



Ramji & 2 others v Investigations & 3 others; Police (Interested Party) (Civil Application E388 of 2024) [2024] KECA 1184 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1184 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E388 OF 2024
JW LESSIT, JM MATIVO & PM GACHOKA, JJA
SEPTEMBER 20, 2024**

BETWEEN

**BHARAT RAMJI 1ST APPLICANT
HARISH RAMJI 2ND APPLICANT
ASHVIN RAMJI 3RD APPLICANT**

AND

**DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
MOMBASA CEMENT LIMITED 4TH RESPONDENT**

AND

**DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE INTERESTED PARTY**

(Being an application for stay of execution pending appeal against the entire Ruling of the High Court of Kenya at Kiambu (D. O. Chepkwony, J.) dated 24th July, 2024 in Judicial Review Application No E010 of 2024))

RULING

1. *Vide* judicial review application dated 25th April 2024, the applicants (Bharat Ramji, Harish Ramji & Ashvin Ramji) moved the High Court seeking orders of certiorari to quash the respondents' decision to summon them under section 52 of the *National Police Service Act* to investigate them for alleged forgery of Title L.R No. 11895/50. The applicants also sought orders of prohibition to prohibit the



respondents from initiating any criminal proceedings based on the summons dated 18th April 2024 or the alleged forgery of Title L.R No. 11895/50.

2. Upon hearing the parties, Chepkwony, J. dismissed the Judicial Review application holding that the investigations on the alleged forgery concerning the title to the subject property are still ongoing and so far, no charges have been shown to have been brought against the applicants. The learned judge also found that this Court in Civil Appeal No. 590 of 2019, Harish Ramji & 2 Others vs. Mombasa Cement Limited & Another never adjudicated on the alleged claim of forgery. Therefore, the said investigations cannot be said to be aimed at settling a civil dispute that culminated in the said appeal to this Court. Consequently, the learned judge found that the applicants were undeserving of the judicial review remedies of certiorari and prohibition.
3. Aggrieved by the dismissal of their application, the applicants lodged a notice of appeal and filed before this Court a notice of motion dated 31st July 2024, the subject of this ruling seeking orders that this Court stays execution of the ruling delivered by Chepkwony, J. on 24th July 2024 pending the filing, hearing, and determination of the intended appeal to this Court. The applicants also pray for an order that this Court stays the 3rd respondent's decision to arrest and prosecute of them pending the filing, hearing and determination of their intended appeal to this Court.
4. The applicants contend that they have an arguable appeal and unless stay is granted, the respondents are likely to proceed with their arrest and abuse of criminal prosecution before the lower court in order to intimidate and harass them in a bid to influence any further civil process thereby greatly prejudicing and breaching their rights. The grounds in support of the application as stated on the face of the motion and in the supporting affidavit are inter alia that:
 - i. The Charge Sheet alleges that the applicants conspired to forge a transfer document purporting it to be a genuine Transfer document signed by the Board of Trustees of National Social Security Fund, yet they are yet to be shown a formal complaint lodged by NSSF nor has any person(s) it is alleged they conspiring with been arrested.
 - ii. There are no minutes and or resolutions emanating from the Board of Trustees of National Social Security Fund alleging that the Transfer document was not signed by the authorized officer of the NSSF Board;
 - iii. The Complainant in the Charge Sheet is one Hasmukh Patel who is associated with Mombasa cement and so are all the other two witnesses.
 - iv. Mombasa cement does not have authority to complain on behalf of the NSSF. Consequently, the institution of the criminal proceedings is in furtherance of private interests rather than public interest.
 - v. The Criminal proceedings are an afterthought aimed at orchestrating fictitious charges.
 - vi. That a subordinate court cannot sit on appeal against this Court's decision which held that there was no evidence of fraud on the applicants' part since the transfer document was drafted by NSSF lawyers Wetangula, Adan and Makokha Advocate and the certificate of title was issued by the Registrar of titles.
 - vii. The interested party being dissatisfied by this Court's decision has applied for leave to appeal to the Supreme Court. However, the said leave has not been granted, therefore initiating the criminal proceeding in a matter determined by this Court amounts to abuse of the legal process.



- viii. There was disobedience of stay orders issued on 23rd April 2024 by the 5th, 6th, 7th, and 8th respondents. Therefore, the learned judge erred when she held that the stay against arrest and prosecution of the applicants lapsed on 31st May 2024. Consequently, there is need for this Court to clarify this issue for certainty in law.
5. As at the time of writing this ruling, the respondents had not filed any response to the instant application.
 6. The interested party (Mombasa Cement), opposed the application vide replying affidavit sworn on 23rd August 2024 by one Evans Francis Muigai, one of the interested party's managers duly authorized by the interested party's Board of Directors. It is the interested party's case that the instant application is an attempt to circumvent the decision by the trial court's decision delivered on 24th July 2024 since the reliefs sought are tantamount to this Court preemptorily determining the appeal from the decision of the Superior Court without hearing the appeal on merits, a jurisdiction this Court lacks.
 7. The interested party deponed that the intended appeal is not arguable because there is clear evidence of fraudulent conduct on the part of the applicant in transferring LR. No. 11598/50 meriting the intended prosecution and should there be any infractions, appropriate safeguards under the law are available to redress the infractions. Further, there is no allegation or evidence that the applicants are being or have been treated unfairly.
 8. The interested party also averred that the instant application is an abuse of the court process given that the applicants have filed a similar application seeking the same reliefs before the superior court and indeed before the superior court the applicants have the benefit of ex-parte orders of stay which have been extended. Therefore, having elected to proceed with a similar application before the High Court, it is evident that the instant application is an abuse of the process of the court and ought to be struck out.
 9. The interested party also averred that the learned judge dismissed the applicant's applications, which amounts to a negative order incapable of being stayed in law.
 10. During the hearing of this application, learned counsel Ms. Lumallas represented the applicants, learned state counsel Mr. Owiti represented the respondents while learned counsel Mr. Khagram represented the interested party.
 11. The applicants' counsel reiterated the grounds in support of the application contained in the supporting affidavit of Mr. Harish Ramji and the submissions dated 27th August 2024. Counsel submitted that the impugned Judgment exposed them to immediate arrest and prosecution instigated by the interested party relating to LR. No. 11895/50. A draft memorandum of appeal was attached to the supporting affidavit. Counsel submitted that the intended appeal was arguable and shall be rendered nugatory if the orders prayed for are not granted.
 12. Ms. Lumallas maintained the respondents will not suffer any prejudice if the orders sought are granted because the criminal prosecutions are being instituted 14 years after the commission of the alleged offence. Conversely, the applicants will be gravely prejudiced if the orders are refused because they risk being subjected to unlawful prosecution and breach of their constitutional rights.
 13. Learned State Counsel Mr. Owiti for the 1st respondent in opposing the application reiterated his submissions dated 23rd August 2024 and urged that the intended appeal was neither arguable nor could it be rendered nugatory if the orders sought are refused. He maintained that the instant appeal emanates from criminal proceedings in Milimani Criminal Court and therefore the Director of Public Prosecution is properly on record for the respondents.



14. Mr. Owiti also contended that there being a similar application pending before the superior court, the instant application is sub-judice and it would be prudent to await for the Superior Court's ruling since an appeal on the same application might find itself before this Court. In support of his submission, counsel cited *Kinatwa Co-operative Savings & Credit Society Limited vs. Kinatwa Prestige Ltd* (Civil Suit No. E003 of 2021) [2021] KEHC 6611 (KLR) (31st May 2021) (Ruling) where the High Court held that the rationale behind *sub-judice* rule is to prevent having conflicting orders emanating from two or more different courts over the same subject matter.
15. Learned counsel for the interested party Mr. Khagram, reiterated the grounds in the interested party's replying affidavit as deposed by Mr. Evans Francis Muigai. He submitted that given that the applicants are enjoying interim stay granted by the High Court, the jurisdiction of this court under Rule 5 (2) (b) of the *Court of Appeal rules* cannot be invoked and the instant application ought to be struck out with costs since it's an abuse of court process and relied *Satya Bhama Gandhi vs. Director of Public Prosecution & 3 Others* [2018] eKLR in support of the said assertion.
16. Mr. Khagram also submitted that no notice of appeal has been filed against the impugned judgment, therefore this Court lacks jurisdiction to grant the orders sought in the instant application.
17. Regarding the filing of multiple applications for stay of execution, Mr. Khagram submitted that the appellant's conduct amounts to abuse of court process and cited *Kemusalt Packers production limited vs. Dubai Bank Kenya Limited (in Liquidation) & 2 Others* [2021] eKLR where the High Court abhorred filing similar applications in different courts seeking identical orders.
18. We have considered the application, the grounds in support thereof, the replying affidavits, submissions by counsel and the law. For the applicants to succeed in this application, they must satisfy the twin principles, namely: (a) they must demonstrate that their intended appeal is arguable, that is, it not frivolous; and, (b) that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory. (See *Reliance Bank Ltd. vs. Norlake Investments Ltd.* [2002] 1EA 227 and *Githunguri vs. Jimba Credit Corporation Ltd.* (No. 2) (1988) KLR 838).
19. First, we will address the question whether an order of stay of criminal proceedings is available to the applicant's considering that the trial court dismissed their judicial review application. In answering this question, we adopt the words of this Court in *Erdemann Property Limited & 2 Others vs. Ethics and Anti-Corruption Commission & 5 Others (Civil Application E372 of 2021)* [2022] KECA 860 (KLR) (10 June 2022) (Ruling) that:
 - "14. ... While the dismissal of the applicants' suit is a negative order incapable of execution, the applicants have not sought an order for stay of execution but have sought an order for stay of the criminal proceedings pending against them in the Chief Magistrates' criminal court. Under Rule 5(2)(b) of the *Court Rules*, this Court has power to grant orders for stay of criminal prosecution proceedings provided those proceedings have a bearing on the appeal before the Court. It is clear to us that the appeal arises from a constitutional petition, and that the criminal proceedings sought to be stayed formed the substratum of the suit in the High Court. It is therefore relevant to this appeal and the Court has jurisdiction to entertain the application."
20. On whether the intended appeal is arguable, the applicants have cited 9 broad grounds in their draft memorandum of appeal. Briefly, the grounds: (a) The learned Judge erred in law in holding that where leave was granted to operate as stay, that stay period expired upon the lapse of the timeline given to file the substantive judicial review application. (b) The learned Judge erred by asserting that the definitive



finding by the Court of Appeal in Civil Appeal Case No. 590 of 2019 in *Harish Ramji & 2 Others vs. Mombasa Cement* and Another that the title for LR No. 11895/50 was validly acquired by the appellants did not address the question whether it was forged. (c) That it is impossible for a title to be adjudged as validly acquired and then be subject to a subsequent criminal proceeding premised on fraud. (d) The learned Judge erred in fact and in law by finding that there was no threat to charge or arrest the appellants since no decision to charge them had been made by the 3rd respondent, yet a copy of the charge sheet was attached to the court documents.

21. We are alive to the fact that at this stage, we are not required to make definitive findings of fact or law. An arguable ground does not necessarily have to succeed. An arguable ground is one which merits consideration by the Court. Even one arguable ground will suffice. We have carefully considered the above grounds. At this stage, we are not required to make definitive findings of fact or law. That is a function for the Court which will hear the appeal. Upon considering the grounds cited, we are satisfied that the above grounds are arguable, therefore, the applicants have satisfied the first hurdle.
22. Regarding the nugatory aspect, the question is whether, absent an order of stay of the criminal proceedings, the appeal will be rendered useless to the extent that what the applicants seek to stop, if allowed to happen, is will be irreversible, and damages may not reasonably compensate them. (See *Reliance Bank Limited vs. Norlake Investments Limited* [2002] 1EA 227).
23. This Court in *Eng. Michael Sistu Mwaura Kamau vs. Ethics and Anti-corruption Commission & Others* Civil Application No. Nai. 173 of 2015 stated:

“... that each case is considered on its own merits. It is only in instances where there are trumped up charges, or the prosecution is not undertaken according to law, or it is actuated 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 the court as, indeed, this is a country that is governed under the rule of law and not the whims of the Director of Public Prosecutions, or any other person or authority.”
24. The essential focus at this stage is to examine the facts before us and satisfy ourselves that there exist exceptional circumstances to merit the stay sought, and to ensure that the appeal if successful will not be rendered nugatory. Courts should first consider whether or not there is anything in the trial to prevent a fair trial and if there is, then the court ought to stay the prosecution pending the hearing of the appeal.
25. As alluded to earlier, we are obligated not to delve into merits of the intended appeal. However, the existence of a judgment by the High Court determining the civil dispute between the parties and specifically the finding that fraud was not proved constitutes an exceptional circumstance which is a relevant factor in determining the issue under consideration. Without delving into the merits of the case, it is important to mention the provisions of section 44 of the *Evidence Act* which provides that:

- “(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.
2. Such judgment, order or decree is conclusive proof—



- a. that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
 - b. that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
 - c. that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
 - d. that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.
26. It is also important to mention that before us the interested party stated that it is appealing to the Supreme Court against this Court's decision. We say no more, save to mention that the fact that the finding on the alleged fraud will be a live issue in the said appeal and its finding may be used as evidence in the criminal trial.
27. It is also important to note that the dispute between the parties which culminated in the Court of Appeal the subject of the intended appeal to the Supreme Court was filed in the High Court in 2010. After the interested party's claim premised on inter alia alleged fraud was dismissed by Court of Appeal, the interested party lodged a complaint with the police in January 2024. The above uncontroverted facts, the existence of a Court of Appeal decision dismissing the allegations of fraud, the above cited provision of the *Evidence Act* and an intended appeal to the Supreme Court in our view constitute exceptional circumstances which should influence this Court in granting or refusing to grant the stay sought. In any event, a final decision by the Supreme Court will one way or the other have an impact on the criminal trial. Therefore, should the prosecution proceed, the intended appeal may also be rendered nugatory in the event it is determined in the applicants' favour. We are therefore persuaded that the applicants have surmounted the nugatory aspect.
28. Before we conclude, counsel for the interested party argued that the applicants have a similar application pending before the trial court which it described as abuse of court process. Indeed, the interested party has annexed a copy of the applicants' application seeking similar orders as those sought in the instant application. This allegation was not denied by the applicants. It is settled law that this Court exercises original jurisdiction under Rule 5 (2) (b) of the *Court of Appeal Rules, 2022*. However, the practice of filing similar applications before the superior court and this Court at the same time must be abhorred because it creates a fertile ground for courts to issue conflicting decisions. One wonders what would happen if the High Court were to grant the stay and this Court declines it and vice versa. In our respectful view, a party should choose one forum at a time to ventilate his grievance. Be that as it may, our determination of the instant application renders the stay application before the Superior Court otiose. (See *Mwakeli & 3 Others vs. Vipingo Development Limited & 2 Others, (Civil Application No. E060 of 2021)* [2022] KECA 1378 (KLR) (16 December 2022) (Ruling)).
29. In conclusion, it is our finding that the applicants have satisfied both requirements under Rule 5 (2) (b) of the *Court of Appeal Rules*. Accordingly, we allow the application dated 31st July 2024. We hereby stay the 3rd respondent's decision to arrest and prosecute the applicants pending the filing, hearing and determination of their intended appeal to this Court. The costs of this application shall abide the outcome of the intended appeal.



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

J. LESIIT

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M.GACHOKA C.Arb, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

