



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL REVISION CASE 143 OF 2019**

**KENNETH OMONDI & 39 OTHERS.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**ZUHURA KALI HASSAN**, the 1<sup>st</sup> applicant herein together with upto 30 other applicants moved this court by way of application dated 7.10.2021 from on onset, I must say that the exact number of the applicants was never made with certainty to the court. This is because whereas the initial application was made by the 1<sup>st</sup> applicant, many more of the parties applied to be enjoined as applicants. And even after the court issued the orders that all the parties who had shown interest in being enjoined as applicants do file the relevant application for joinder, the number of persons who duly applied and so were enjoined remains unclear. Matters have been made worse by the sheer number of advocates involved as representing the parties, some of whom would only attend court on certain occasions. The one fact, however, that remained constant during the hearing of this application is that all the parties supported the application as filed by Mr. S. Kithi Advance for the applicant. This ruling therefore relates to the application filed by Mr. Kithi and supported by the other applicants.

The application herein had originally been filed on 12.11.2020. the applicant's however filed a fresh application dated 7.10.2021. It is this 2<sup>nd</sup> application (*which in any case prays for the same orders as the earlier application*), that the applicants made submissions filed on 18.11.2021. This ruling therefore relates to those submissions filed on 18.11.2021.

This application basically has 2 substantive prayers as follows:-

1. **THAT**, the order of the 11<sup>th</sup> November 2020, issued by the Honourable Justice Kimaru and delivered by the Honourable Justice Wakiaga, vacating the orders staying the prosecution of the applicants issued on 17.12.2019 be stayed pending the hearing and determination of this application, and the said orders issued on 17.12.2019 be reinstated.

2. **THAT** the order of 11.11.2020 issued by the Hon. Justice Luka Kimaru and delivered by the Hon. Justice Wakiaga vacating the orders staying the prosecution of the applicants issued on 17.12.2019 be stayed pending the hearing and determination of the intended appeal, and the said orders issued on 17.12.2019 be reinstated.

Of the 2 prayers, it is clear that the 2<sup>nd</sup> prayer, ie, stay pending appeal is the more relevant at this stage. The respondents have opposed this application. And following as agreement of the parties, this application has been canvassed by way of written submissions.

On the part of the applicants, it was submitted that 2 issues are up for determination in this application, thus;

i) **Whether the orders of 19.12.2019 staying the prosecution of the applicants should be re-instated and the ruling of 11.11.2020 delivered by Hon. L. Kimaru should be stayed.**

ii) **Who bares the cost of this application.**

On the first issue, it was submitted that the application seeks stay of the prosecution/proceedings pending appeal so as to preserve the subject matter. The applicants relied on several decision in support of their case as follows:-

a) **Goddy Mwakio & Another Versus Republic (2011)eKLR**, that an order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances.

b) *Diana Kathi Kilonzo Versus Republic (2016)eKLR*, that an order of stay of proceedings can issue where it is demonstrated that the prosecution is actuated by malice and there is abuse of the process of the court and or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the applicant.

Counsel for the applicant listed upto 7 areas on which it was alleged that the rights of the applicants had been derogated.

c) *Global Tours and Travels Limited, Nairobi HC*, winding up cause No. 43/2000 in which the court gave the principles that the court ought to consider in granting an order of stay as

- *Whether the applicant has established a prima facie or arguable case.*
- *Whether the application was filed expeditiously.*
- *Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.*

d) *Timothy Issaac Bryant & 2 others Versus Republic Inspector General of Police & 7 others (2015)eKLR*, that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the court. And further, whether or not an appeal will be rendered nugatory is a question of fact which must depend on peculiar facts and circumstances of each case.

It was further argued that this application was filed without any delay, and that the appeal would be rendered nugatory if the orders of stay are not reinstated. The argument raised herein was that in the absence of the orders of stay, the criminal proceedings aggrieved of would proceed and the intended appeal would be rendered nugatory.

Based on the memorandum of appeal, it was submitted that the appeal has high chances of success. It was pleaded that this application be allowed with costs to applicants.

Several other applicants also filed separate submissions, all in support of this application for stay. Mr. Katwa (*Katwa Kemboy Advocates*) for the 35<sup>th</sup> applicant, submitted that the applicant's stand to suffer irreparable loss (*Nguruman Limited Versus Jan Bonde Nielsen and 2 other (2014)eKLR*), and that the court ought to consider the balance of convenience (*Stars and Garters Restaurant and Another Versus National Bank of Kenya Limited (2019)eKLR*). And that the court only needs to satisfy itself that a sole bonafide contention is not unarguable or frivolous (*Barkeley North Market & others Versus A-G and others, NIA 74/2005*). Further, that an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration (*Dennis Mogambi Mongare Versus A-G and 3 Others (2012)eKLR*).

Juda Ndiso Advocate, made submissions for one applicant, Lawrence Ndothia Nzyoka, simply that the prosecution stands to suffer no prejudice should the application be allowed.

As at the time of writing this ruling, no other submissions of the other applicants could be located on the portal for consideration.

The respondent has filed submissions in opposing this application. The submissions of the respondent were as follows:-

i) **THAT** the applicant have failed to cite any enabling provision of the law under which the orders of stay are sought. That the ruling sought to be stayed is final and so the application lacks locus standi or merit.

ii) **THAT** the court lacks the jurisdiction to grant the orders sought as the court is functus officio.

iii) **THAT** the applicants have failed to satisfy the principles for order of stay as laid down in *Gatirau Peter Munya Versus Dickson Mwenda Kithinji & 2 Others (2014)eKLR*, that:-

- *That the appeal or intended appeal is arguable and is not frivolous.*
- *Unless the order sought is granted, the appeal or intended appeal, were it to succeed, would be rendered nugatory.*
- *That it is in the interest of the public that the order of stay be granted.*

It was also submitted that the applicants have no arguable appeal. The court was urged to dismiss this application.

I have considered the submissions of the learned counsel for the parties herein. This application seeks that this court do issue an order staying the orders issued by the Hon. Justice L. Kimaru on 11.11.2020. In deciding on this, it is important to consider the history of this matter, a matter on record and generally agreed on by the parties.

The applicants were arrested on 10.5.2019 on tax related crimes. They moved to the High Court in this matter and the court duly issued orders staying their prosecution pending the hearing and determination of their application. This court (Hon. Justice Kimaru) heard the applications on their merit. In the ruling of 11.11.2020, the applications of the applicant were dismissed. They have now moved this court to stay the said orders dismissing their applications, pending the determination of the appeal they have lodged before the court of appeal.

The first issue therefore that comes to mind, is whether this court has the jurisdiction and power to issue the orders prayed for in this application. I have considered the application that was determined by the Hon. Justice Kimaru. The applications were brought under several provisions of the law including section 362, 123 and 364 of the Criminal Procedure Code, and Articles 165(6)(7), 21(1), 29(a), 49(1)(a)(i), 49(g), 159, and 259 of the constitution. The applications were therefore brought under the revisionary powers of the court as well as for enforcement of the specific constitutional rights of the applicants. In making its considered ruling, the Honourable Judge duly considered the relevant constitutional and statutory guides relating both to safeguarding the constitutional and statutory rights of the applicants.

The submissions of the applicants on this application are basically that the appeal that they were filed at the court of appeal is arguable, not frivolous and has high chances of success (Timothy Isaac Bryant case), that the said appeal would be rendered nugatory should an order of stay not issue. In effect, this court is being invited to consider whether the appeal filed following a finding of a Judge of concurrent and equal jurisdiction has high chances of success. The issue of whether this court has the jurisdiction to issue the orders sought is therefore of foremost importance.

In the case of **Samuel Kamau Macharia and Another Versus KCB and Another (2012)eKLR**, the court ruling on the issue of jurisdiction, held;

***“A courts jurisdiction flows from either the constitution or legislation, or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law.”***

In our instant case, the applicant have not cited any provision of the constitution nor of any written law that would confer on this court the power or jurisdiction to consider a finding of a court of concurrent jurisdiction. I am therefore not convinced that this court is endowed with such powers. And on this, this court gets directions from the Supreme Court, in the case of **Raila Odinga and others Versus IEBC and others (2013)eKLR**, when it observed;

***“The functus officio doctrine is one of the mechanisms, by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is rested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same power ..... the principle is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary), final and conclusive. Such a decision cannot be revoked or varied by the decision makers.”***

The position herein therefore, is that since the Hon. Justice Kimaru had dealt with the issues raised by the applicants, the High Court is functus officio, bereft of any jurisdiction to reconsider, or vary the same. Moreso, in view of the fact that the applicants have already filed an appeal at the Court of Appeal.

It is for this reason that I find the application dated 7.10.2021 (originally dated 12.11.2020) and supported by all the other applicants lacking in any merits. I dismiss the same with no orders as to costs. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**9.12.2021.**

**Court:**

Ruling read out in court (on-line) in presence of Mr. Kithi for applicants, Ms. Kimiri for the state, Ms. Waweru for Mr. Katwa Kigen for 35<sup>th</sup>, Ms. Bundi for Mr. Gitonga for Caroline Wachira.

**D. O. OGEMBO**

**JUDGE**

**9.12.2021.**

**Mr. Kithi:**

We have filed an appeal. We pray for the certified copies of the proceedings and the file to be transmitted.

**Court:**

Typing of the proceedings and ruling to be expedited for purposes of appeal. Same to be supplied to the parties accordingly. Deputy Registrar to execute.

**D. O. OGEMBO**

**JUDGE**

9.12.2021.