



REPUBLIC OF KENYA



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**Zein v Republic (Criminal Application E001 of 2022)
[2022] KECA 607 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 607 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E001 OF 2022
W KARANJA, HM OKWENGU & MSA MAKHANDIA, JJA
JUNE 24, 2022**

BETWEEN

WALEED AHMED ZEIN APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for stay of execution from the judgment and decree of the High Court of Kenya at Nairobi (G. Nzioka. J) dated 29th November, 2021 in HC Cr. Applications Nos. 225, 226, 227 & 228 of 2021)

RULING

1. By a Gazette Notice No. 375 of 24th January 2020, Kahawa Law Courts was gazetted to handle cases of counter terrorism and other related high risk cases. As a result, the Office of the Director of Public Prosecutions (ODPP) started filing fresh counter terrorism and related cases in that court. In this regard, the ODPP wrote to the Chief Magistrate in charge of Criminal Cases at Milimani Law Courts that was handling those matters and requested that the pending partly heard matters before the court which related to counterterrorism be transferred to the new specialized court. In response, the learned Magistrate compiled a list of partly heard cases and listed them for mention on 15th April, 2021 for directions pursuant to section 81(2) of the Criminal Procedure Code (CPC).
2. The applicant's case was amongst the ten matters in the list which were to be transferred. It was by then listed for hearing for 3 consecutive days, 3rd, 4th and 5th May, 2021 and there was on record a caution by the court addressed to the ODPP against delaying the matter. The chief Magistrate prepared a list of the matters that were supposed to be transferred and sent the list to the Presiding Judge of the Criminal Division at the High court for the Judge to transfer the affected files. This was done without involving counsel for the parties affected by the intended transfer of their cases.



3. The Court initiated Criminal Application Nos. E225 of 2021 and E226 of 2021 whereby the applicant was indicated as the ODPP and the accused persons in the affected files were listed as respondents. The applicant (ODPP) sought to have the affected cases transferred to Kahawa Court pursuant to Section 81 of the *Criminal Procedure Code*.
4. The appellant herein opposed the application on grounds, inter alia, that the ODPP could have filed an application as provided for under Article 47 of *the constitution* rather than for the court to initiate the matter suo moto; the prosecution had caused the delay by failing to supply the documents on time and caused the hearing scheduled for 3rd September, 21st November 2020 and 9th and 10th March, 2021 to collapse and further the hearing scheduled for 3rd and 5th May, 2021 was frustrated by the prosecution; there were no allegations of bias against the chief Magistrate in handling the cases and no reasons had been advanced why there was confidence on the Kahawa Law Court to handle the cases; that if there was bond bail application the same would be done at Nairobi High Court and not Kiambu High Court yet Kahawa Law Courts fell under the jurisdiction of Kiambu Law Courts; the cases were registered in the month of March 2019, the accused were arrested in the month of January 2021 and the Kahawa Law Courts were established on 24th January, 2020 therefore it should hear the matters registered after that date; the transfer will infringe on the accused constitutional rights under Articles 19, 20, 21, 25, 27, 28, 48, 50(1)(2), (a), (e) and 157 of *the Constitution*; the prosecution was forum shopping and setting up a trial that shall result in a conviction and that the High Court had no jurisdiction to transfer the cases.
5. The objection was heard by way of written submissions and in a ruling dated 29th November, 2021 the objection was dismissed and the court directed that the cases be transferred to Kahawa Law Courts forthwith and the same be determined on priority basis due to the age of the matter.
6. It is this decision that the applicant herein is aggrieved with and has filed a Notice of Appeal dated 10th January, 2022 and annexed thereto a draft memorandum of appeal raising 7 grounds on appeal. In the meantime, the applicant, has filed the Notice of motion application dated 13th January, 2022 under rule 5(2)(b) and 42(1) of *this Court's rules* seeking, inter alia, orders as follows:-
 - 1) ...
 - 2) That there be stay of execution of the High Court ruling in Misc. Criminal Application No. E226 of 2021 and the consequential proceedings in the subordinate court at Kahawa Law Courts pending the hearing and determination of this application.
 - 3) That there be a stay of execution of the High Court ruling in Misc. Criminal Application No. E226 of 2021 and the consequential proceedings in the subordinate court at Kahawa Law Courts pending the hearing and determination of the appeal.
7. The application is premised on the grounds on its face and is supported by the affidavit of, Waleed Ahmed Zain, the applicant who in addition to the grounds deposes that: he was apprehended on 7th June, 2018 and remained in custody for 30 days while investigations were being conducted; he was later charged but the matter never proceeded for hearing; he has never been supplied with documents the prosecution intends to rely on and the ATPU Investigating Officer was summoned; the court issued summons against the Investigating Officer on 28th June, 2019 on missing documents; the case was slated for hearing on 10th March, 2019, 3rd September, 2019 and 21st November, 2019 but it never took off and was further delayed by the transfer process. He avers that the appeal is arguable but unless the application is allowed, his intended appeal will be rendered nugatory.
8. There is no replying affidavit or grounds of opposition to the application but the respondent filed brief submissions. In his submissions, the applicant urged that for this Court to grant stay he has to establish



he has an arguable appeal and that in the absence of stay it may be rendered nugatory. See [Berkely North Markel & 2 Others v Attorney General & 3 others](#) [2005] eKLR.

9. On arguability of the intended appeal, this Court is being urged that section 81(2) of the [Criminal Procedure Code](#) provides for the circumstances when a court can transfer a case which includes: the High Court acting on a report from the lower court; the High Court acting on an application by a party and the High Court acting on its own initiative. The applicant is trying to persuade us to find that the High Court ought to have disregarded the report from the subordinate court which was not seized of the matter through its letter dated 7th April, 2021. Further that the High Court itself had made an error in stating that section 81 of the [Criminal Procedure Code](#) had not given any guidance on the manner in which the report had to be initiated before the subordinate court or how it was to be presented at the High Court. Thus these were triable issues, which this Court would determine on appeal.
10. On the intended appeal being rendered nugatory, this Court was urged to find that the prosecution was choosing the court to proceed with in criminal matters, thus the intended appeal was challenging the improper transfer of cases and in the absence of stay, the proceedings at Kahawa Court would proceed to conclusion thus rendering the intended appeal nugatory.
11. In opposing the motion, the respondent urged this Court to find that it was not forum shopping at all on the transfer of the cases. The applicant had been charged on 8th March, 2018 with the offence of collection of funds for the commission of a terrorism act contrary to section 5(a) of the [Terrorist Act](#) 2012 amongst other offences. He was arrested on 22nd June, 2018. It is their submission that due process was followed and it wrote a letter dated 6th April 2021 to the Chief Magistrate at Milimani Law Courts, Criminal Division informing them that a new court had been established at Kahawa which was to hear and determine counter-terrorism and high risk matters. The High Court had the jurisdiction to transfer the case pursuant to section 81(2) of the [Criminal Procedure Code](#).
12. According to the respondent, grounds for staying a prosecution include: when the continuation of the proceedings would constitute an abuse of the process; when the resultant trial would be unfair to the accused and when the continuation of the proceedings would tend to undermine the integrity of the criminal justice system. The transfer of the case to Kahawa Court does not in any way constitute an abuse of the court process and that the applicant shall not suffer any prejudice or unfairness since the new court does not have any backlog of cases thus the matter would proceed expeditiously.
13. At the plenary hearing of the application, Mr. Kariuki Ben appeared for the applicant while Ms. Matiru appeared for the State. They both made brief highlights in support of their rival positions. We have considered the application, the grounds in support thereof, submissions by counsel and the law. For the applicant to succeed, he must satisfy the twin guiding principles that the intended appeal is arguable, (it is not frivolous), and that unless a stay is granted, the appeal or intended appeal if successful would be rendered nugatory. See [Githunguri v Jimba Credit Corporation Ltd](#) (no. 2) [1988] KLR 838 and [K. J. Industries Ltd v Kenya Commercial Bank Ltd](#) [1982-1988] I KAR 1088.
14. In our view, the entire application and intended appeal turns on one point, whether section 81(2) of the [Criminal Procedure Code](#) was complied with when the applicant's case was transferred to Kahawa Law Courts. Section 81(2) of the [Criminal Procedure Code](#) gives the High Court the jurisdiction to act on a report of the lower court or on an application by an interested party or even on its own initiative to transfer cases. The respondent herein had written letters informing the Chief Magistrate of the gazettement of the Kahawa Law Courts to hear matters relating to terrorism, under which offence the applicant had been charged. The Chief Magistrate's court acted on the request letter dated 7th April, 2021 and made a report dated 8th July 2021 to the High Court.



15. Section 81 of the *Criminal Procedure Code* is clear and totally unambiguous. The provisions were clearly explained to the applicant by the Judge when she made the order for transfer of the case. Section 82(2) provides that the High Court ‘may act on the report of the lower court, or on the application of an interested party, or on its own initiative’ to transfer a criminal matter from one subordinate court to another under circumstances outlined therein. In this case, the court acted on the report from the magistrate. It could even have acted suo moto or been moved by the ODPP. Either way the Court had inherent power to entertain the application and give the orders it did.
16. There is no demonstration of any prejudice that the applicant is likely to suffer by the transfer. He complains of delay but this appeal and the application for stay is actually one of the reasons the case has not been concluded. We are not persuaded on the arguability of the intended appeal. We hold the view that the intended appeal raises no arguable issues. It therefore, fails the first limb on arguability. It will, in the circumstances, be otiose for us to consider the nugatory aspect of the application. The applicant is required to demonstrate both arguability and the nugatory aspect and demonstrating only one limb will not be of much assistance to him. The two limbs of arguability and nugatory aspect being conjunctive, this application fails to meet the required threshold and is consequently dismissed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

I certify that this is a true copy of the original

Signed

.....

JUDGE OF APPEAL

DEPUTY REGISTRAR

