



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL DIVISION**

**PETITION NO. 45 OF 2019**

**IN THE MATTER OF AN APPEAL AGAINST THE CHIEF MAGISTRATE'S DECISION IN MISCELLANEOUS CRIMINAL  
CASE NO. 267 OF 2019**

**BETWEEN**

JAYNE NGENGE.....1<sup>ST</sup> PLAINTIFF

PAOLO PORCELLI.....2<sup>ND</sup> PLAINTIFF

DAVIDE DOMENGHETTI.....3<sup>RD</sup> APPLICANT

**AND**

**THE REPUBLIC THROUGH THE COMMISSIONER GENERAL**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**CMC DI RAVENNA.....2<sup>ND</sup> RESPONDENT**

**STANLEY NUIRURI MUTHAMA.....3<sup>RD</sup> RESPONDENT**

**STANSHA LTD.....4<sup>TH</sup> RESPONDENT**

**RULING:**

1. The applicants have moved this Court by a notice of motion application seeking stay of the ruling delivered by Hon. Kassan (CM) and the proceedings in miscellaneous criminal application No. 274 of 2019 pending the hearing and determination of this application and the petition of appeal. The grounds in support of the motion are that they had requested for typed proceedings; the appeal has high chances of success as it raises points of law; the motion had been brought without undue delay and that no prejudice shall be occasioned to the respondents.

2. In support of the motion is an affidavit dated 12<sup>th</sup> May, 2020, sworn by Jayne Ngenge. She deposed that she is an employee of the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent vide an application had sought for orders that the 2<sup>nd</sup> respondent be compelled to provide documents to be used in investigations and that the project supervisor, the finance officer and the procurement officer be compelled to record statements. This was allowed by the Court, but the applicants were aggrieved with the same and filed an application dated 29<sup>th</sup> November 2019 challenging the orders, the application was dismissed. The applicants are apprehensive that the 1<sup>st</sup> respondent may proceed with execution of the Court orders.

3. In addition, she deposed that the Court need to issue a pronouncement on the extent employees can release company documents not in their custody. She deposed that this Court has the jurisdiction to issue the orders sought.

**Response:**

4. In response to the motion, PC Salim Bibo swore an affidavit, deposing that he was the investigating officer hence competent to swear the

affidavit. The applicants had been granted 14 days stay of execution and the same had lapsed. Summons were issued to the Company's representatives to record statements. The applicants have not satisfied the threshold for granting stay of execution. The applicant seeks to appeal from a negative order and there is therefore nothing to stay. He further deposed that the application be dismissed with costs.

### **Submissions:**

#### **1<sup>st</sup> Respondents submissions:**

5. The first issue submitted on was whether the criminal case and the summons dated 8<sup>th</sup> August, 2019 could be stayed pending the hearing and determination of this application. They had investigated and found that there was a subcontract between the 2<sup>nd</sup> and 4<sup>th</sup> respondent and they had earned Kshs 487, 194,087/= and had failed to declare the same. It is their submission that stay shall interfere with the investigations, in the criminal case No. 2089 of 2019 and their mandate to collect tax.

6. Further, the Court is urged to be guided by Article 165(6) of the Constitution. This Court has supervisory jurisdiction over the subordinate Court. The issue had been heard and determined and the application had been dismissed leaving nothing to stay. In regard to section 59(1) and section 59 of the Tax Procedure Act 2015, they had the mandate to gather full information in respect of tax liability, and failure to provide such information was an offence. The Court summons were against the applicants to explain why the orders granted on 25<sup>th</sup> July 2019 could not be complied with, the 1<sup>st</sup> applicant said the documents were not in her possession, the other three failed to respond to the summons. The applicants have not filed an application to have the summons varied or set aside.

7. In addition, the applicants have not established that they have an arguable appeal as was held in **Mark Njihia vs DPP (2015)eklr.** On whether the appeal will be rendered nugatory, they have failed the test. The Court should weigh the conflicting claims by both sides. They have failed to show what kind of loss they shall suffer if stay is not granted.

8. The Court is urged to dismiss the application with costs.

#### **2<sup>nd</sup> Respondents submissions:**

9. The Court is urged to find that they have an arguable appeal and grant stay. The appeal raises questions on constitutionality of the orders of the Court which were issued ex-parte on the 25<sup>th</sup> July 2019. The 1<sup>st</sup> respondent in 2019 had indicated to the 2<sup>nd</sup> respondent that they had investigated and found there was a nexus between the 2<sup>nd</sup> respondent and Stansha. This was followed by a letter dated 24<sup>th</sup> April, 2019 asking them to supply crucial documents to carry out investigations. They indicated to the 1<sup>st</sup> respondent that they had released all documents to Stansha. This led to filing of the application and granting of ex-parte orders. The applicants were served with summons to record statements vide the order dated 25/7/2019. The Court failed to seek evidence from the 1<sup>st</sup> respondent to warrant the orders. There was no evidence to show that the 2<sup>nd</sup> respondent had committed an offence, as was held in **Manfred Walter Schmit & another Vs. R & ors (2003)eklr.** Further, the Court failed to give the grounds upon which the application was allowed. The affidavit in support of the application for seizure and search were full of general denials but not substantive grounds.

10. The trial Court had failed to consider the provisions of Article 47 of the Constitution in respect to a fair and administrative action as was held in **Sceneries Ltd Vs National Land Commission (2017) eklr.** The order issued on 25<sup>th</sup> July 2019 was contrary to Article 47 and 25 of the Constitution. The order was not clear on the nature of the documents to be supplied to the 1<sup>st</sup> respondent.

11. The appeal will be rendered nugatory if the application is not granted since the applicants shall be subjected to untold hardship as was held by the Court of Appeal.

12. The written submissions were highlighted on the 2/12/2020.

### **Analysis and determination:**

13. The Court has referred to the motion, the replying affidavit, the submissions by both sides and the authorities relied on.

#### **Issue for determination is:-**

Whether the proceedings in the criminal case should be stayed.

14. The applicants are seeking stay of the proceedings in the miscellaneous criminal application No. 274 of 2019 pending the hearing and determination of the petition of appeal. The application for stay is premised on order 42 rule 6.

**“ order 42 Rule 6(1) provides as follows:-**

a. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

b. No order of stay shall be made under sub rule (1) unless:-

- i. The Court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and
- ii. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

15. The trial Court dismissed the application dated 20<sup>th</sup> November 2019 seeking to challenge the orders of the Court that the applicants herein do provide documents to be used in investigations by the 1<sup>st</sup> respondent. The applicants filed a petition and a notice of motion application. They raise matters of the Constitution in regard to fair trial since the orders were granted by the Court ex-parte.

16. The Court of Appeal in **Butt Vs Rent Restriction Tribunal (4) (Madan, Miller and Porter JJA)** while considering an application of this nature had this to say:-

- i. The power of the Court to grant or refuse an application for a stay execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Judge's discretion.
- iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
- iv. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

17. The applicants further must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in **Hassan Guyo Wakalo Vs. Straman EA Ltd (2013)** as follows:-

**“in addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”.**

18. The applicants avers that they are being asked to provide information which has already been given to Stanch company and therefore the sought document are not in their possession. They have also stated that their appeal shall be rendered nugatory since they would be subjected to untold hardship that would be out of proportion.

19. In addition, it is their argument that the 1<sup>st</sup> respondent shall not suffer any loss if stay of execution is granted. However, Section 59 (1) of the Tax Procedure Act gives the 1<sup>st</sup> respondent the mandate to request production of record and it is an offence not to comply. The applicants are asking this Court to stay criminal proceedings pending the determination of the appeal. The Court has discretionary power to grant the same, but in criminal cases the same should be granted sparingly. In **Goddy Mwakio & Another Vs Republic (2011) eklr**, the Court stated as follows:

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

20. On whether the applicants have an arguable appeal, the Court in **Dennis Mogambi Mong'are Vs A.G & 3 ors (2012)eklr**, held that, **“an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the Court's consideration.”**

21. Having made the foregoing observation, I do find that it won't be in the interest of Justice to allow the application. Allowing it would delay investigations in the criminal matter and the outcome on the same. Justice delayed, is justice denied. The application therefore lacks merit and is hereby dismissed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF MARCH, 2021.**

In the presence of:-

Mr. Onyango holding brief Dr. Ojiambo for the 2<sup>nd</sup> Respondent

Mr. Opiyo for the Respondent -absent

Mr. Nyamwogo for the Applicant-absent

Gladys - Court Assistant