



**Erdemann Property Limited & 2 others v Ethics and Anti-Corruption Commission & 5 others (Civil Application E372 of 2021) [2022] KECA 860 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 860 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E372 OF 2021  
DK MUSINGA, HM OKWENGU & J MOHAMMED, JJA  
JUNE 10, 2022**

**BETWEEN**

**ERDEMANN PROPERTY LIMITED ..... 1<sup>ST</sup> APPLICANT  
ZEYUN YANG ..... 2<sup>ND</sup> APPLICANT  
ZHANG JING ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT  
INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT  
DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT  
LAKE BASIN DEVELOPMENT AUTHORITY ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application for stay of proceedings in CM A.C.E.C. No. 26 of 2019, pending hearing and determination of an appeal against the Judgment and Decree of the High Court (Anti-Corruption and Economic Crimes Division (Hon. Wakiaga J.) delivered on 28th September, 2021 in HC ACEC PET 20 OF 2019)*

**RULING**

1. Zeyun Yang and Zhang Jing (2<sup>nd</sup> and 3<sup>rd</sup> applicants), who are the directors of Erdemann Property Limited (1<sup>st</sup> applicant), were charged before the Magistrates' Anti-Corruption Court in CM A.C.E.C No. 26 of 2019 under the Anti-Corruption and Economic Crimes Act, for alleged engagement in irregular procurement and inflation of costs. The applicants moved to the High Court in High Court, ACEC Petition No. 20 of 2019 seeking to stop the criminal prosecution against them, on the grounds



that it was a violation of their fundamental constitutional rights under Articles 10, 27, 28, 47, 50 and 159. In a judgment delivered on 28<sup>th</sup> September 2021, the learned Judge dismissed the applicants' suit. Being aggrieved by that dismissal, the applicants have now filed an appeal to this Court

2. By a notice of motion dated 27<sup>th</sup> October 2021, the applicants have moved this Court under sections 3, 3A & 3B of the *Appellate Jurisdiction Act*, and Rule 5(2)(b) of the *Court of Appeal Rules*, 2010, for orders of stay of the criminal proceedings against them in the Chief Magistrates' Court, pending the hearing and determination of their appeal against the judgment of the High Court.
3. The application is premised on grounds that the criminal proceedings instituted against the 2<sup>nd</sup> and 3<sup>rd</sup> applicants in the Chief Magistrates' Court is an abuse of prosecutorial powers under Article 157 of *the Constitution*. This is because the prosecution is anchored on a purely commercial dispute, and is intended to frustrate the applicants from demanding the outstanding contractual amount of Kshs. 645 million due from the Lake Basin Development Authority (the 6<sup>th</sup> respondent), to the 1<sup>st</sup> applicant. Further, the applicants maintain that they have an arguable appeal as the learned Judge erred gravely in law in dismissing the applicants' suit, and misdirected himself in failing to address pertinent issues placed before him, including the violation of the applicants' constitutional rights. The applicants have filed a draft memorandum of appeal that they intend to rely upon. They maintain that their appeal will be rendered nugatory if the criminal prosecution proceedings in the Chief Magistrates' Court are allowed to proceed.
4. The applicants have also filed written submissions reiterating that they have an arguable appeal which may be rendered nugatory if orders sought are not granted. They argue that no prejudice shall be suffered by the respondents if the criminal proceedings are stayed and the appeal fails, as the criminal trial would simply proceed. Moreover, public interest demands that the possibility of wastage of public funds that may arise should the criminal trial proceed, and the appeal results in the trial being declared null and void, be averted.
5. The respondents did not file a replying affidavit to the motion but have filed written submissions in which they contend: that the High Court did not issue orders capable of being stayed; that the applicants have improperly invoked the provisions of Rule 5(2)(b) of the Court of Appeal Rules in seeking orders of stay of the criminal prosecution; and that the criminal prosecution is a matter of public interest as it involves a public body, and it is important that the applicants' culpability be addressed.
6. We have perused the application, the rival submissions, and the authorities cited. The applicants' motion is anchored on an appeal which arises from a suit that was initially filed in the Constitutional and Human Rights division of the High Court, but was subsequently ordered to be transferred to the Anti-Corruption and Economic Crimes division of the High Court. In the amended petition, which was subject of the impugned judgment, the applicants had sought several orders basically anchored on the allegation that the criminal prosecution against them were an abuse of the court process and a violation of their fundamental rights. The judgment of the High Court dismissing the suit overrides the interim conservatory order that was issued stopping the applicants' criminal prosecution, which means the prosecution can now proceed. This is what has prompted the applicants to seek orders from this Court to stay the criminal prosecution in the Chief Magistrates' court pending the hearing of the appeal which they have filed against the High Court judgment, and this would amount to reinstatement of the conservatory order.
7. The first issue that arises is whether such an order of stay of criminal proceedings would be available to the applicants under Rule 5(2)(b) of the *Court Rules*. Although the applicants have moved the Court



under Rule 5(2)(b) of the *Court of Appeal Rules*, we find it necessary to set out Rule 5(2) (a) & (b) of the Court of Appeal Rules in order to appreciate the jurisdiction conferred thereunder.:

- “(2) Subject to sub rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may-
- a. In any criminal proceedings, where notice of appeal has been given in accordance with Rule 59, order that the appellants be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;
  - b. In any civil proceedings where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

8. In *David Kipruto Chingi & Another v Director of Public Prosecutions & 2 Others* [2016] eKLR, the applicants were charged with various anti-corruption offences. They filed a judicial review application seeking to quash the charges and the judicial review application was dismissed by the High Court. They filed a notice of appeal and applied under Rule 5(2)(b) of the *Court of Appeal Rules* for stay of execution and an order to stop the criminal proceedings pending determination of the appeal. The Court (Mwilu, Mohammed and Otieno-Odek JJ.A.) while rejecting an application for stay of criminal proceedings, underscored the importance of recognizing prosecution as a legal mandate of the Director of Public Prosecutions as follows:

“In principle, it is not the work of the courts to interfere with other State Organs unless it can be shown that they violate *the Constitution*; each State Organ must be allowed to function without interference. See *Judicial Service Commission v Speaker of the National Assembly and 8 Others*, Nairobi HC Petition No. 518 of 2013). It is the duty of this Court to protect not only the functional, administrative and operational independence of the Office of Director of Public Prosecution but also to protect the applicants and ensure that in exercise of his functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”

9. In *Ian Gakoi Maina & 3 Others v Republic & Another* [2020] eKLR, Makhandia, JA. (Kiage, JA. concurring and Odek, JA. (being deceased)), clarified the scope of Rule 5(2)(a) of the Court of Appeal Rules as compared to Rule 5(2)(b) of the Court of Appeal Rules, and also addressed the circumstances in which the Court can grant stay when criminal proceedings are pending. This is what the learned judge stated:

“The applicants have not sought bail before us, nor is there a warrant of distress that they seek to have suspended. Furthermore, they have not been convicted or a warrant of distress issued against them as was the case in *Jayendra Khimji Malde & 2 Others v Republic* Criminal Application No. Nai 14 of 2010 (unreported) where Githinji, JA held that:

‘It is apparent from the wording of Rule 5 (2)(a) as read with Rule 59 that the rule applies to cases where the applicant has already been convicted and sentenced either by the subordinate court, or by the High Court.’

However, we note that 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.



In *Republic v The Kenya Anti-Corruption Commission & 2 Others* Civil Application No. Nai 51 of 2008 (Unreported) Tunoi, JA. (as he was then) in dealing with the issue of the jurisdiction of this Court to grant an order of stay of criminal proceedings, 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.”

10. The Judge then concluded that:

“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.”

I am therefore called upon to exercise my discretion on whether or not to grant the prayers sought in the application which I proceed to do.”

11. Makhandia, JA. also noted in the same decision the fact that an order staying criminal proceedings would only be granted in exceptional circumstances.

12. In *Diana Kethi Kilonzo vs Republic* [2016] eKLR, this Court (GBM Kariuki, Azangalala and Sichale JJ.A.) dealt with a similar application under Rule 5(2)(a) for stay of criminal proceedings pending the hearing of an appeal in a matter arising from the High Court. The Court expressed the following view:

“It is plain to us that the format of the above rule demonstrates beyond peradventure that an order of stay of execution, an injunction or stay of further proceedings is available where both sub rule 5 (2)(a) and 5(2)(b) are invoked. A stay of execution, injunction and stay of proceedings is not therefore limited to sub rule 5(2)(b) of the Rule. If the framers of the rules intended so, the paragraph ‘order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think’ would come immediately below and after the sub rule. Here it is designed to apply to both sub rule 5(2)(a) and 5(2)(b).”

13. The Court identified the following considerations in granting stay of criminal proceedings, which is relevant for our purposes:

“The upshot on the issue of jurisdiction is, therefore, that 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.

....



The applicant is still bound to demonstrate first that the appeal is not frivolous or that it is arguable and secondly, that if it were to succeed, the success would not be rendered nugatory unless a stay is granted. See this Court's decisions in *Reliance Bank Ltd. -v- Norlake Investments Ltd.* [2002] 1EA 227 and *Githunguri -v- Jimba Credit Corporation Ltd. & Others (No.2)* [1988] KLR 838.”

14. The applicants have filed a notice of appeal seeking to appeal the judgment of the High Court that dismissed their constitutional petition in which they alleged violation of their constitutional rights and sought declaratory orders and order of prohibition. While the dismissal of the applicants' suit is a negative order incapable of execution, the applicants have not sought an order for stay of execution but have sought an order for stay of the criminal proceedings pending against them in the Chief Magistrates' criminal court. Under Rule 5(2)(b) of the *Court Rules*, this Court has power to grant orders for stay of criminal prosecution proceedings provided those proceedings have a bearing on the appeal before the Court. It is clear to us that the appeal arises from a constitutional petition, and that the criminal proceedings sought to be stayed formed the substratum of the suit in the High Court. It is therefore relevant to this appeal and the Court has jurisdiction to entertain the application
15. The applicants have filed a memorandum of appeal wherein they have set out several issues that they intend to raise on appeal. The issues include determination of the applicable law to the dispute, the propriety of the impugned prosecution, the violation or threatened violation of the applicants' constitutional rights, and the existence of an arbitration clause for determination of a commercial dispute. In order to satisfy the requirement of arguability, the applicants need only establish one arguable issue. We are satisfied that the grounds raised by the applicants are bona fide issues capable of argument and are not frivolous.
16. As regards the nugatory aspect, the question is whether, absent an order of stay of the criminal proceedings, the appeal will be rendered useless to the extent that what the applicants seek to stop, if allowed to happen, is irreversible, and damages may not reasonably compensate them. (See *Reliance Bank Limited vs. Norlake Investments Limited* [2002] 1EA 227). It cannot be said that the criminal prosecution will be an irreversible event as the Court can set aside the findings of the trial court if the appeal is successful.
17. We also take note of the fact that the proceedings being of a criminal nature, there must be demonstration of exceptional circumstances to justify interference with the prosecution. The applicants are apprehensive that if the criminal proceedings against them proceed, they may be severely prejudiced. However, it is common ground that the court hearing the criminal proceedings has the obligation of ensuring that the applicants get a fair trial. The applicants also could appeal, should they not be satisfied with the decision of the Chief Magistrates' Court or the High Court. We find that the applicants are simply jumping the gun, as other than mere speculation, they have not demonstrated any exceptional circumstances to justify interference with the criminal prosecution.
18. We come to the conclusion that although the intended appeal raises arguable points of law, the same will not be rendered nugatory if the orders of stay of criminal proceedings are not granted. In order to succeed in their motion, the applicants must satisfy the twin requirements of Rule 5(2)(b) of the Court of Appeal Rules (see. *Republic v. Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).
19. The applicants having failed to establish that their appeal will be rendered nugatory, this application fails and is dismissed with costs. Dated and delivered at Nairobi this 10<sup>th</sup> day of June, 2022.

**D. K. MUSINGA (P)**

.....



**JUDGE OF APPEAL  
HANNAH OKWENGU**

.....

**JUDGE OF APPEAL  
J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

