IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MWERA & MURGOR, JJ.A)

CRIMINAL APPLICATION NO. 1 OF 2015 (UR 1/2015)

BETWEEN

HELMUTH RAME …….....….. APPLICANT

AND

REPUBLIC ……..... RESPONDENT

(An application for stay of proceedings of the Chief Magistrate's Court at Nairobi

in

Criminal Case No. 2261 of 2005)

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RULING OF THE COURT

1. ***Helmuth Rame***, the applicant herein, is the accused person before the Chief Magistrate's Court at Nairobi in CMCC No. 2261 of 2005. He was arraigned before that court on a charge of conspiracy to defraud contrary to ***section 317*** of the Penal Code, as well as on three counts of obtaining money by false pretences contrary to ***section 313*** of the Penal Code. His trial proceeded in the normal course until the close of the prosecution case, after which Githua, SPM (as she was then), ruled on the 29th December, 2010 that the applicant be put on his defence. After several mentions, during which the hearing never proceeded, the prosecution, through Principal State Counsel, Mr. Joseph Gikonyo applied to withdraw the case against the applicant under ***section 87*** of the Criminal Procedure Code. The complainant, through his advocate Mr. Charles Kanjama, opposed this application. The trial court eventually declined to allow the withdrawal of the charges. The court also ordered that the trial of the appellant start *de novo*. Thereafter, Mr. Gikonyo applied to the High Court and asked the court to invoke its revisionary jurisdiction under ***section 362*** of the Criminal Procedure Code, to call for and examine the record so as to pronounce itself on the legality and propriety of the learned magistrate's ruling and orders. Mr. Kanjama as well asked the court to review the order directing that the matter proceed *de novo*.

2. The application was dismissed by Mbogholi Msagha, J. In reaching his determination, the learned judge considered the power of the Director of Public Prosecutions to discontinue proceedings as is provided for in ***Article 157*** of the Constitution of Kenya, 2010. He noted that ***Article 157 (8)*** of the Constitution provides that a criminal case may be discontinued only with the permission of the court. The learned judge refused to revise the trial court's refusal to allow the prosecution to

withdraw the criminal case, as to do so would, in his words, ***"put into question the public interest and the interest of the administration of justice and the need to prevent and avoid abuse of legal process."*** The learned judge was therefore of the view that the trial magistrate was correct in her decision to require the prosecution to continue with his case. The learned judge, however, revised the order that the trial before the magistrate starts afresh, and ordered that the hearing continue from the defence case as had been ordered previously.

3. Aggrieved by that decision, the applicant lodged a notice of appeal indicating his intention to appeal against the entire Ruling. He also filed the present application which is dated the 10th December, 2014, seeking an order in the main that there be

   "a stay of further proceedings in Nairobi Criminal Case No. 2261 of 2005 pending the hearing and determination of [his] intended appeal."

   The application is premised on various grounds that are presented on the face of the motion, and also in the supporting affidavit sworn by the applicant on the 10th

   December, 2014. The grounds were argued before us by Mr. Harrison Kinyanjui, learned counsel for the applicant. These grounds are that there will be irreparable harm visited upon the respondent as he will be subjected to an unfair trial; that the intended appeal raises weighty constitutional issues which include the right to a fair trial; and that the intended appeal will be rendered nugatory as the respondent will enforce the order of the High Court and the trial of the applicant will continue.

4. The application was opposed by Miss Mary Oundo, Senior Assistant Director of Public Prosecutions. Miss Oundo stated that the appeal is not arguable as the application for withdrawal made before the Chief Magistrate was not a *nolle prosequi* application under ***section 193*** of the Criminal Procedure Code as contended in the applicant's supporting affidavit, but was made under ***section 87*** thereof, where the prosecution is allowed to withdraw proceedings *with the consent of the court*.

5. The jurisdiction of this Court under ***Rule 5 (2) (b)*** is limited to civil proceedings. See ***Goddy Mwakio & Another v Republic [2011] eKLR (Criminal Application No. Nai. 8 of 2010 (UR. 6/2010)***wherein the Court stated as follows:

   > ***"The first is that of jurisdiction. 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 courts inherent jurisdiction."***

6. However this Court has inherent jurisdiction to grant orders of stay of proceedings. As Musinga, JA observed in ***Equity Bank Limited v West Link Mbo Limited [2013] eKLR (Civil Application 78 of 2011 (UR. 53/2011)****:*

   > ***"This Court's jurisdiction to grant interim orders of stay … in exercise of its inherent powers … is deeply entrenched in its operations and has been applied over a long period of time. That jurisdiction is of fundamental importance and without it the Court's effectiveness would be greatly compromised."***

7. This inherent jurisdiction has been invoked to stay criminal proceedings pending an intended appeal in this Court. In ***Republic v The Kenya Anti-Corruption Commission & 2 Others [2009]***

eKLR (Civil Application No. Nai 51 of 2008) Tunoi, JA (as he was then) who in dealing with the issue of the jurisdiction of the Court to grant an order of stay of criminal proceedings, expressed himself on the jurisdiction of the Court to grant an order of stay in criminal proceedings thus -

> ***"It would appear logical to say that it seems that the Court can [grant an order of stay] 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."***

8. The exercise of this Court's jurisdiction in an application of this nature follows a well beaten path. In ***Trust Bank Limited & Another v Investech Bank Ltd & 3 Others [2000] eKLR (Civil Application Nos. Nai 258 & 315 of 1999)*** this Court succinctly set out the twin prerequisites that an applicant must satisfy in order to benefit from the discretion of the Court as follows:

> ***"The jurisdiction of the Court under Rule 5 (2) (b) is … discretionary and it is trite law that to succeed an applicant has to show first that his appeal or intended appeal is arguable, [or that it is not frivolous] and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these must be considered against facts and circumstances of each case."***

9. These principles remain true where an applicant seeks an order of stay of criminal proceedings before the magistrate's court. In reaching a determination of whether or not an appeal is arguable, we are alive to the fact that the grounds of appeal only

   need to disclose a single *bona fide* contention that is worthy of further interrogation by this Court. In ***Berkeley North Market & Others v Attorney General & Others[2005] eKLR (Civil Application No. Nai 74 of 2005)*** the Court rendered itself on the issue in the following terms:

> ***"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."***

10. In the present application, the applicant contends that he has an arguable appeal; in his view, his trial before the magistrate's court should not go on as it was instituted over ten years ago, and due to that long lapse of time, some of his witnesses cannot be traced, and those who can be will not be in a position to remember the flow of events that gave rise to the criminal trial. For these reasons, the applicant considers that he is in danger of undergoing an unfair trial.

11. In hearing an appeal from the High Court, where that court was exercising its revisionary jurisdiction, this Court will be exercising its jurisdiction as a second appellate court. See ***section 361 (7)*** of the Criminal Procedure Code.

12. We do not consider that the grounds the applicant raises on appeal are arguable. If, as the applicant contends, he feels that he will not get a fair trial before the Chief Magistrate's Court, then the grounds he raises could well be good grounds on appeal to the High Court from whatever decision is reached by that court.

13. We also do not see how the appeal would be rendered nugatory. While the applicant contends that there will be an unwarranted loss of judicial time and resources should the criminal trial proceed and on the other hand should his appeal be successful. We disagree. It is the function and duty of criminal courts to try and determine cases before them. This Court will not interfere with the duty simply because there is a remote chance that the applicant's intended appeal may be successful.

14. One of the factors that we must consider is whether or not, the damage to be suffered by the applicant, if indeed there is any, would be capable of being compensated by damages. See ***Timothy Isaac Bryant & 2 Others v Inspector***

    General of Police & 7 others ***[2015] eKLR (Criminal Application No. Nai 3 of 2014 (R)*** where it is stated that:

"Where an award of damages is found to be sufficient remedy to compensate the applicant, an order under *Rule 5 (2) (b)* ***will not normally be granted."***

15. In the present case, even if the proceedings before the criminal court are not stayed, the applicant still has an avenue of appeal before the High Court, and should it be found that the applicant will have been subjected to an unfair trial as he claims he is in danger of undergoing, then he has a remedy in damages. For these reasons we do not consider that the applicant's appeal would be rendered nugatory.

16. Accordingly, we find that we have nothing before us that would mandate us to interfere in the conduct of Criminal Case No. 2261 of 2005. The applicant has failed to satisfy us on the twin principles summarised hereinabove and as such, the application has no merit and accordingly fails. We therefore decline to exercise our discretion and instead order that this application be and is hereby dismissed.

Dated and delivered at Nairobi this 8th day of May, 2015.

P. KIHARA KARIUKI, (PCA)

JUDGE OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR