



Ndegwa & 3 others v Republic & another (Criminal Application E014, E015 & E016 of 2022 (Consolidated)) [2023] KECA 211 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KECA 211 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E014, E015 & E016 OF 2022 (CONSOLIDATED)
MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA
MARCH 3, 2023**

BETWEEN

**LILIAN WANJIRU NDEGWA 1ST APPLICANT
REGINA CHEPKEMOI ROTICH 2ND APPLICANT
STEPHEN OGAGA OSIRO 3RD APPLICANT
JIMMY MUTUKU KIAMBA 4TH APPLICANT**

AND

**REPUBLIC 1ST RESPONDENT
NANCY WAIHERA KIRURI 2ND RESPONDENT**

(An Application for stay of execution of the judgment and decree of the High Court of Kenya (E.N. Maina, J.) dated 30th day of June 2022 at Nairobi in Milimani ACEC Appeal No. 1 of 2018)

RULING

1. The 1st respondent, through the Office of the Director of Public Prosecutions commenced and preferred ten (10) counts of corruption related offences inclusive of the alternative charges, contrary to the provisions of the [Anti-Corruption and Economic Crimes Act, 2003](#) against the applicants and the 2nd respondent before the Chief Magistrate's Court at Nairobi in Nairobi Anti-Corruption Case No 7 of 2015. After hearing the evidence of the prosecution witnesses as well as the defence, the Magistrate's Court delivered its Judgment on January 11, 2018 and acquitted the applicants under section 215 of the [Criminal Procedure Code](#). It also important to note that the applicants had been acquitted of some other counts at no case to answer stage.



2. Dissatisfied with the judgment, the 1st respondent lodged an appeal in the High Court being ACEC Appeal No 1 of 2018 against the applicants and the 2nd respondent. The High Court in its Judgment dated June 30, 2022 allowed the appeal holding that the acquittal of the applicants on some counts as no case to answer stage as well as after a full trial was erroneous. Citing section 354 of the *Criminal Procedure Code*, the High Court remitted the case back to the trial court for it to place the applicants on their defence in those counts that the trial court had acquitted them at the no case to answer stage. Further, the order of the trial court acquitting the applicants after a full trial was reversed and substituted with an order of conviction on all the counts and the trial court was directed to take their mitigation and thereafter sentence them.
3. Aggrieved by the decision of the High Court, the applicants have lodged different notices of appeal pursuant to rule 59 of this Court's *Rules* and are desirous of pursuing the appeal challenging the decision of the High Court. In the pendency of the said intended appeals, the applicants are apprehensive that their intended appeals though arguable, may be rendered nugatory should this Court not grant an order of stay of execution of the said judgment, since the trial court may proceed as directed by the High Court. They have therefore, filed various applications for stay of execution and or proceedings, in this Court. When the applications came up for hearing on September 26, 2022, Criminal Application Nos E014, 015 and E016, all of 2022 were consolidated with the lead file being Criminal Application No E014 of 2022. They are premised on the grounds already set out above and we need not rehash them.
4. The applications were further supported by the affidavits of the applicants. Those affidavits merely reiterate and expound the contents of the grounds in support of the motions hence the need again not to rehash them.
5. The applications were opposed by the 1st respondent vide the grounds of opposition dated September 21, 2022 in which it stated that the applications had been overtaken by events. That the intended appeals are therefore not arguable nor would they be rendered nugatory if the orders sought were not granted. That an unwarranted stay of proceedings delays the wheels of justice and the same should not be encouraged.
6. Parties filed written submissions with regard to their respective positions. On irreparable prejudice, the applicants submitted that the trial on counts that they had been acquitted of at the no case to answer stage will resume on August 1, 2022 with the applicants being placed on their defence which act will render the intended appeals spent and cause irreversible prejudice to them. According to the applicants, this will be an affront to the sense of justice, particularly, where penal consequences follow. That the High Court's Order that the appellants be produced specifically before the Chief Magistrate, Hon Mugambi and not any other judicial officer at the said court raises apprehension in the applicants' minds regarding their right to a fair trial.
7. On the arguability of the appeal, the applicants submitted that the direction by the High Court to convict the applicants and reverse their acquittal under section 210 of the *Criminal Procedure Code*, was bad in law in as much as it discriminates the applicants. Lastly, that the court had made an extremely erroneous finding that the applicants signed cheques without following the laid down procurement procedures under section 27(3) of the *Public Procurement and Asset Disposal Act*, a charge that was not in the initial charge sheet and yet it was used as the basis for their conviction by the High Court.
8. In response, the 1st respondent through Mr Okatch, learned Prosecution Counsel stated that it was clear that the High Court's mandate to re-evaluate the evidence tendered in the trial court and come out with its own independent decision was adhered to, hence its findings and did not make an error as purported by the applicants. If there was any, there was no bar for the applicants to seek a review.



That offences faced by the applicants were very serious and of economic nature and should be taken seriously. He further submitted that it was premature to state that the appeal will succeed whereas they have actually not argued the same. He thus prayed that the applications be dismissed for want of merit.

9. In reply, it was submitted that the response by the 1st respondent was omnibus and generous and did not address the principles for granting stay execution of the judgment and or order. That the 1st respondent had not given any reason whatsoever to dislodge the submissions made by the applicants. It was further submitted that an arguable appeal need not be one that must succeed, as one ground is sufficient to justify stay of execution of the judgment pending appeal. The argument that the applicants should have filed an application for review of the judgment instead of the intended appeals is baseless because the applicants had non- derogable rights under Article 50 (2) (q) to file the appeals.
10. We have carefully considered the application, the supporting affidavit, the grounds of opposition, respective submissions and the law. We are aware that an order staying criminal proceedings should be granted only in the most exceptional of circumstances. In *Goddy Mwakio & another v Republic* [2011] eKLR this Court stated that:

“ An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”.
11. The Court’s jurisdiction to grant stay orders is derived from rule 5(2)(a) of the *Court of Appeal Rules*.
12. The overriding “command” under rule 5(2)(a) of this Court’s *Rules* is found in the words “but the court may –”, which ideally means that the court has a discretion in the exercise of its mandate under the said rule. Similarly, as in the case of its twin sister rule 5(2)(b) of this Court’s *Rules*, the guiding principle on the exercise of judicial discretion is that it is unfettered. Other principles have been reiterated by this Court severally in numerous of its decisions for instance that of *Githiaka v Nduriri* [2004] 2 KLR 67 where the court held, inter alia, that the court’s discretion should be exercised judicially, that is to say, on sound reason rather than whim, caprice or sympathy with the sole aim of doing justice to the parties before it.
13. Besides bearing in mind the foregoing as we consider and determine this application, we shall also revert to the caution sounded by this Court in the case of *Berkeley North Market & others v Attorney General & others* [2005] eKLR thus ;

“ At this stage, on an application to stay criminal proceedings, it is not for this Court to make a final determination: we only need to be satisfied that a sole bona fide contention is not unarguable or frivolous.”
14. Being cautious about the above and also having warned ourselves of the dangers of any attempt to stray into the arena of the merits of the pending proceedings, we are satisfied that the intended appeals raise fundamental issues of law, for instance, whether the learned Judge erred in law and fact in reversing the entire judgment of the trial court and ordering the applicants to be put on their defence on counts that they had been acquitted of at the no case to answer stage and after a full trial and be sentenced on the others, and lastly, in holding that the applicants acted in blatant violation of the law governing Public Procurement hence committed the offences charged and that they ought not therefore to have been acquitted. These issues are indeed sufficient to invite the 1st respondent’s response and also deserving of this Court’s consideration.
15. On the nugatory aspect, in this case the applicants being compelled to appear before the same magistrate who had already pronounced himself on whether or not the applicants had a case to answer,



may prejudice the applicants' rights to a fair trial. From the look of things, it appears as though the High Court had directed the trial court on how to proceed with the case and the possible outcome, which may be a violation of fair trial provisions, and, if the proceedings are not stayed, will no doubt render the intended appeals nugatory. A party cannot be told to await the outcome of a flawed process and thereafter seek a review as counsel for the 1st respondent seems to suggest.

16. In the result, we are satisfied that the applicants have made out a case warranting the exercise of the Court's discretion in their favour. Accordingly, there shall be stay of execution of the judgment of June 30, 2022 in Nairobi HC ACEC Appeal No 1 of 2018 as far as it directed the subordinate court to continue with the criminal proceedings against the applicants.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

G. W. NGENYE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

