



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 54 OF 2017

EVANSON MWANGI KIHUMBA.....APPLICANT/APPELANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. In his application dated 13/12/2017, the applicant seeks for orders for permanent stay of proceedings in criminal case No. 498/2016 before the Chief Magistrate's court.
2. The grounds on the face of the application and those contained in the supporting affidavit, register the grievance of the applicant with the ruling of a case to answer against the applicant delivered on 29/11/2017. It is stated that the applicant has faithfully attended court while out on bond and is a law abiding citizen. Further, he states that if the orders sought are not granted, this appeal challenging the said ruling will be rendered nugatory.
3. It is further contended that the applicant was greatly wounded by the said ruling and that this appeal may take long to be heard thus justifying the necessity of staying the lower court proceedings.
4. The application was vehemently opposed by the respondent. Relying on the replying affidavit of Freda Mwanza, it is deponed that the CM criminal case No. 498 of 2016 was duly processed through the office of the respondent. The applicant subjected himself to trial until he was called upon to give his defence that he challenged the trial and the criminal charges facing him.
5. The respondent further states that the applicant was accorded a fair trial and that his constitutional rights were not violated. It is further contended that the trial is designed to have the case be heard *de novo* so that the applicant can shop for a favourable court. He had earlier filed a Constitutional Petition No. 2 of 2016 seeking to have the same charges quashed but the application was dismissed.
6. I have looked at the grounds relied on in this application for stay of the criminal proceedings. I note that this is an interlocutory application in which permanent orders are sought. If permanent orders for stay are granted at this stage, this would amount to rendering a positive decision on the appeal before it is heard.
7. The applicant in this pending appeal ought to seek for temporary orders pending the hearing of the appeal. Such orders are meant to protect the constitutional rights of the applicant in the appeal so that he is accorded a chance to be heard. This court would not consider a permanent order at this stage of the proceedings. I am of the considered opinion that this prayer for permanent stay of proceedings is misplaced.
8. Even assuming that the applicant had sought a temporary order for stay pending appeal, he has an obligation to demonstrate that his appeal has high chances of success. The applicant surely subjected himself to trial without complaining and only raised issues when the court ruled that he has a case to answer.
9. The applicant has only stated that he was not given a fair hearing but has not attempted to show how this ever happened. From the proceedings, the prosecution's case was heard and concluded and the court called upon the applicant to give his defence. Putting the applicant on his defence, was in compliance with the constitution that an accused person shall be given an opportunity to present his defence where the court finds that a *prima facie* case has been made. Instead of proceeding with his defence in the advanced criminal trial, the applicant opted to file an appeal against the ruling.
10. Some of the grounds relied on in the appeal relate to the motive of instituting the charges against him. The Director of Public Prosecutions under Article 157 of the Constitution, has power to institute criminal proceedings against any person and should not be hindered from so doing unless its actions are against the law or are in violation of the constitutional rights of the accused. No violation of the law has been demonstrated in this application.

11. The supporting affidavit is sworn by the applicant's counsel who is not in a position to ventilate the grievances of the applicant for he is not seized of the facts of the matter save for the instructions he has received from the applicant. The fact that a counsel has been instructed to represent the accused in a criminal case does not make him competent to swear an affidavit on behalf of his client in an application of this nature. It has not been intimated that the applicant was non-available to swear the supporting affidavit.

12. The respondent produced a copy of a ruling in Constitutional Petition No. 2 of 2016 in which the applicant challenged these same charges against him. The application was fully heard by the High Court and dismissed. It appears that the applicant has been employing all kinds of games to ensure that the trial does proceed.

13. In view of the foregoing analysis, I find that the applicant has failed to demonstrate that his appeal has any chances of success. He has also failed to show that he deserves a “permanent” stay at this stage of the appeal.

14. I find no merit in this application and it is hereby dismissed.

15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Guantai for Applicant

Applicant present

Ms. Mate for respondent