



Ngethe v Ethics and Anti-Corruption Commission & another (Civil Appeal (Application) E006 of 2020) [2024] KECA 1174 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1174 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E006 OF 2020
DK MUSINGA, JW LESSIT & A ALI-ARONI, JJA
SEPTEMBER 20, 2024**

BETWEEN

MARY NGECHI NGETHE APPLICANT

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

(Being an application for stay of any further proceedings in Anti-Corruption Case No. 19 of 2010 pending the hearing and determination of an appeal from the Judgment of the High Court at Nairobi (Onyiego, J.) delivered on 9th August 2019 in Anti-Corruption & Economic Crimes Petition No. 30 of 2018)

RULING

1. Before this Court is a Notice of Motion dated 15th May 2024, which is brought by the applicant under the provisions of Article 25 (c), 48, 50 (o) of *the Constitution*, rule 5(2)(b) of the Rules of this Court and all other enabling provisions of the law. The applicant seeks stay of any further proceedings in the High Court Anti-Corruption Criminal Case No. 19 of 2020 pending the determination of this application and stay of any further proceedings in the said matter pending determination of an appeal that she has filed before this Court.
2. A brief background of the application is that the State instituted criminal proceedings against the applicant and several other persons, to wit, Anti-Corruption Case No. 19 of 2010 and Anti-Corruption Case No. 20 of 2010 before the Anti-Corruption Court. The applicant was convicted in Anti-Corruption Case No. 20 of 2010 and served a custodial sentence. It is the continuation of proceedings against her in Anti-Corruption Case No. 19 of 2010 that precipitated the filing of a Constitutional Petition before the High Court.



3. In her Petition, the applicant contended that the transaction that gave rise to the criminal proceedings, the witnesses, and the police file were the same in the two court cases, and therefore, having been convicted and served a custodial sentence in Anti-Corruption Case No. 20 of 2010, the ongoing proceedings against her in Anti-Corruption Case No. 19 of 2010 were in breach of her constitutional rights to a fair trial and offended the principle of double jeopardy. The High Court (Onyiego, J.) dismissed the petition in its entirety, setting the stage for the filing of an appeal which is pending hearing and determination before this Court.
4. The gravamen of the appeal is whether the learned judge erred on a matter of law in failing to appreciate that the ongoing proceedings against the applicant would infringe on her constitutional right to a fair trial and offend the double jeopardy principle in light of her conviction and sentencing in Anti-Corruption Case No. 20 of 2010. The applicant contends that the appeal is arguable.
5. On the nugatory aspect, it is contended that the Anti- Corruption Court declined to grant an adjournment of the proceedings in Anti-Corruption Case No. 19 of 2010 pending the hearing and determination of the appeal on grounds that this Court had not granted an order of stay of proceedings. The applicant therefore contends that grave injustice is looming against her, which may render the appeal nugatory if the Anti- Corruption case proceeds as scheduled on 3rd, 4th and 15th July 2024 (now past), as several witnesses are lined to testify against her. She contends that there is need for this Court to grant the orders sought in this application so as to preserve the subject matter of the appeal and to ensure that the appeal is not rendered a mere academic exercise.
6. The application is opposed by the 1st respondent by way of a replying affidavit sworn by Tabu Lwanga, one of its investigators. From the onset, the 1st respondent challenges the jurisdiction of this Court under rule 5(2)(b) to grant a stay of criminal proceedings, and avers that the said rule applies to civil proceedings. As to the merits of the application, it is averred that the same is not arguable on grounds, inter alia, that the High Court in the impugned decision found that the two sets of charges were not similar in terms of the statement of the offence and particulars and therefore the ingredients of the respective offences were not the same; the applicant is using the plea of autrefois convict in Anti-Corruption Case No. 20 of 2010 as an excuse to delay legitimate prosecution in Anti-Corruption Case No. 19 of 2010; the applicant has always been protected by Article 50 of *the Constitution* from the commencement and during the trial of Anti-Corruption Case No. 19 of 2010 and therefore a stay of proceedings as sought is unmerited.
7. As regards the nugatory aspect, it averred that if the appeal is successful, the proceedings in the Anti-Corruption Court will be set aside and therefore the appeal will not be rendered nugatory.
8. The 2nd respondent does not appear to have filed any replying affidavit to the application.
9. At the hearing hereof, Senior Counsel Mr. Paul Muite appeared together with learned counsel Mr. Mwangi for the applicant. The 1st respondent was represented by learned counsel Ms. Grace Maina, while learned counsel Mr. Omondi was present for the 2nd respondent. Highlighting the applicant's written submissions dated 6th June 2024, Senior Counsel reiterated that the appeal pending determination in this Court on the principle of double jeopardy is arguable, and that the applicant is apprehensive of exposure to double jeopardy, having already been convicted and jailed over the same issues in Anti- Corruption Case No. 20 of 2010. As to this Court's jurisdiction under rule 5(2) (b), Senior Counsel contended that the application arises from a constitutional petition and not a criminal case, and therefore the applicant properly invoked the provisions of rule 5(2)(b) in bringing this application.



10. On her part, Ms. Maina, highlighting the 1st respondent's written submissions dated 1st July 2024, reiterated that this Court did not have jurisdiction under rule 5(2)(b) to stay proceedings in the Anti-Corruption Court, which are criminal in nature. According to counsel, the rule applies specifically to civil proceedings. Counsel further submitted that cases touching on public interest such as the one against the applicant ought to be prosecuted expeditiously. In this regard, she submitted that only three witnesses were remaining to testify, and therefore urged this Court to allow the case to proceed to its logical conclusion in the public interest.
11. On his part, Mr. Omondi, highlighting his client's written submissions dated 15th July 2024, challenged the argument by the applicant that she would be exposed to double jeopardy and stated that the charges against her in the two cases before the Anti-Corruption court were different, and with distinct ingredients. He cited the decision of *Lee Nicholas Kipsigei Ngetich & 6 Others v R* [2016] eKLR, where the Court held that the rule against double jeopardy does not forbid the State from presenting offences at consecutive trials even though they arose from the same occurrence, and that the test is whether such a course has led to fundamental unfairness. On this basis, therefore, he contended that the appeal before this Court is not arguable and that the applicant's contention that she has already been convicted of some of the offences she committed can only serve as mitigating factors in the Anti-Corruption Case No. 19 of 2010 and not as a ground for discontinuing the said proceedings.
12. We have considered the application, the respective replying affidavits and submissions, as well as the applicable law. Before we address the merits of this application, this Court's jurisdiction to grant the orders sought in the application has been challenged by the respondents. It behooves us to first of all determine the issue of jurisdiction as without it, we cannot move any further.
13. The challenge on jurisdiction rests primarily on whether rule 5(2)(b) applies to stay of criminal proceedings and whether this Court can stay such proceedings before a Magistrates' Court. This Court had occasion to consider a similar issue of its jurisdiction under that rule in *Diana Kethi Kilonzo v Republic* [2016] eKLR. The Court held at paragraph 19 of the said decision thus:

“19. In *R v Kenya Anti-Corruption Commission & 2 Others* [2009] eKLR, the applicant, an employee of the Public Service Commission, sought a stay of proceedings in a criminal case against him pending an appeal against a decision of the High Court dismissing his judicial review application for orders of certiorari and prohibition. He invoked rule 5(2)(b) of this Court's Rules. Although the application was allowed by a majority, the Court was unanimous that criminal proceedings before a magistrate's court would not be stayed pending an appeal from a decision of the High Court under rule 5(2)(b). The majority of the members of the Court however, determined that such criminal proceedings would be stayed as there existed precedent for doing so. See cases of: *R -v- Isaac Theuri Gitbae & Another, Civil Appeal No. 11 of 2002* (UR); *Dr. Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another* [2006] eKLR; *Joram Mwenda Guantai v Chief Magistrate - Nairobi, Civil Appeal No. 228 of 2003* (UR); *Yagnesh Devan & 4 Others v Joseph Ngindari & 3 Others - Civil Application No. 136 of 2004* (UR), & *Civil Application No. 246 of 2005* (UR) between the same parties and *Rerkely Northmarket & 3 Others v Attorney General and 3 Others - Civil Application No. Nai. 74/2005* (UR). The decision in *R. v Kenya Anti-Corruption Commission* (supra) was followed in *Manilal Jamnades Gohil v D.P.P. - Cr. Application No. 57 of 2013* (UR) and *Helmith Rame v Nairobi C.A. Cr. Application No. 1 of 2015* (UR).”



14. The Court went further to hold as follows:

“20. This Court had occasion to consider the issue of jurisdiction under rule 5(2) a. and (b) of the Court's Rules in *Mary Ngechi Ngethe v The AG & Another - C.A. Civil Application No. Nai. 157 of 2012 (UR)*. There, the applicant sought stay of criminal proceedings before a subordinate court pending disposal of an appeal against a judgment of the High Court dismissing the applicant's judicial review application where she had sought an order of certiorari. We held:

“There cannot be any doubt that this Court cannot stay criminal proceedings in the magistrate's courts in the manner sought in this application because there is no jurisdiction to do so. This Court will issue and has issued as demonstrated by decisions we have referred to orders prohibiting magistrates' courts from proceeding with criminal trials where it found evidence that the trial was actuated by malice and abuse of process, where such prosecution was in derogation of the appellant's constitutional rights and instituted with the pre-dominant and improper intent to harass and exert pressure on the appellant”.

21. The decision in the case of *Mary Ngechu (supra)* was followed in the case of Eng. *Michael Sistu Mwaura Kamau v The Ethics and Anti-Corruption Commission & 3 Others - Nairobi Civil Application No. 173 of 2015*. There, we stated:

“We are in agreement with the above findings (findings in the *Mary Ngechu (Supra)* case), that each case is considered on its own merits. It is in instances where there are trumped-up charges, or the prosecution is not undertaken according to law, or it is activated by malice and meant to harass the applicant that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice are met and to prevent the abuse of the process of court, as indeed this is a country that is governed under the rule of law and not the whims of the D.P.P. or any other person or authority”.

22. The upshot on the issue of jurisdiction is, therefore, that under the inherent jurisdiction of this court and pending disposal of appeals from the High Court, 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 court process and/or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the applicant. The subordinate court criminal proceedings will also be stayed if it is demonstrated that the prosecution is instituted in derogation of the applicant's constitutional rights. The jurisdiction is sparingly used and only where the justice of the matter so demands.”

15. We fully adopt the holding of this Court in *Kethi Kilonzo (supra)*. The constitutional rights of the applicant to a fair trial as well as her protection from double-jeopardy warrants this Court's



intervention in the exercise of its inherent jurisdiction, so that the application is determined on its merits.

16. In an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice. See Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.
17. The question whether Anti-Corruption Case No. 19 and 2010 which is ongoing before the trial court and Anti-Corruption Case No. 20 of 2010 for which the applicant was convicted and sentenced are founded on the same ingredients, facts, witnesses and the police file does not appear to us an idle issue. Whether her constitutional rights to fair hearing as guaranteed under Article 50 of *the Constitution* is threatened by the proceedings in Anti-Corruption Case No. 19 and 2010 and more specifically her protection against double jeopardy under Article 50(o) of *the Constitution* is an issue that ought to be argued and determined on appeal. The applicant has therefore, in our view, established that her appeal is not idle and hence arguable.
18. On the nugatory aspect, if the proceedings before the Anti-Corruption Court continue to their logical conclusion before the appeal is heard and determined, the appeal will be rendered a mere academic exercise. The applicant has therefore satisfied this Court that her appeal will be rendered nugatory in the absence of the orders sought in this application.
19. The applicant has satisfied the twin principles which the Court considers in applications brought under rule 5(2)(b) of its Rules. Consequently, we grant the prayers set out in the Notice of Motion dated 15th May 2024. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

D. K. MUSINGA, (P)

JUDGE OF APPEAL

J. LESIIT

JUDGE OF APPEAL

ALI-ARONI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

