



Kimaru v Director of Public Prosecution (Criminal Application E004 of 2023) [2023] KECA 1014 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 1014 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E004 OF 2023
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
JULY 28, 2023**

BETWEEN

JOSEPH MWANGI KIMARU APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

(A partial Appeal from judgment of the High Court at Machakos (M. Muigai, J.) dated 24th November, 2022 in Machakos HCCRA No. E072 of 2021)

RULING

1. The Office of the Director of Public Prosecutions “ODPP” preferred several charges against the applicant before the Chief Magistrate’s Court at Mavoko in Criminal Case No E435 of 2021. After the trial court heard the entire prosecution’s case on October 26, 2021, it made a finding that the applicant had no case to answer and acquitted him of all the charges under section 210 of the [Criminal Procedure Code](#).
2. Dissatisfied with the ruling, the respondent lodged an appeal in the high court at Machakos. In its judgment dated November 24, 2022, the high court allowed the appeal on some charges but dismissed the appeal on some others. Indeed, it ordered the applicant to be placed on his defence before any other court other than the one that acquitted him at no case to answer stage.
3. Aggrieved by the decision of the high court, the applicant has lodged a notice of appeal pursuant to rule 59 of this [Court’s Rules](#) and is desirous of pursuing the appeal wholly challenging the decision of the high court. However, he is apprehensive that his appeal, which he asserts is arguable, may be rendered nugatory should this court not grant an order staying further proceedings in the trial court. For this reason, the applicant approached this Court through a notice of motion on January 13, 2023, which was amended on May 15, 2023 pursuant to rule 5 (2) (a) of this [Court’s Rules](#). The applicant seeks that: this Court be pleased to order a stay of execution of the judgment of the Machakos HCCRA No E072



of 2021 - [Republic v Joseph Mwangi Kimaru](#), dated on November 24, 2022 pending the hearing and determination of the intended appeal against the said judgment.

4. The motion is supported by the grounds on its face which are reiterated in the affidavits of the applicant sworn on May 15, 2023, to wit that: the substantive appeal will be rendered nugatory and occasion a miscarriage of justice and will be prejudicial to the applicant should stay not be granted as the trial court will proceed to put him on his defence as directed by the high court; that he has an arguable appeal with good prospects of success as set out in the draft memorandum of appeal annexed to his affidavit in support of the application; that should the applicant be put on his defence, it would destroy the substratum of the appeal; that the balance of convenience tilts in favour of the applicant as the trial court found no sufficient evidence against him and the order of the learned Judge was equivalent to an order directing the trial court to convict them.
5. The application was not opposed by the respondent as there was no replying affidavit filed but we shall revert to this issue later in this ruling. The application was canvassed before us on June 5, 2023. The applicant relied on his submissions dated January 30, 2023. He submitted that this court has jurisdiction to stay proceedings as long as the applicant is able to prove that the proposed appeal is not frivolous and that success of the appeal will be rendered nugatory unless the stay is ordered.
6. The applicant relied on the case of [Berkeley North Market & 2 Others v Attorney General & 3 others](#) [2005] eKLR, for the proposition that in an application to stay criminal proceedings, it is not for the court to make a final determination but rather what is necessary is for the court to be satisfied that a sole bona fide contention is not unarguable or frivolous. It was the applicant's view that he had made out an arguable case as could be gathered from the draft memorandum of appeal annexed to the application. The grounds of appeal proposed to be argued include: whether the high court is vested with jurisdiction to grant substantive orders that have not been sought in the record of appeal; and, whether the appellants' right to a fair trial was violated by the high court when it ordered that he be put on his defence before a magistrate that did not have the opportunity to hear the witnesses as they testified and form an opinion on their demeanor.
7. As already stated the respondent did not file a replying affidavit to the application but found refuge in canvassing the application by way of written submissions dated June 5, 2023. It was the respondent's position that the applicant had not disclosed any exceptional circumstances to enable this court grant orders as was held in the case of [Goddy Mwakio & another v Republic](#) [2011] eKLR. That remitting the case back to the lower court for defence hearing does not in any way prejudice the applicant as he will have his day in court to defend himself.
8. We have carefully considered the application, the supporting affidavits, respective submissions, and the law. We are alive to the fact that an order staying criminal proceedings should be granted only in the most exceptional of circumstances. In the case of [Goddy Mwakio & Another v Republic](#) (*supra*) this court stated that:

“An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances”.

This Court's jurisdiction to grant stay of proceedings is derived from rule 5 of this [Court's Rules](#).

9. The application is for stay of proceedings in the lower court but out of an order issued by the high court. This court has power to grant stay orders in criminal proceedings pending before the subordinate court only on appeal arising from the decision of the high court. In saying so, we are fortified by the reasoning of Tunoi, JA. (as he then was) in the case of [Republic v the Kenya Anti-Corruption Commission & 2](#)



others Civil Application No Nai 51 of 2008 (UR,) in which dealing with the issue, the Judge expressed himself as follows:

“It would appear logical to say that it seems that the court can [grant an order of stay] if petitioned on time to stay the order and/or decree of the superior court which will in turn have the effect of staying the criminal proceedings in the superior court. Further, as to whether it can do so or not depends on the particular circumstances of each case and especially so, what exactly the applicant is asking the court to do and how the court is approached from my consideration of the above somewhat conflicting decisions I would hold therefore that whether rule 5(2) (b) of the Rules does apply to criminal proceedings and as to whether this court can issue an order for prohibition in a criminal case against the magistrate’s court pending appeal depends on what prayers an applicant is seeking under the rule and the particular circumstances of each case.”

10. In the application before us, we are called upon to exercise our discretion on whether or not to grant the prayers sought in the application. Before we get there, there is an issue that came up during the hearing. That even though served with the application, the respondent did not find it necessary to file papers in opposition to the application. Instead, it filed written submissions, which it relied on during the hearing of the application.
11. As stated by this court in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
12. Similarly, this court in the case of Avenue Car Hire & another v Slipha Wanjiru Muthegu Civil Appeal No 302 of 1997, held that no judgment can be based on written submissions, and that such a judgment is a nullity since written submissions are not a mode of receiving evidence set out under order 17 rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same court in Muchami Mugeni v Elizabeth Wanjugu Mungara & another Civil Appeal No 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence, deplorable.
13. We find no reason to depart from such novel findings of this court about the issue of written submissions being used as pleadings. To that end, we are of the considered view, and which we so hold that the application is unopposed. However, having said so, even if this was not the position, on the merits of the application, to benefit from the said discretion, the applicant must satisfy the court that first, his appeal is arguable, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory.
14. We are indeed satisfied having looked at the memorandum of appeal that the intended appeal would be arguable. The main issues in contention are whether a magistrate who did not hear the prosecution’s case may be ordered by the first appellate court to hear the defence case and whether the high court had jurisdiction to grant prayers not prayed for in the appeal. This in our view raises fundamental jurisprudential questions. We find that on this ground alone, the applicant has satisfied us that he has an arguable appeal sufficient to invite the respondent’s response and also deserving of this court’s consideration.



15. We now turn to the second limb that the appeal may be rendered nugatory if the orders sought are not granted. The factors which can render an appeal nugatory are to be considered within the circumstances of each particular case. However, in doing so, the court is bound to consider the conflicting claims of both sides. In this case, being compelled to defend himself against the order he has appealed against will obviously render the intended appeal nugatory.
16. Further, the applicant cannot be told to undergo the process which he considers flawed and then await the appeal's outcome.
17. Having said as much, we find that the application succeeds on merit too, and therefore we are persuaded to exercise our discretion in favour of the applicant. Consequently, an order staying the high court decision in *Machakos HCCRA No E072 of 2021* delivered on November 24, 2022 is hereby issued and will remain in force until the intended appeal is heard and determined.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

signed

DEPUTY REGISTRAR

