



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & SICHALE, J.J.A)

CIVIL APPLICATION NO. NAI 250A OF 2017

BETWEEN

MUKTAR SAMAN OLOW.....APPLICANT

AND

**DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT
CHIEF MAGISTRATES COURT AT KIAMBU.....2ND RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS....3RD RESPONDENT
PIUS NGUGI.....4TH RESPONDENT
NATIONAL LAND COMMISSION.....5TH RESPONDENT**

(Being an application for stay of execution pending the hearing and

determination of the intended appeal against the judgment and order

of the High Court (R.E.Aburili, J.) dated 13th September 2017

in

Misc Application No. 397 of 2016)

RULING OF THE COURT

Although this is an application for stay of execution pending the hearing and determination of the intended appeal against the judgment and order of the High Court (R.E. Aburili, J.) dated 13th September, 2017 we think the following brief background is essential. The dispute relates to land, **L.R No 1870/1/240** situated in Westlands Nairobi mainly between the applicant and the 4th respondent both of whom are claiming title to it. The 4th respondent averred that he was the owner of the suit property having purchased the property from one Helen Fear in 1974.

On 16th July, 2009 the High Court in Nairobi **Civil Suit No.1321 of 2005 (OS) Pius Ngugi V Hellen Fear** declared that the 4th respondent was the proprietor of the suit property. While presenting the decree for registration, the 4th respondent discovered that a caveat had been lodged against the title by the then Nairobi City Council as it was then known, now the Nairobi City County.

On 18th August, 2011, the applicant, together with a group of people forced their way into the suit property where the 4th respondent's daughter was staying and harassed her while taking and destroying property. The 4th respondent established through his advocate that the applicant had obtained an order to levy distress against his daughter in **Milimani Chief Magistrate's Court Misc. Case No. 527 of 2011**, which orders were subsequently set aside on the 4th respondent's application.

On 22nd August 2011, the applicant instituted **ELC Case No. 424 of 2011**, against the 4th respondent seeking a permanent injunction to restrain him from trespassing on the suit property. On 23rd August 2011, the next day, the 4th respondent similarly filed **ELC Case No.437 of 2011** to restrain the applicant from trespassing on the same suit property. When he discovered that the applicant had filed **ELC No. 424 of 2011** on 22nd August, 2011 in which he alleged that the property had been sold to him by Hellen Fear in 2000, the 4th respondent made a complaint to the police to investigate the claim because Hellen Fear died in the year 1988. After investigations the applicant was arrested and subsequently charged in Kiambu Magistrate's Criminal Case No. 2287 of 2011 **R. V Muktar Saman Olow** with the offences of forgery contrary to **section 349** of the Penal Code, making a false document contrary to **section 347** of the Penal Code and stealing contrary to

section 275 of the Penal Code. On 24th January, 2012, the DPP applied to court to withdraw the said criminal case against the applicant under **section 87A** of the Criminal Procedure Code which application was allowed.

Approximately 5 years later on 6th April 2016, the 3rd respondent recommended to the 1st respondent (DPP) that the applicant be re-charged for the offences committed in relation to the suit property that had earlier been withdrawn in **Kiambu Criminal Case No.2287 of 2011**. This culminated in the applicant being arrested on 18th May 2016 and detained at the CID headquarters. The following day he was arraigned before the Chief Magistrate's Court at Kiambu in **Criminal Case No.1170 of 2016**, where he was charged with similar offences as the earlier charges which had been withdrawn by the DPP in **Kiambu Criminal Case No.2287 of 2011**.

According to the applicant, his arrest and prosecution was actuated by malice and false allegations leveled against him by the 4th respondent with whom he has pending litigation in court.

By a motion on notice dated 1st September, 2016, the applicant approached the High Court *ex parte*, for leave to institute judicial review proceedings against the 1st, 2nd and 3rd respondents. Pursuant to that leave, the applicant filed a notice of motion for orders of prohibition and *certiorari* as well as a declaratory order that the prosecution of the applicant in the Chief Magistrate's Court at Kiambu in Criminal Case No. 1170 of 2016, was a violation of the applicant's right to fair administrative action. Leave was accordingly granted to the applicant which operated as a stay of the proceedings before the 2nd respondent in Criminal Case No.1170 of 2016, **Republic V Muktar Saman Olow**.

The High Court dismissed this application finding that the applicant had failed to demonstrate that he was deserving of the reliefs sought. As a result, the court vacated the interim orders of stay of continuation of the applicant's prosecution before the Magistrate's Court at Kiambu.

The applicant, dissatisfied by the order, intends to challenge it before this court and has evinced that intention in a notice of appeal filed in Misc. Application No. 379 of 2016.

In the interim, he has brought this application pursuant to **Rules 5(2)(b)** and **42** of the Court of Appeal Rules, seeking an order of temporary injunction to restrain the 1st and 2nd respondents from exercising their authority to continue with the trial of the applicant in **Kiambu Criminal Case No. 1170 of 2016**, pending the hearing and determination of the intended appeal.

The respondent, opposing the application, submitted that the Court has no jurisdiction to grant the reliefs sought herein; that, under the current Constitution, the right to fair trial includes the right to appeal; and that the points raised in this application can be raised in the trial.

The applicant has invoked the provisions of **rule 5(2)(b)** of the Court's Rules, yet what is sought is the stoppage of the applicant's trial. As a general rule, the institution of an appeal does not operate to suspend any sentence or to stay execution, but this Court may—

“5(2)(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”

The rules do not anticipate jurisdiction to stop criminal proceedings. Instead, the Court can order the appellant to be released on bail or the suspension of execution of any warrant of distress pending the determination of the appeal.

As a matter of fact, **section 193A** of the Criminal Procedure Code, provides that the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings is not a ground for any stay, prohibition or delay of the criminal proceedings.

The policy why stay of criminal proceedings must be approached sparingly and with caution was explained in the case of **Helmuth Rame V Republic**, Criminal Application No.1 of 2015, where this Court expressed itself as follows:

“In the present case, even if the proceedings before the criminal court are not stayed, the applicant still has an avenue of appeal before the High Court, and should it be found that the applicant will have been subjected to an unfair trial as he claims he is in danger of undergoing, then he has a remedy in damages. For these reasons we do not consider that the applicant's appeal would be rendered nugatory.”

It is equally true that even if the trial were to proceed to its logical conclusion with a conviction, by **Article 50(2)(q)** of the Constitution, an accused person is guaranteed the right to a fair trial, which includes the right of appeal.

Since the applicant has not sought bail before us, nor is there a warrant of distress issued against him that he seeks to have suspended and he has not been convicted of any offence arising from the same set of facts. No orders to restrain the respondents from proceeding with the trial can be issued. In the result, we find no merit in the application. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 13th Day of July, 2018.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR