



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, NAMBUYE & J. MOHAMMED, J.J.A)**

**CIVIL APPLICATION NO. NAL 147 OF 2018**

**BETWEEN**

**SIMON NYAMANYA ONDIBA.....APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT AT MILIMANI.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT AT MAKADARA.....3<sup>RD</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF THE**

**NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT**

**AND**

**ROSE NJERI MACHARIA.....INTERESTED PARTY**

*(An application for stay of further proceedings in Criminal Case No. 2067 of 2016 and Criminal Case No. 2788 of 2016 in the Chief Magistrate's Court at Milimani & Makadara*

*respectively pending the hearing and determination of an intended appeal against the*

*Ruling of the High Court of Kenya at Nairobi (Odunga, J.) dated 5<sup>th</sup> March, 2018*

*in*

***Judicial Review Misc. Applic. No. 440 of 2017.)***

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**RULING OF THE COURT**

1. **Simon Nyamanya Ondiba** (the applicant) has invoked our jurisdiction under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules) seeking:-

*i. Spent*

*ii. Stay of any further proceedings in Criminal Case Nos. 2067 of 2016 & 2788 of 2016 in the Chief Magistrate's Court at Milimani and Makadara law courts respectively and/or any related charges over L.R No. 209/112931/1 pending determination of an intended appeal against the ruling of the High Court*

**dated 5<sup>th</sup> March, 2018 in J.R Misc. Applic. 440 of 2017.**

He believes that the aforementioned orders would preserve the substratum of the intended appeal.

2. The genesis of the aforementioned application revolves around competing interests over the proprietorship of L.R. No. 209/112931/1 (suit property). Both Simandi Investments Ltd (a company under the control of the applicant) and the interested party hold titles over the suit property. According to the applicant, the interested party trespassed onto the suit property in August, 2016 provoking the company to file a suit at the Environment and Land Court (ELC) being **E.L.C Suit No. 1035 of 2016** seeking an injunction against the interested party and damages for trespass.

3. Upon service of the pleadings and summons to enter appearance in the above mentioned ELC suit, the interested party, who also claims ownership to the suit property, caused the company's title and accompanying documents to be investigated. Conversely, at least as per the interested party, the said investigations revealed that the title relied on by the applicant was a forgery and aimed at defrauding her of the suit property. As a result, she registered a complaint at Muthaiga Police Station which eventually led to the arrest and arraignment of the applicant in the Chief Magistrate's Court at Milimani wherein he was charged with the offence of conspiracy to defraud contrary to **Section 317 of the Penal Code in Criminal Case No. 2067 of 2016.**

4. Nevertheless, on 26<sup>th</sup> September, 2016 the applicant in the company of others trespassed onto the suit property and began demolishing the perimeter wall which had been put up by the interested party. Once again the applicant was arrested with his accomplices and this time round, he was charged with the offence of malicious damage to property contrary to **Section 339(1) of the Penal Code** in the Chief Magistrate's Court at **Makadara in Criminal Case No. 2788 of 2016.**

5. As far as the applicant was concerned, his arrest and the subsequent criminal charges were calculated to frustrate and intimidate him into submitting to the interested party's unlawful conduct. The criminal proceedings were not brought in good faith; rather they were in retaliation of the ELC suit commenced at his instance. He perceived that the interested party had roped in the respondents to assist in the perpetuation of her unlawful conduct. What is more, the said respondents had exercised their discretionary powers arbitrarily by arresting, preferring charges as well as maintaining the criminal proceedings against him. Nonetheless, the dispute between him and the interested party is civil in nature.

6. Towards that end, the applicant filed judicial review proceedings in the High Court being **Misc. Applic. No. 440 of 2017** seeking several judicial review remedies namely, an order of *certiorari* to quash the 1<sup>st</sup> respondent's decision to prefer the charges against him; an order of *prohibition* prohibiting the 1<sup>st</sup> respondent from proceeding with his prosecution in the criminal proceedings; an order of *prohibition* prohibiting the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from entertaining the criminal proceedings; and an order of *mandamus* compelling the 1<sup>st</sup> respondent to terminate the criminal proceedings.

7. Upon weighing the rival positions taken by the parties against the law, the learned Judge (Odunga, J.), who was seized with the matter, dismissed the applicant's application vide a ruling dated 5<sup>th</sup> March, 2007. In doing so, the learned Judge expressed:

***“In determining whether criminal proceedings ought to proceed, a distinction must be made between a situation where what is alleged is insufficiency of evidence as opposed to where the evidence to be adduced does not disclose an offence. In the former, the right forum to deal with the matter is the trial Court. In the latter, it would amount to an abuse of the criminal process to subject the applicant to such a process. However a prosecutor is not required to have a full proof case but ought to have in his possession such evidence which if believable might reasonably lead to a conviction. He does not have to have evidence which disclose a prima facie case under section 210 of the Criminal Procedure Code since a decision as to whether a prima facie case is disclosed is a jurisdiction reserved for the trial Court. He however must have evidence which satisfy him that his is a case which ought to be presented before a trial Court.*”**

***In this case the Respondents have according to their version collected evidence on the basis of which they have formed an opinion that criminal charges ought to be levied against the applicant. It is in fact contended that the surveyor who the applicant contends undertook the survey relied upon by the applicant has denied that he in fact did so.***

***In my view this is not a case where it can be said with certainty that the allegations levelled against the applicant even if true cannot support a conviction. Based of (sic) the said allegations***

***I cannot say that the prosecution of the applicant is malicious or is being undertaken to achieve collateral purposes. I am further unable to find that the existence of the civil case necessarily bars the Respondents from undertaking the criminal proceedings since one of the charges facing the applicant, malicious damage to property, does not necessarily depend upon the proprietorship of the suit property.***

...

***It must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Although there are some thinly veiled but feeble accusations directed at the trial Court based on the manner in which the trial court intends to proceed, there is no basis at all laid for such accusations save for the fact that the court intends to expedite the hearing. I cannot read malice in the desire of the courts to expedite the disposal of cases before them unless it is shown that such speed does not augur well for the fair hearing of the case which is not what the applicant alleges. In my view courts should be***

*praised rather than condemned to expediting trials.*

***Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words unless the applicants demonstrate that the circumstances of the impugned process render it impossible for the applicant to have a fair trial, the High Court ought not to interfere with the trial simply on the basis that the applicant's chances of being acquitted are high. In other words a judicial review court ought not to transform itself into a trial court and examine minutely whether or not the prosecution is merited.***

***In the instant case, the Applicant has failed to discharge the burden and must be ready to face his accusers ...”***

8. The applicant was not happy and he has lodged a notice of appeal signifying his intention to appeal against the said decision. It is on the basis of this intended appeal that the applicant has invoked our discretionary jurisdiction under **Rule 5(2)(b)** of the Rules.

9. Opposing the application, the interested party through her affidavit, deposed that the same was an abuse of the court process. The application was driven by mischief on the part of the applicant who is bent on evading prosecution for his wrongful acts. She deposed that the criminal proceedings did not in any way bar the applicant's civil suit which could proceed concurrently with the criminal proceedings. In any event, the applicant had not demonstrated any prejudice he would suffer if the criminal proceedings continued. More so, in light of the legal principle that he is presumed innocent until he is otherwise proven guilty.

10. At the hearing of the application, learned counsel, Mr. Kiget, appeared for the applicant while learned counsel, Mr. Obuya appeared for the interested party. There was no appearance for the respondents despite service of the hearing notice.

11. Mr. Kiget submitted that the intended appeal raised arguable issues *to wit*, whether the dispute between the parties is purely civil in nature and could not form the basis of criminal proceedings; whether the criminal proceedings was an abuse of the court process; whether the trial court erred by delving into merit review of the parties' respective claims of proprietorship; and whether the respondents' actions amounted to arbitrary use of power.

12. He went on to argue that unless the order sought was granted the applicant stands to suffer irreparable loss. In that, the applicant will be forced to face two criminal cases which are damaging and would otherwise hinder effective prosecution of the civil suit. Further, the continuance of the criminal proceedings would be an abuse of the court process. He stated that the respondents and the interested party would not suffer any prejudice if the order sought was granted.

13. On his part, Mr. Obuya argued that by virtue of **Section 193A** of the **Criminal Procedure Code** the pendency of the applicant's civil suit did not bar the criminal proceedings against him. Besides, the applicant's suit has not taken off for over 3 years. In counsel's view, the criminal proceedings are a legal process and cannot be the basis of urging that the respondent would suffer prejudice.

14. We have considered the application, submissions by counsel as well as the law. Essentially, before exercising our discretion under **Rule 5(2)(b)** of the Court of Appeal Rules (CAR) in favour of the applicant we have to satisfy ourselves that he has demonstrated firstly, that he has an arguable appeal or an appeal that is not frivolous. Secondly, that if the order sought is not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See **Reliance Bank Ltd. (in liquidation) vs Norlake Investments Ltd. [2002] 1 EA 227.**

15. On arguability of the intended appeal, the applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. This much was appreciated by this Court in **National Bank of Kenya Limited & Another vs Geoffrey Wahome Muotia [2016] eKLR.** He is also not required to show that the intended appeal would definitely succeed. It is sufficient if he can show that it raises serious questions deserving consideration by this Court.

16. Taking into account the foregoing and also being cautious not to make final determinations on issues subject of the intended appeal, we are not convinced that the intended appeal is arguable. This is because of the clear provisions under **Section 193A** of the **Criminal Procedure Code** which allows concurrent civil and criminal proceedings over the same subject matter.

17. On whether the intended appeal will be rendered nugatory, we must carefully weigh the competing claims of both parties. In doing so, we are guided by the following sentiments of this Court in **Cabinet Secretary, Ministry of Labour and Social Protection & 2 others vs. Central Organisation of Trade Unions [2019] eKLR:**

***“Put in a different way, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”***

In our view, in the event the intended appeal is successful, any prejudice suffered by the applicant on account of the criminal proceedings are capable of being compensated by damages in a cause of action founded on malicious prosecution.

18. Accordingly, the applicant having failed to establish the twin principles, we find that the application lacks merit and is hereby dismissed.

Costs of this application shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of April, 2019**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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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.

**DEPUTY REGISTRAR**