



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, J.J.A.)**

**CRIMINAL APPLICATION NO. NYR. 1 OF 2014 (UR 1/2014)**

**BETWEEN**

**ELIUD MUNENE KIRAGU .....APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An application for stay of criminal proceedings and appeal from the judgment of the High Court of Kenya at Embu (Ongundi, J.) dated 21<sup>st</sup> August, 2013*

*in*

*Misc. Petition No 10 of 2013)*

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**RULING OF THE COURT**

1. The applicant is facing a criminal charge before the Kerugoya Chief Magistrate’s Court in ***Criminal Case No. 525 of 2009***. The charge relates to obtaining money by false pretences particulars of which are that he entered into a sale agreement with one Richard Njagi Ndaka to sell ***Plot No. 53 Kagumo***, which the said Richard Njagi was to buy at Ksh. 1.5 million. He failed to transfer the plot and Richard Njagi reported him to the police and he was arrested on 30<sup>th</sup> May, 2009, and charged in court on 2<sup>nd</sup> June, 2009. He claims that the transaction between him and the said Richard Njagi is a civil matter supported by a Sale Agreement and his rights were violated when he was being subjected to criminal prosecution.
2. The applicant moved to the High Court at Embu by ***Petition No. 10 of 2013***, in which he sought orders to declare the ***Criminal Case No. 525 of 2009***, to be null and void. The Honourable Judge (Ongundi, J.) ,upon hearing the parties found that there was no merit in the application and dismissed the same. Aggrieved with the decision of the Honourable Judge, the applicant has moved to this court by way of Notice of Motion seeking orders for stay of proceedings in ***Criminal Case No. 525 of 2009***, at Kerugoya pending the hearing and determination of his appeal.
3. In support of the application, the applicant states that the appeal has a high chance of success and the same will be rendered nugatory if no stay is granted. In his supporting affidavit, the applicant deposes that the criminal case is based on a land sale agreement between a one Richard Njagi

Ndaka and himself and he states that he has delayed in transferring the plot to Richard because of succession documents in **Nyeri High Court Succession Cause No. 117 of 2003**, have not been finalized. The applicant deposes that once succession in the **Nyeri HC Succession Cause No. 117 of 2003**, is finalized, he will be able to transfer the plot to the purchaser. That under the terms of the grant in the Succession Cause, he is entitled to the plot and it is this plot that he intends to sell and transfer to Richard Njagi Ndaka. The applicant deposes that upon the grant and transfer of the plot through succession to himself, the criminal proceedings against him shall have been overtaken by events.

4. At the hearing of the application, learned counsel George M. Gori appeared for the applicant while the State was represented by the Assistant Director of Public Prosecution Mr. Job Kaigai.
5. Counsel for the applicant submitted that the dispute between the applicant as seller and a one Richard Njagi Ndaka is a contractual matter and the police should not be used to enforce contracts. It was submitted that the criminal proceedings is being used by the police to harass and intimidate the applicant making it difficult for him to finalize the succession and transfer documents. Counsel submitted that **Clause 7** of the **Sale Agreement** between the parties expressly stipulated that “*if the vendor breaches the agreement, he shall refund the consideration paid with interest at the rate of 30% p.a. and the damages incurred while, if the breach is caused by the purchaser only, the consideration paid shall be refundable*”. Counsel for the applicant urged this Court to find that this is a civil contractual matter and not a criminal matter. Counsel submitted that **Civil Appeal No. 112 of 2013**, has already been filed before this Court challenging the judgment by the Honourable Judge issued in **Misc. Petition No. 10 of 2013**. This Court was urged to grant orders and stay the criminal proceedings in **Kerugoya Criminal Case No. 525 of 2009**.
6. The State through the Assistant Director of Public Prosecution Job Kaigai opposed the application for stay of criminal proceedings. The State submitted that the applicant has been charged before a competent court and the applicant shall have the opportunity to be heard and argue his defence before the trial court. It was submitted that whereas it is true there was a sale agreement, the said agreement is an exhibit in **Criminal Case No. 525 of 2009**. The State submitted that the applicant through the present application is trying to transfer the hearing of his defence from the trial magistrate’s court to this Court. It was submitted that if the applicant has a good defence, the proper forum to argue his defence was before the trial court and not this Court. The State submitted that it did not wish to go into the merits of the case because this would prejudice the hearing before the trial magistrate’s court. It was submitted that the present application did not meet the threshold for the grant of stay orders.
7. We have considered the Notice of Motion filed before this Court and the submissions made by counsel for the applicant and the State. The gist of the application before us is that the applicant states he has a good defence to the criminal charge facing him. It is also the applicant’s case that the dispute between him and the purchaser is a matter of contract and criminal processes should not be activated to enforce contractual obligations.
8. Having evaluated the submissions made in this matter, we are of the considered view that the trial magistrate’s court is competent to consider and evaluate the issues and defence raised by the applicant. This is an appellate court and we have no original jurisdiction to consider and evaluate the explanation or defence given by the applicant in relation to the charges facing him before the trial magistrate’s court. The application before us has no merit and we decline to order stay of proceedings in **Kerugoya Criminal Case No. 525 of 2009**. The application is dismissed.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of March, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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*JUDGE OF APPEAL*

*J. OTIENO-ODEK*

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*JUDGE OF APPEAL*

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

**DEPUTY REGISTRAR**