IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & ODEK, JJ.A)

CIVIL APPLICATION NO. NAI. 199 OF 2015

BETWEEN

GEORGE JAMES KANG'ETHE…….....…….……1ST APPLICANT

PATRICK KANG'ETHE NJUGUNA…….....……2ND APPLICANT

AND

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

THE CHIEF MAGISTRATES COURT MILIMANI LAW COURTS……2ND RESPONDENT

(An application for stay of further proceedings in Chief Magistrate's Court Criminal Case Number 744 of 2014 pending an intended appeal against the Judgment of the High Court of Kenya at Nairobi (Korir, J.) dated 10th July, 2015

in

Judicial Review Misc. Civil Appln. No. 155 of 2015)

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RULING OF THE COURT

This application is brought under ***Rule 5 (2) (b)*** of the Court of Appeal Rules for an order that;

> **"… court be pleased to grant an order prohibiting the arrest, arraignment and prosecution of the Applicants and equally for staying any further proceedings in Nairobi Criminal Case No. 744 of 2014 pending the filing and determination of the intended appeal herein".**

At the hearing of the application M/s Doreen Areri from the firm of Sichangi & Company Advocates applied for leave to represent John Karanja Warui and that the said John Karanja Warui be joined as an interested party in the application. As Gachie Mwanza, learned counsel for the Applicant had no objection to the application, the application was allowed by consent.

In about the year 2009, John Karanja Warui filed civil suit no. 415 of 2009 in the High Court Land & Environment and Division against the two applicants and one Patrick Ndonga for recovery of land title

No. Dagoretti/Riruta/2290 claiming that the 1st applicant obtained the registration of the land in his name fraudulently. An interlocutory application filed by John Karanja Warui to restrain the applicants from dealing with the land in dispute in any manner pending the hearing of the suit was dismissed by the High Court (Mbogholi Msagha, J.) on 4th March 2010.

It is apparent that sometime in year 2011, John Karanja Warui reported the transaction to police who initiated investigations which culminated in the two applicants being charged by the 1st respondent with six counts alleging fraudulent acquisition of the land in dispute.

In a Constitutional Petition High Court Miscellaneous Application No. 298 of 2013 the applicants moved the High Court Criminal Division for declarations including a declaration that any arrest and prosecution of the criminal proceedings in the Chief Magistrate's court would be a nullity, illegal and a breach of fundamental rights of the applicants and therefore violation of the Constitution. It seems that at the time the petition was filed the police investigations had been completed and the applicants had been bonded to appear in court to answer for criminal charges on 20th September 2013.

The basis of the petition was that in view of the process in which the first applicant obtained the registration of the disputed land in his name, all the charges are completely unfounded in law, baseless and unjustifiable in an open and democratic society and that the respondents were intent to infringe the applicants' constitutional rights by settling of a civil dispute through the criminal justice system. The applicants further averred that the charges were an abuse of criminal justice system and intended to harass and intimidate them.

The High Court (Achode, J.) heard the parties and made a finding in part;

> **"There is no evidence that the Respondents have acted arbitrarily or unconstitutionally in the performance of their duties, nor that the interested party is actuated by the desire to punish or oppress the petitioners by brandishing the rod of punishment under criminal law. A court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution. In addition, the court cannot prevent the police or the Director of Public Prosecutions from carrying out investigations on reasonable suspicion that an offence has been committed since they are executing their duty and obligations. The court cannot weigh whether there is evidence that is sufficient to sustain the criminal prosecution or charges. There is also no bar to be exercise of concurrent criminal and civil jurisdiction."**

On the basis of that reasoning Achode, J. dismissed the petition on 14th May 2014.

By a Judicial Review Application in High Court Miscellaneous Cause No. 155 of 2015 dated 26th May 2015 the applicants again moved the High Court for an order of prohibition to "prohibit, forbid and to act as a restraint to any trial or any further proceedings" pending against applicants in Criminal Case No. 744 of 2015.

The application was based on the grounds, ***inter alia,*** that the charges were brought in blatant abuse of the powers of the Director of Public Prosecutions to institute criminal proceeding, that there is no evidence to sustain criminal charges, that the charges were brought without proper investigations and, that the interested party has criminalized a purely civil dispute. The Director of Criminal Prosecutions filed a preliminary objection based on the ground that the subject matter was ***res judicata*** having been canvassed in criminal application no 298 of 2013. The High Court on 10th July 2015 (Korir, J.) upheld the preliminary objection saying:

> ***"I say nothing is novel in the application before me. Although it is not clear from the judgment of justice Achode whether the criminal case had been filed before the magistrate's court, it is clear as day is clear from night that the ex parte applicants were***

in that petition fighting to stop the Director of Public Prosecutions from prosecuting them. This is what they are also doing through these proceedings. I therefore agree with the respondents that this matter is not only res judicata but also an abuse of court process".

The applicants have filed a notice of appeal signifying an intention to appeal against the entire decision. The Applicants have filed a draft memorandum of appeal containing four grounds.

They say that the learned judge misdirected himself in relying solely on the preliminary objection and in failing to address his mind to the facts of the case; that the learned judge failed to appreciate that the two proceedings were different the first one seeking declaration before the criminal case was instituted and the second seeking to prohibit further prosecution on the ground that the criminal trial was an abuse of the process of the court; that the learned judge misdirected himself in failing to appreciate that the issues before him were different matters on the same facts but seeking a different remedy.

In order to succeed in the application, the applicant has to principally demonstrate that the intended appeal is arguable and that unless stay of proceedings is granted, the appeal, if successful, would be rendered nugatory.

Mr. Mwanza addressed us on the proposed grounds of appeal and submitted that the intended appeal is arguable and not frivolous, that if the application is not allowed, the appeal if successful would be rendered nugatory and that the respondents would not suffer any prejudice if the application is not allowed.

The application was opposed by both the respondents and the interested party on legal grounds.

We have considered the application. On the question whether or not the intended appeal is arguable, we appreciate that we are not dealing with the appeal and that no final decision can be made at this stage. The Applicants say that although the Constitutional Petition (No. 298/2013) and Judicial Review Application (No. 155 of 2015) were based on the same facts different remedies were sought at different stages of the prosecution process. However, it is ***prima facie*** clear, that in both applications the applicants were questioning the legal foundation of the charges and the exercise of power of the Director of Public Prosecutions to prosecute the applicants. The High Court (Achode,J.) made a finding that there was no evidence that the respondents had acted unconstitutionally and spelt the role of the court in an application of that kind.

The High Court (Korir, J.) in the Judicial Review application said that the two applications the applicants were fighting to stop the Director of Public Prosecutions from prosecuting them.

In the premises we are not satisfied that the appeal against the finding ***of res judicata*** is arguable on solid grounds.

Nor are we satisfied that the success of the appeal will be rendered nugatory if the application for stay of proceedings is not granted. The prosecution is intended to achieve the policy of the Constitution that those suspected on reasonable grounds to have committed crimes should go through the due process and if found guilty punished and if innocent release. The prosecution is not primarily intended to secure a conviction. If the appeal is successful, the likely result is that the appellate court will set aside the decision on the preliminary objection and order that Judicial Review be heard on the merits. If the judicial review application is ultimately heard and allowed on the merits and unsuccessful prosecution takes place, the policy of the constitution will have been achieved and the applicants will have a remedy in damages for damages for instituting a prosecution without a reasonable cause.

In the premises, the intended appeal would not be rendered nugatory. For those reasons, the application is dismissed with costs to the respondent and the interested party.

Dated and delivered at Nairobi this 20th day of November, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR