



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A)**

**CRIMINAL APPLICATION NO. 3 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR STAY OF PROCEEDINGS IN**

**NAKURU C.M. CRIMINAL COURT IN AN INTENDED APPEAL**

**BY**

**EDDAH WANJIRU MBIYU.....APPLICANT/INTENDED APPELLANT**

**VERSUS**

**THE REPUBLIC..... 1ST RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT**

*(Being an application for stay of proceedings in Nakuru CM Criminal Case No. 287 of 2012)*

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**RULING OF THE COURT**

Pursuant to **Section 3A (1) and (2)** of the Appellate Jurisdiction Act and **Rules 5(2) (b), 41 & 47** of this Court’s Rules, the applicant **EDDAH WANJIRU MBIYU**, filed the motion dated 18th July, 2017 and sought the following orders:

“1. Spent

**2. That there be a stay of further proceedings in Nakuru CCM Criminal Case No. 287 of 2012 -R- vs. Eddah Wanjiru Mbiyu & Others pending the hearing and determination of the Appellant’s intended appeal.**

**3. That the costs of this Motion be borne by the Respondent in any event.”**

The **REPUBLIC** and the **DIRECTOR OF PUBLIC PROSECUTIONS (DPP)** were named as the 1st and the 2nd respondents respectively. The motion was supported by the affidavit of the applicant sworn on the same day of the filing of the motion.

In her affidavit in support of the motion the applicant averred that she is one of the accused persons in

Nakuru CMCCR No. 287 of 2012; that she had been arraigned in an alleged murder charge in Nakuru HCCR Case No. 123 of 2010; that on or about 24th January 2012, (inspite of the pendency of Nakuru HCCR No. 123 of 2010) the 1st and 2nd respondents caused her to be charged and arraigned in court in Nakuru CMCCR No. 287 of 2012 for the offence of attempted murder; that on 15th December, 2014 she was acquitted of the murder charge in Nakuru HCCR No. 123 of 2010; that the 1st respondent has sought (in Nakuru CMCCR Case No. 287 of 2012) to prosecute her for the offence of attempted murder based on the same facts obtaining in Nakuru HCCR No. 123 of 2014; that she stands to suffer double jeopardy if Nakuru CMCCR Case No. 287 of 2012 was to proceed; that unless an order of stay is granted the intended appeal would be rendered nugatory.

The motion came before us for plenary hearing on 30th October, 2017. There was no appearance by the office of the DPP inspite of service of the Hearing Notice upon them on 6th October, 2017.

In his brief address before us, Mr. Muite, Senior Counsel reiterated the contents in the applicant's affidavit. He urged us to find the applicant has an arguable appeal which will be rendered nugatory, absent stay, as the applicant will be tried for an offence arising out of similar facts and incident wherein she had been acquitted.

We have considered the motion and the supporting affidavit, the submissions of Senior Counsel before us, the entire record, the authorities cited and the law.

The facts of this matter are fairly straight forward. The applicant and 6 others were charged in Nakuru HCCR Case No. 123 of 2010 on two counts of murder contrary to section 203 as read with section 204 of the Penal Code. On 9th December, 2014 Omondi, J. acquitted all the 7 accused persons of the two counts of murder. However, during the pendency of Nakuru HCCR Case No 123 of 2010 the 2nd respondent proceeded to arraign all the 7 accused persons in Nakuru CMCCR Case No.287 of 2012 on a charge of attempted murder contrary to section 203 of the Penal Code. Aggrieved by the 2nd respondent's actions, the applicant framed constitutional issues revolving around the issue of double jeopardy. The issues so framed were urged before Ogolla, J. who in a ruling dated 7th November, 2016 directed the CMCCR No. 287 of 2012 do proceed to its logical conclusion.

The applicant was dissatisfied with the said outcome and duly filed a Notice of Appeal dated 16th November, 2016, thus paving the way for the institution of the motion before us.

The grant of an application under Rule 5(2)(b) of this Court's Rules, lies in the discretion of the Court. For an applicant to succeed, he/she has to demonstrate that he/she has an arguable appeal that would be rendered nugatory, if stay is not granted. These principles were restated in the case of **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI (2014) eKLR** wherein this court whilst considering an application under **Rule 5 (2) (b)** expressed itself as follows:

**“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR 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 of 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.”**

In the instant matter it is arguable whether an accused person can stand trial, albeit for a different offence allegedly committed at the same place and time and involving the same witnesses. Does this amount to double jeopardy? In their submissions in the High Court the DPP was of the view that the offence of murder is different from a charge of attempted murder and that these two are separate and distinct offences with different ingredients and that it was immaterial that the two charges emanated from the same incident.

Without making definitive conclusions, we think it is a moot point as to whether one can be tried for an offence during the pendency of a trial, and/or upon an acquittal, on a second disparate charge against her/him based on the same set of evidence and transaction. It is in view of this that we therefore think the appellant has an arguable appeal.

On the nugatory aspect, we have no hesitation in making a finding that if indeed the trial of the applicant was to proceed, then her intended appeal would be but a sham as she would suffer the rigorous and stigma of a criminal trial.

We are satisfied that the two conditions for consideration of an order for stay have been met. We therefore grant the orders sought in the motion dated 14th of September, 2017. However given the nature of this application, we make no order as to costs.

Be that as it may, we further direct that in order to fast track the intended appeal the applicant is to file her appeal within 60 days from today’s date, with liberty to apply. It is so ordered.

***Dated and delivered at Nairobi this 10th day of November, 2017.***

***G. B. M. KARIUKI***

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***JUDGE OF APPEAL***

***F. SICHALE***

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**