



REPUBLIC OF KENYA



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**Wainaina & another v Republic (Criminal Application E030 & E032 of 2022
(Consolidated)) [2023] KECA 727 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 727 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E030 & E032 OF 2022 (CONSOLIDATED)
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
JUNE 9, 2023**

BETWEEN

JUNGHAE WAINAINA 1ST APPLICANT

LILIAN WANGIRI NJENGA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(An application for stay of criminal proceedings before Chief Magistrates Court at Nairobi pending the hearing and determination of this application and the appeal of the decision of the High Court of Kenya (E. N. Maina, J.) dated 6th October, 2022 in Nairobi HC ACEC Appeal No. 6 of 2020)

RULING

1. The two applicants herein were among three others who were charged on the March 17, 2014 with 8 counts of various corruption related offences under the provisions of the [Anti-Corruption and Economic Crimes Act](#) and the [Penal Code](#), in the Chief Magistrate's Anti-Corruption Court Milimani Case No 4 of 2014. The same arose from an alleged allocation and transfer of the parcel of land known as Nyandarua/Njambini/5852 measuring 25 acres from the Settlement Fund Trustees to Midlands Limited. The case was heard before the Magistrate's Court, and in a ruling delivered on May 20, 2020, the trial court acquitted all the accused persons under section 210 of the [Criminal Procedure Code](#). The respondent being aggrieved by the outcome, filed an appeal in the High Court.
2. In its judgment dated October 6, 2022, the High Court overturned the decision to acquit the applicants. Instead, it directed the applicants and other co-accused to be put on their defence before the same trial magistrate. Being aggrieved by the said decision, the applicants have proffered an appeal against the decision to this court vide a notice of appeal dated October 13, 2022. Pursuant to the said notice of appeal, the applicants have now filed the instant applications in which they seek orders that



pending the hearing and determination of the applicants' intended appeals, there be a stay of further proceedings in Chief Magistrate's Court at Nairobi Anti-corruption Case No 4 of 2014.

3. In respect of the 1st application, it is premised on the grounds that the applicant has an arguable appeal as can be discerned from the draft memorandum of appeal annexed to the application. The grounds he intends to advance are: that the High Court erred by failing to recognize that there is a distinction between a company and its Directors; that the applicant had appended signature to the transfer documents as a Director of Midlands Limited, a public company and not in his own personal capacity; and, further, preferring charges against him alone when the company had twelve Directors was discriminatory of the applicant.
4. That unless stay of the criminal proceedings are ordered pending the hearing of the intended appeal, the intended appeal will be an academic exercise even if it is successful, as the applicant would have been placed on his defence and the hearing proceeded based on a flawed prosecution. That the balance of convenience lies in his favour, in that, in the event that the appeal is unsuccessful, he would still be put on his defence without any prejudice and or violation of his constitutional rights. The application was further supported by the affidavit of the 1st applicant, which affidavit merely reiterates and expounds on the grounds above, hence the need not to rehash.
5. On the part of the 2nd applicant, the grounds in support of her motion were similar to those of the 1st applicant. Suffice to add that the High Court had put much reliance on the discredited evidence of PW8, Kipruto Arap Kirwa, during cross-examination, to find the process of allocation of the land in question to be illegal while disregarding the evidence of the majority of the prosecution witnesses who had testified that there was no iota of wrong in allocating the land. Further, that the learned Judge did not appreciate that failure to call the then Ministry of Lands Permanent Secretary, was detrimental to their case as had been found by the trial court. That if the orders are not granted, and the intended appeal is successful, the appeal would be rendered nugatory while infringing on the 2nd applicant's constitutional rights and fundamental freedoms, which include the right to a hearing by impartial court under Article 50 of the Constitution.
6. Both motions were opposed by the respondent through a replying affidavit sworn by Vincent Monda, Senior Assistant Director of Public Prosecutions. He deponed that the applicants though claiming violation of their constitutional rights as enshrined under Article 50(2) of the Constitution, had nevertheless failed to place any relevant material demonstrating how the proceedings in the trial court will or have violated their fundamental rights and freedoms. That it was not true that the High Court proceeded to make final determinations in its judgment as alleged by the applicants who were merely engaging the court in speculative exercise. The public interest outweighs the personal interests of the applicants; hence the balance of convenience should tilt in favour of the application being denied. That directions had been taken in accordance with the judgment of the High Court and the matter is slated for hearing on 28th and March 30, 2023. Accordingly, the application had been overtaken by events.
7. When the two applications came up for hearing, they were consolidated for ease of hearing since they sought the same prayers and arose from the same judgment of the High Court. The applications proceeded by way of written submissions. Mr Pareno and Mr Musyoka, learned counsel appeared for the 1st and 2nd applicants respectively whereas Mr Kimanzi, learned prosecution counsel represented the respondent.
8. According to the applicants, the issues for determination were whether they had demonstrated that they have arguable appeals, and secondly, whether the intended appeals shall be rendered nugatory if the stay orders are not granted. As to the first issue, the applicants submitted that they had raised several grounds of appeal in the draft memorandum of appeal annexed to their respective applications, chief



of which in respect of 1st applicant: that the High Court erred by failing to recognize that there is a distinction between a company and its Directors; that the 1st applicant had appended signature to the transfer documents as a director of Midlands Limited, a public company and not in his own personal capacity; and, further, preferring charges against the said applicant alone when the company had twelve Directors was discriminatory of the applicant.

9. As for the 2nd applicant, she intends to argue that the learned Judge in her judgment, had made definitive findings of which the end result was to tie the hands of the trial magistrate as the said trial magistrate will be proceeding on instructions from the said judgment. The definitive findings in the judgment included that the land in question was public land that was not available for allocation and that the same was allocated irregularly. That these findings will no doubt bind the trial magistrate.
10. As to the second limb, counsel for the applicants submitted that if the criminal proceedings against the applicants were to proceed, and they are placed on their defence, the intended appeals will be rendered nugatory and a mere academic exercise. That were the applicants to undertake their defences in the trial court, they will be going through a flawed process that would be out of proportion to their suffering. That should a stay not be granted, the effects of being placed on their defence, cannot be undone nor will it suffice for them to be compensated in damages.
11. In response, the respondent submitted that the applicants had filed an application in the High Court seeking for review of the decision of the High Court. That, in any case, the decision of the High Court had already been implemented and the matter is scheduled for defence hearing on 28th and March 30, 2023. Given these developments, any order of stay at this stage will not only prejudice the expeditious hearing of the case but equally will impugn on the provisions of Article 50(2)(e) of the Constitution. That since the orders of the High Court had been executed, the appeal will not be rendered nugatory. In any event, the applications as they were, had been overtaken by events subsequent to the judgment.
12. We have carefully considered the applications, the supporting and replying affidavits, respective submissions and the law. This Court's jurisdiction to grant stay orders is derived from rule 5 of the Court of Appeal Rules. Rule 5 (2) (a) 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. An order staying criminal proceedings should be granted only in the most exceptional of circumstances. In the case of Goddy Mwakio & Another vs. 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'.
14. The law as regards the principles that guide the Court in such an application are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, firstly, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Secondly, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory.
15. In the case of Berkeley North Market & Others vs Attorney General & Others, Civil Application No Nai 74 of 2005 (unreported), the Court rendered itself on the factors to be considered in an application for stay of criminal proceedings in the following manner: '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.'

16. From the record, we are satisfied, having looked at the draft memorandums of appeal annexed to the applications that the intended appeals would be arguable. We have already set out some of grounds elsewhere in this ruling and we need not rehash them. We are therefore satisfied that the applicants have demonstrated that they have arguable appeals sufficient to invite the respondent's response and also deserving of the Court's consideration.
17. Turning to the second limb, the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case. In this case, the applicants have been ordered to appear before the Chief Magistrate's Court, and in particular, before a specific magistrate for their defence hearing. Indeed, the respondent has confirmed that the date has already been fixed. We do not agree with the respondent that since the date has been fixed for defence hearing and directions given, the application has been overtaken by events, as the date taken is after the hearing and ruling on this application. We think that it will not serve the course of justice if the applicants were allowed to undertake their defence hearing when that order is the subject of the intended appeals. The weight therefore tilts in favour of the applicants.
18. We are persuaded that even if the appeal does not succeed, the applicants will still be available to take their defences. As a corollary, if the orders are not granted and the applicants undergo the process, the intended appeals will be rendered an academic exercise. Take for instance, if the applicants are found guilty and start serving a sentence when the appeal is pending. It is obvious that the applicants will be prejudiced if the sentences are served wholly or partially which can neither be undone, nor can compensation by way of damages do. In any event a party cannot be told to await the outcome of a process he is challenging and thereafter appeal.
19. In consequence therefore, we find merit in the applications. We are persuaded to exercise our discretion in favour of the applicants. Accordingly, an order staying the High Court decision in Nairobi ACECC Criminal Appeal No E06 of 2020 is hereby issued and will remain in force until the intended appeals are heard and determined. The applicants to file and serve the intended appeal within the next 60 days from the date of this ruling, failing which this order of stay will lapse.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

