



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO 29 OF 2016 (UR 21/2016)

BETWEEN

JOHNSON NDUYA MUTHAMA.....APPLICANT

AND

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

PAUL KIBUGI MUIITE.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....4TH RESPONDENT

CHIEF MAGISTRATE’S COURT (NAIROBI).....5TH RESPONDENT

(an application for stay of the judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated 3rd November 2015

in

Miscellaneous Civil Application No 424 of 2014)

RULING OF THE COURT

Before the court is a motion on notice dated 9th February 2016 in which the applicant seeks an order in the main that:

“pending the hearing and determination of the applicant’s intended appeal, this Honourable Court be pleased to grant a stay of execution of the judgment and decree of the High Court at Nairobi ... dated 9th November 2015 in Judicial Review No 424 of 2015.”

The background against which the applicant comes to this court to seek those orders is provided in the affidavit of the applicant filed in support of the application as follows: On or about April 2014, the 3rd respondent began an inquiry regarding the sum of Kshs 1 billion that was said to have been paid by the government of Kenya to some of the shareholders of Malili Ranch Limited. Subsequent to that inquiry the 3rd respondent recommended to the 1st respondent that the applicant, together with seven other parties who are not party to this application, be charged with various offences.

Thereafter, the file was passed to the 2nd respondent, who at the time was an advocate in private practice, to review the file and make a recommendation to the 1st respondent regarding the matter after which the 2nd respondent instituted and commenced criminal proceedings against the 2nd respondent before the 5th respondent in Anti-Corruption Case No 19 of 2014.

Being aggrieved with his prosecution, the applicant filed a judicial review application where he sought various orders, among them an order of prohibition to stop his prosecution and an order of certiorari to quash the gazette notice appointing the 2nd respondent as a special prosecutor. In this application the applicant argued that the 1st respondent's decision to divest himself of his constitutional mandate to deal with the applicant's prosecution was unreasonable, unlawful and illegal. He further argued that the 2nd respondent's decision to charge him and leave out other people who could be charged was unreasonable and discriminatory. He also argued that the decision made to appoint the 2nd respondent as a special prosecutor was irregular, illegal and contrary to established legal principles. This judicial review application was dismissed for being without merit, and the applicant, being aggrieved with the decision, intends to appeal against it. He therefore seeks an order to stay the outcome of that judgment pending the hearing and determination of the intended appeal.

It is trite law that to succeed in a motion of this nature, the applicant must show or demonstrate that first, the intended appeal is not frivolous, or that it is arguable, and second, that the intended appeal if it is successful, will be rendered nugatory if the orders of stay of execution are not granted. These principles are well settled and have been restated in several decisions of this Court, such as in **Patel v Transworld Safaris Ltd [2004] eKLR (Civil Application No. Nai. 197 of 2003)** when the Court stated that:

“In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application.”

See **Collin Bett T/A C.K. Bett Traders v Ecobank Kenya Limited & another [2014] eKLR (Civil Application No Nai 182 of 2014 (UR 141/2014)** where this Court rendered itself as

hereunder:

“There are two main principles that guide the Court in determining applications such as the present one. These are first, that the applicant must demonstrate that the (intended) appeal is arguable, and secondly that the intended appeal would be rendered nugatory should the order of stay sought not be granted.”

Before we embark on determining whether the applicant has carried out his responsibility on the two principles, we must first consider the challenge brought by the respondents that the orders sought herein cannot be granted because there were no positive orders emanating from the impugned decision of the High Court that are capable of being stayed.

In granting orders sought under rule 5(2)(b) of this Court's rules this Court exercises original jurisdiction. This much the Court in **Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006** reiterated in the following manner:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary.”

That this Court has original jurisdiction was re-emphasised by Githinji JA in *Equity Bank Limited vs West Link Mbo Limited [2013] eKLR (Civil Application No. NAI 78 of 2011)* wherein he stated that:

“It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. ...

It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

The question of whether this court had the power to grant an order of stay of proceedings that were before a magistrate’s court pending the outcome of an appeal to this Court was the subject of inquiry in *Republic v The Kenya Anti-Corruption Commission & 2 Others [2009] eKLR (Civil Application No. Nai 51 of 2008)*.

The court concluded that:

“It would appear logical to say that it seems that the Court can [grant an order of stay of proceedings] if petitioned on time to stay the order and/or decree of the superior court which will in turn have the effect of staying the criminal proceedings in the superior court. Further, as to whether it can do so or not depends on the particular circumstances of each case and especially so, what exactly the applicant is asking the Court to do and how the Court is approached.

...

From my consideration of the above somewhat conflicting decisions I would hold therefore that whether rule 5(2)(b) of the Rules does apply to criminal proceedings and as to whether this Court can issue an order for prohibition in a criminal case against the magistrate’s court pending appeal depends on what prayers an applicant is seeking under the rule and the particular circumstances of each case.”

Having read the judgment of the High Court, and bearing in mind the manner in which the applicant has couched his prayer, and giving due consideration to the authorities we have cited herein, it is clear in our minds that what the applicant seeks to stay is the prosecution before the 5th respondent. We have no doubt that this Court has the jurisdiction to grant an order of stay of proceedings before a magistrate’s court pending the hearing and determination of an appeal in which is challenged the conduct of those proceedings in order to ensure that the intended appeal is not rendered moot.

In addition, this Court has the jurisdiction to ensure that in all appeals, orders are made to facilitate a proportionate resolution of the dispute before us as was the case in *Mbaabu Mbui & Another – V- Langata Gardens Limited [2011] eKLR (Civil Application Nai 73 Of 2011 (Ur 49/2011))*. This Court, in granting such an application will of course consider if there will be substantial loss that may be occasioned should the injunction not be granted. See *Lake Tanners Limited & 2 others v Oriental Commercial Bank Limited [2010] eKLR (Civil Application No. 64 Of 2010)* where the Court stated that this consideration will apply to an application for injunction pending appeal because the purpose of the injunction will be to preserve the status quo pending appeal. For these reasons, we reject the respondent’s challenge to the application on this ground.

We now proceed to address ourselves to the crux of the application, which is whether the applicant has met the conditions for the granting of the orders sought.

Through his learned counsel, Dr Khaminwa and Mr Ndubi, the applicant submitted that the intended appeal is arguable and has good chances of success. He contends that the suit before the High Court was founded on the threatened infringement of his right to a fair trial. The judicial review application challenged the conduct of the criminal proceedings through which the applicant’s rights could be violated. In his view, the decision to prosecute him was made by the 2nd respondent, who is an unqualified person

to make such a decision, and is also unqualified to prosecute him. He further argues that the judicial decision to prosecute him was arrived at by the 2nd respondent even before his gazettelement as a special prosecutor for the 1st respondent.

The 2nd respondent on his part contends that the intended appeal is not arguable. In his view, the applicant has lost the right to appeal because the decision of the High Court was delivered on 3rd November 2015, over sixty (60) days ago, and he cannot obtain a certificate of delay because the letter seeking typed proceedings before the High Court was not served on them or their respective advocates. The 2nd respondent further urges us not to allow this application because the criminal proceedings sought to be stayed affect eight other accused persons who have not been heard on the issue of delaying their prosecution. In addition, all the respondents in their respective submissions contended that under Article 157 of the Constitution, the 1st respondent has the authority to delegate his prosecutorial powers, and that therefore, there was no harm in the 2nd respondent continuing with the prosecution.

An arguable appeal is any appeal that raises at least one bona fide issue that deserves the consideration of this Court. This was the holding of the Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR (Civil Application 31 of 2012)* where it rendered itself in the following manner:

“vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...;

vii) 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...;”

On our part, we find that the issues raised by the applicant are certainly not frivolous. We were informed from the bar that the 2nd respondent is the one who drafted the charge sheet, then the 1st respondent proclaimed the decision of the 2nd respondent as its own. We have also taken note of the applicant’s apprehension that his prosecution is being conducted by a politician who continues to hold a position in a political party.

In our view, the applicant’s concern that his right to a fair trial will be violated is merited. The court that will eventually hear the appeal will be called upon to consider various questions to wit: what a fair trial as envisaged under article 50 as read with article 25 of the Constitution encompasses; whether or not the fact of potential prejudice on the part of the prosecutor may undermine the right to a fair trial; whether or not the 1st respondent has the power to appoint an advocate who regularly undertakes private practice to perform the functions of a public prosecutor; and whether or not such a person so appointed will be a public officer. We have also taken note that the investigations regarding the money that was said to have been misappropriated were begun before the establishment of the 1st respondent’s office as provided under the Constitution of Kenya, 2010. It therefore begs the question as to whether or not the 1st respondent has the power to revive investigations that begun before the establishment of his office.

It has been contended that the applicant is one of eight accused persons who are entitled to an expeditious trial under article 50 of the Constitution and that an order of stay would delay the hearing and finalization of the criminal trial against them. It has also been contended that an order of stay of the criminal proceedings would violate the rights of the other accused persons. While we agree that every accused person is entitled to a speedy trial and that the other accused persons have not challenged their prosecution, we do not perceive this to mean that the applicant cannot raise concerns to this Court if he thinks that he is not legitimately or fairly prosecuted. This cannot be used to stop this Court from exercising its jurisdiction over all matters presented to it. The choice of an individual under article 50 cannot be a front to deny him the right to question what he perceives to be an alleged violation or infringement of his rights.

Another issue that has been raised by the respondents is that the applicant is eminently represented before the criminal court and that he will therefore have the opportunity to test the veracity, reliability and

cogency of the prosecution case. In our view, that is missing the point that is in issue before the court, which we understand to be the nature, the import and the parameters of the application of the principles of a fair trial.

It is undisputed that the 2nd respondent received the files in respect of the subject criminal case in the month of April 2014 and was gazetted as a special prosecutor in the month of August 2014. In between, he had been reviewing the files and evidence. He even exchanged correspondence with the applicant and the 1st respondent. It is alleged that the decision to prosecute the applicant and his co-accused was arrived at by the 2nd respondent. Having regard to these facts, our view is that the process that led to the commencement of criminal proceedings against the applicant is in serious dispute and this is a fundamental point for the investigation, discussion and determination during the hearing of the substantive appeal. In our view, these are all weighty issues that require further inquiry on appeal before this Court. The applicant has therefore satisfied us that his intended appeal is arguable.

We now turn to consider whether or not, the intended appeal will be rendered nugatory if we do not stay the criminal proceedings. In making a determination on the nugatory aspect, we are aware that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See *Reliance Bank Ltd v Norlake Investments Limited* [2000] 1 EA 227.

For the proposition that the intended appeal will be rendered nugatory if we do not stay his prosecution, the applicant submitted that if the proceedings are not stayed, then his prosecution will continue in violation of his rights. We agree with the applicant that the right to a fair trial is one of the inalienable rights under the Constitution; it is an inherently personal right that cannot be limited as provided under article 25 of the Constitution.

If we do not grant the orders of stay of proceedings sought herein, it is very likely that the proceedings before the 5th respondent will continue, with the result that the applicant will have to undergo a prosecution that may result in the deprivation of his right to a fair trial. If the intended appeal is successful, that means the applicant will have undergone a prosecution that will have been conducted by an unqualified person. That will cause him prejudice that is unlikely to be remedied by any other order that this Court may make. In that event, the intended appeal from the judgment of Odunga J., if successful, will indeed have been rendered nugatory.

We find therefore that the applicant has demonstrated the second limb, and have satisfied us that if we do not allow this application, the intended appeal, if it is successful, will be rendered nugatory. We therefore find that the application has merit and we allow it as prayed. The costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 29th day of July, 2016

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR