IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & GATEMBU, JJ.A)

CIVIL APPLICATION NO. 388 OF 2018

BETWEEN

BENSON KHWATENGE WAFULA ……......………….......….APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS …..........…RESPONDENT

ETHICS AND ANTI-CORRUPTION …..……... 1ST INTERESTED PARTY

THE BUNGOMA CHIEF MAGISTRATE'S

ANTI-CORRUPTION COURT ……...……..... 2ND INTERESTED PARTY

ATTORNEY GENERAL ……....…....……………. 3RD INTERESTED PARTY

(An application for stay of proceedings under Rule 5(2)(b) pending the hearing and determination of an appeal from the Judgment of the High Court, Anti-Corruption and Economic Crimes Division at Nairobi (Ong'udi, J.) dated 24th May, 2018

in

Misc. Application No. 4 of 2018)

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RULING OF THE COURT

The motion before us dated 21st December, 2018 is brought under **Rule 5(2)(b)** of the **Court of Appeal Rules**. The applicant **Benson Khwatenge Wafula** has for good measure also cited **Articles 159** and **164(3)** of the Constitution as well as **sections 3A** and **3B** of the **Appellate Jurisdiction Act**. The prayer falling for our consideration is framed thus;

> ***"THAT pending the hearing and determination of the appeal in Civil Appeal No. 264 of 2018 between Benson Khwatenge Wafula and the Director of Public Prosecutions & 3 Others in this honourable court, a stay of proceedings as against Benson Khwatenge Wafula the 8th Accused in Bungoma Chief Magistrates Court Anti-Corruption Case No. 1 of 2017 between Republic and Godfrey Sifuna Wanyonyi & 7 Others be and is hereby granted."***

On the grounds appearing on the face of the motion it is stated, first, that the applicant has a *"sound arguable appeal with high chances of success"*, for which contention some fourteen reasons are cited all of which revolve around the prejudice and injustice that the applicant will suffer by reason of the decision of the Director of Public Prosecutions to unconstitutionally, oppressively, prejudicially and unreasonably convert him from being a prosecution witness into an accused person whose right to a fair trial is therefore in peril of being violated irredeemably. The Director of Public Prosecutions is accused of *"gerrymandering"*, being impelled by malice and acting on *"contrived evidence"* of *"a non-existent offence."*

It is also contended that the applicant's said appeal would be rendered nugatory unless the stay sought is granted because his dignity will be irreparably damaged, he will be exposed to shame and stigma, and his right to fair trial will have been trampled upon through a criminal trial that is an abuse of process.

The applicant swore an affidavit on 21st December 2018 in support of the motion. Its contents mirror the grounds of the motion as we have summarized and we need not rehash them. We have carefully considered the said affidavit as well as those filed by the parties opposed to the motion which are to the general effect that the applicant has not, as he urges, satisfied the two principles on which this Court grants the interlocutory relief sought, namely; a demonstration of an arguable appeal and; also, that the said appeal is likely to be rendered nugatory unless stay is granted. We have also considered the rival submissions and cases cited. We did not hear the parties orally due to the prevailing Covid19 Pandemic.

We state at the outset that it is doubtful that this application as framed is properly before us. **Rule 5(2)(b)** is quite explicit in its terms;

"…The Court may –

….

(b) In 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 as the Court may think just."

The interlocutory reliefs of stay of execution and stay of proceedings must related to orders or proceedings of the court appealed. Where, as here, what are sought to be stayed are proceedings, not of the High Court whose orders are subject of the intended appeal, but the subordinate court, this Court ought to decline the invitation. See ***MARY NGECHI NGETHE vs. THE ATTORNEY GENERAL & ANOR*** Court of Appeal Civil Application No.

Nai. 157 of 2012 (UR); ***ENG. MICHAEL SISTU MWAURA KAMAU vs. THE ETHICS & ANTI-CORRUPTION COMMISSION & 2 OTHERS*** – Nairobi Civil Application No. 173 of 2015 and ***DIANA KETHI KILONZO vs. REPUBLIC [2016] eKLR*** where this was even more emphatic on the point and went as far as to state that we do not have jurisdiction to stay proceedings at Magistrate's Courts.

It is not lost to us that the High Court in the present case did not issue any orders capable of being stayed - which might well explain why the applicant did not seek a stay of its orders. It rejected and dismissed his petition to stop his prosecution in **Magistrate's Anti-Corruption Case No. 1 of 2017**. That negative order would not have been the subject of an application for stay of execution. There therefore is a sound basis on which the motion before us would fail on account of being incompetent.

But assuming that the application was competent, has the applicant satisfied the two limbs we have adverted to? Doubtless, he does raise arguments that are not entirely idle to the effect that having been previously treated as a prosecution witness and even recorded a statement and received summons to attend court for that purpose, it was unreasonable, unfair that the prosecution should resile from that position, turn around and make him an accused person. He argues that this implicates and violates his right to a fair trial. That argument is vehemently denied by the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission, named as *"2nd interested party"* though under the Rules it can only be a respondent herein.

A perusal of the grounds and the draft memorandum of appeal exhibited leads us to the conclusion that the intended appeal is arguable. We are cognizant that an arguable appeal needs only raise a single *bona fide* point worthy of consideration by the bench that will hear the appeal and it need not be one that must necessarily succeed. See ***CO-OPERATIVE BANK OF KENYA LTD vs. BANKING INSURANCE OF FINANCE UNION (KENYA) [2015] eKLR***. We therefore answer the first limb in the affirmative.

Regarding the nugatory aspect, we note that the thrust of the applicant's complaint is that he stands to be stigmatized and put to shame by the criminal proceedings. There is no denying that criminal proceedings bring with them anxiety, publicity and embarrassment but we do not think that such unpleasantness rises to the level of rendering the intended appeal nugatory in the full meaning of the term. See ***BANK vs. NORLAKE INVESTMENT LTD [2002] 1 EA 227.*** There have been no allegations made that the applicant will not be accorded the full extent of the rights he is entitled to as an accused person. Nor has it been alleged that the trial court has been, or will be unfair towards him and deny him the rights that accrue to him in those proceedings. There is also always the possibility that the trial could conclude in the applicant's favour. An acquittal would see him vindicated where he fears humiliation. In short, we do not see that the applicant has satisfied the second limb.

As the requirement is that to succeed under ***Rule 5(2)*** an applicant must satisfy not either, but both of the limbs, this application fails and is accordingly dismissed.

The costs shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. OUKO, P

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR