



REPUBLIC OF KENYA



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Kidero v Ethics & Anti-Corruption Commission & 13 others (Civil Application E003 of 2022) [2023] KECA 62 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 62 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E003 OF 2022
HM OKWENGU, FA OCHIENG & JM MATIVO, JJA
FEBRUARY 3, 2023**

BETWEEN

EVANS KIDERO APPLICANT

AND

**ETHICS & ANTI-CORRUPTION COMMISSION & 13
OTHERS RESPONDENT**

(Being an application for stay of proceedings pending hearing of appeal against the Ruling at Nairobi (Maina, J.) dated 25th November, 2021 in ACECA Civil Suit No. E008 of 2021)

RULING

1. A synopsis of the factual background to the several court cases between the parties herein among them the instant appeal culminating in the application dated December 20, 2021 the subject of this ruling is necessary so as to properly contextualize the issues presented in the said application. Fortunate for us, the history is largely uncontroverted.
2. Briefly, on April 29, 2019 the applicant herein together with 15 others were arraigned before the Nairobi Chief Magistrate's Court (Anti-corruption Court) in ACC Case No 8 of 2021 with several offences. As against the applicant the charges were:
 - a. jointly with others, they were charged with conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48 of the *Anti-Corruption and Economic Crimes Act* (ACECA). The particulars whereof were that they conspired to defraud the Nairobi City County Kshs. 58,000,000/=;
 - b. unlawful acquisition of public property contrary to section 45(1) (a) as read with section 48 of the *Anti-Corruption and Economic Crimes Act*. It was alleged that the appellant unlawfully acquired Kshs. 14,400,000/=.



- c. Alternatively, the appellant was charged with the offence of dealing with suspect property contrary to sections 47(1) and 48(1) of the ACECA, namely, the said sum of Kshs. 14,400,000/=.
 - d. He also faced the offence of money laundering contrary to section 3 as read with section 16(1) (a) of the *Proceeds of Crime Act and Anti-Money Laundering Act*, namely, the said sum of Kshs. 14,400,000/= which allegedly formed part of proceeds of crime.
3. Vide a petition dated September 10, 2019 the petitioner instituted Constitutional Petition No 366 of 2019 at the Constitutional and Human Rights Division of the High Court, Nairobi challenging the constitutional validity of the said arrest, detention, prosecution and the warrants authorizing investigations into his bank accounts. He sought a raft of reliefs among them a prayer that the criminal proceedings be quashed. The said petition was subsequently transferred to the High Court Anti-Corruption and Economic Crimes Division where it was assigned Number HCC ACEC Civil No 30 of 2019.
4. During the pendency of the both the petition and the criminal proceedings, by a plaint dated April 13, 2021 filed in the High Court of Kenya, Anti-Corruption and Economic Crimes Division, the 1st Respondent herein sued the applicant and others in High Court ACEC Civil Suit No E008 of 2021, *Ethics and Anti-Corruption Commission v Dr. Evans Odhiambo Kidero and Others*, seeking inter alia to recover the sum of Kshs, 58,000,000/= from all the defendants jointly and severally. In the alternative, it sought to recover from the applicant Kshs. 14,400,000/= and or a declaration that it is entitled to trace the said sum.
5. Aggrieved by the existence of three concurrent cases, namely, the criminal proceedings, the constitutional petition, and now the civil suit, by a notice of motion dated 21st June, 2021 the applicant applied to strike out ACEC Civil Suit No E008 of 2021 on grounds that it was an abuse of court process. Alternatively, he prayed that the suit be stayed pending the hearing and determination of HCC ACEC No 30 of 2019 and Anti-Corruption Criminal Case No 8 of 2019.
6. The grounds in support of the application were:
 - a. Civil Suit No ACEC E008 of 2021 arises from the said criminal proceedings and it is aimed at defeating HCC ACEC No 30 of 2019;
 - b. the civil suit was brought in bad faith and it will embarrass and delay HCC ACEC No 30 of 2019;
 - c. since section 48 of the ACECA prescribes punishment, it defeats justice to have a parallel civil suit because section 54 of the *Act* provides for compensation similar to what is sought in the civil suit.
7. The High Court (Maina, J.) by a ruling dated November 25, 2021, distilled the following issues:
 - a. whether the application met the test for striking out a suit;
 - b. whether the suit could properly co-exist with the criminal proceedings;
 - c. whether the suit will compromise the applicant's rights in the criminal proceedings; and
 - d. whether the decision in the suit will negatively impact on ACEC Petition No 30 of 2019. After evaluating the facts, the law and the authorities, the learned Judge was not persuaded that the case is an abuse of court process or that it is in public interest to stay the proceedings. The learned Judge also distinguished the authorities cited in support of the application and



dismissed it. Dissatisfied by the ruling, the applicant lodged a notice of appeal dated December 1, 2021 signifying intention to appeal to this Court and applied for typed proceedings vide a letter of even date.

8. By a notice of motion dated December 20, 2021 expressed under the provisions of sections 3, 3A & 3B of the *Appellate Jurisdiction Act*; rule 5(2) (b) of the *Court of Appeal Rules*, 2010, and all other enabling provisions of law, the applicant entreats this Court to stay the proceedings in ACEC Civil Suit No EOO8 of 2021 pending the hearing and determination of his appeal to this Court against the said ruling. He also prays that this Court grants such other relief as it may deem fit. Lastly, he prays that the costs of this application be provided for. Prayers (1) and (2) of the application are spent.
9. The grounds in support of the application are that the said suit arises from the Chief Magistrate's Criminal Case No ACC No 8 of 2019; that he has challenged the criminal charges in High Court ACEC NO 30 of 2019 in which he seeks inter alia to have the proceedings quashed; that if the civil suit is allowed to proceed concurrently with ACEC No 30 of 2019, there is a real likelihood of the three courts entering different decisions over the same subject matter regarding his culpability; that to allow the matters to proceed concurrently is an abuse of the court processes by the 1st respondent.
10. He also states that by dismissing his application on the grounds that nothing bars the EACC from concurrently prosecuting both civil and criminal matters over the same subject, the court ignored that the money could be recovered from the applicant upon the conclusion of the criminal trial if he is found guilty under section 54 of the ACECA. He states that the import of the impugned ruling is that the applicant is going to be subjected to a recovery process over the same subject matter that can be recovered at the end of the criminal proceedings. He states that he has an arguable appeal with high chances of success as demonstrated by the grounds listed in the draft memorandum of appeal.
11. Even though in her submissions counsel for the 1st respondent stated that she filed a response to the application, it does not appear to have been uploaded into the e-filing system, so, we did not have the benefit of reading it. Further, none of the other respondents filed a response despite having been served by way of an e-mail.
12. Prof. Ojienda SC, representing the applicant relied on his written submissions dated January 13, 2022. He cited *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission & 3 others* [2015] and *Republic v Kenya Anti-Corruption Commission & 2 others* [2019] eKLR in support of the holding that for proceedings to be stayed pending appeal, one has to have an arguable appeal, that the balance of convenience must tilt in favor of staying the proceedings and that an applicant must show that the appeal will be rendered nugatory if the proceedings are not stayed. He also relied on Misc App No 7 of 2016, *Ethics & Anti-Corruption Commission v Peter Mangiti & 17 others* [2016] eKLR; *Ethics and Anti-Corruption Commission v Jamal Bare Mohamed* [2019] eKLR and *Kenya Anti-Corruption Commission v Judith Marilyn Okungu & another* [2013] eKLR.
13. Prof. Ojienda SC, argued that the applicant has an arguable appeal that has high probability of success as outlined in the grounds in the draft memorandum of appeal. As for the nugatory aspect, he submitted that unless the proceedings are stayed this application and the appeal will be rendered nugatory, and if the civil case is determined first, the applicant will be rendered guilty in the criminal proceedings. Lastly, he argued that the balance of convenience lies in favour of allowing the application and that it is in public interest that the application be allowed.
14. Miss Ngethe, representing the 1st respondent relied on her submissions dated 19th January, 2022. Essentially, she submitted that the principles guiding applications under rule 5 (2) (b) were stated in *Stanley Njuguna v Tony Ketter & 5 others* [2013] eKLR, that the applicant must satisfy the court that he has an arguable appeal, that if the orders sought are not granted, the appeal if successful will be



rendered nugatory and that a third principle was added by the Supreme Court in [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR, whether it is in public interest that the order of stay be granted.

15. Miss Ngethe, counsel for the 1st respondent argued that the applicant lacks an arguable appeal, that the appeal challenges the mandate of the EACC to institute recovery proceedings under section 11(1) (j) of the [Ethics and Anti-Corruption Commission Act](#) during the pendency of a criminal trial. She argued that in dismissing the application, the High Court found that the law permits concurrent criminal and civil proceedings, so no prejudice can arise against the applicant in the circumstances. She cited section 193 of the [Criminal Procedure Code](#) and argued that the object of the two proceedings is different and that the determination of the civil proceedings will not influence the criminal proceedings.
16. On the nugatory aspect, she argued that having established that the applicant has no arguable appeal, the question of the appeal being rendered nugatory cannot arise. She cited [Benson Kwatenge Wafula v Director of Public Prosecutions Ethics and Anti-Corruption Commission & 2 Others \(Interested Parties\)](#) [2020] eKLR in support of the holding that there is nothing to suggest that the applicant will not be afforded a fair trial. She argued that there is nothing to show that the outcome of either case will have a bearing on the other and that the degree of proof in either cases is different. Counsel cited [Gatirau Peter Munya](#) (*Supra*) in support of the holding that conservatory orders unlike injunctions are not linked to irreparable harm occurring during the pendency of the case or a high probability of success in case of an application for stay. Further, conservatory orders should be granted on inherent merit of a case, bearing in mind public interest, the constitutional values and the proportionate magnitudes and the priority levels attributable to the relevant causes. Lastly, counsel submitted that devoid of an arguable appeal, public interest tilts in favour of the 1st respondent.
17. Even though the Director of Public Prosecutions was not named as a party in this appeal despite being a party in High Court ACEC No 30 of 2019 and despite being the body constitutionally ordained to undertake prosecutions, it was represented by a Miss M. Matiru who stated that they filed written submissions on 17th November, 2022. (However, the said submissions do not appear to have been uploaded into the e-filing system, so, we did not have the benefit of considering them). The essence of her submissions is that criminal proceedings can proceed simultaneously with civil cases. Further, that the appeal has no merits nor is there prejudice if both cases proceed simultaneously.
18. We have considered the facts, the opposing submissions and the authorities cited. The principles to be considered in exercising our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly, an applicant must satisfy the court that he/she has an arguable appeal. This does not mean the appeal that will necessarily succeed. Even one ground of appeal will suffice. It is an appeal that is not frivolous. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal will be rendered nugatory. These principles were restated by this court in [Multimedia University & Another v Professor Gitile N. Naituli](#) [2014] eKLR as follows:

“...the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in [Stanley Kangethe Kinyanjui v Tony Ketter & others](#) [2013] eKLR as follows:

- a. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge’s discretion to this Court.



- b. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - c. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 77.
 - d. In considering whether the appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - e. An applicant must satisfy the court on both the twin principles.
 - f. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - g. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
 - h. In considering an application brought under Rule 5(2) (b), the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
 - i. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - j. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
19. To benefit from the discretion of this Court, both limbs must be demonstrated to the court’s satisfaction. As to whether or not the appeal is arguable, we will consider whether there is at least a single bona fide arguable ground that has been raised by the applicant.
20. The 1st respondent’s counsel’s argument was that the law permits the existence of parallel criminal and civil proceedings. A similar line reasoning was adopted by counsel for the DPP who relied on section 193A of the *Criminal Procedure Code* in opposing the stay sought. On the other hand, the applicant’s counsel’s key argument as we glean it from his submissions is what he sees as the danger of conflicting decisions by the three different courts hearing the criminal case, the civil suit and the constitutional petition. He also argued that if the civil court finds against the applicant, his innocence in the criminal case risks being compromised.
21. In the High Court, vide the application dated 21st June, 2021, the applicant applied to strike out ACEC Civil Suit No E008 of 2021 for being an abuse of court process. Alternatively, he prayed that the said suit be stayed pending the hearing and determination of HCC ACEC No 30 of 2019 and Anti- Corruption Criminal Case No 8 of 2019. The application was dismissed by the ruling dated 25th November, 2021 against which the applicant desires to appeal.
22. In his application dated 20th December, 2021 the subject of this ruling, the applicant specifically prays that this Court stays the proceedings in ACEC Civil Suit No E008 of 2021, pending the hearing and determination of his appeal to this Court against the ruling dated 25th November, 2021. He also prays that this Court grants such other appropriate relief as it may deem fit, to give effect to the orders sought herein. Lastly, he prays that the costs of this application be provided for. Notably, before us there is



- no prayer seeking to stay the criminal proceedings. The application before us simply prays for stay of ACEC Civil Suit No E008 of 2021 pending the hearing of his Petition No ACEC No 30 of 2019. The only point of convergence is that the said petition seeks to quash the criminal trial.
23. We have read the Petition filed in ACEC No 30 of 2019. The prayers sought in the said Petition are all directed at the Chief Magistrates Criminal Case No ACEC 8 of 2019. There is no single averment in the Petition or a prayer relating to ACEC Civil Suit No E008 of 2021. The two suits are totally independent and distinct. The Petition challenges the warrants permitting investigations into the petitioner's bank accounts, his arrest and prosecution in the criminal case. He seeks to halt the criminal proceeding citing constitutional invalidity of the warrants, arrest, prosecution and the charges. The civil suit seeks to recover the money claimed. The civil suit was instituted by the 1st respondent pursuant to section 11(1) (j) of the *Ethics and Anti-Corruption Commission Act* which permits the Commission to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.
24. The boundary between the constitutional Petition and the civil suit is not blurred. The two suits stand on different legal thresholds. There is no danger or prejudice of conflicting decisions nor has it been demonstrated that the outcome of the civil suit will have a bearing on the petition. Civil proceedings, as distinguished from constitutional Petition, are adjudicated and concluded by adopting different yardsticks. In a constitutional petition, the onus is to cite the constitutional provisions alleged to have been violated and to prove the alleged infringement. (See *Anarita Karimi* Case). In the civil suit, the threshold is to prove the property sought to be recovered is public property and or proceeds of corruption. The two processes can exist concurrently and independent of each other. The outcome of one cannot injure the other. It has not been claimed that the applicant will not be afforded a fair trial in the petition. Based on the prayers sought in the application before us, and the submissions before us, we find and hold that the applicant has not established that he has an arguable appeal. On this ground alone, the application collapses.
25. Notwithstanding the above finding, and conscious that the draft memorandum of appeal and the submissions before us deviated into the criminal proceedings, we will address the said ground also on merit, at least to satisfy ourselves whether the applicant has raised an arguable ground. For starters, section 193A of the *Criminal Procedure Code* provides for concurrent criminal and civil proceedings. The Singapore High Court in a 2022 decision in *Debenho Pte Ltd and another v Envy Global Trading Pte Ltd and another* [2022] SGHC 7, though not binding to this court is worth quoting. It held that the existence of parallel criminal proceedings per se is not sufficient as a ground to obtain a stay of the civil proceedings.
26. In India, both civil and criminal proceedings can be initiated simultaneously with distinct impetus and objective. The Supreme Court of India in *P. Swaroopa Rani v M. Hari Narayana* (AIR 2008 SC 1884) held that it is well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. It further cautioned that whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case.
27. Randy S. Eckers in an article entitled *Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, 1998, Hofstra Law Review, Volume 27*, defines parallel proceedings as: "Parallel proceedings are independent, simultaneous investigations and prosecutions involving



substantially the same matter and parties.” At page 112, he proceeds to elucidate circumstances under which a court can stop parallel civil and criminal proceedings. He states as follows:

“...The courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process or Fifth Amendment violation.’ Even if a defendant meets one of these requirements, a stay is not guaranteed. The court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment.” Absent special circumstances, both cases will probably proceed.”

28. In short, courts will not ordinarily grant a stay of civil proceedings simply by virtue of the existence of parallel criminal proceedings arising out of the same events or subject matter. This is the import of section 193A of the *Criminal Procedure Code* which expressly permits parallel criminal and civil proceedings. The above being the general proposition of the law, to surmount the arguability threshold, an applicant bears the burden of showing how the continuance of the civil action will lead to a “real danger of prejudice” against him in the concurrent criminal and civil proceedings. As was held by a Constitutional Bench of the Supreme Court of India in *M. S. Sheriff v The State of Madras and others* (AIR 1954 SC 379):

“No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.”

29. The Court of Appeal in *Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank and others* Nairobi Civil Appeal No 56 of 2012 [2013] eKLR held that:

“While the law (section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings” It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely a civil dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.”

30. The above decisions provide clarity on the scope of the “real danger of prejudice” test, as well as the competing factors which the courts will take into account in deciding whether an applicant has an arguable appeal to merit stay of the civil proceedings pending appeal or hearing of the criminal case.



To us, it was necessary for the applicant to satisfy the “real danger of prejudice” so as to at least satisfy the court that he has an arguable appeal.

31. Whether or not to stay civil proceedings pending the final determination of an appeal is a matter of judicial discretion, which is to be exercised after weighing various competing considerations. The burden is on the applicant to show that there is a real danger that the parallel continuance of the civil action, the criminal case and the petition will result in injustice in either of the proceedings and that the appeal will be rendered nugatory. This must be balanced against the plaintiff’s *prima facie* entitlement to have his civil claim heard in the ordinary course.
32. In relation to the factors relevant in determining whether the applicant would suffer a “real danger” of injustice or prejudice as a result of the concurrent civil and criminal proceedings, the following factors adopted in the English and Australian decision in *Jefferson Ltd v Bbetcha* [1979] 1 WLR 898 and *McMahon v Gould* (1982) 7 ACLR 202: are useful:
 - a. the possibility that the civil action might obtain such publicity as to influence criminal trial and deprive the accused a fair trial;
 - b. the proximity in time of the trial of the criminal proceedings to the trial of the civil action;
 - c. where the disclosure of the defence in the civil action by an accused enables the fabrication of evidence by Prosecution witnesses or interference with defence witnesses, resulting in a miscarriage of justice in the criminal proceedings;
 - d. the burden on the accused of preparing for both sets of proceedings concurrently;
 - e. whether the accused has already disclosed his defence to the allegations; and
 - f. the conduct of the accused, such as his own prior invocation of the civil process when it had suited him.
33. It remains necessary for the applicant to demonstrate that the precise steps which he is required to take in the civil action will have the effect of undermining the protections to which he is entitled to as an accused person in the criminal trial or in the Petition. For example, there is no suggestion that the applicant’s rights to a fair trial either in the criminal trial or the civil suit will be compromised. To us this would have been a formidable arguable ground. There is no suggestion that requiring him to plead a defence in the civil action would have the effect of undermining his privilege against self-incrimination or prejudice his presumption of innocence in the criminal trial or his prosecution of the petition. Again, this could have been an arguable ground, though not conclusive because when filing his defence in the civil action, a defendant is free to plead whatever facts he deems fit and considers relevant, for example, by denying the plaintiff’s allegations and putting forward a different version of events (the intended effect of which would be exculpatory rather than incriminating).
34. In a nutshell, we find and hold that the applicant has failed to surmount the arguability test. Having so found, we find no reason to address the nugatory aspect. However, it will suffice to mention that we find nothing to suggest that if the civil suit is determined, the petition or the criminal trial will be rendered nugatory. The upshot is that we find and hold that the applicant has not satisfied the twin principles for consideration in an application under Rule 5(2) (b) nor is it in public interest to stay the proceedings. Accordingly, we dismiss the application dated 20th December, 2021 with costs to the 1st respondent.



DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

