IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, WAKI & NAMBUYE, JJ.A)

CRIMINAL APPLICATION NO. 19 OF 2016 (UR 2/2016)

BETWEEN

SGT. CATHERINE ELIZABETH RUSSEL …….......………. APPLICANT

AND

REPUBLIC ……………………………………….……..…….. RESPONDENT

*(An application for stay of execution & proceedings in Nanyuki Traffic case No. 85 of 2012 pending the hearing and determination of the intended appeal against the judgment of the High Court of Kenya at Nanyuki (**Kasango, J.)** dated 25th February, 2016*

in

H.C.CR.A No. 34 of 2015)

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RULING OF THE COURT

Before Court is a Notice of Motion brought under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act; Cap 9 Laws of Kenya Rules 5(2) (a)** and **Rules 42 and 47** of the **Court of Appeal Rules.** Initially four (4) reliefs were sought from court. Prayer 1 and 2 are however spent. Prayers 3 and 4 read as follows:-

> ***"3. There be a stay of execution of the judgment delivered by Lady Justice Mary Kasango on 25th February, 2016 and in particular the following be granted pending the hearing and determination of the intended appeal.***
>
> ***(a) A stay of proceedings in Nanyuki Criminal Case Number 85 of 2012, Republic versus Sgt. Catherine Elizabeth Russel.***
>
> ***(b) A suspension of the warrant of arrest issued against the applicant in Nanyuki Criminal Case Number 85 of 2012 Republic versus Sgt. Catherine Elizabeth Russel.***
>
> ***(c) A stay of the order made in Nanyuki Criminal Case Number 85 of 2012, Republic versus Sgt. Catherine Elizabeth Russel requiring Alfred Kamansi, the surety to produce Sgt. Catherine Russel in court and the suspension of any warrant of arrest issued against***

the surety.

4. The costs of this application abide by the outcome of the appeal.”

The application is supported by the grounds on its body and a supporting affidavit of Major Bonnie Nicolle. It was opposed by the State on points of law only. The background information to the application is that following a Memorandum of Understanding (MOU) between the Government of Great Britain and Northern Ireland, on the one hand, and the Kenyan Government, on the other hand, the British Army Training Unit Kenya (*herein after referred to as* **BATUK**), a department of the United Kingdom’s Ministry of Defence commenced its operations in Kenya. On 5th February, 2012, the applicant then stationed at BATUK’s Nanyuki base while driving a Bedford Lorry registration No. 62 KE 77 was involved in an accident with Motor vehicle registration No. EX 03 KN O5 make Nissan Patrol along Nanyuki/ Timau road. Subsequently, she was charged before the Chief Magistrate’s Court at Nanyuki with the offence of careless driving contrary to ***Section 49(1) of the Traffic Act***. The applicant raised a preliminary objection with regard to the jurisdiction of the subordinate court to hear the matter. It was to the effect that by virtue of Clause 6 of the MOU, the Kenyan courts have no jurisdiction to entertain the matter since the accident happened while she was in the course of duty. The jurisdiction to try her for any offence, therefore lay with the British Authorities. However, the applicant left the country after the conclusion of her assignment before the preliminary objection was heard. Subsequently the High Court directed the subordinate court which had initially been reluctant to proceed on with the disposal of the preliminary objection to proceed and determine the said preliminary objection. The learned Principal Magistrate, Mr. P. Nyagena heard and dismissed the preliminary objection causing the applicant to prefer an appeal at the High Court which was also dismissed in a judgment dated 25th February, 2016, the subject of the intended appeal. Upon the conclusion of the appeal in the High Court, the subordinate court issued a warrant of arrest against the applicant and directed her surety to produce her in court prompting the filing of the application under review.

The grounds in support of the application as gathered from the pleadings are that the intended appeal raises an issue of utmost importance with regard to jurisdiction and interpretation of the MOU; the intended appeal is arguable and would be rendered nugatory unless the orders sought are granted; the Royal Military Police in line with clause 6.3 of the MOU had taken up the matter, investigated and concluded that the applicant was not responsible for the accident and appropriate leave would be sought to produce evidence of the said investigations as additional evidence.

In his submissions before Court learned counsel Mr. H. K. Mahan while reiterating the grounds in the supporting pleadings submitted that a jurisdictional issue raised by the applicant is a good ground for granting stay, the intended appeal is therefore arguable and not frivolous; it is acknowledged that the applicant was not in the country having left the country under the instructions of her commanding officer and not for purposes of avoiding prosecution. There is also no need to avail her during the hearing of the appeal dealing with a jurisdictional issue that can be handled by her lawyer without her participation.

On the nugatory aspect, Mr. Mahan submitted that unless the orders sought are granted the proceedings at the subordinate court will proceed hence rendering the intended appeal nugatory. He further contended that the MOU in question has a force of the law as will be demonstrated at the hearing of the intended appeal.

To buttress his argument Mr. Mahan relies on the observations of the court in **Republic versus The Kenya Anti-Corruption Commission [2009] 1 EA 384 CAK** at page **389** thus:-

> ***“the other vexing issue we have to grapple with is whether this Court under rule 5(2) (b) of the rules has jurisdiction to stay criminal proceedings in the magistrates court which proceedings do not from part of the substantive appeal before the court as the applicant has petitioned the court to do in the matter now before us. It would appear logical to say that it seems that the court can do so if petitioned in 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."

In opposition to the application the learned Assistant Director of Public Prosecutions Mr. J. Kaigai submitted that the applicant ought not to be given audience since she absconded and jumped bail; the MOU did not oust the jurisdiction of Kenyan courts in criminal matters; and the MOU has no force of the law. In Mr. Kaigai's view, clause 5.2 of the MOU required all activities thereunder to be conducted in conformity with the law of the host country which in this case was Kenya, meaning that any activity performed contrary to the law of the host country, as in this case committing a traffic offence, the perpetrator has to face the consequences of such breach in Kenyan courts.

On the nugatory aspect, Mr. Kaigai submitted that the intended appeal was not arguable as under clause 6.4 of the MOU Kenyan authorities had the primary right to exercise jurisdiction with respect to alleged offences committed in the country and punishable under the laws of Kenya; and, lastly since the applicant was charged with an offence under Kenyan law, the law ought to take its course. The two courts below were therefore in order when they asked the surety to produce the applicant in court for prosecution.

The court's jurisdiction to intervene has been invoked under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** (supra) **Rules 5(2) (a), 42** and **47** of the **Rules** of the court. **Rules 42 and 47** are merely procedural rules. The substantive enabling provisions of access to the relief sought are therefore **Sections 3A, 3B of the Act** (supra) and **Rule 5(2) (a)** of the **Rules of the Court.** These provide;-

> ***"3A. (1) The overriding objectives of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.***
>
> ***(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***
>
> ***(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.***
>
> ***(3B) Duty of Court***
>
> ***(1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall, handle all matters presented before it for the purpose of attaining the following aims –***
>
> ***(a) the just determination of the proceedings;***
>
> ***(b) the efficient use of the available judicial and administrative resources;***
>
> ***(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
>
> ***(d) the use of suitable technology.***

Rule 5(2) (a)

> ***"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."***

Sections 3A and **3B** of the **Appellate Jurisdiction Act** (supra) enshrines the overriding objective

principle. In summary, this principle, among others, enjoins the Court to view each case on its own peculiar facts and circumstances. (See **Kenya Commercial Finance Ltd versus Richard Akwesere Ondati C.A. Nai 329 of 2009).** This principle also confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under (see **City Chemist (NBI) Mohammed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited C.A. No. NAI 302 of 2008 (UR 199/2008)**. The aim of the overriding objective principle is to enable the Court to achieve fair, just, speedy, proportionate time and costs saving disposal of cases before it (see **Kariuki Network Limited & Another versus Daly & Figgs Advocates No. NAI 293 of 2009).** It is intended to re-energize the process of the Court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the rules made there under are "O_2" compliant. (See **Hunter Trading Company Limited versus ELF Oil Kenya Limited Civil Application no. NAI 16 of 2010 (UR 3/2010);** and lastly but not least, that the principal aim of the principle is to give the court greater latitude to overcome past technicalities which might hinder the attainment of the overriding objective (see **Caltex Oil Limited versus Evanson Wanjihia Civil Application No. NAI 190 of 2009 (UR).**

Turning to **Rule 5 (2) (a)** (supra), in the **Republic versus The Kenya Anti-corruption Commission** (supra**)** the court in its observations indicated that for the Court to intervene it has to be specifically moved. The applicant herein has done so by specifically inviting the court to suspend the execution of the warrant issued for her arrest and production before the subordinate court to stand trial for the traffic offence pending against her. In ***Goddy Mwakio & Another –vs- R (2011) eKLR*** the court expressed itself *inter alia* that:

> ***"Rule 5 (2) (a) 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--***

It is further the applicant's submissions that the stay of the proceedings in the subordinate court against her, which the High Court ordered to proceed, is not intended to bring that prosecution to a close but simply to hold it in abeyance pending the hearing and the determination of the jurisdictional interpretation issue intended to be raised by her in the intended appeal. The overriding "*command*" under **Rule 5(2)(a)** of the Court is found in the words "*but the court may –"*, meaning that the court has a discretion in the exercises of its mandate under the said rule. Like in the case of its twin sister **rule 5(2)(b**) of the **Rules** of the court the guiding principle on the exercise of judicial discretion is that the exercise of this discretion is unfettered (see **Republic versus The Kenya Anti-corruption Commission (supra)**. Other principles have been reiterated by this Court severally in numerous of its decisions. See **Githiaka versus Nduriri [2004] 2 KLR 67** where the court held *inter alia* that the court's discretion should be exercised judicially, that is to say, on sound reason rather than whim, caprice or sympathy with the sole aim of doing justice to the parties before it as fortified by the courts inherent power to do justice to the parties before it. In **Boniface Kyalo Mwololo versus Republic [2016] eKLR** the following observations were made:-

> ***"----- the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice and prevent the abuse of the process. The interests of the applicant and the victim must also be considered within the law and within the overarching parameters that judicial authority is exercised according to the purposes and the principles set out in the Constitution. Justice is like a double edged sword, an instrument that cuts both ways and protects both the accused and the victim……….."***

Although the observation in the **Boniface Kyalo Mwoholo case (supra)** related to stay of criminal proceedings directly subject of the appeal before the court, it is our view that the observation equally applies to criminal proceedings indirectly affected by the appeal as in the instant application. It is our finding that in terms of the above observations of the court has a proper basis to intervene either way on behalf of the applicant but before we do so, we have to determine the second but equally important issue, that is whether the intended appeal is arguable as contended by the applicant. In determining this issue, we wish to associate ourselves fully with the stand taken by the court in ***Berkeley North Market & Others –vs- Attorney General & Others [2005] eKLR*** wherein it rendered itself as follows;

> ***"At this stage, on an application to stay criminal proceedings, it is not for this Court to make a final determination: we only need to be satisfied that a sole bona fide contention is not unarguable or frivolous."***

In terms of the above caution, we find it prudent not to delve into the merits of either the intended appeal or the proceedings pending before the subordinate court as we are enjoined to avoid making any final determinations on the issues raised before the said forums.

Being cautious about the above and also having warned ourselves of the dangers of any attempt to stray into the arena of the merits of the pending proceedings, it is our firm belief that the intended appeal raises a fundamental issue of jurisdiction that merits the consideration of the court, that is whether the courts' of this Country have jurisdiction to entertain the criminal proceedings against the applicant in the light of the MOU between Kenya and the UK. In our view, jurisdiction is imperative in any matter before a court of law. It is what empowers a court to entertain a matter before it. It is also trite that an issue of jurisdiction ought to be determined by the court before embarking on the merits of the matter before it. In ***Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 others [2013] eKLR*** this Court expressed itself on the issue of jurisdiction thus,

> ***"So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain."***

Further, in the oft-cited case of ***The Lillian 'S' case [Owners of Motor Vessels 'Lillian S' –vs- Caltex Oil (Kenya) Ltd [1989] KLR1*** Nyarangi, J.A (as he then was) observed;

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

Consequently, since the central issue in the intended appeal is one of jurisdiction, it is our considered view that if the criminal proceedings continue the intended appeal would be rendered nugatory in the event the said appeal is successful.

In the result, it is our finding that the applicant has made out a case warranting the exercise of the Court's discretion as fortified by its inherent jurisdiction particularly in issuing an order in terms of prayer 3 of the application staying the execution of the judgment of the High Court dated 25th February, 2016 intended to be impugned in the intended appeal as far as it directed the subordinate court to continue with the criminal prosecution proceedings against the applicant. In other words, the stay of execution of the High Court orders of the 25th July, 2016 automatically acts as a stay of the criminal proceedings in the subordinate court.

Costs of the application to abide the outcome of the intended appeal.

Orders accordingly.

DELIVERED and DATED at NYERI this 9th day of November, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR