



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KIAGE & SICHALE, JJ.A)

CIVIL APPLICATION NO. NYR 33 OF 2015

BETWEEN

SUSAN MBOO NG'ANG'A.....APPLICANT

AND

THE HON. ATTORNEY GENERAL

(Sued for and on behalf of the CHIEF MAGISTRATE'S

COURT, NYERI LAW COURTS)..... 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS..... 2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

(Being an application for stay of further proceedings and execution of the Judgment and Decree of the High Court of Kenya (Jairus, J) delivered on 31st July, 2015 pending the lodging, hearing and final determination of an intended appeal

in

THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 5 OF 2013)

RULING OF THE COURT

The applicant, **SUSAN MBOO NG'ANG'A** filed a Notice of motion dated 13th August, 2015 premised under Rules 5(2)(b) and 47(1) of this Court's Rules. In the main, she sought an order of stay of execution of the orders of the judgment and decree in Nyeri High Court Constitutional Petition No. 5 of 2015. The Attorney General (sued on behalf of the Chief Magistrates Court, Nyeri Law Courts); the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission, were named as the 1st, 2nd and 3rd respondents respectively.

The background to the motion is that on 21st August, 2009 the applicant was arrested by the 3rd respondent's officers and subsequently arraigned in court on two counts. In Count 1, she was charged with the offence of corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of the Anti-corruption and Economic Crimes Act and in Count II she was charged with the offence of corruptly receiving a benefit contrary to section 39(3) (a) as read with section 48(1) of Anti-Corruption & Economic Crimes Act. The applicant pleaded not guilty to the two charges and the trial that ensued was conducted by the late S. Muketi, the then Chief Magistrate, Nyeri who recorded the evidence of all the prosecution witnesses. However, before she concluded the trial the late S. Muketi was elevated to the High Court and the trial was taken over by W. A. Juma, who on the request of the applicant ordered that the trial commence *de novo*. Immediately thereafter the applicant filed a Miscellaneous Application dated 15th March, 2013 in the Chief Magistrate's Court and sought an order, *inter alia*, that the criminal proceedings against her be terminated and she be acquitted. The basis for the orders sought was that the 3rd respondent had failed and/or neglected to submit a report to the Attorney General as mandatorily required under Section 35 of Anti-Corruption & Economic Crimes Act

and secondly, that the 3rd respondent had failed to secure the approval of the Attorney General before arraigning the applicant in court. On 23rd July, 2013 the trial court dismissed the applicant's application.

Following the dismissal, the applicant filed a Constitutional Petition, No. 50 of 2015 the subject of this appeal, alleging infringement of her constitutional rights. The petition was heard by Ngaah, J, who on 31st July, 2015 dismissed the applicant's petition. The applicant was dissatisfied with the said outcome and she filed a Notice of Appeal dated 16th August, 2015 and the motion before us dated 13th August, 2015. In the motion the applicant sought an order of stay of the dismissal of the constitutional petition pending the hearing and determination of the appeal.

The matter came before us for hearing on 13th October, 2016. Mr. Millimo learned counsel for the applicant urged the motion whilst Miss Ogama and Miss Ng'ethe appeared for the 1st and 3rd respondents respectively. There was however no representation by the 2nd respondent although according to Miss Ng'ethe, the 2nd respondent was aware of the hearing date, having been a party to its fixing. The applicant relied on its written submissions dated 5th August, 2016 and filed on 10th August, 2016 as well as its list of authorities filed on 4th April, 2016. The 2nd respondent relied on its submissions dated 9th September and filed on 13th September, 2016 as well as its list of authorities filed on 5th October, 2016. On its part the 3rd respondent relied on its submissions dated 30th September, 2016 and filed on the same day.

During the plenary hearing before us, Mr. Millimo for the appellant urged us to find that failure to submit an investigation report as well as failure to obtain consent before the arraignment of the applicant in court was fatal to the prosecution case. He submitted that the applicant was arraigned in court on 27th August, 2009 before the 3rd respondent had obtained consent to prosecute from the 1st respondent; that consent for the continuation of the prosecution was obtained on 14th December, 2009, long after the applicant had been arraigned in court. He contended that the applicant had an arguable appeal as the learned judge irregularly disregarded two decisions of this Court that clearly spelt out that an investigation ought to be carried out and a report submitted to the 1st respondent before arraignment in court. These are:

(i) Nicholas Muriuki Kangangi v Republic [2011] eKLR and

(ii) Esther Theuri Waruiru & Another v Republic [2011] eKLR.

It was his further submission that unless a stay was granted, the trial which was scheduled for further hearing on 11th November, 2016 may be concluded and thus rendering the appeal nugatory.

Miss Ogama for the 1st respondent chose not to make any submissions. Miss Ngethe for the 3rd

respondent, however, opposed the motion. She was of the view that the applicant had not demonstrated an arguable appeal as no consent is required before one is arraigned in court as stated by the applicant. Further, that the non-submission of the investigation report to the 1st respondent before the arraignment of the applicant in court was not fatal to the prosecution case. It was her further contention that the applicant was blatantly abusing the process of the court.

We have considered the application, the affidavits on record, the written and oral submissions, the cited authorities as well as the law. In an application under Rule 5(2)(b) an applicant has to demonstrate that he/she has an arguable appeal and secondly that the appeal (or intended appeal) shall be rendered nugatory unless an order of stay is granted.

In **Stanley Kangethe Kinyanjui v Tony Keter & Others [2013] eKLR** the jurisprudence underlying the consideration of the twin principles was summarized as follows:

- i. In dealing with Rule 5 (2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court.*
- v. The discretion of this Court under Rule 5 (2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.*
- vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*
- vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*
- viii. An applicant must satisfy the Court on both the twin principles.*
- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*
- x. 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.*
- xi. 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.*
- xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*
- xiii. 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."*

On our part, we have considered the issues raised by the applicant. On arguability of the appeal, it was the applicant's contention that failure to obtain consent from the Attorney before the applicant's prosecution was fatal to the prosecution case. The applicant relied on the authority of **Esther Theuri Waruiru & Another v Republic**, (supra) wherein this Court found that Section 12 of the Prevention of Corruption Act, now repealed, that required consent of the Attorney General before prosecution was retained in Section 35 of the Anti-Corruption and Economic Crimes Act.

Section 12 of the Prevention of Corruption Act provided as follows:

"A prosecution of an offence under this Act shall not be instituted except by or with the written consent of the Attorney General: Provided that a person charged with such an offence may be

arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.”

On the other hand, Section 35 of Anti-Corruption and Economic Crimes Act provided as follows:

“35 (1) following an investigation the Commission shall report to the Attorney-General on the results of an investigation.

(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”

The learned judge considered the provisions of the two statutes and rendered himself as follows:-

“The legislature was fairly categorical here that a prosecution under the Prevention of Corruption Act, Chapter 65 must be preceded by a written consent from the Attorney General; its intention was quite clear from the outset leaving no doubt that any prosecution without the written consent from the Attorney –General would have been fatal. There is no such express provision in the Anti-Corruption Act. Section 35 of the Act has nothing to do with the consent to prosecute any offence under the Anti-Corruption & Economic Crimes Act, 2003 but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the Investigations and any action taken upon it, which would necessarily include arrest and prosecution of suspects pursuant to Section 32 of the Anti-Corruption Act.

It must also be noted that there was no provision in the Prevention of Corruption Act similar to Section 32 of the Anti-Corruption & Economics Crimes Act, 2003 and I would opine that the existence of that provision in the current anti-corruption legislation is an additional reason against any comparison between Section 12 of the Prevention of Corruption Act, Chapter 65 and Section 35 of the ACECA.”

It would appear to us that the provisions of Section 12 of the Prevention of Corruption Act were not retained in Section 35 of the Anti-Corruption and Economic Crimes Act. On the other hand, Section 35 of the Anti-Corruption Act provided for compilation of an investigative report which would then be forwarded to the Attorney General. As to whether the consent of the Attorney General first had and obtained was to precede a prosecution is arguable.

It is also an arguable point whether the learned judge ignored the principle of *stare decisis* in not following the two decisions emanating from this Court and/or whether the two cases could be distinguished from the case the subject of this appeal. It is for the above reasons that we have come to the conclusion that the applicant has demonstrated that this is an arguable appeal. An arguable appeal is not necessary one that will succeed. However, as regards the contention that the applicant’s appeal would be rendered nugatory, we do not think so. The applicant is before a court of law established pursuant to Article 169 of the Constitution. Being a Court of law, there are sufficient inbuilt safeguards to protect the applicant and to ensure that she has a fair trial, either before the trial court, or before any other court in the event of an appeal.

It would also appear to us, and as urged by Miss Ng’ethe for the 3rd respondent that the applicant is blatantly abusing the process of the court. The applicant’s trial commenced on 13th May, 2010 and was heard to conclusion of the prosecution case by the late Hon. S. Muketi. Upon conclusion of the prosecution evidence, the learned trial magistrate reserved the ruling for 4th August, 2011. However Hon. Muketi was elevated to the High Court and W. Juma took over the matter. Thereafter the applicant successfully applied to have the case start *de novo*. Her wishes were granted. Soon thereafter, she filed a constitutional petition alleging that her constitutional rights had been infringed. Her petition was

dismissed by Ngaah, J and hence this appeal. On the face of it, those actions reek of *mala fides*. Be that as it may, we shall say no more on this.

In view of what we have stated above, we have come to the conclusion that the applicant has not demonstrated that her appeal would be rendered nugatory unless an order of stay is granted. Accordingly the motion is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 25th day of January, 2017.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR