



**Kisa v Director of Public Prosecutions & 4 others (Civil Appeal (Application)
E108 of 2024) [2025] KECA 977 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 977 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E108 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MAY 23, 2025**

BETWEEN

KIPKOECH JUMA KISA APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

KIMILILI LAW COURTS 3RD RESPONDENT

GEOFREY KORORIA 4TH RESPONDENT

PC KENNEDY KIPSOI 5TH RESPONDENT

(Being an application to stay the proceedings of the Kimilili Principal Magistrate's Court Criminal Case Files Nos. E804 of 2023 (two counts) and E805 of 2023 "three counts" from the Judgment of the High Court of Kenya at Bungoma, (Ougo, J), dated 3rd April, 2024 in BUNGOMA JUDICIAL REVIEW NO. E006 OF 2023)

RULING

1. The application before us, dated 13th May 2024 and brought without reference to any legal provisions, seeks to stay the proceedings of Kimilili Principal Magistrate's Court in criminal case numbers Nos.E804 of 2023, comprising two counts, and E805 of 2023, comprising three counts. The application follows the judgment delivered on 3rd April, 2024, by Ougo J. of the High Court of Kenya at Bungoma in Judicial Review application No. E006 of 2023. By that judgment the trial court dismissed the applicant's Judicial Review application for orders of certiorari to quash the decision of the 1st and 2nd respondents to charge and prosecute the applicant in the 3rd respondent with Criminal Case numbers E804 of 2023 and E805 all of 2023.



2. The applicant had been charged in Kimilili Law Courts, the 3rd respondent, with making a false document, obtaining money by false pretences, stealing a motorcycle, handling stolen property, and malicious damage to property, all of which arose from complaints made by the 4th respondent. With the dismissal of the application, the 1st to 3rd respondents will be at liberty to proceed with the hearing of the cases, hence the application.
3. The applicant, argues that the charges against him stem from identical witness statements, which he claims are malicious, false, and reflective of manifestly unjust prosecution. He asserts that these charges have caused him significant prejudice and infringed upon his fundamental rights, leading to irreparable harm and loss.
4. The applicant maintains that the appeal has high likelihood of success and could be rendered futile if the order sought is not granted.

Furthermore, he expresses concerns about prejudice and fundamental rights violations if the proceedings continue. The applicant asserts that the respondents will not suffer any prejudice if the stay is granted. However, and in the converse, he would face severe prejudice.

5. The application is opposed by the respondents, who, through the replying affidavit of PC Kennedy Kipsoi, dated 30th July 2024, depose that the applicant is facing charges in Kimilili Criminal Case Nos. E804 of 2023 and E805 of 2023, which have since been consolidated into Case No. E804 of 2023. The respondents assert that the applicant's rights to a fair trial, including access to all relevant documents, have been upheld, and there has been no breach of fundamental rights by the respondents in the exercise of their legal duties. They argue that the application is a deliberate attempt to delay the trial and that the appeal has no likelihood of success. Consequently, the respondents maintain that the application should be dismissed as it is without merit and will not result in any prejudice to the applicant.
6. The application came up for hearing on 20th March, 2025. The applicant appeared in person on our virtual platform and opted to rely entirely on his written submissions. Ms. Matere, holding brief for Ms.Mwaniki, learned Assistant Director of Public Prosecutions was present for the respondents and equally indicated that she too wished to rely on her written submissions.
7. The applicant's submissions merely reiterated and expounded on the grounds in support of the application as well as the affidavit in support thereof. We need not therefore rehash the same.
8. The respondents, on the other hand submitted that there were no sufficient grounds to warrant the stay of proceedings. That the charges against the applicant are well-founded, as there was a victim seeking justice due to the applicant's alleged illegal dealings with motorcycle registration No. KMFP 356V.
9. It was contended that the application was a premature attempt to raise a defence that is better addressed during the criminal trial. Counsel further states that the applicant will have the opportunity to cross-examine prosecution witnesses and challenge the evidence during the trial.
10. Finally, counsel urged the court to allow the respondents to exercise their lawful mandate in prosecuting the applicant, as no proof of abuse of office or constitutional violations has been demonstrated. Counsel therefore prayed for the application to be dismissed to allow the criminal proceedings to proceed to their logical conclusion.
11. This Court has the discretion to grant an order for stay of proceedings, but such discretion must be exercised judiciously. In determining whether to grant the application, we are guided by the principles set out in *Ali v Republic (Criminal Appeal 51 of 2021) [2024] KECA 1168 (KLR)*. In this case, this



Court differently constituted emphasized that the discretion to grant a stay of proceedings in criminal proceedings must be exercised judiciously and only in exceptional circumstances. The court held:

“The mere existence of an appeal does not automatically warrant a stay of proceedings. The applicant must demonstrate exceptional circumstances and irreparable harm.”

12. Further, in *Republic v David Njogu Gachanja* [2013] eKLR, this Court stated that:

“A stay of proceedings is not a matter of right but a discretionary remedy that must be exercised sparingly and only in exceptional circumstances where the interests of justice demand it.”

13. In this matter, the applicant’s allegations that the charges are malicious and false must be weighed against the respondents’ assertion that investigations revealed a clear link between the applicant and the offences. The existence of a victim seeking justice further reinforces the public interest in allowing the criminal trial to proceed to its logical conclusion.

14. The applicant has not demonstrated sufficient evidence to substantiate the claim of malicious prosecution. As held in *Munyiri v Githinji* [1976] KLR 208, the burden of proving malice and lack of probable cause, rests on the claimant. In the absence of such evidence, this Court must exercise caution before interfering with the criminal proceedings.

15. Additionally, this Court in *Njau v Republic (Criminal Appeal E028 of 2020)* [2022] KEHC 14123 (KLR) emphasized that:

“The right to a fair trial does not include the right to avoid trial altogether. Allegations of malicious prosecution must be supported by clear and convincing evidence.”

16. Having considered the submissions of both parties and the applicable principles and the law, we are satisfied that the applicant has failed to establish exceptional circumstances that warrant the stay of proceedings. We doubt therefore that the intended appeal is arguable nor will it be rendered nugatory. The applicant’s allegations of malicious and unconstitutional prosecution remain unsubstantiated, and even if they are, these are all matters that can be taken up in his defence during the criminal proceedings.

17. Having found as such, it follows that the application dated 13th May 2024 is hereby dismissed. The criminal proceedings in Kimilili Principal Magistrate’s Court Criminal Case No. E804 of 2023 shall proceed to its logical conclusion. We make no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

