



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, PCA, MARAGA & OUKO, JJ.A)

CRIMINAL APPEAL (APPLICATION) NO. 57 OF 2013

MANILAL JAMNANDAS RAMJI GOHIL.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

(Being an appeal from a ruling of the High Court of Kenya at Nairobi (L. Achode, J.) dated 25th July 2012

in

H.C. MISC. CR. APPL. NO. 42 OF 2011)

RULING OF THE COURT

1. The applicant, **MANILAL JAMNANDAS RAMJI GOHIL**, is the accused before the Chief Magistrate's Court at Kibera (Criminal Case No 2601 of 2009) where he is charged with the offence of threatening to murder, contrary to **section 223 (1)** of the Penal Code.

2. During the course of his trial, he filed before the High Court a constitutional reference seeking first, a declaration that his prosecution in the subordinate court is unconstitutional, discriminating, cruel, harsh and degrading; and secondly, an order barring, preventing, restraining or prohibiting the continuation of that trial.

3. That application was heard by **Achode, J.** who was not persuaded that the applicant had demonstrated any legitimate reason to warrant a discontinuation of the trial. The applicant has filed a Notice of Appeal in this Court, evincing his intention to appeal this ruling.

4. The applicant now approaches this Court by way of a Notice of Motion dated the 4th December 2013 and lodged in this court on the 17th December 2013 seeking orders *inter alia* that:

i. There be a stay of proceedings in Kibera Chief Magistrates Court, Criminal Case Number 2601 of 2009 pending the hearing and determination of the application;

ii. There be a stay of proceedings in Kibera Chief Magistrates Court, Criminal Case Number 2601 of 2009 pending the hearing and determination of the appeal; and

iii. The costs of and incidental to this application abide the results of the said appeal.

5. It is not indicated on the face of the application the grounds upon which the applicant relies, which is in clear violation of **Rule 42 (1)** of the **Court of Appeal Rules**, which provides that:

“Subject to sub-rule (3) and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application”. (Emphasis ours)

6. The application is supported by an affidavit sworn by the applicant on the 4th December 2013 in which he states that he challenged his prosecution on the grounds that it was discriminatory, oppressive and degrading; that the complainant in the trial court has continually used the police to subject him to harassment; and that while the High Court held that he could argue the constitutional issues he raised in the subordinate court, he believes that subordinate courts do not have jurisdiction to entertain constitutional issues. He further urges that this application is urgent because the criminal trial is coming up for hearing on the 6th March 2014.

7. In opposition to the application, the respondent relies on an affidavit sworn on the 10th February 2014 by **CORPORAL NICHOLAS MULUKU**, the investigating officer in the criminal case. He maintains that the prosecution is being carried out by the respondent in exercise of its powers to institute and undertake criminal proceedings against any person in respect of any offence alleged to have been committed by that person. This mandate was found in **section 26 (3)(a)** of the retired Constitution, and is now found within **Article 157 (6)(a)** of the Constitution.

8. He denies that the police have at any time harassed the applicant and avers that the criminal case ought to be allowed to proceed to its logical conclusion. He further states that the subordinate court has jurisdiction to frame any constitutional issues and forward them to the High Court for determination and, therefore, urges the Court to dismiss the present application for lack of merit.

9. The application was canvassed before us by **Mr. Maatwa**, learned counsel for the applicant, and **Mr. Monda**, on behalf of the respondent. Mr. Maatwa submitted that the prosecution is simply meant to harass the applicant. He further submitted that the appeal is a strong one and that while the Notice of Motion does not indicate what provision of law has been invoked, he nevertheless moves the Court under its inherent jurisdiction.

10. Mr. Monda, arguing in opposition, submitted first that the applicant had delayed in filing not only this application, but the substantive appeal as well. On this point, we agree with Mr. Monda that the applicant is culpable of inordinate delay. The ruling from which the applicant intends to appeal was delivered on the 25th July 2012, yet the present application was brought on the 17th December 2013, about one and half years later. The applicant has failed to explain what has caused him to approach this Court for stay orders after such a delay.

11. Mr. Monda also submitted to us that the issues raised would best be placed before the trial court to consider and that there would be no prejudice suffered by the applicant should his trial continue on the 6th March 2014. He further argued that if the applicant’s complaint of theft by the police officers was genuine, then that would be a matter for investigation which is separate from the criminal case the applicant is facing.

12. Finally, Mr. Monda submitted on the form of the application and urged us that the application is incompetent for failure to cite the provision of law under which it is brought. In a short rejoinder, Mr. Maatwa argued that the application ought not to be dismissed merely for the fact that the applicant has not invoked the correct provision of law since he moved this Court under its inherent jurisdiction.

13. We agree, as did Musinga, JA., in ***Equity Bank Limited v West Link Mbo Limited [2013] eKLR*** that:

“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."

14. We however think that it is good practice that parties invoke the relevant provisions of the law that give the Court jurisdiction because the inherent jurisdiction of the Court is limited to **'make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court'**. The applicant specified the constitutional provisions in the High Court petition. He failed to cite the provisions of law he relies on in the application before us. We are mindful that an order staying criminal proceedings would be granted only in the most exceptional of circumstances. See **Goddy Mwakio & Another v Republic [2011] eKLR** where this Court, in illustration of this point, stated that:

"An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances".

15. The Court's jurisdiction to grant stay orders is derived from Rule 5 of the Rules. Rule 5 (2)(a) provides that:

"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."

The applicant has not sought bail before us, nor is there a warrant of distress that he seeks to have suspended. In addition, he has not been convicted or a warrant of distress issued against him as was the case in **Jayendra Khimji Malde & 2 Others v Republic Criminal Application No. Nai 14 of 2010 (unreported)** where Githinji, JA. opined that:

"It is apparent from the wording of Rule 5 (2)(a) as read with Rule 59 that the rule applies to cases where the applicant has already been convicted and sentenced either by the subordinate court, or by the High Court."

16. This Court may grant stay orders in criminal proceedings pending before the subordinate court only on appeal arising from the decision of the High Court. See the lead judgment of **Tunoi, JA.** (as he was then) in **Republic v The Kenya Anti-Corruption Commission & 2 Others Civil Application No. Nai 51 of 2008 (Unreported)** who in dealing with the issue of the jurisdiction of the Court to grant an order of stay of criminal proceedings, expressed himself as follows:

"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."

The Judge then considered various authorities on the issue and concluded that:

"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."

17. To benefit from the discretion of the Court the applicant must satisfy the Court that first, his appeal is an arguable one, and secondly, that should the order of stay not be granted, the appeal, if successful, would be rendered nugatory. These principles are now well settled in a host of the decisions of this Court including **Trust Bank Limited and Another v Investech Bank Limited & 3 Others (Civil Application No. Nai 258 and 315 of 1999 (unreported))** where the Court expressed itself thus:

“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.”

18. In ***Berkeley North Market & Others v Attorney General & Others***, Civil Application No. Nai. 74 of 2005 (*unreported*), the Court rendered itself on the factors to be considered in an application for stay of criminal proceedings in the following manner:

“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 bonafide contention is not unarguable or frivolous.”

19. From the material before us we are not satisfied that the intended appeal would be an arguable one. The applicant has not placed before us a memorandum of appeal which would indicate the grievances that he has with the findings of the High Court. In any event, we do not find that the applicant’s prosecution is prejudicial. From the High Court ruling, it appears that his main bone of contention is what he terms as malice and harassment from the police and the complainant, who is his former employer. These allegations may only be proven on evidence and the most appropriate place for the same to be presented will be during trial in the subordinate court. In her ruling, Achode, J. stated that:

“The sooner the applicant presents himself before the Court in [Criminal Case Number 2061 of 2009], the sooner he will get a chance to demonstrate to the court the malice with which he thinks the prosecution is tinged. His case is before a court of competent jurisdiction which is capable of discerning whether the case is merely being used as a tool to discriminate and oppress the applicant who is an innocent person, or indeed he committed a crime for which he ought to be punished.”

20. We would agree and add that the learned Judge did say that the appellant can take his constitutional issues to the subordinate court. We are also of the view that the issues of malice and harassment that have been raised by the applicant can be raised during the trial in the subordinate court as defences. It is at this stage not possible to state that the applicant will not get a fair trial because there has been no evidence placed before us to indicate so.

21. For these reasons as well, we do not find that the applicant has satisfied the second limb for the granting of an order of stay proceedings, that is, he has not demonstrated in what way the appeal will, should it be successful, be rendered nugatory.

22. In the end, we find that the application is devoid of merit and it must fail. It is accordingly hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 28th day of February, 2014.

P. KIHARA KARIUKI

.....

PRESIDENT, COURT OF APPEAL

D.K. MARAGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR