



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & J. MOHAMMED, J.J.A.)

NAIROBI CIVIL APPLICATION NO NAL. 348 OF 2019

BETWEEN

MAJOR ERASTUS HEZBON OTIENOAPPLICANT

AND

THE DIRECTOR OF MILITARY

PROSECUTIONS.....1ST RESPONDENT

KENYA DEFENCE FORCES2ND RESPONDENT

(An application for stay of proceedings and bail pending hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (W. Korir, J.) delivered on 31st October, 2019 in

PETITION No. 188 of 2019)

RULING OF THE COURT

BACKGROUND

1) By way of a notice of motion dated 5th November, 2019, **Major Erastus Hezbon Otieno** (the applicant), seeks orders that:

a) There be an order staying proceedings in **Court Martial**

Criminal Case Number 2 of 2019: Republic Vs. Major Erastus Hezbon Otieno pending the hearing and determination of the intended appeal by Major Erastus Hezbon Otieno against the judgment of the High Court (W. Korir, J.) delivered on 31st October, 2019.

b) The Applicant be released on bail pending hearing and determination of the intended appeal.

c) Costs.

2) In this motion that is filed under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Court Rules) **The Director of Military Prosecutions** is named as the 1st respondent while **Kenya Defence Forces** is named as the 2nd respondent.

3) The motion was supported by the affidavit of the applicant sworn on 5th November, 2019 in which he depones *inter alia* that on 18th February, 2019 he was arrested and detained in the barracks without being arraigned before court or subjected to legal process; that on 20th May, 2019, he lodged Constitutional Petition No. 188 of 2019 (the Petition) seeking *inter alia* orders to compel his release from custody; that on 27th May, 2019 all the parties named in the Petition attended the High Court which gave directions for the expeditious hearing and determination of the application and the Petition and fixed the matter for hearing on 19th June, 2019; and that on 30th May, 2019, the respondents arraigned the applicant before the Court Martial at Kahawa Barracks and charged him with the offence of conspiracy to defraud named civilians and attendant charges in **Court Martial Criminal Case No. 2 of 2019: Republic vs. Major Erastus Hezbon Otieno**.

4) The applicant further deponed that on 19th June, 2019, the Petition proceeded to hearing and judgment was delivered on 3rd October,

2019. Aggrieved by the judgment, the applicant filed a Notice of Appeal. It is the applicant's contention that the intended appeal is meritorious and raises substantial issues of law for trial and determination and has a high probability of success. The substantial issues of law include *inter alia* that the learned Judge erred: in failing to find and hold that the Court Martial lacks jurisdiction to hear and determine the charges, the same having been expressly ousted by the provisions of the Defence Forces Standing Orders, Chapter 19, Paragraphs 3, 4 and 5 which vest jurisdiction over all cases in which a civilian or his/her property is involved and in all cases where a Service Offender has a civilian accomplice; in finding and holding that the provisions of the Defence Forces Standing Orders: Chapter 19, Paragraphs 3, 4 and 5 vests in the Director of Military Prosecutions discretion to determine the forum for trial of cases in which a civilian or his/her property is involved and in all cases where a Service Offender has a civilian accomplice in civil courts; in failing to find and hold that Sections 53 and 140 of the Kenya Defence Forces act, No. 25 of 2012 are inconsistent with the Constitution and therefore null and void; and that the impugned judgment is not supported by the evidence, the facts and the law.

5) The applicant further averred that the intended appeal will be rendered nugatory, vain and moot if further proceedings are allowed in **Court Martial Criminal Case Number 2 of 2019: Republic vs. Major Erastus Hezbon Otieno**; that it is in public interest if further proceedings are stayed as it will save on public resources; that he has suffered in detention since he was arrested on 18th February, 2019; and that he be granted bail pending determination of his matter.

6) The respondents filed a replying affidavit on 9th December, 2019 sworn by **Brigadier Daniel Omondi Odeny**, a commissioned Senior Officer of the 2nd respondent and the Chief of Legal Services and Director of Military Prosecutions. In the replying affidavit it was deponed that the application lacks merit, raises no substantial issues of law and the applicant has not demonstrated that he has a *prima facie* case with a probability of success. It was further deponed that the High Court did not err in finding and holding that the Court Martial has jurisdiction to hear and determine the charge levelled against the applicant; that the jurisdiction of the Court Martial is granted by the Kenya Defence Forces Act and the same cannot be ousted by Standing Orders; that the provisions of paragraph 3,4 and 5 of the Defence Forces Standing Orders are subordinate to the provisions of the Kenya Defence Forces Act and cannot oust the jurisdiction of the Court Martial; that the charges levelled against the applicant are not within the purview of offences that have been expressly ousted by Section 55 of the Kenya Defence Forces Act; that this Court and the lower Courts will be exceeding their jurisdiction were they to direct the respondents on the charges to prefer and the forum in which to try the applicant; that the charges before the Court Martial are part-heard; and that the impugned judgment is supported by the evidence, facts and the law.

7) On the nugatory aspect, it was deponed that the intended appeal will not be rendered nugatory if the proceedings in the Court Martial are allowed to proceed; that an appeal lies to the High Court and subsequently to other superior courts on conviction and/or sentence of the Court Martial as provided for under Section 186(1)(a) of the Kenya Defence Forces Act; that an order of stay of proceedings will further delay the prosecution of the applicant thus delaying the expeditious disposal of the Court Martial proceedings; that a stay of proceedings of the Court Martial militates against the expediency and disciplinary objectives of the Court Martial proceedings thereby undermining the disciplinary process in the Kenya Defence Forces; and that a stay of proceedings of the Court Martial Proceedings will prejudice the prosecution's case as witnesses may leave the jurisdiction of the Court or lose their memory.

8) The respondent further contends that there are compelling reasons that militate against this Court granting the applicant bail which are *inter alia* that the applicant applied for bail in the Court Martial on 26th July, 2019 which was declined; that the applicant has not appealed against the said ruling; that the right to bail in respect of the members of the Kenya Defence Forces is not an absolute right as the same has been limited by Section 54(2)(b) of the Kenya Defence Forces Act pursuant to Article 24(5) of the Constitution; that the applicant if released on bail may interfere with witnesses; and that the applicant is a flight risk and if released on bail will abscond the jurisdiction of the Court.

SUBMISSIONS BY COUNSEL

9) At the plenary hearing, **Mr. Peter Kaluma**, learned counsel for the applicant submitted that he had filed written submission which he relied on. Counsel submitted that the applicant has an arguable appeal and raised grounds *inter alia* that the Court Martial lacks jurisdiction to hear the matter pending before it; and that the Court Martial as constituted is unconstitutional. On the nugatory aspect, counsel submitted that the appeal will be rendered nugatory and public resources wasted if stay is denied; that in view of the fact that the chances of the appeal succeeding are high, and if stay is denied, the applicant will be tried before the Court Martial and will suffer pre-trial and conviction; that bail is a right under Articles (a) and 50 of the Constitution; that the applicant is not a flight risk as being a military officer, he can only travel with permission; and that there is no compelling reason(s) to deny the applicant bail.

10) **Mr. Yator**, learned counsel for the respondents relied on the replying affidavit sworn by **Brigadier Daniel Omondi Odeny** and opposed the application. Counsel submitted that the applicant has not established a *prima facie* case with a probability of success to justify the grant of the orders sought; and that the Court Martial has jurisdiction to try the applicant for offences preferred. Counsel further submitted that if the orders sought are not granted and the appeal succeeds, the appeal will not be rendered nugatory; that the applicant has a right of appeal pursuant to Section 186 of the Kenya Defence Forces Act; that the applicant is restrained within the Barracks, is under open arrest, and is on half pay. Counsel further submitted that the application for bail is opposed; that *inter alia* the reasons for limiting the right to bail in respect of members of the Defence Forces are provided for in Section 43 of the Kenya Defence Forces Act and include the need to ensure the maintenance and preservation of national security and good order and Service Discipline in the Kenya Defence Forces; that the release of the applicant on bail will be prejudicial to good order and Service Discipline; and that if the applicant is granted bail he may interfere with witnesses some of who are his juniors and the applicant has command over them. Counsel urged us to dismiss the application.

DETERMINATION

11) We have considered the application, the rival submissions, the authorities cited and the law. The jurisdiction under **Rule 5(2)(b) of this Court's Rules** is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

12) The principles applicable to the determination of applications under **Rule 5 (2) (b) of the Rules** are well settled. This Court clearly elucidated the said principles in the case of **REPUBLIC V KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS, (2009)**

KLR 31 as follows:

“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [emphasis added].

13) In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction.

14) On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single *bona fide* arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See ***Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR (Civil Application No. Nai. 31 of 2012)** where this Court described an arguable appeal in the following terms:

“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

15) We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable whether the jurisdiction of the Court Martial has been ousted by the provisions of the Defence Forces Standing Orders: Chapter 19, Paragraphs 3,4 and 5 as the subject matter involves specified civilians, civilian property and civilian accomplices. We remind ourselves that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.

16) We now turn to the second limb, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought. In ***Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others (supra)*** the Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecunity, the onus shifts to the latter to rebut the allegation.”

17) The factors which can render an appeal nugatory have to be considered on a case by case basis and in doing so, the Court is bound to consider the conflicting claims of both parties. In the instant application, we note that if a stay of proceedings is not granted, an appeal lies to the High Court and subsequently to other superior courts on conviction and/or sentence of the Court Martial pursuant to Section 186(1)(a) of the Kenya Defence Forces Act. We further note that the case against the applicant in ***Court Martial No. 2 of 2019 Republic Versus Major Erastus Hezbon Otieno*** has not been determined. In the circumstances, we find that the intended appeal will not be rendered nugatory if the orders sought are not granted and the appeal succeeds. We lay emphasis to the fact that the avenue of appeal is available to the applicant in the event that he is aggrieved by the decision of the trial court.

18) On the application for bail, we find that the right to bail in respect of the members of the Kenya Defence Forces is not an absolute right as the same is limited by Section 54(2)(b) of the Kenya Defence Forces Act pursuant to Article 24(5) of the **Constitution**. Counsel for the respondent contended that there are compelling reasons to militate against the Court granting the applicant bail including being a flight risk and that he may interfere with witnesses. We accordingly decline to exercise our discretion to grant bail pending the hearing.

19) In conclusion, the applicant has satisfied us that the intended appeal is arguable but has failed to satisfy us that the appeal will be rendered nugatory and we cannot therefore exercise our discretion in his favour. The upshot is that we decline to grant stay of proceedings and bail pending hearing and determination of the intended appeal. The Notice of Motion dated 5th November, 2019 is hereby dismissed with costs to the respondents.

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

M. KOOME

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR