



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & J. MOHAMMED, JJ.A)

CRIMINAL APPLICATION NO. 3 OF 2019

BETWEEN

KULDIP MADAN.....1ST APPLICANT

ASHUMAN MADAN.....2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

(An appeal from ruling and order of the High Court of Kenya at Nairobi (Ngenye, J.) dated 12th March 2019

in

Cri. Rev. Appl. No. 809 of 2018)

RULING OF THE COURT

[1] *Kuldip Madan* and *Ashuman Madan*, (the applicants) were arraigned before the Chief Magistrates' Court at Nairobi in **Criminal Case No. 2005 of 2017** where they were charged with the offence of falsely acquiring Letters of Administration in the matter of the **Estate of the Late Yogaish Madan Mohan Sapra**. In a ruling dated 23rd May, 2018 the learned magistrate rejected the charges declaring that they were defective under the provisions of **Section 89(5)** of the **Criminal Procedure Code**. In the said ruling, the trial magistrate stated that:-

“I also find that due to the inadequacy of the investigations conducted by the investigating officer, which is evident in the manner he has charged the accused persons in the fourth count which clearly should not be the case, the accused persons are likely to be prejudiced if they are asked to plead to the charges filed herein and this will occasion a miscarriage of justice”.

The learned magistrate also found the criminal case against the applicants was an offshoot of **High Court Succession Cause No. 26 of 2011** (*In the Matter of the Estate of the Late Yogaish Madan Mohan Sapra*) which matter was still pending before the High Court and ruled that the High Court was the right forum to deal with the issues laid before it to determine whether any of the grounds for annulment or revocation of the grant were satisfied.

[2] The Director of Public Prosecution (DPP) (respondent), made an application before the High Court seeking to invoke its revisionary jurisdiction under **Section 362** of the **Criminal Procedure Code**, to call for and examine the record of the lower court so as to pronounce itself on the legality and propriety of the learned magistrate's ruling and orders. The application was dismissed by **Ngenye, J.** in a ruling dated 11th March, 2019. In reaching that decision, the learned Judge considered the issue as to whether the learned magistrate had misconstrued the provisions of **Section 89(5)** of the **Criminal Procedure Code** which allows the court to refuse to admit any complaint or formal charge that does not disclose an offence. The learned Judge found that the facts disclosed a cognizable offence under the Penal Code and proceeded to revise the trial magistrate's order dismissing the charges.

This is what she stated in a pertinent paragraph of her ruling:

“While the genesis of the charges preferred against the respondents was the Succession Cause, it is clear that the charges

facing them are coherent charges framed within the provisions of Section 134 to 137 of the Criminal Procedure Code and as such should be the subject of a conclusive trial. Further, it is clear that the trial magistrate based his finding by equating the criminal proceedings to a bid to revoke the grant issued to the respondents. While that may be the logical conclusion that flows from the conclusion of the present trial, the fact is that if a criminal act is committed within the course of a civil or probate matter, nothing stops the investigators to investigate the criminal culpability element. I therefore align myself with section 193A of the Criminal Procedure Code which allows for civil and criminal proceedings to proceed concurrently. The respondents ought to disprove their involvement in the commission of the act at trial. Consequently, any criminal charges are in order and legal.”

[3] Aggrieved by that decision, the applicants lodged a Notice of Appeal indicating their intention to appeal against the decision by the learned Judge, revising the orders of the learned magistrate. They also filed the present application before us which is dated 19th March, 2019 seeking an order, in the main that there be a stay of the order of the High Court allowing the revision, reinstatement and ordering prosecution of the applicants pending hearing and determination of the appeal.

[4] This application is premised on the grounds stated on the face of the motion, and also in the supporting affidavits sworn by both applicants on 20th March, 2019. The grounds were argued before us by **Mr. Bwire** for the 1st applicant and **Mr. Ndubi** for the 2nd applicant. **Mr. Bwire** stated that the applicants have an arguable appeal; that the application for revision was an abuse of the court process; that the question of the legality or propriety of **Section 89(5)** of the **Criminal Procedure Code** had not been an issue for determination by the High Court and that the applicants would suffer irreparable harm if the respondent was allowed to proceed with the prosecution which would subject the applicants to an unfair trial. **Mr. Ndubi**, learned counsel for 2nd applicant, adopted the submissions by **Mr. Bwire** and added that the powers of the DPP under **Article 157(7)** of the Constitution should not be used to abuse the process in a Succession Cause which is an independent proceeding before the probate and administration court. Moreover, the issue of whether the grant should be annulled or revoked on the many grounds stated therein for trial overlap with the charges against the applicants. Both counsel entreated us to allow the application and grant the order of stay as prayed.

[5] The application was opposed by **Mr. O’Mirera**, Senior Assistant Director of Public Prosecutions. He submitted that the High Court properly exercised its revisionary powers as provided under **Article 165(6) &(7)** of the Constitution and **Section 364(5)** of the **Criminal Procedure Code**; that the applicants have not established an arguable appeal; that they have not shown how a trial for a cognizable offence which is defined under the Penal Code can possibly prejudice them and lastly, it was not within the province of the learned magistrate to make a determination on the succession dispute as what was before the court was only on the issue of the charge.

[6] We have considered the rival submissions within the parameters of **Rule 5 (2) (b)** of the **Court of Appeal Rules**. This Court’s jurisdiction in an application of this nature follows a well beaten path. In **Trust Bank Limited & Another vs. Investech Bank Ltd & 3 Others [2000] eKLR (Civil Application Nos. Nai. 258 & 315 of 1999)** this Court succinctly set out the twin prerequisites that an applicant must satisfy in order to benefit from the discretion of the Court as follows:-

“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.”

These principles remain the same even where as in this case the applicants are seeking an order of stay of criminal proceedings before the magistrate’s court.

[7] In reaching a determination of whether or not an appeal is arguable, we are alive to the fact that the grounds of appeal or a draft memorandum of appeal only need to disclose a single *bona fide* contention that is worthy of further interrogation by this Court. In **Berkeley North Market & Others vs. Attorney General & Others [2005] eKLR (Civil Application No. Nai. 74 of 2005)** the Court rendered itself on the issue in the following terms: -

“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 bona fide contention is not unarguable or frivolous.”

In the instant application, the applicants contend that they have an arguable appeal because the charges against them before the magistrate’s court were premature as the respondent had not completed investigations and for that reason the applicants would be unduly prejudiced if they are subjected to a trial which would eventually end up with an acquittal or conviction. The applicants therefore considered that they were in danger of undergoing an unfair trial.

[8] The intended appeal from the High Court, will involve a determination of whether in exercising its revisionary jurisdiction, the High Court erred in setting aside the order by the learned magistrate. In that regard this Court will be exercising its jurisdiction as a second appellate court as provided under **Section 361(7)** of the

Criminal Procedure Code. In the event only matters of law fall for determination.

[9] What are the arguable points of law disclosed in this application? We understand the applicants to be saying that they will not be subjected to a fair trial because the respondent had not concluded investigation to lay a basis for a criminal prosecution and that the alleged charges overlap with matters pending in a succession dispute. The principles of a fair trial are the bedrock of not only criminal but civil trials, and they are ring-fenced by the Constitution that spells out the fundamental rights of an accused person. Should it turn out in the trial that there was failure to comply with the law or procedure, those could be good grounds of appeal before the High Court by whoever is aggrieved by whatever decision reached by the trial court. It is common ground that the offence indicated in the charge sheet is provided in the Penal

Code. We are not in the least persuaded that a misapprehension or fear that the applicants will not get a fair trial is an arguable ground.

[10] On the nugatory aspect, where the applicants contend in their memorandum of appeal that the ruling: -

“shall cause confusion in the proceedings before subordinate courts especially given that High Court decisions are binding on subordinate courts, and shall frustrate legislative intention of section 89(5) of the Criminal Procedure Code.”

We are also not persuaded that the appeal will be rendered nugatory for the simple reason that it is the function and duty of criminal courts to try and determine cases before them guided by the purpose and principles of the Constitution as required by **Article 159(2)**. This Court will not interfere with that duty. The mandate of every court is defined in the law. See the case of **Timothy Isaac Bryant & 2 Others vs. Inspector General of Police & 7 others [2015] eKLR (Criminal Application No. Nai. 3 of 2014 (R))**. For that reason, we do not consider that the applicants’ appeal would be rendered nugatory.

[11] Accordingly, we find that we have nothing before us that would mandate us to interfere in the conduct of **Criminal Case No. 2005 of 2017**. The applicants have failed to satisfy us on the twin principles summarized hereinabove and as such, the application has no merit and accordingly fails. We therefore decline to exercise our discretion and instead order that this application be and is hereby dismissed.

Costs to be in the appeal

Dated and Delivered at Nairobi this 22nd day of May, 2020

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR