IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPLICATION NO. 73 OF 2019 (UR. 6/2019)

CONSOLIDATED WITH

CRIMINAL APPLICATION NO. 74 OF 2019 (UR.7/2019)

BETWEEN

IAN GAKOI MAINA ..... 1ST APPLICANT

SUKHWINDER SINGH CHATTHE.....2ND APPLICANT

EPAINTO APONDO OKOYO .....3RD APPLICANT

CROSSLEY HOLDINGS LIMITED ..... 4TH APPLICANT

AND

REPUBLIC.....1ST RESPONDENT

ODONGO PHILIPS KABITA.....2ND RESPONDENT

(An application for stay of proceedings and orders of the Ruling of the High Court of Kenya at Nairobi (**Mumbi Ngugi, J.)** dated 7th *October, 2019* in **HC Misc. Appeal No. 21 of 2019**)

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RULING OF ASIKE-MAKHANDIA, JA

The office of the Director of Public Prosecution commenced and preferred several charges against the applicants before the Chief Magistrate's Court at Kisumu in **Criminal Case No. 429 of 2010.** After the honourable magistrate heard the evidence of 30 witnesses, he on 20th May, 2019 made a finding that the applicants had no case to answer and acquitted them under section 210 of the Criminal

Procedure Code. Dassatisfied with the ruling, the 1st respondent lodged an appeal in the High Court being **Misc. Criminal Appeal No. 21 of 2019** against the applicants. The High Court in its Judgment dated 7th October, 2019 and delivered on 9th October, 2019 allowed the appeal and ordered and or directed the applicants to be placed on their defences before the trial court thus reversing the decision acquitting them rendered by the trial court.

Aggrieved by the decision of the High Court, the applicants have lodged a Notice of appeal pursuant to Rule 59 of this Court's rules and are desirous of pursuing the appeal wholly challenging the decision of the High Court putting them on their defence. However, they are apprehensive that their appeals may be rendered nugatory should this Court not grant an order staying further proceedings in the trial court. That is why on 16th October, 2019 pursuant to rule 5 (2) (a) of this Court's rules, the applicants sought the following orders in two separate applications being criminal application numbers 73 and 74 of 2019 respectively;-

1. **Spent**

2. **That pending the hearing and determination of this application an interim order do issue staying proceedings and the**

applicants from being put on their defence in Kisumu Criminal Case No. 429 of 2010.

3. That pending the lodging, hearing and determination of the applicants' intended appeal there be stay of defence hearing and further proceedings in Kisumu Criminal Case No. 429 of 2010.

Or in the alternative

That pending the lodging, hearing and determination of the applicants' intended appeal there be stay of orders in Kisumu Criminal Case No. 429 of 2010.

4. That the honourable court be pleased to issue such orders that it deems fit and just to grant in the circumstances of this matter.

The two motions were supported by the grounds on their face which were reiterated in the affidavits of the applicants all sworn on 16th October, 2019, to wit that; the applications and the substantive appeals will be rendered nugatory and occasion a miscarriage of justice and will be prejudicial to the applicants should stay not be granted, the applicants have arguable appeals with good prospects of success as outlined in the draft memorandums of appeal annexed in their affidavits in support of the applications, should the applicants be put to their defences it would destroy the substratum of the appeal, the balance of convenience weighed in favour of the applicants as the trial court found no sufficient evidence against them and the order of the learned Judge was equivalent to an order directing the trial court to convict them.

As would be expected, the applications were opposed by the 1st respondent. In a replying affidavit sworn on 13th November, 2019 by **Nicholas Koech,** the investigating officer, he deposed that upon commencement of the trial in Criminal Case No. 429 of 2010 the same was stayed by the High Court in Kisumu in HCJRA No. 12 of 2010 which culminated in the filing of Civil Appeal Nos. 1 & 2 of 2013 by the respondent. The appeals were successful and stay orders by the High Court were set aside and paving way for the prosecution of the case. Thereafter, one of the accused persons, Addul Salim Elkindy filed High Court Petition No. 181 of 2016 challenging his prosecution which, upon full hearing, was similarly dismissed. The trial commenced in January 2018 and 30 witnesses testified for the prosecution after which 2 accused persons were put on their defence while the applicants were acquitted. The 1st respondent appealed to the High Court and the trial court ruling acquitting the applicants was set aside and the applicants were ordered to be put on their defences. On 1st November, 2019 the applicants were summoned to appear before the trial court on 18th November, 2019 for directions pursuant to Section 211 of the Criminal Procedure Code. The applicants had constitutional rights and safeguards including the right of appeal and therefore there was no likelihood that their appeals would be rendered nugatory if stay is not granted. It was further deposed that the applicants would suffer no prejudice should trial continue to conclusion. The trial had been halted for long and any further delay was not in the interest of administration of justice or expeditious disposal of cases. Finally, it was deposed that the applicants had not satisfied the conditions for grant of stay in criminal proceedings which could only be granted in rare and exceptional circumstances.

The application was canvassed before us by **Mr. Gichaba**, learned counsel for the 1st applicant, **Mr. Onsongo**, learned counsel for the 2nd, 3rd, 4th & 5th applicants and Mr. Ashimosi, learned counsel for the 1st respondent. At the commencement of the hearing the two applications were consolidated with criminal application No. 73 of 2019 being the lead file.

Mr. Gichaba relied on the supporting affidavit and authorities cited in submitting that the High Court directed the Chief Magistrate to put the applicants on their defences though the same magistrate had acquitted them under Section 210 of the Criminal Procedure Code for lack of evidence. The applicants had lodged notices of appeal and intended to lodge the substantive appeals within 7 days. The intended appeal would raise serious issues of law as to whether the same magistrate can proceed to hear the applicants on their defences when he had already ruled that they had no case to answer. Counsel argued that if stay is not granted and the defence hearing proceeds, the appeal will be rendered nugatory and will in effect become an academic exercise.

Mr. Onsongo in supporting the applications submitted first, that there was already an appeal No. 359 of 2019 filed and served. The appeal challenged the finding by the High Court that the applicants had a case to answer. The arguable point is whether a magistrate who has made a ruling under Section 210 of the Criminal Procedure Code can be forced to put an accused on his defence by the High Court. He faulted the High Court for failing to examine the exhibits tendered in evidence by the applicants. It was his further argument that the appeal would be rendered nugatory if the applicants were put on their defence and that no prejudice will be suffered by the 1st respondent if stay is granted for if the appeal is dismissed the hearing of the criminal case would proceed. This Court had jurisdiction to entertain the present application and the issues raised in the memorandum of appeal were not frivolous.

Mr. Ashimosi arguing in opposition to the application stated that the applicant should have invoked inherent jurisdiction. The appeals are not arguable at all and should stay not be granted the appeal will not be rendered nugatory given that should the applicants be convicted, they can always appeal.

I have carefully considered the application, the supporting and replying affidavits, respective submissions and the law. I am alive to the fact that an order staying criminal proceedings would be granted only in the most exceptional of circumstances. In **Goddy Mwakio & Another v Republic [2011] eKLR** this Court stated that:

"An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances".

The Court's jurisdiction to grant stay orders is derived from Rule 5 of the Court of Appeal Rules. Rule 5 (2) (a) provides that:

> **"in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal."**

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."**

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. To benefit from the said discretion the applicants must satisfy the Court that first, their appeals are arguable, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory as was set out in **Trust Bank Limited and**

Another v Investech Bank Limited & 3 Others (Civil Application No. Nai 258 and 315 of 1999 (unreported) that:

> **"The jurisdiction of the Court under rule 5 (2) (b) is … discretionary and it is trite law that to succeed an applicant has to show first that his appeal or intended appeal is arguable, [or that it is not frivolous] and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these must be considered against facts and circumstances of each case."**

In the case of **Berkeley North Market & Others v Attorney General & Others**, **Civil Application No. Nai. 74 of 2005** (unreported), the Court rendered itself on the factors to be considered in an application for stay of criminal proceedings in the following manner:

> **"At this stage, on an application to stay criminal proceedings, it is not for this Court to make a final determination: we only need to be satisfied that a sole bonafide contention is not unarguable or frivolous."**

I am satisfied having looked at the memorandum of appeal that the intended appeals would be arguable. The main issue in contention is whether a magistrate who has ruled under Section 210 of the Criminal Procedure Code acquitting an accused person on account of no case to answer can be compelled to put such an accused on his defence by the High Court. This in my view raises a fundamental jurisprudential question. On this ground alone, I am satisfied that the applicants have demonstrated an arguable appeal sufficient to invite the 1st respondent's response and also deserving of the Court's consideration. It was stated in **Dennis Mogambi Mang'are v Attorney General & 3 others (supra**) that:

> **"An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."**

Turning to the second limb, the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the court is bound to consider the conflicting claims of both sides. In this case being compelled to appear before the same magistrate who had already pronounced himself on whether or not the applicants had a case to answer may prejudice the applicants' rights to a fair trial. As it is and it would not be farfetched to assume that the High Court seems to have directed the trial court on how to proceed with the case which may be a violation of fair trial provisions; and if not stopped will no doubt render the intended appeals nugatory. A party cannot be told to await the outcome of a flawed process and thereafter appeal. In **Reliance Bank Ltd v Norlake Investments Ltd (2002) E.A. 227**, this Court stated thus*:*

> **"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined."**

In consequence therefore, I find merit in the application and I am persuaded to exercise my discretion in favour of the applicants. Consequently, an order staying the High Court decision in Nairobi Misc. Appeal No. 21 of 2019 is hereby issued and will remain in force until the appeals are heard and determined.

This Ruling is delivered pursuant to rule 32 (2) of the Court of Appeal rules, Odek, J.A having passed on. As Kiage, J.A concurs, it is so ordered.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

JUDGMENT OF KIAGE, J.A

I have had the advantage of considering in draft the Ruling of my learned brother Asike-Makhandia, J.A with which I fully concur with nothing useful to add.

Dated and delivered at Nairobi this 3rd day of April, 2020

P. O. KIAGE

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JUDGE OF APPEAL