



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & KANTAL, J.J.A)

CIVIL APPLICATION NO. 60 OF 2019

BETWEEN

IN THE MATTER OF AN INTENDED APPEAL BETWEEN

HASSAN AHMED HAFEDI ZUBEIDI.....APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT

THE CHIEF MAGISTRATE COURT MILIMANI.....3<sup>RD</sup> RESPONDENT

*(An application for stay of proceedings in Criminal Cases Nos. 1897 of 2015, 983 of 2018, 984 of 2018 and 1109 of 2018, and 1652 of 2018 pending the lodging, hearing and determination of an intended appeal from the judgment of the Constitutional and Human Rights Court at Nairobi (Mwita, J., delivered on 25<sup>th</sup> January, 2019*

in

Consolidated Petition No. 361 of 2017)

\*\*\*\*\*

RULING OF THE COURT

[1] This is an interlocutory application brought under *Rule 5 (2) (b)* of this Court's Rules. **Hassan Ahmed Hafedi Zubeidi** (applicant) is principally seeking an order of stay of proceedings in **Nairobi CMCC Nos. 1897 of 2015, 983 of 2018, 984 of 2018, 1652 of 2018 and 1109 of 2018** pending the hearing and determination of an intended appeal. The jurisdiction of this Court under the aforesaid Rule is circumscribed within two basic points that an applicant to succeed must satisfy;

*i) That the appeal is arguable and not frivolous and*

*ii) That if the stay order sought is not granted the appeal will be rendered nugatory.*

-See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd - Civil Application No. Nai 157 of 2006 (unreported)** where the principles to bring to bear on whether or not to grant an order of stay of execution were set out thus:-

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory. (See also Githunguri vs. Jimba Credit Corporation Ltd. No. 2 [1988] KLR**

[2] That said, the whole matter is well set out in the applicant’s affidavit and the impugned judgment the applicant wishes to appeal against. We nonetheless set out a synopsis to place this Ruling in perspective. The applicant says he was at the material time the non-executive Chairman and majority shareholder of **Dubai Bank Ltd** (presently under receivership). To begin with on 17<sup>th</sup> November, 2015 the applicant alongside others was charged in **Criminal Case No 1897 of 2015** for violating amongst others **sections 11 and 16(5) of the Proceeds of Crime and Anti-Money Laundering Act**. The applicant however challenged the constitutionality of the said charges in the High Court vide a **Petition No. 361 of 2017**. In the said petition he sought orders staying the decision by the 1st and 2nd respondents to arrest, charge, or prosecute him pertaining his involvement in the day to day running and management of the Dubai Bank and/ or declarations that any criminal charges or any attempt to prosecute him were illegal.

[3] The applicant states that he was initially granted interim orders but that notwithstanding he was arrested and arraigned in court where he was charged with other charges in **Criminal Cases Nos. 983 of 2018; 984 of 2018; 1109 of 2018 and 1652 of 2018**. The main petition was heard on merit and dismissed with costs as the learned trial Judge was not persuaded that the elements of violation of the appellant’s constitutional rights were apparent and that the contention that the appellant was an executive chairman who was not involved in the day to day management of the bank was a matter to be extrapolated from evidence before the trial court. This provoked the appellant to file a Notice of Appeal and followed by the instant application seeking stay of proceedings pending hearing and determination of the appeal.

[4] During the plenary hearing, **Mr. Arwa** learned counsel for the applicant relied on his client’s written submissions and also made some oral highlights stating that the intended appeal is arguable. He argued that the Judge erred by holding that the fact that the appellant was a non-executive chairman was a matter of evidence to be determined by the trial magistrate; that prosecution would be tantamount to abuse of prosecutorial powers; that the Judge misconstrued his mandate which was strictly to determine whether there was blatant abuse of power by the Director of Prosecution; that the charges did not disclose an offence therefore it was an abuse of the appellant’s human rights to be taken through a trial. Counsel cited the case of **Githunguri vs. R (1985) KLR** where it was held that the High Court has power to stop a Magistrate’s Court from proceeding with a prosecution that was oppressive and an abuse of the court process and meant to vex the applicant. Counsel urged us to allow the application pending the hearing and determination of the appeal as allowing the criminal proceedings to proceed will prejudice the applicant.

[5] **Mr. Ashimosi** learned State Counsel opposed the application on points of law. In his view the applicant has not demonstrated how the Judge misdirected himself in holding that the allegations made by the applicant are matters of evidence to be determined by the trial court; that the Judge analysed the matter and gave reasons why it was not apt to interfere with the prosecution; the DPP’s power to prosecute are protected by the Constitution and the law has safety measures that is inbuilt with procedures that ensure every party is given a fair trial. The law also sets out the principles that guide the court; that the magistrate’s court is also a constitutional creature; that the issues raised by the applicants relating to the evidence in support of the charge fall within the realm of the applicants defence. Counsel urged us to disallow the application.

[6] Taking into account the parameters of our discretion in an application such as this one and being careful not to make final determination on the merit of the intended appeal, we are not convinced that the said appeal is arguable. We say this because the material that was before the Judge were statements by the applicant that being a non-executive chairman of the bank, he was not involved in the day to day running of the bank. Certainly, in our view we cannot fault the Judge for holding that these were matters of evidence to be subjected to court room processes of examination and cross examination. The matter before the Judge was a Constitutional petition that was supported by affidavits and in any event the trial was not before the High Court for the Judge to test the evidence.

[7] The jurisdiction to stay a proceeding either of civil or criminal nature before any court is always sparingly exercised. When this Court has done so, it is always in a very clear cases to nip from the bud any attempt to circumvent or use the law to harass an applicant. This was the gist in the case of; - **Githunguri vs. Republic case (supra)** where it was held;

**“The Attorney-General is given unfettered discretion to institute and undertake criminal proceedings by section 26 of the constitution but this discretion should be exercised in a judicious way. It should not be exercised arbitrarily, oppressively or contrary to public policy.”**

That discretion is now given to the Director of Public Prosecutions by **Article 157 (6)** of the Constitution 2010.

[8] We need to state that the facts in the instant case are distinguishable from the **Githuguri Case**, however, the principle of law about the alleged abuse of prosecutorial power is the same. However at this interlocutory stage, we are unable to determine the allegations

made by the applicant regarding his role in the Bank.

[9] In view of our finding that the applicant has not demonstrated that the intended appeal is arguable, it is not necessary to discuss the nugatory aspect of the intended appeal.

[10] Accordingly, the applicant has failed to satisfy the court that the intended appeal is arguable, 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 11<sup>th</sup> day of October, 2019.*

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**