



**Kerema v Republic & another (Criminal Appeal E016 of 2021)  
[2022] KECA 173 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 173 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL E016 OF 2021  
W KARANJA, MA WARSAME & P NYAMWEYA, JJA  
FEBRUARY 18, 2022**

**BETWEEN**

**BENJAMIN NKAATE KEREMA ..... APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**EVA WAIRIMU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of criminal proceedings in Thika Chief Magistrate's Court Criminal Case No. 7344 of 2020 pending an intended appeal from the judgement & decree of the High Court of Kenya at Kiambu (Kasango, J.) delivered on 24th June, 2021 in HC Criminal Appeal No. E012 of 2020)*

**RULING**

1. The application before us is a Notice of Motion dated 23rd July, 2021 brought under Rule 1(2), 41 and Rule 47 of this Court's Rules for stay of criminal proceedings in Thika Chief Magistrate Criminal Case No. 7344 of 2020, Republic v. Benjamin Nkaate Kerema, pending an intended appeal from the judgement and decree of the High Court of Kenya at Kiambu (Kasango, J) in Criminal Appeal No. E012 of 2020.
2. The background facts are that the applicant was charged with three counts of obtaining money by false pretence contrary to section 313 of the Penal Code; forgery contrary to section 345 of the Penal Code and conspiracy to defraud contrary to section 317 of the same code. The particulars of the charge are that on diverse dates between 12th October 2016 and 4th September 2018 the applicant with the intent to defraud the 2nd respondent, Eva Wairimu, obtained 11,356,527/-, forged a stamp of National Cereals and Produce Board Narok Silos and falsely pretended to be in a position to lease land and carry out wheat farming. The applicant pleaded not guilty to all the three counts.



3. Before the commencement of the trial, the prosecution applied to withdraw the criminal case against the applicant under section 87(a) of the *Criminal Procedure Code* on the ground that the dispute was civil in nature and that a civil action had been filed by the 2nd respondent on the same dispute against the applicant. In a ruling dated 26th November, 2020 the Chief Magistrate's Court dismissed the prosecution's application based on the finding that the criminal case was not an abuse of the court process since forgery being one of the charges could not be subsumed into the civil proceedings.
4. Those findings provoked the applicant's first appeal before the High Court in Criminal Appeal No. E012 of 2020. The applicant also filed an application dated 11th December 2020 seeking to 'disturb the trial magistrate's decision'. The appeal was subsequently dismissed by the Court on grounds of incompetence; first, for being filed out of time, contrary to section 349 of the Criminal Procedure Code and secondly, by virtue of section 347 of the CPC which impedes the court from entertaining criminal appeals from interlocutory rulings made by the trial court in the course of the trial.
5. The parties to the appeal agreed to have the matter treated as a revision of the learned magistrate's finding on whether the law bars criminal proceedings involving a civil action instituted over the same dispute. In a judgment dated 24th June 2021, the learned Judge found no basis within the law to revise the learned magistrate's ruling. The Court held thus:

“The court in considering the application for withdrawal of a criminal case needs to be assured that DPP is acting in the public interest that such withdrawal will be in the interest of the administration of justice and that such withdrawal would be to prevent and avoid abuse of legal process. DPP failed to surmount the above tests. The trial court, in my view, cannot be faulted for having denied DPP the application to withdraw the criminal case”

6. That order declining revision of the trial court's order is the subject of the applicant's application before us seeking to stay the proceedings in the Chief Magistrate's Court pending his intended appeal.
7. The Notice of Motion is premised on the grounds that the intended appeal, raises arguable grounds involving important points of law including the unconstitutional encroachment by the High Court of the prosecutorial powers of the Office of the Director of Public Prosecution to discontinue criminal trials; that unless stay is granted the applicant's liberty and freedom will be under threat of deprivation through a trial that is skewed against him and actuated by malice and that the intended appeal will be rendered nugatory as his trial will proceed thereby continuing to contravene his fundamental rights. The respondents did not file any response to the application.
8. We have considered the application, the submissions by the applicant, and the applicable law. The applicant has invoked this Court's inherent jurisdiction under Rule 1(2). It is common ground that criminal proceedings before a magistrate's court will not generally be stayed pending an appeal from a decision of the High Court unless it is demonstrated that the prosecution is actuated by malice and there is an abuse of the court process.
9. In *Mary Ngechi Ngethe v. The AG & Another - C.A. Civil Application No. Nai. 157 of 2012 (UR)* the applicant sought stay of criminal proceedings before a subordinate court pending disposal of an appeal against a judgment of the High Court dismissing the applicant's judicial review application. The court held:

“This Court will issue and has issued as demonstrated by decisions we have referred to orders prohibiting magistrates' courts from proceeding with criminal trials where it found evidence that the trial was actuated by malice and abuse of process, where such prosecution was in



derogation of the appellant's constitutional rights and instituted with the pre-dominant and improper intent to harass and exert pressure on the appellant".

10. Similarly in *Diana Kethi Kilonzo v. Republic [2016] eKLR* this Court held:

“under the inherent jurisdiction of this court and pending disposal of appeals from the High Court, an order of stay of proceedings can issue where it is demonstrated that the prosecution is actuated by malice and there is abuse of the court process and/or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the applicant. The subordinate court criminal proceedings will also be stayed if it is demonstrated that the prosecution is instituted in derogation of the applicant's constitutional rights. The jurisdiction is sparingly used and only where the justice of the matter so demands.”

11. In considering the application before us, the applicant must also still demonstrate the twin principles; that the appeal is arguable and that if it were to succeed, the success would not be rendered nugatory unless a stay is granted.

12. From a preliminary and cursory look of the issues in this matter, it has not been demonstrated that the prosecution of the applicant was an abuse of the court process or was instituted for an improper motive. It must not be forgotten that the main function of this Court is to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law. In this instance, the applicant's appeal was improperly before the High Court.

It is not in dispute that the applicant did not follow the correct procedure in filing his appeal before the High Court. As correctly stated by the High Court no leave was sought and granted, therefore making the application incompetent. Furthermore, even where the appeal and application were treated as a revision of the orders of the learned magistrate as in this case, we note that the court simply agreed with the trial court and dismissed the applicant's attempt to stop his prosecution in the Magistrate's Court. In our view, the orders sought by the applicant are clearly meant to circumvent the orders of the High Court.

13. In the circumstances, we are not persuaded that the intended appeal is arguable. Again, it has not been demonstrated that the substratum of the dispute will be lost. Consequently, the application has no merit and is accordingly dismissed with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. WARSAME**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*



*SIGNED*

**DEPUTY REGISTRAR**

