The trial finally begun on 18th November 2021. The Prosecution closed its case on 21st November 2022 after seven (7) witnesses had testified. On 26th January 2023, the trial court (Hon. Kibellion) ruled that the Prosecution had established a prima facie case against the Accused (now Applicants) and placed them on their defence.

26. Hon. Kibellion was soon transferred and Hon. Rabera took up the matter on 16th May 2023 and read and informed the Accused about section 200 of the *Criminal Procedure Code*. The aforementioned section of the law provides:-

- (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
 - (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.
- (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.



- (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
- (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
27. Through their counsel, the Accused indicated that they would like the trial to start afresh for the reason that the typed proceedings contained some mix ups and did not accurately represent the content of the proceedings thus far. This position was objected to by the Prosecution Counsel who stated that the trial court had already placed the Accused on their defence and they had an opportunity to defend themselves. That the matter had dragged on from 2019 and the Accused had not shown any prejudice they would suffer if the trial continued from where it had reached.
28. On 25th May 2023, the trial court (Hon. Rabera) ruled that the matter should proceed from where it had reached. The Accused were aggrieved by this decision and filed an Appeal dated 5th June 2023. The present Application was to stay the criminal proceedings pending the hearing and determination of the said Appeal.
29. As earlier stated, the court had power and discretion to stay criminal proceedings. However such power and discretion are to be exercised sparingly and with circumspection. An order for stay is only to be granted in exceptional circumstances and in most cases if the Applicant's rights would be infringed upon if the proceedings are not stayed. That however has to be balanced with the need for an expeditious trial or if by allowing the proceedings to start afresh would amount to amount to an illegality, an abuse of the process and further, a travesty of justice.
30. After going through the record, I have noted that the trial took some time before it commenced. After it commenced, seven (7) prosecution witnesses testified and were cross examined by the Accused's counsel. As noted earlier, after the Prosecution closed their case, the Accused were placed on their defence and had a chance to defend themselves. As rightly noted by the Prosecution, this decision has not been challenged.
31. The Accused argue that the trial court erred when it ruled that the criminal proceedings ought to continue from where it had reached and they based their argument on the fact that the trial Magistrate found that there were no typed proceedings in the record. These typed proceedings were the subject of the Accused's dissatisfaction with the impugned Ruling.
32. I have gone through the record and noted that there were no typed proceedings as stated by the Applicants. However, the record of the proceedings is deemed a proper record whether it is typed or handwritten. The purpose of the record is to capture the trial proceedings which in this case, it has. The Applicants made reference to some alleged mix ups in the record but did not state which ones, they made a general statement without proof. This whole argument on the typed proceedings is without basis let alone legal basis, and I dismiss the same.
33. The Record shows clearly that the Applicants heard and cross-examined the Prosecution witnesses. In this Application, they have failed to demonstrate the prejudice they would suffer if the trial continued from where it had reached. They had already been placed on their defence and the continuation of the trial in my considered view would neither dent the integrity of the trial process nor trample any fair trial rights of the Accused.



- 34. In the final analysis, I have found no exceptional circumstances to warrant stay of the criminal proceedings. Stay of proceedings would only cause further delay.
- 35. The Application dated 13th July 2023 has no merit and is dismissed. The Applicants are at liberty to expeditiously prosecute their Appeal.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 3RD DAY OF JULY, 2024.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicants, Mr. Kiamba for the Applicants, Mr. Wainaina for the State and Siele (Court Assistant).

