



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CRIMINAL APPLICATION NO. 7 OF 2015

BETWEEN

MARK KIBIA NJIHIA APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(An application for stay of proceedings and execution pending appeal from the Orders of the High Court of Kenya at Kakamega (Sitati, J.) dated 21st April, 2015

in

MISC. CRA. NO. 19 OF 2015)

RULING OF THE COURT

1. This is an application brought under certificate of urgency pursuant to **rule 5 (2) (a)** of the **Court of Appeal Rules**. The applicant seeks the following orders:

“(a). That there be a stay of proceedings and execution of the orders given by the superior court on 21st August, 2015 in Kakamega Misc. Application NO. 19 of 2015 pending the hearing and determination of this application or the intended appeal;

(b). That an order do issue that the proceedings in lower court Criminal Case No. 2415 of 2013 Kakamega Law Courts be and are hereby stayed pending the hearing and determination of this application and or the intended appeal.”

2. The applicant is yet to file the memorandum and record of appeal but filed a notice of appeal on 28th April, 2015. The applicant is the accused in **criminal case No. 2415 of 2013** that is partly heard before the Chief Magistrate’s Court at Kakamega and five witnesses have so far testified. Further hearing of the case is scheduled to be on 24th September, 2015.

3. On 16th March, 2015, the applicant filed **Misc. Criminal Application No. 19 of 2015** in the High Court of Kenya at Kakamega seeking, **inter alia**, transfer of the Criminal Case from the Principal Magistrate’s Court, Kakamega, to any other subordinate court and/or particularly to Nairobi, where the applicant said the alleged offence was committed. In his view, the Principal Magistrate’s court

at Kakamega had no jurisdiction to hear and determine the criminal case.

4. The grounds advanced in support of the said application were that:

“(i). The alleged offence occurred in Nairobi.

(ii). The alleged garage where the motor vehicle in question KBU 317 Y was garaged is in Nairobi.

(iii). The alleged account operated by the applicant is at Kawangware, Nairobi Equity Bank Limited.

(iv). That the current Magistrate seems to be biased in one way or the other.

(v). That most witnesses are based in Nairobi i.e. from Equity Bank, Safaricom, Garage, Investigating Officer, etc.

(vi). That the applicant has lost faith with the court handling the matter as such and he may end up not getting a fair trial.”

5. The respondent through Mr. Mailanyi opposed the application. He contended, *inter alia*, that the trial court has jurisdiction to hear and determine the criminal case, that the offence was committed at Kakamega Central District, that the money transactions and negotiations were conducted when the complainant was within Kakamega County, that most of the prosecution witnesses reside within Kakamega and that the applicant had not demonstrated that the trial magistrate was biased against him.

6. In a considered ruling delivered by **Sitati, J.** on 21st April, 2015, the learned judge declined to grant the orders sought, whereupon the applicant filed a notice of appeal on 28th April, 2015.

7. When the application came up for hearing before this Court, the applicant's advocate was not present. The applicant informed us that his advocate had been involved in a minor accident on his way to court and consequently he opted to argue the application in person. In so doing, he relied on his affidavit in support of the application as well as a further supporting affidavit sworn by one Naomi Wakarima Nyutu.

8. **Mr. Ogoti**, Senior Assistant Deputy Public Prosecutor, opposed the application. He argued that the application was premised on the wrong provisions of the law and more importantly, that the applicant had not demonstrated actual bias on the part of the trial magistrate to warrant his disqualification and transfer of the criminal case to another court.

9. In an application for stay of proceedings pending appeal or an intended appeal, the applicant has to satisfy the two basic and well known requirements, namely;

(i). that the applicant's intended appeal is arguable, that is, it is not a frivolous appeal;

and

(ii). that unless the relief sought is granted the intended appeal, were it to succeed, the success would have been rendered nugatory.

See *J. K. INDUSTRIES LIMITED V KENYA COMMERCIAL BANK LIMITED* [1982 – 85] 1 KAR 1688.

10. An arguable appeal is not one that must succeed, it is one that is worth of the court's interrogation.

11. Having considered the application, the affidavits in support and the ruling by Sitati, J., we are satisfied that the intended appeal is arguable and may be rendered nugatory unless the orders sought are granted because the trial shall proceed and be finalised before the intended appeal is considered. We need not say more than that at this stage lest we pre-empt the intended appeal.

12. Consequently, we allow the application and hereby order that the proceedings in **criminal case No. 2415 of 2013** before the Chief Magistrate's Court at Kakamega be stayed pending the hearing and determination of the intended appeal.

13. We further direct the applicant to file and serve the memorandum and record of appeal within fourteen (14) days from the date hereof, failing which the order of stay shall lapse.

DATED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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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