



**Muriuki v Republic (Criminal Miscellaneous Application
E018 of 2023) [2023] KECA 1397 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1397 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL MISCELLANEOUS APPLICATION E018 OF 2023
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
NOVEMBER 24, 2023**

BETWEEN

MAJOR J. K MURIUKI (130358) APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for stay of further proceedings in Court Martial No. 5 of 2021 from the ruling of the High Court at Nairobi (D. O. Ogumbo J.) in Criminal Revision No. E209 of 2022)

RULING

1. In the Notice of Motion dated May 2, 2023 brought under rule 5(2)(a) and 43 of the [Court of Appeal Rules 2022](#), the applicant, Major J K Muriuki seeks orders that pending the hearing and determination of the intended appeal this Court be pleased to stay any further proceedings in Court Martial Number 5 of 2021 sitting at Kahawa Barracks and any other relief deemed necessary in the circumstances of this case.
2. The applicant's motion is brought on the grounds set out on the face of the motion to wit; that the members of the court did not have any legal right to place an accused person on his defence as that right is a preserve of the Judge Advocate only; that the members of the Court Martial cannot be allowed to act without jurisdiction; that ruling on matters of law as prescribed by section 175 of the [Kenya Defence Forces Act](#) can only be made by a Judge Advocate whose decision is final and binding on the members of the court; that the ruling placing the appellant on his defence was delivered by the members of the Court and not the Judge Advocate. It was asserted that in the interest of justice the proceedings in the Court Martial be conducted in accordance with the law; that the current proceedings were an abuse of the process and tantamount to a mistrial.
3. The motion was supported by the affidavit of the applicant sworn on May 2, 2023 which deposed; that he was charged in a court martial and after the prosecution's case, in a ruling the members of



the court and not the Judge Advocate placed him on his defence which was in disregard of the law; that section 175 of the [Kenya Defence Forces Act](#) empowers the Judge Advocate to make rulings on matters of law which is final and binding upon the members of the court; that jurisdiction cannot be delegated by the Judge Advocate to members of the court who do not have the legal qualifications to make rulings on matters of law. It was further deponed that he thereafter filed an application for review to the High Court which dismissed the application; that, dissatisfied with the ruling of the High Court he orally applied for leave to appeal which application was allowed; that it is only fair and just that this application be allowed so that a distinction can be made between the powers of the Judge Advocate on the one hand and members of the court on the other in proceedings before a Court Martial; that the application was merited and in the interest of justice, the proceedings in that court should be stayed pending the appeal, which will be rendered nugatory if stay is not granted.

4. In a Replying Affidavit sworn by Colonel Symon Cheberek Yator, an advocate of the High Court and commissioned officer of the Kenya Defence Forces and Prosecuting Officer of the Court Martial on May 16, 2023, it was deponed that this Court should decline to grant the orders sought under rule 5 (2) (a) of this Court's rules, since nothing in the motion demonstrated that the appeal was either arguable, or that it would be rendered nugatory were the appeal to succeed and the orders sought were not granted.
5. During hearing of the application on a virtual platform, learned counsel for the applicant Mr. Were highlighting the submissions stated that the Court Martial proceedings were in violation of the written law and amounted to an abuse of due process as the proceedings of the Court were conducted ultra vires the law, and if allowed to proceed, then injustice would be occasioned to the applicant; that the Court Martial went against the provisions of section 175 of the [Kenya Defence Forces Act](#).
6. Counsel submitted that the learned judge failed to interpret section 175 of the [Kenya Defence Forces Act](#) correctly and failed to appreciate that there were no contradictions between and of the [Kenya Defence Forces Act](#); that the application raises a pertinent question of law which ought to be determined by this Court, and if a stay of proceedings was not granted, and the appeal were to succeed, it would be rendered nugatory because the Court Martial proceedings were based on an illegality.
7. Counsel contended that the Judge did not appreciate the mischief that section 175 of the [Kenya Defence Forces Act](#) sought to cure, given that all the members of the Court, save for Judge Advocate and the advocate for the accused, are employees of the complainant; that additionally, the Judge also failed to appreciate what was meant by the court having to consider only matters of law. It was argued that, the trial court having misconstrued the law in its determination, it was left to this Court to properly determine the issue on its merits. Counsel concluded that the stay of proceedings sought was necessary to ensure that the appeal was not rendered nugatory.
8. In rebuttal, learned counsel for the State Mr Kimathi, submitted that there is no specific prayer seeking to stay the orders of the High Court, and even if there was, the court had merely dismissed the application, thereby issuing a negative order, so that there was nothing for this Court to stay.
9. As a brief background to the application, the applicant was charged in a Court Martial. After the prosecution closed its case, the members of the court placed him on his defence. Dissatisfied by the ruling the applicant filed an application for revision to the High Court pursuant to sections 362, 364 (b), 365 and 366 of the [Criminal Procedure Code](#). Upon considering the application, the High Court dismissed the application for want of merit.



10. 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 the Court may;
- "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."
11. Given that the circumstances set out above are not applicable to the applicant's case, the applicant's motion for stay of execution 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.
12. 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))..."
13. Consequently, with respect to whether the appeal is arguable, the applicant argues that the learned judge misconstrued the meaning and effect of sections 175 and 177 of the [Kenya Defence Forces Act](#). If indeed this be the case, then we are prepared to agree that the appeal is arguable.
14. That said, it is not lost on us that though the instant application, seeks to stay the proceedings of the Court Martial, the order of the High Court against which the applicant seeks to stay was a mere dismissal. As submitted by the respondent's counsel, there were no orders issued that were capable of being stayed.
15. In the case of [George Ole Sangui & 12 others vs Kedong Ranch Limited](#) [2015] eKLR, this Court dealing with an application for stay of execution of a similar order of dismissal, had this to say;
- "In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted."
16. From the above it is clear that the High Court issued a negative Order that is incapable of being stayed, with the result that the orders sought are not capable of being granted. See also [Simiyu vs Kibera Chief Magistrates Court \(Thereafter Bungoma Chief Magistrates Court & 8 others\)](#) (Civil Appeal



(Application) E343 of 2021) [2023] KECA 1028 (KLR) and *Mbugua vs Mathara Holdings Limited & another* (Civil Application E169 of 2022) [2023] KECA 1033 (KLR).

17. In sum, the applicant having failed to satisfy all the requirements for rule 5 (2) (b) application, the Notice of motion dated May 2, 2023 is not merited and is dismissed. Costs in the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR

