



**Kithinji v Director of Public Prosecutions & another (Civil Application
E154 of 2022) [2022] KECA 1087 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1087 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E154 OF 2022
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
OCTOBER 7, 2022**

BETWEEN

JAMES NTHUKU KITHINJI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATES COURT AT NAIROBI KIBERA LAW

COURTS 2ND RESPONDENT

*(Being an application for stay of further proceedings pending an intended
appeal from the Judgment of the High Court of Kenya at Nairobi (A C Mrima,
J) delivered on 4th April, 2022 in Petition Miscellaneous E011 of 2021)*

RULING

1. The brief background of this application is that the applicant (James Nthuku Kithinji) was charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code* in Kibera Chief Magistrate's Court at Nairobi in Criminal Case No 743 of 2018 – Republic vs James Nthuku Kithinji.
2. Upon taking plea on June 12, 2018, the prosecution case proceeded to hearing whereupon the applicant was put on his defence on May 26, 2020.
3. Dissatisfied by the trial court's ruling, the applicant moved the High Court for revision in High Court Criminal Revision No 521 of 2020, which was disallowed on June 24, 2020 with orders that the file be returned to the trial magistrate for defence hearing and determination.
4. Further aggrieved by the decision of the High Court (Kimaru, J), the applicant filed a petition in the High Court of Kenya at Nairobi (Constitutional and Human Rights Division) being Petition Miscellaneous No E011 of 2021 seeking, *inter alia*: a declaration that the applicant's arrest by the



investigating officer violated his (the applicant's) constitutional rights guaranteed by article 29 (a) (the right not to be deprived of freedom arbitrarily or without just cause); a declaration that his arrest and charge violated his constitutional rights and, in particular, articles 27(1) –the right to equality and equal protection and benefit of the law), 27(4) – the right to freedom from discrimination by the State, and 28 – the right to human dignity; a declaration that the P3 report evidence was obtained in a manner that violated the applicant's rights or fundamental freedoms in the bill of rights, and that the said report was inadmissible, having allegedly violated article 50(4); a declaration that his constitutional rights to a fair hearing and fair trial guaranteed under article 50(1) and (2) had been violated in consequence of which there was a mistrial; an order that the P3 aforesaid was inadmissible as having violated article 50(4) of the Constitution; an order to terminate the 1st respondent's case against the applicant, and acquitting the applicant unconditionally; and costs.

5. In addition to the petition dated October 1, 2021, the applicant filed a notice of motion of even date seeking conservatory orders to temporarily stop the criminal proceedings in the trial court pending the hearing and determination of his petition. By an order given by Mrima, J the motion was subsumed in the petition and heard together.
6. Having heard the motion and the petition, the rival submissions of the applicant and the 1st respondent, the learned judge delivered his judgment dated April 4, 2022 dismissing the applicant's motion and petition.
7. Dissatisfied with the decision the applicant moved to this court on appeal on 33 grounds set out in his draft memorandum of appeal dated May 12, 2022, which we need not replicate here, but which we take the liberty to summarise and reframe as follows, namely that the learned judge erred in law and fact by: misapprehending uncontroverted facts and evidence of the applicant's alleged unlawful arrest; in failing to find that the decision to charge him was arbitrary; in failing to find that the P3 on the basis of which he was charged with assault was inadmissible; in failing to find that his trial was not fair; in failing to find that his constitutional rights had been violated; by hearing and determining his motion and petition together; and by declining to grant conservatory orders staying proceedings in the trial court.
8. By a notice of motion dated May 12, 2022, the applicant requests this court to stay the proceedings in the trial court, being Criminal Case No 743 of 2018, pending hearing and determination of his motion and the intended appeal. He also prays that costs of the application abide in the intended appeal. The motion is supported by the applicant's affidavit sworn on May 12, 2022, and by his written submissions, list and bundle of authorities both dated May 18, 2022, and a supplementary bundle of authorities dated August 1, 2022. Neither the 1st nor the 2nd respondent filed any affidavit in reply or submissions in opposition to the applicant's motion.
9. Having considered the applicant's notice of motion, the affidavit in support thereof, the draft memorandum of appeal annexed thereto, the applicant's written and oral submissions, we form the considered view that the motion stands or falls on two main grounds, namely whether the appeal is arguable, which is to say that it is not frivolous; and whether the appeal, if successful, would be rendered nugatory if stay of the proceedings in the trial court was not granted.
10. The principles that apply in applications under rule 5(2)(b) of the Court of Appeal Rules for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this court, and to which we now turn.



11. On the first limb of this twin principle, this court held in *Anne Wanjiku Kibeh vs Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, ie, not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
12. With regard to the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this court in *Yellow Horse Inns Limited vs AA Kawir Transporters & 4 others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
13. To our mind, the applicant’s intended appeal is arguable. As to whether it will succeed is not for us to judge, and at least not by this ruling. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted.
14. The term “nugatory” was defined in *Reliance Bank Ltd vs Norlake Investments Ltd* (2002) 1 EA p 227 at p 32 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case.
15. The circumstances of the applicant’s case are that declining to grant stay of proceedings in the trial court cannot by any stretch of imagination be said to render his intended appeal worthless, futile or invalid. To the contrary, the proceedings in issue are suitably designed to give him the opportunity to present his defence and challenge the evidence adduced by the prosecution. Moreover, the proceedings that he seeks to block would present him with a perfect opportunity to enjoy his constitutional right to fair trial and determination of the charge against him. Put differently, we fail to understand what prejudice or injustice is likely to be occasioned by giving the applicant the opportunity to present his defence, or how denial of stay of the proceedings in the trial would be discriminatory, violate his right to dignity, the right to equality and equal protection of the law so as to render the intended appeal nugatory.
16. In saying so, we take to mind the peculiar circumstances under which criminal proceedings may be stayed pending appeal. First, the applicant must show that the continuation of the proceedings would constitute an “abuse of process”; secondly, that the resultant trial would be unfair to him; and, thirdly, that the continuation of the proceedings would tend to undermine the integrity of the criminal justice system (see Chris Corns “*Judicial Termination of Defective Criminal Prosecutions: Stay Applications*” p 76 University of Tasmania Law Review Vol 16 No 1, 1977). Far from it, it is not true to say that being put on one’s defence in criminal proceedings amounts to abuse of process, unfairness, or that the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.
17. Indeed, it is more true to say that the constitutional discretion given to the 1st respondent ought not to be lightly interfered with. To our mind, trial courts are best placed to take and consider evidence and decide whether or not to place the applicant on the defence with the possibility of acquittal. Any attempt to erect barriers, as is the case here, with the intention of standing in the way of a fair trial would be in vain. Furthermore, the proceedings in the trial court are at the defence hearing. The applicant is yet to call the first witness (if any). He has ample opportunity to adduce evidence in his defence and challenge that of the prosecution as best he can.
18. In view of the foregoing, we reach the inescapable conclusion that the applicant has failed to satisfy the second limb of the twin-principle for a grant of the orders sought. Accordingly, his application lacks merit and is hereby dismissed with no orders as to costs. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.



H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

