



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Juma v Republic (Criminal Application E035 of 2022)
[2023] KECA 557 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 557 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E035 OF 2022
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
MAY 12, 2023**

BETWEEN

ABDULRAHMAN IMRAAN JUMA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for stay of the Ruling and Orders delivered on the 28th day of November 2022 (D. O. Ogembo, J.) pending the hearing and determination of an intended appeal in High Court Criminal Appeal No. E165 of 2022)

RULING

- 1 In this Notice of Motion dated December 9, 2022 brought under rule 5(2) (a) and rule 31 of the [Court of Appeal Rules](#), and Article 159 of the Constitution the applicant, Abdulrahman Imraan Juma is seeking that;
 - a. Pending the lodging, hearing and determination of the applicant's intended appeal this Court be pleased to stay execution of the order and or Judgment together with all consequential orders flowing therefrom arising from the Judgment/Ruling delivered on 28th November 2022 in Criminal Revision No. E 165 of 2022; and
 - b. Pending the lodging, hearing and determination of the Applicants intended appeal, there be stay restraining the Respondent from returning and or permitting or authorizing the extradition of the applicant to the United States of America.
- 2 The applicant's motion is brought on the grounds set out on its face, substantive of which are that; the applicant was subjected to extradition proceedings in the Chief Magistrates' court in Misc. Criminal Application No. E 4167 of 2021 to face charges before the United States District Court for the Central District of California for the offences of;



- 1 Count 1: Conspiracy to commit wire fraud in violation of Title 18, *United States Code (U.S.C)* section 1349.
- 2 Count 2: Conspiracy to commit Money Laundering, in violation of Title 18 U.S.C Section 1956 (H).
- 3 Count 3: Aggravated identity theft, in violation of Title 18 U.S.C. Section 1028A(a) (1) and 2(a).

3 Upon hearing the application and the parties, the trial court ordered the extradition of the applicant; that being dissatisfied with the trial court's decision, the applicant filed High Court Criminal Appeal No. E 165 of 2022 in the High Court, and simultaneously lodged an application for stay of execution pending the hearing of the appeal. After hearing the application in a ruling dated 28th November 2022 the High Court dismissed the application for stay for the reason that the applicants appeal was not arguable, and neither would it render the appeal nugatory.

4 Aggrieved by the decision of the High Court, the applicant filed a notice of appeal to this Court against the High Court's decision so as to lodge a substantive appeal. In the meantime, the High Court granted him a stay of 20 days to enable him pursue an appeal in this Court. The applicant's case is that the period of stay has since lapsed, and unless this Court is pleased grant stay orders of the trial court's decision, the applicant will be extradited to the United States.

5 It was further asserted that the applicant has strong grounds of appeal to the effect that the learned judge treated the matter before him as a revision whereas it was a substantive appeal; that the judge did not appreciate that the trial court adopted a procedure based on submissions during the trial which was not unprocedural as it denied him the right to a fair trial which was in violation of his constitutional rights; that further, the judge did not consider the contention that the extradition bundle did not include the extradition request without which, no extradition proceedings could lie; that the judge misdirected himself in failing to have regard to the very clear and explicit provisions of section 7 of the *Extradition (Contiguous & Foreign Countries) Act*, Cap 76 which sets out the proper procedures to be followed; and that the failure to follow the laid down procedures has occasioned a grave miscarriage of justice.

6 The application is supported by the affidavit of Wandugi K.K Karatite advocate for the applicant sworn on 9th December 2022 in which he reiterates the grounds on the face of the application and further deposed that though the applicant had lodged High Court Criminal Appeal No. E 165 of 2022, being a first appeal against orders of extradition to the United States of America issued by the trial magistrate, in a ruling delivered on the 28th November 2022 the learned judge declined to grant orders of stay pending the hearing of the appeal, for the reason that the applicant had not demonstrated that he had an arguable appeal; that the refusal to grant the stay order has exposed the applicant to extradition out of jurisdiction of the court, as a consequence of which he will be unable to prosecute his appeal if he is extradited, which would render the appeal nugatory.

7 The respondent filed grounds of opposition dated January 12, 2023, opposing the application on the grounds that the intended appeal cannot be canvassed before this Court before the appeal filed by the applicant in High Court Criminal Appeal No. E 165 of 2022 is determined and as such the doctrine of ripeness had not crystallized which will offend the provisions of article 165 of *the Constitution*; that this Court will be usurping the jurisdiction of the High Court if it determines the issues contained in the draft memorandum of the intended appeal; and that the same issues contained in the draft memorandum of appeal are pending determination before the High Court and this offends the rule of sub judice.



- 8 Furthermore, it was asserted that the applicant has not met the threshold requirements set out in rule 5 (2)(b) of this Court’s rules for the grant of the orders sought; that the applicant has not set out any arguable points of law for consideration and determination by this Court; that additionally, the appeal will not be rendered nugatory if the orders of stay being sought are not granted, because the appeal before the High Court is yet to be set down for hearing and determination, before any appeal can be filed in this Court; that this application is a gross abuse of the court process and an afterthought, and is intended to delay and subvert the course of justice by causing different courts to issue ruling and judgments based on the same set of facts and circumstances and that the applicant has to date not set down High Court Criminal Appeal No. E 165 of 2022 for hearing after the application for stay was dismissed.
- 9 In a replying affidavit sworn on January 12, 2023, Njoki Kihara, Prosecution Counsel for the respondent depones that the application is devoid of merit for the reasons the learned judge properly exercised his jurisdiction and dismissed the application for stay; that the learned judge did not treat the application as a revision as alleged by the applicant that the word "revision" in the ruling is an error.
- 10 The respondent further argued that the learned judge properly exercised his discretion and scrutinized the record and came to the conclusion that the appeal was not arguable with any chance of success and neither would the intended appeal filed by the applicant be rendered nugatory should the order of stay not be granted; that further the notice of motion was premature, misconceived and intended to delay the determination of the appeal pending before the High Court, and that this Court has no jurisdiction to hear and determine the questions and issues raised in the draft memorandum of appeal of High Court Criminal Appeal No. E165 of 2022.
- 11 In their submission, counsel for the applicant Mr Wandugi submitted that applicant was merely seeking to be afforded the opportunity to prosecute his appeal, but if he is extradited to the United States of America he will be removed from the jurisdiction of the Court, so that were the applicant’s appeal is to be successful, any orders made would be rendered nugatory; that applicant’s appeal is arguable since the *Extradition (Contiguous & Foreign Countries) Act*, Cap 76 does not list the offences the applicant is facing as extraditable offences; that the applicant is being dragged into a vicious and completely unjustifiable process and prays this Court order a stay of execution of the orders arising from the ruling delivered in the High Court.
- 12 We have considered the motion and the parties’ submissions. To begin with, the applicant’s motion is premised under rule 5 (2) (a) of the *Court of Appeal Rules* which provides that;
in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”
- 13 In the case of *Jayendra Khimji Malde & 2 Others vs Republic*, Criminal Application No. Nai 14 of 2010 (unreported) Githinji, JA opined that;
It is apparent from the wording of Rule 5 (2)(a) as read with rule 59 that the rule applies to cases where the applicant has already been convicted and sentenced either by the subordinate court, or by the High Court.”
- 14 This would mean that, in view of the nature of the instant motion, rule 5 (2) (a) of this Court’s rules was inappropriate, since the applicant is neither seeking an order for bail nor a warrant of distress, but is seeking to stay the orders of the High Court. It would mean that the applicant’s motion for stay ought to have been premised under rule 5 (2) (b). Given this error on the applicant’s part, we will invoke our inherent powers and apply rule 5 (2) (b) to the circumstances of this case so as to ensure that the ends of



justice are served. Having said that, the question would arise as to whether this Court can grant orders of stay under the specified rule in criminal proceedings.

15 In the case of *Manilal Jamnandas Ramji Gobil vs Director of Public Prosecution* [2014] eKLR this Court observed that;

16 This Court may grant stay orders in criminal proceedings pending before the subordinate court only on appeal arising from the decision of the High Court...”

The Court continued;

17 To benefit from the discretion of the Court the applicant must satisfy the Court that first, his appeal is an arguable one, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory. These principles are now well settled in a host of the decisions of this Court including *Trust Bank Limited and Another v Investech Bank Limited & 3 Others* (Civil Application No. Nai 258 and 315 of 1999 (unreported))...”

18 With due reference to the above guidance, we turn to consider firstly, whether the intended appeal is arguable. In the application that is before us, the applicant seeks a stay of execution of the decision of the High Court. In the memorandum of appeal annexed to the application, the applicant has set out several grounds in which he complains that the learned judge treated the matter before him as a revision, whereas it was a substantive appeal; that further the judge did not appreciate that the trial court adopted a procedure on submissions which was not legally tenable during trial and denied him of his rights to a fair trial which was in violation of his constitutional rights; that further, the judge did not consider the contention that the extradition bundle did not even have the extradition request without which, the extradition proceedings were irregular; that the judge misdirected himself in failing to have regard to the very clear and explicit provisions of section 7 of the *Extradition (Contiguous & Foreign Countries) Act*, Cap 76 which sets out the proper procedures to be followed, but which were not adhered to.

19 In considering the grounds advanced, it is apparent that they pertain to the trial court’s decision as opposed to the High Court’s decision. However, there is the complaint that the learned judge determined the matter before him as revision as opposed to a substantive appeal. For their part, the respondent asserts that the learned judge did not treat the application as a revision, but erroneously included the word “revision” in the ruling. Whatever the case, it remains necessary to ascertain whether the judge determined, the matter as a revision or a substantive appeal or an application for stay of execution so as to negate any possibility of a miscarriage of justice. The foregoing notwithstanding, we bear in mind that an arguable appeal need not necessarily one that will of necessity, succeed.

20 In reiterating the attributes of an arguable appeal in the case of *Stanley Kang’ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR this Court stated;

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.”

21 As concerns the nugatory aspect, it goes without saying, and having regard to the circumstances of the case, the applicant’s extradition is imminent and were this to happen, the pending appeal will be overtaken by events, and would be rendered nugatory in the event that it were to succeed.

22 In the circumstances, the applicant having satisfied the two threshold requirements under rule 5 (2) (b) of this Court’s rules, the notice of motion dated December 9, 2022 is merited and is allowed. Costs in the intended appeal.

23 It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A.K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

