



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJA.)

CRIMINAL APPLICATION NO. 2 OF 2017

BETWEEN

SAMUEL OTIENO OBUDOAPPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS...1ST RESPONDENT

KEITH KISINGUH2ND RESPONDENT

ALLOYS NYAMBARIGA TINEGA3RD RESPONDENT

MARY GATHIGA KANYIHA4TH RESPONDENT

GEORGE OMONDI ARUM5TH RESPONDENT

DAVID MULINGE KITHUA6TH RESPONDENT

BENJAMIN NJATHI KAGUTU.....7TH RESPONDENT

(An application for stay of the order of the High Court of Kenya at Nairobi (Ngenye Macharia, J.) dated 2nd March, 2017

in

HC. CR. R. NO. 179 OF 2016)

RULING OF THE COURT

This ruling relates to two applications namely Criminal Application No. Nai. 1 and 2 of 2017. The first, dated 20th March 2017, was brought by Mary Gathiga Kanyiha and David Mulinge Kithua, while the second, dated 30th March 2017, was brought by Samuel Otieno Obudo. The first and true respondent in both is the Director of Public Prosecutions. At the commencement of the hearing the two applications, which are similar in form and content, were consolidated under No. 2 of 2017 and were heard as such. We shall hereafter refer to them in singular form.

The application seeks in relevant part the following orders;

“2. That the honourable court be pleased to grant a stay of the order of the High Court of Kenya at Nairobi by (Lady Justice Ngenye Macharia) dated 2nd March, 2017 in HC CR. R. NO. 179 OF 2016 Republic vs. Samuel Otieno Obudo and Six Others pending the hearing and determination of the applicants’ intended appeal against the said order.

3. That the honourable court be pleased to grant a stay of proceedings in Chief Magistrate Criminal Case No. 1860 of 2015 Republic vs. Samuel Otieno Obudo and Six Others pending hearing and determination of the intended appeal against the order of the High Court of Kenya at Nairobi by (Lady Justice Ngenye Macharia) dated 2nd March, 2017.

4. That the honourable court be pleased to grant any other/direction relevant to the circumstances.”

The grounds on which it is premised appear on its face as follows;

“(i) That the applicant has an arguable appeal against the order of the High Court of Kenya at Nairobi by (Lady Justice Ngenye Macharia) dated 2nd March, 2017 in HC CR. R. NO. 179 OF 2016 Republic vs. Samuel Otieno Obudo and Six Others.

(ii) That if a stay is not granted, the applicant’s intended appeal against the order of the High Court of Kenya at Nairobi by (Lady Justice Ngenye Macharia) dated 2nd March, 2017 in HC CR. R. NO. 179 OF 2016 Republic vs. Samuel Otieno Obudo and Six Others would be rendered nugatory.

(iii) That if a stay of proceedings in Chief Magistrate Criminal Case No. 1860 of 2015 Republic vs. Samuel Otieno Obudo and Six Others pending hearing and determination of the intended appeal against the order of the High Court of Kenya at Nairobi by (Lady Justice Ngenye Macharia) dated 2nd March, 2017 is not granted, the applicant’s right to fair trial as guaranteed under Article 50 of the Constitution will be infringed.”

In support of the application are the affidavits of **Mary Gathiga Kanyiha** and **Samuel Otieno Obudo** sworn on 20th and 30th March 2017, respectively. The gist of what is deposed to is that the applicants, alongside 4 other persons, are employees of the Parliamentary Service Commission (PSC). They are all charged in Criminal Case No. 1860 of 2015 before the subordinate court in Nairobi with offences under the Penal Code. The charges relate to the procurement of toners on various dates at the PSC. After being supplied, at length, with typed witness statements by the prosecution, the applicants realized that they needed disclosure of further documents including certain invoices in the possession of the PSC, which is the complainant in the case, in order to properly defend themselves. Their defence counsel accordingly filed and served upon the prosecution, namely the office of the Director of Public Prosecutions, with notices to produce various specified documents. They swear that those documents are critical to their defence as the charges relate to making of documents including Minutes, without authority; and abuse of office, and that without full disclosure it would be impossible for them to properly defend themselves and to cross-examine the prosecution witnesses.

Upon the prosecution’s failure to disclose and hand over those documents notwithstanding many opportunities granted by the court, the applicants and their co-accused applied, successfully, for the charges against them to be dismissed as sustaining the trial absent the disclosure sought would have amounted to abuse of process and an infringement of their fair trial rights. That court accordingly discharged them but the prosecution successfully moved to the High Court for an order of revision with Ngenye Macharia, J ruling that the prosecution was under no obligation to supply to the applicants herein any documents beyond and besides the ones it intended to rely on.

Aggrieved by that ruling, the applicants filed notices of appeal and, apprehensive that their trial at the subordinate court will proceed to their prejudice, have filed the current application. They urge that they have an arguable appeal with chances of success. They have exhibited those grounds in an annexed draft memorandum of appeal. They include the complaint that the learned Judge erred in law in failing to find

that they were entitled to the documents requested as of right under **Article 35(1)(a)** and **(b)** or as part of facilities necessary for the preparation of their defence under **Article 50(2) (c)** and **(j)** of the Constitution.

The applicants also swear that unless the learned Judge's order is stayed and the *status quo ante* preserved pending their intended appeal, then the said appeal would be rendered nugatory as the trial will proceed in the absence of the requested documents leading to their irreversible suffering and violation of their absolute and non-derogable right to a fair trial that cannot be compensated. Such could, moreover, render this Court's final determination on the intended appeal a mirage as they would have been convicted and jailed due to their inability to adequately prepare their defence. They conclude that to proceed with the trial before the appeal would see natural justice and **Article 50** of the Constitution trampled underfoot whereas a temporary stay while the intended appeal is expeditiously heard would cause the prosecution no prejudice.

Those averments under oath were the main focus of the written submissions filed by the firm of Ochieng, Onyango, Kibet and Ohaga advocates, and the address by **Mr. Ochieng' Oduol** and echoed by Mr. Otachi Bw?Omaiwa, learned counsel for the applicants in No. 2 and No. 1, respectively, and we need not rehash them at any length. Mr. Oduol on the issue of arguability contended that the intended appeal „bristles with arguable points of constitutional significance? as far as the right of fair trial is concerned. He contended that the documents the applicants sought were admittedly in the custody and control of the PSC which had, however, declined to furnish them even after a dozen court appearances by the applicants. The documents were critical, argued counsel, because they went to show that the PSC did authorize the very procurement and purchases that the applicants were being prosecuted for. He argued that the prosecution's duty to disclose was not limited to what it would rely on, but the more on any material that would be exculpatory of the accused such as was sought. The prosecution's failure to comply with court orders to furnish the said documents left that court with no option but to dismiss the charge due to contempt and impunity, and the learned Judge was therefore wrong to use the revisionary jurisdiction, which was improperly invoked, to reverse that dismissal order.

Buttressing the nugatory aspect, Mr. Oduol submitted that it would be prejudicial for the applicants to be subjected to the trial without the exculpatory minutes of the PSC sought. He argued that from the prosecution's failure to charge members of the Tender Committee and the suppliers over the transaction in question, it was clear the criminal justice system was being abused with the sole aim of getting the applicants out of service at Parliament. He concluded that the record of appeal is ready for lodgment and there is nothing that stands in the way of a speedy hearing and determination of the intended appeal.

Mr. Otachi associated himself with those submissions and added that on arguability, this Court will be called upon in the appeal to make a clear demarcation between appeal and revision, the distinction between which he stated to be currently hazy with the latter amenable to abuse. Urging that there was absolute clarity about the documents the applicants sought to be furnished with, counsel submitted that the same were needed for cross-examination and that this Court will be called upon to guide on “whether an incomplete disclosure that is merely illusory and does not satisfy the test of comprehension” suffices to discharge that duty on the part of the prosecution. On the nugatory aspect he stated that the trial is due to commence on 23rd August 2017 in compliance with the impugned orders and would expose the applicants to grave prejudice.

Mr. Moriasi, learned counsel for the 7th respondent who also held brief for **Mr. Wena** and **Mr. Juma** for the 2nd and 5th respondents respectively, who are the applicant's co-accused, associated himself entirely with the submissions made by his colleagues as we have set them out herein and supported the application.

In his opposition to the application, **Mr. Omirera**, the learned Senior Assistant Director of Public Prosecutions (SADPP) was dismissive of the applicant's submissions. To him, “what is raised here is (sic) triable issues to be handled at the trial not the High Court or this Court.” To him, once the prosecution establishes sufficiency of evidence and develops a theory of the case, it is satisfied and does not go seeking any other documents not availed by the complainant. He conceded that the documents sought by the applicants are in the possession of the PSC, which is the complainant. To him, the trial was

properly ordered to proceed by the High Court and it would then have been for the trial court to compel the witnesses from the PSC to appear and explain why they would not produce the requested documents.

The Senior Assistant Director of Public Prosecutions contended further that the trial magistrate usurped the powers of the High Court when she dealt with the matter before her on the basis of possible violation of fair trial rights. He was categorical that the intended appeal “is not arguable and will be dismissed on pure points of law.” On the nugatory aspect, it was Mr. Omirera’s submission that the applicants stand to suffer no prejudice if the stay sought is not granted. He therefore urged us to dismiss the application because “it carries in itself the seeds of its own destruction.”

Making reply to those submissions **Mr. Oduol** stated that the learned magistrate was within rights to recognize that the applicants’ fair trial rights stood to be abused and this was within his jurisdiction and involved no usurpation. Counsel reiterated that the applicants’ right to prepare their defence was compromised and it would be prejudicial to proceed with the trial in those circumstances pending the appeal.

We have given due consideration to the application before us, the rival submissions made and the authorities cited in support of the opposing positions. The grant of an application for stay lies in the discretion of the court. It is exercised on sound principles that have crystallized over time and are now notorious. They were very aptly summed up in **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & OTHERS** [2013] eKLR thus;

“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) 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.”

See also **EQUITY BANK vs. WEST LINK MBO LTD** [2013] eKLR.

The Supreme Court in **GATIRAU PETER MUNYA vs. DICKSON MWENDA KITHINJI & 2**

***OTHERS* [2014] eKLR** after emphatically restating that a court must be satisfied before granting an order of stay of execution on the arguability of the appeal or intended appeal and that if stay is not granted the same would be rendered nugatory, added a third consideration that it is in the public interest that the order of stay be granted. That decision accords with a long line of authorities and provides appropriate guidance.

On whether the intended appeal is arguable, we have no difficulty finding that it is. We cannot accept the learned Assistant Director of Public Prosecution's off-hand dismissal and confident remark that it will be dismissed in summary fashion. Having perused the draft memorandum of appeal, it seems quite clear that there are serious points of constitutional significance touching on the right to a fair trial and the contours and content of the duty of prosecutorial disclosure that will fall for decision. As we are not at this juncture called upon to pronounce on those matters or to take any position on them, suffice it to state that there definitely are several issues at the least that will be urged and must be answered by the respondent. A single *bona fide* issue is sufficient. In a word, the appeal is not at all frivolous.

As to whether the intended appeal would be rendered nugatory if an order of stay were declined, it has to be borne in mind that the stay of execution jurisdiction is exercised to preserve the *status quo* or prevent interim harm, and to ensure that the appellate process is not rendered an empty ritual. In the present case the applicants have laid before us their apprehensions that their rights to a fair trial as set out in **Article 50**, which are indubitably declared under **Article 25** of the Constitution to be non-derogable and not subject to limitation, are in clear and present danger of violation as a result of the learned Judge's order that their trial do commence and proceed notwithstanding their strenuous protestations that they will be prejudiced by prosecutorial non-disclosure.

A cursory consideration of **Article 50** lays down certain minima for a fair criminal trial including but not limited to the right to adequate time and facilities for the preparation of one's defence under **Article 50(2) (c)**. This right finds meaning and fulfillment in prosecutorial disclosure, which in turn also goes to fulfill the related right to adduce and challenge evidence under **Article 50(2) (K)**. The applicants' case seems to be that the various documents which they have sought, and which the PSC has intransigently refused to furnish, are essential for them to be able to properly prepare their own defence and confront the prosecution witnesses through cross-examination. The Assistant Director of Public Prosecution's explanation that the prosecution does not intend to rely on the particular documents is answered by the applicant's rejoinder that the duty to disclose and hand over materials extends to exculpatory material which would presumably fall under the right to tender evidence in their own defence. It will be for the bench hearing the appeal to interrogate, unpack and authoritatively pronounce itself on the merits of those rival contentions.

For our present purposes, we are confronted with a stark choice; whether to grant the application and stop a criminal prosecution thus truncating a trial which ought ordinarily to proceed seamlessly and expeditiously or, on the other hand, disallow the application and allow the said prosecution to proceed when there is a reasonable and well-founded fear that the fair trial rights of the applicants will be infringed and violated. It really is a Hobson's choice but in the struggle between form and substance, we are inclined to give effect to the latter over the former.

It is not enough to have a trial, desirable as criminal trials are as enablers of accountability and an antidote to impunity. Where the Constitution declares that fair trial is a non-derogable right and the trial court itself has found that in the absence of disclosure by the prosecution much prejudice may be visited upon the accused, it seems to us untenable that we should accede to a counter-argument that would potentially convert the prosecution into a persecution. We think that the interests of justice would be better served by a grant of a limited stay of execution and proceedings as sought until the intended appeal is heard and determined. Courts of law must not appear to be complicit in the taking of liberties with the liberties of citizens. We think that there is much more harm likely to occur not only to the applicants, but to the cause of justice itself and the judicial process, were we to countenance and give our stamp of approval to a process that runs afoul the bill of rights and especially violates or is likely to violate the applicant's fair trial rights. We would therefore hold that the public interest commands the upholding of the Constitution and the rule of law.

For those reasons we find that the applications before us are meritorious. They are granted as prayed. The stay of execution and of proceedings shall be pending the filing and determination of the intended appeals. We direct that the records of appeal be lodged within **30 days** of the date hereof and the appeals be thereafter fast-tracked for expeditious disposal.

The costs shall be in the intended appeals.

Dated and delivered at Nairobi this 14th day of July, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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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