Kariuki v Director of Public Prosecution & another (Civil Application E394 of 2023) [2023] KECA 1671 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KECA 1671 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E394 OF 2023

S OLE KANTAI, F TUIYOTT & A ALI-ARONI, JJA

DECEMBER 15, 2023

BETWEEN

DANIEL KIMANI KARIUKI ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... 1ST RESPONDENT

SYLVIA WAMBOI KARANJA ..... 2ND RESPONDENT

(An application for conservatory orders pending the hearing and determination of the intended appeal against the Judgment and order ((P. Mulwa, J.) dated 3rd August 2023 in H.C. Petition No. E022 of 2021)

RULING

1. This Court will not invoke its rule 5(2)(b) jurisdiction to stay criminal proceedings pending before a trial court instituted and undertaken by The Director of Public Prosecutions (DPP) unless the applicant points out an outright illegality or breach of law in the institution or conduct of the proceedings, or a violation of right which does not require protracted arguments; the illegality, breach or violation must be plain and obvious. (Michael Sistu Mwaura Kamau v Ethics & Anti-corruption Commissioner & 4 others [2017] eKLR). This holds true to prosecutions instituted and undertaken by other authorities contemplated by Article 157(12) of *the Constitution*.

2. Has the applicant, Daniel Kimani Kairuki, made out such a plain and obvious case? The background to the notice of motion dated 14th August, 2023 can be stated briefly.

3. On 19th September, 2018 the applicant was arraigned before Kiambu Chief Magistrate's Court on a charge of assault, on a complaint of Sylvia Wamboi Karanja (the 2nd respondent). The matter is part heard with the complainant having testified. The DPP then sought to amend the charge sheet

to include three counts of making fraudulent withdrawals from two separate accounts from the bank account of Bebadis Company Limited and the personal account of the complainant.

4. Displeased with this development, the applicant moved the High Court at Kiambu through Constitutional Petition of E022 of 2022 in which, in an amended notice of motion dated 7th December, 2021 sought the following orders:

> " 1. That pending interpartes hearing and determination of this application, a Conservatory Order be issued against the respondent, their agents, servants, employee and/or any other person acting on their behalf from proceedings with criminal case number 1591 of 2018 registered before the Chief Magistrates Court at Kiambu.
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> 2. That pending the hearing and determination of this application, a Conservatory Order be issued against the respondent, their agents, servants, employee and/or any other person acting on their behalf from proceedings with criminal case number 1591 of 2018 registered before the Chief Magistrates Court at Kiambu.
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> 3. That pending hearing and determination of the Petition a Conservatory Order be issued against the respondent, their agents, servants, employee and/or any other person acting on their behalf from proceedings with criminal case number 1591 of 2018 registered before the Chief Magistrates Court at Kiambu.
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> 4. That any other relief that this honourable court may deem fit and just to grant in the interest of justice.
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> 5. That the costs of this application be provided for."

5. The motion was unsuccessful and the entire petition dismissed in a judgment by Mulwa, J delivered on 3rd August 2023. The applicant is aggrieved and has lodged a notice of appeal evincing his intention to challenge the said decision on appeal.

6. Now before us is the applicant's motion in which he seeks two substantive orders:

> " 3) That pending hearing and determination of the intended appeal, this honourable court be pleased to grant a Conservatory Order to restrain the 1st Respondent from prosecuting the applicant in Kiambu Chief Magistrate Court criminal case No. 1591 of 2018 (Republic v. Daniel Kimani Kariuki)
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> 4) That this honourable court be pleased to grant a Conservatory Order on the judgment and order dated on 3rd August, 2023, in Petition, HCCHPET no. E022 of 2021 pending hearing and determination of the intended appeal."

7. The applicant urges that the intended appeal raises several arguable points. We are told that the learned judge did not consider the unchallenged evidence that the 1st respondent deliberately denied him his right to have adequate time and facilities to prepare a defence against the charges in counts II, III and IV; the 2nd respondent deliberately destroyed his laptop, stole two hard disks and a server which had copies of the CCTV footage that showed that he did not assault her; there is a private conversation between him and the 2nd respondent which is stored or saved in the server showing that the 2nd respondent had instructed him to make the withdrawals that are the subject of counts II and III. The applicant

contends that his complaint to the police about the theft of the server and the destruction of the laptop was investigated by the Directorate of Criminal Investigation (DCI) through the Kiambu Police Station but the 1st respondent has declined to act upon that investigation.

8. Regarding count 1, in which he is charged with stealing Kshs.990,000/- from Bebadis Company Limited, the applicant argues that the 1st respondent disregarded exculpatory evidence of the High Court order and ruling dated 21st November 2018 in ELC No. E115 of 2018 which held that he was the sole lawful person mandated to control all the affairs and operation of the company. Further, that the 1st respondent ignored two board resolutions of 18th October 2016 and 19th February 2020 which confirmed that he did not steal the money and was authorised to transact in the company's account No. 1340267658222. In addition, that the 1st respondent disregarded the ruling of the ELC MISC Case No. E135 of 2022 dated 5th October 2022 that he is the sole person mandated to appear in any court of law where the operations and affairs of the company are concerned.

9. The applicant is apprehensive that he will suffer penal consequences and possible deprivation of liberty and freedom by being sent to prison should the 1st respondents pursue the criminal trial; he will suffer shame and stigma connected to criminal proceedings, which cannot be reversed; and it is in the public interest for the order sought to be granted to forestall the suffering he will endure through criminal trial when there is high probability that such a trial will be declared not to lie.

10. Only the 1st respondent filed a response to the application. In a replying affidavit sworn by David Okachi, Senior Assistant Director of Public Prosecution, on 18th September, 2023, he stated that the applicant lacks locus standi; the application is an abuse of process of court; it is premature, vexatious, and frivolous; and it has been overtaken by events.

11. The applicant who acted in person filed written submissions dated 23rd August 2023 which he highlighted at plenary hearing. He submitted that the intended appeal is arguable because, while what was before court was the amended notice of motion the learned judge erred in dismissing both the motion and the petition. We are also told that the learned judge did not consider the issues raised in the amended motion and failed, for instance, to find that the charge in count 1 was malicious, oppressive, had no legal or factual foundation and that the DPP disregarded exculpatory evidence in preferring the charge; the 2nd respondent is neither an authorised officer or lawful director of the company and a complaint by her could not form the basis to prosecute or charge the applicant in court 1. He then regurgitated the grounds in support of the application to argue that the intended appeal will be rendered nugatory if stay is not granted.

12. In response at the plenary hearing, Mr. Okachi, Senior Assistant Director of Public Prosecutions appearing for the 1st respondent relied on his replying affidavit filed on 18th September, 2023. He submitted that the 1st respondent was acting within the parameters of the law and there were no orders restraining him from continuing to prosecute the matter before court; that the 1st respondent has sufficient evidence to proceed with the prosecution and is not controlled by anybody or person from executing that mandate; finally, that the application and appeal are a delaying tactic on the part of the applicant and the 1st respondent is ready to proceed with the matter as it is currently unless otherwise directed by Court.

13. The 2nd respondent was represented by Mr. Otwal learned counsel who filed written submissions on 27th August, 2023 which he highlighted at hearing. It was submitted that the orders made by the High Court were negative orders incapable of being stayed or executed. It was contended that the applicant has not demonstrated misuse or abuse of power, a mistrial,illegality, irrationally or impropriety on the part of the DPP to warrant a meritorious appeal. It was asserted that there is no prejudice to be

suffered by the applicant who has actively participated in the trial process including the hearing of the application to amend which he has zealously defended for two years.

14. Regarding the nugatory aspect, the 2nd respondent submitted that the criminal case against the applicant is before a judicial officer where only one witness has testified and the applicant has a right to challenge the evidence adduced through cross examination

15. While it is true that the ruling which is the subject matter of the intended appeal dismissed the request by the applicant to injunct the criminal case proceedings and is, therefore, a negative order, the jurisdiction under Rule 5(2)(b) also empowers the Court to order an injunction. Before us the applicant makes a plea for a Conservatory Order

16. In Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR the apex court differentiated Conservatory Orders from orders of injunction as follows:

> " Conservatory Orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory Orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory Orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

17. A Conservatory Order is a remedy which would ordinarily be in the realm of public law and is granted on different considerations from private law injunctions. Yet under rule 5(2)b) both a Conservatory Order or injunction will be granted to serve one ultimate purpose; to ensure that an arguable appeal is not rendered nugatory. Undoubtedly, therefore, this Court's jurisdiction to grant an order of injunction under rule 5(2)(b) is also the power to grant Conservatory Orders.

18. Having determined that the application is properly before us, we proceed to determine its merit bearing in mind the long settled principles for grant of an order under rule 5(2)(b) and which were well set in the case of Stanley Kang'ethe Kinyanjui v. Tony Keter & 5 Others [2013] eKLR as follows :

> " i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another [1989] KLR 459.
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> ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
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> iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin [1963] Ltd. [1990] KLR 365.
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> iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.
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> v. An applicant must satisfy the court on both of the twin principles.

vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

vi. 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. Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.

vii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

viii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

ix. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

x. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

19. Yet because the application seeks to prevent a public officer, the DPP, from carrying out his constitutional mandate, there is a public interest element and so the Court will only grant the Conservatory Order sought if the applicant shows an outright or overt illegality or breach or violation of that mandate that is so plain and obvious that does not require protracted argument.

20. We understand one complaint of the applicant to be that the learned trial judge determined the entire proceedings including the substantive petition when what was before her was a motion for Conservatory Orders. If that was so then the argument by the applicant that the decision went beyond the scope of what was before court is not frivolous. This one point alone demonstrates that the intended appeal is arguable.

21. Regarding the nugatory aspect, it is not lost on us that the applicant was arraigned in court in the year 2018 on a charge of assault, proceedings which are already part-heard. What irks the applicant is the expansion of that trial to include other charges which we have set out earlier. While the applicant asserts that the criminal proceedings against him on the expanded charge sheet places him at reputational risk, we think that if it is true that his reputation is likely to suffer because he is to face more charges then he will have already suffered as a result of already existing criminal proceedings which have been ongoing since 2018, five years now.

22. Second, it is not plain to us that there is a violation of the applicant's constitutional rights in bringing the amended charges. Take for instance the argument that the proposed count 1 is not sustainable on the basis of a complaint by the 1st respondent because she is not a director or official of the company. This can be countered by an argument that she is entitled do so in her position as a shareholder.

23. As to the contention that it is preposterous to charge him for alleged misdeeds in the conduct of company affairs when he was protected by court orders and is, in fact, implementing them, one just

needs to observe the dates of alleged offences and when the orders were granted. The orders were granted after that date of the alleged offences and an argument can be set up as to whether such orders can possibly have retrospective effect to provide a shield to the alleged criminal conduct. Yet if we were wrong in our observation, it has not been made clear to us why the applicant cannot deploy the argument he makes before us in his defence at trial. The same applies to the applicant's argument that by destroying the server and stealing the laptop, the 2nd respondent has disabled him from effectively conducting his defence. Evidence that the server was destroyed and the laptop stolen and its implications can be brought to the attention of the court seized of the criminal trial.

24. What we are saying is that we are unable to see any violation or breach of right or abuse of power that is so plain and obvious as to persuade us to grant an order stopping the DPP from discharging the mandate granted to his independent office by Article 157 of *the Constitution*.

25. The application is without merit and the notice of motion dated 14th August, 2023 is hereby dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

S. ole KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.