



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 22 OF 2017 (UR 13/2017)

BETWEEN

JULIUS OTIENO POLO.....1ST APPLICANT

JENIPHER ANYANGO POLO.....2ND APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

AND

ANDREW AGENGA ORIWA.....1ST INTERESTED PARTY

LUKE OMOLLO MMIDAMBA.....2ND INTERESTED PARTY

ZACHARY NYAIRO OKORA.....3RD INTERESTED PARTY

MAURICE OTIENO NGETA.....4TH INTERESTED PARTY

JOHN ODENYO PETERS.....5TH INTERESTED PARTY

KENNETH MUNGAI NGANAGA.....6TH INTERESTED PARTY

(An application for stay of execution of the Judgment pending the determination of the appeal in the High Court of Kenya at Kisumu (Cherere, J) dated 23rd February 2017 in HC Petition No. 15, 16, & 17 of 2014 (Consolidated))

RULING OF THE COURT

1. This application by the applicants is brought under sections 3A and 3B of the Appellate Jurisdiction Act and rule 5(2) of the Court of Appeal Rules. The applicants seek the following orders:-

“(1)

(2) THAT pending the hearing and determination of this application inter partes this Honourable Court be pleased to suspend, vary and/or stay the execution of the orders issued in the Judgment delivered on 23rd February, 2017 dismissing the applicants petition in Kisumu Petition No. 15 of 2014.

(3) THAT pending the hearing and determination of this appeal this Honourable Court be pleased to suspend, vary and/or stay the orders issued in the judgment delivered on 23rd February, 2017 dismissing the applicants petition in Kisumu No. 15

of 2014.

(4) THAT this Honourable court be pleased to order stay of taking of plea by the applicants in Kisumu Chief Magistrates Court Criminal Case No. 5 of 2014 REPUBLIC VERSUS RAPHAEL NJIRA & 7 OTHERS.”

2. The background to the application is that the applicants, who are public officers in the employment of the County Government of Homa Bay, are accused persons in **Anti-Corruption Case No. 5 of 2014, REPUBLIC V RAPHAEL NJIRA & OTHERS**, that is pending before the Chief Magistrate’s Court at Kisumu.

3. The applicants and others were alleged to have flouted procurement regulations in relation to the refurbishment of Moi Stadium, Kisumu. Before the plea could be taken on 6th August, 2014, the applicants filed a petition in the High Court at Kisumu and obtained a conservatory order in the nature of prohibition, prohibiting the respondents from preferring the intended charges pending hearing and determination of their petition.

4. In a considered judgment delivered on 23rd February, 2017, the High Court (Wanjiku Cherere, J.) found no merit in the petition and dismissed it. On 28th February, 2017 the applicants moved to this Court and filed the application now under consideration, having earlier filed a notice of appeal against the High Court decision.

5. The grounds upon which the application was made are that if the applicants take plea, by operation of the law they shall be interdicted pending the outcome of the criminal trial; that should they be interdicted their chances of ever getting reinstated shall be remote; that the substratum of the appeal shall be defeated; that it will be difficult to remedy the damage occasioned should the appeal be allowed ultimately.

6. The relevant background information as per the 1st applicant’s affidavit in support of the application is that sometimes in April, 2009 the applicants registered a business name, Mijeri Construction and General Supplies; on 19th July, 2011 the applicants transferred their interests in the said business to some other people, who subsequently incorporated a limited liability company in the same name; that on 27th March, 2012 Mijeri Construction & General Supplies (not the Limited Liability Company) was awarded a tender for the construction of a perimeter wall and installation of floodlights at the Moi Stadium, Kisumu, but prior to that award, a sum of Kshs. 8,500,000/= was wired into the account of the aforesaid business. The money was speedily withdrawn. Subsequent investigations revealed that the tender was irregularly advertised and awarded. As a result, the respondents decided to prefer corruption charges against the applicants.

7. When the application came up for hearing before this Court, **Mr. Onsongo**, learned counsel for the applicants, submitted that the intended appeal has high chances of success; that unless the orders sought are granted the intended appeal shall be rendered nugatory; that if the applicants take plea they will have to be suspended from their respective positions yet the charges against them are unsustainable; and that the respondents shall not suffer any prejudice if the taking of the intended pleas is withheld pending hearing and determination of the intended appeal.

8. Mr. Lore, learned counsel for the 1st, 2nd and 3rd and 4th Interested Parties supported Mr. Onsongo’s submissions.

9. Ms. Wafula and **Ms. Maina**, learned counsel for the 1st and 2nd respondents respectively opposed the application. Ms. Wafula submitted that the application did not meet the threshold for grant of the reliefs prescribed under **rule 5(2)** of this **Court’s Rules**. In her view, the intended appeal is not arguable and the same shall not be rendered nugatory if the orders sought are not granted. She added that the objective of the application was to delay the intended prosecution of the applicants, which delay undermines public confidence in the fight against corruption.

10. On her part, Ms. Maina argued that this Court has no jurisdiction under **rule 5(2)(b)** to stay prosecution of criminal cases. In support of that submission, counsel cited this Court’s decision in **GODDY MWAKIO & ANOTHER V REPUBLIC [2011] eKLR**. We shall return to that decision at a later stage of this ruling.

11. Secondly, Ms. Maina submitted, no order of stay of execution could be granted if the impugned order was a negative one. Counsel cited this Court’s decision in **DAVID KIPRUTO CHINGA & ANOTHER V DPP & 3 OTHERS [2016] eKLR**.

12. In reply, Mr. Onsongo submitted that under **rule 5(2)(a)** of **this Court’s Rules** the Court has jurisdiction to grant the orders sought; and that if stay of the applicants’ prosecution is not ordered and the intended appeal succeeds, taxpayers’ money used in prosecution of the case shall have been wasted. He urged the Court to allow the application.

13. We have considered the application, the submissions on record, as well as the authorities cited. The issue of this Court’s jurisdiction to grant, suspend, vary and/or stay the orders issued by the High Court on 23rd February, 2017 having been raised, we are duty bound to determine it first. Jurisdiction is everything, and without it the court must down its tools. See **OWNERS OF THE MOTOR VESSEL “LILIAN S” V CALTEX OIL (KENYA) LTD [1989] KLR 1**.

14. **Rule 5(2)** of the **Court of Appeal Rules, 2010** states as follows:-

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may –

(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;

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or stay of any further proceedings on such terms as the court may think just.”

15. Although this matter was brought as a civil application, the orders sought pertain to criminal proceedings that have been instituted against the applicants. The application was brought under **sections 3A and 3B of the Appellate Jurisdiction Act** as well as **rule 5(2)** [not 5(2)(b)] of this Court’s Rules. As rightly submitted by Mr. Onsongo, the provisions of rule **5(2)(a)** are applicable in criminal proceedings.

16. The question that we have to answer is whether the provision of rule 5(2)(a) of this Court’s Rules grant the Court jurisdiction to issue the orders sought. In **GODDY MWAKIO & ANOTHER V REPUBLIC** (supra), the applicant brought an application under **rule 5(2)(b)** of this **Court’s Rules** seeking stay of proceedings in the Chief Magistrate’s Court, Kibera, pending hearing and determination of an intended appeal against a High Court’s decision declining to revise the ruling of the Chief Magistrate.

17. In addressing the issue of its jurisdiction in such an application, this Court stated:-

“The application is brought under Rule 5(2)(b) which expressly applies to civil proceedings. The proceedings in the subordinate court which are the subject matter of the application are criminal proceedings and therefore governed by Rule 5(2)(a) which gives this Court power specifically to do two things, firstly, to order an appellant to be released on bail, and, secondly, to suspend the execution of any warrant of distress. The applicants’ advocate made no effort whatsoever to show that the court has, in addition, jurisdiction under Rule 5(2)(a) to order stay of criminal proceedings pending in a subordinate court. The applicants have not invoked the court’s inherent jurisdiction.”

18. In this application, the applicants are asking the court **“to suspend, vary and/or stay the orders issued in the judgment delivered on 23rd February, 2017 dismissing the applicants’ petitions in Kisumu Petition No. 15 of 2014”** pending the hearing and determination of an intended appeal. In prayer 4, the order sought is **“stay of taking plea by the applicants in Kisumu Chief Magistrate’s Court Criminal Case No. 5 of 2014 REPUBLIC VERSUS RAPHAEL NJIRA & 7 OTHERS”**.

19. We do not think that under rule 5(2)(a) of this Court’s Rules we have jurisdiction to grant the orders sought. Under that rule, we can only order release on bail or suspend execution of any warrant of distress pending determination of an appeal. A warrant of distress is a writ authorizing court officer to distrain property. See BLACK’S LAW DICTIONARY, Ninth edition page 1722. Neither of these orders has been prayed for.

20. Secondly, the High Court did not grant any positive order that can be stayed. It simply dismissed the applicants’ petition seeking, *inter alia*, an order to prohibit their prosecution. We agree with Ms. Maina that a negative order cannot be stayed. See **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES V ORANGE & ANOTHER**[1976] KLR 63.

21. But even if we were to disregard the provisions of **rule 5(2)(a)** and apply **rule 5(2) (b)** or invoke the Court’s inherent jurisdiction under **section 3A and 3B of the Appellate Jurisdiction Act**, we would still have to consider whether the intended appeal is arguable; and whether the intended appeal, if successful, shall be rendered nugatory unless the orders sought are granted.

22. Although the applicants did not file any draft memorandum of appeal, from the affidavit sworn in support of the application, it is discernible that the appeal is arguable. This Court has severally stated that an arguable appeal is not one that will necessary succeed, but one which raises triable issues. However, we do not think that the intended appeal would be rendered nugatory unless we order stay of taking of plea by the applicants is granted. The 2nd respondent stated that in its replying affidavit that after plea is taken, it intends to call 19 prosecution witnesses; and that it is improbable that the case will be determined before the intended appeal is concluded. We agree.

23. In view of the foregoing reasons, we decline to grant the orders sought and dismiss this application in its entirety. We make no order as to costs.

Dated and Delivered at Kisumu this 20th day of July, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR