



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 194 OF 2015

JOHN MUGO NJERU.....1ST APPLICANT
MARY WANJIRU BERNARD.....2ND APPLICANT
DAIMLER ENTERPRISES LIMITED.....3RD APPLICANT
DOUBLE CLEAN LIMITED.....4TH APPLICANT
RUORA INVESTMENTS LIMITED.....5TH APPLICANT
MARSTONS ENTERPRISES LIMITED.....6TH APPLICANT
NGINYO ROADWAYS LIMITED.....7TH APPLICANT

VERSUS

DIRETOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

RULING

By Notice of Motion dated 29th February, 2016, brought under Sections 356 and 357 of the Criminal Procedure Code and Articles 49(h) and 50(1) and (2) of the Constitution of Kenya, the Applicants seek the following two main prayers, namely:

- 1. That this court stays its own orders given on 25th February, 2016 requiring the 1st and 2nd Applicants to attend court on 2nd March, 2016 for purposes of taking plea in criminal case no. 1203 of 2015.**
- 2. That the court be pleased to stay its decision given in Criminal Case No. 1203 of 2015 pending the hearing and determination of an intended appeal against the decision of this court given on 25th February 2015.**

The main grounds on which the application is premised are that the Applicants intend to prefer an appeal against this court's entire ruling of 25th February, 2016; that the appeal being arguable, if the ruling of

this court of 25th February, 2016 is not stayed; the appeal is likely to be rendered nugatory; that orders given in the ruling of 25th February, 2016 conflict with other orders issued in High Court Environment and Land Court Case No. 219 of 2015 in which the subject matter is the same as in the instant case; that the order issued by this court is likely to be misused by Jambo Holdings Limited who is a party in the land case and that it is the Applicants right to be accorded an opportunity to defend the land case.

I had earlier given a ruling in brief, the same being dated 8th April, 2016 and indicated in that ruling that I would issue a comprehensive ruling thereafter owing to reasons canvassed therein. I wish to state that all the issues raised by the respective parties particularly the Applicants were therein addressed, more so the reasons as to why I thought that the order for stay of the ruling should not issue. There is however one aspect that I did not address in detail. This is in regard to the application of Sections 356 and 357 of the Criminal Procedure Code which I indicated would not apply in respect of the application herein. The application was majorly brought under the two provisions of the law. Section 356 deals with bail and stay of execution pending the entering of an appeal. The same provides as follows:

356. (1) The High Court, or the subordinate court which has convicted or sentenced a person, may grant bail or may stay execution on a sentence or order pending the entering or an appeal, on such terms as to security for the payment of money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the sentence or order as may seem reasonable to the High Court or the subordinate court.

(2) If the person in whose favour bail or a stay of execution is granted under this section is ultimately liable to a sentence of imprisonment, the time during which the person has been released on bail, or during which the execution was stayed, shall be excluded in computing the term of his sentence, unless the High Court, or failing that court the subordinate court which convicted and sentenced the persons, otherwise orders.

It is clear from the provision that a stay of execution would only apply where either the High Court or the subordinate court has convicted or sentenced a person as a pre-requisite to the granting of bail or stay of execution of a sentence or order pending the filing of an appeal. The scenario in the present case is a total contrast and departure from the said provision in that the Applicants herein have neither been convicted nor sentenced.

Section 357 on the other hand provides for admission to bail or suspension of sentence pending appeal. In the same respect, the provision is only applicable where either the High Court or the Subordinate Court has convicted or sentenced a person. I duplicate the same as under;

357. (1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal:

Provided that, where an application for bail is made to the subordinate court and is refused by that court, no further application for bail shall lie to the High Court, but a person so refused bail by a subordinate court may appeal against refusal to the High Court and, notwithstanding anything to the contrary in section 352 and 359, the appeal shall not be summarily rejected and shall be heard, in accordance with such procedure as may be prescribed, before one judge of the High Court sitting in chambers.

(2) If the appeal is ultimately dismissed and the original sentence confirmed, or some other sentence of imprisonment substituted therefore, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.

The Chief Justice may make rules of court to regulate the procedure in cases under this

section.

The contention by the learned counsel for the Applicants was that since both provisions carry the word ‘**order**’ implies that once a court has issued an order, it would exercise its discretion where circumstances allow in granting a stay of that order pending the entering of an appeal. I disagree with that proposition in that both Sections 356 and 357 are couched in such clear and unambiguous manner that the stay would only apply where the court is dealing with a convicted or sentenced person. In that regard, my view would be that in a scenario as obtains in the present case, the court would be called upon to exercise its discretion in granting a stay where there exist special circumstances.

The circumstances argued in this case were that first, there exists a civil case in the Environment and Land Court which case should first be determined before criminal proceedings are filed against the Applicants. The second aspect is that the Director of Public Prosecutions is barred by the law to file criminal proceedings during the pendency of a civil case. Thirdly, was the argument that there were complaints raised against Jambo Holdings Limited against whom criminal proceedings should have been initiated. Fourthly and finally, it was argued that it was erroneous to file criminal proceedings against the Applicants when they hold genuine titles to the contentious parcels of land. In my view, I think that these were vexing issues given that I entirely addressed them in my ruling of 25th February, 2016. I need therefore not belabor repeating myself.

Having observed the above, I reiterate the position of the court taken both in my brief ruling of 8th April, 2016 and that of 25th February, 2016. Whether or not the prosecution of the Applicants is at the instigation of the 10th Respondent with a view to gaining advantage in the pending land case is a matter that can be canvassed at the criminal trial and in the land case. I do not therefore think that the cited case law being **Republic vs Attorney General and 4 others Ex-parte Kenneth Kariuki Githii [2014] @KLR** and **Eric Kibiwott Tarus and 2 others vs DPP and 7 others [2014] @KLR** would bail out the Applicants. I however agree with the learned counsel for the Applicants that an interlocutory appeal can be filed pending the conclusion of a criminal trial as was observed in the case of **Thomas Patrick Gilbert Cholmondeley vs Republic [2008] @KLR**. The present case unfortunately, is not as was canvassed therein. In the present case, the intended appeal is against a ruling on an order arising from an application for revision. As I stated earlier, a meritorious order would only issue on the exercise of the court’s discretion guided by any prevailing special circumstances. Before me, no special circumstances have been canvassed that would warrant a stay of my ruling of 25th February, 2016.

In the premises, the application is hereby dismissed with each party to meet its own costs of the same.

DATED and DELIVERED this 11th day of **May, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *No appearance for the Applicants*
2. *M/s Aluda for the 1st and 2nd Respondents*
3. *No appearance for Jambo Holdings Limited (previously 10th Respondent)*
4. *No appearance for the Chief Magistrate’s Court at Kiambu and Nairobi and the Chief Lands Registrar (previously 1st, 2nd, and 11th Respondents respectively)*