IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & M'INOTI, JJ.A)

CIVIL APPLICATION NO. NAI 49 OF 2014 (UR 36/2014)

BETWEEN

PETER ODIWUOR NGOGE T/AO. P. NGOGE & ASSOCIATES.....APPLICANT

AND

JOSEPHINE AKOTH ONYANGO.…….....1ST RESPONDENT

SIMON OTIENO ONYANGO……..……....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS……..…….....3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS…….....4TH RESPONDENT

SEHIT INVESTMENTS LTD…….…..5TH RESPONDENT

KENYA COMMERCIAL BANK LTD……..……...…..6TH RESPONDENT

(Application for an injunction, stay of execution and stay of further proceedings pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Majanja, J.) dated 10th March, 2014

in

HC PETITION NO 471 OF 2013)

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RULING OF THE COURT

On 20th December, 2012, the **1st respondent, Josephine Akoth Onyango** was arrested by the police on suspicion of having committed various offences under the Penal Code relating to the property known as **LR No 1160/784, Nairobi** measuring in area approximately 0.6305 hectares and valued at Kshs 200,000,000 (hereafter **the suit property)**. She was held in custody until the eve of Christmas when she was charged before the **Chief Magistrates Court, Kibera** in **Criminal Case No**

6531 of 2012.

Subsequently,**the 2nd respondent,Simon Otieno Onyango** was also arrested and charged before the same court in **Criminal Case No 2178 of 2013** arising from the same set of facts.

When the two criminal cases were ultimately consolidated, the charges against the 1st and 2nd respondents ranged from conspiracy to defraud, forgery, making false documents and uttering false documents, all arising from the transfer of the suit property from the name of the 5th respondent, **Sehit Investments Ltd** to that of the 1st respondent way back in March 2005. Convinced that the criminal charges were ill-motivated and an abuse of the criminal process to assist the 5th respondent regain the suit property which it had genuinely sold to the 1st applicant, the 1st and 2nd respondents launched **High Court Petition No. 471 of 2013** seeking, inter alia, termination of their prosecution on the grounds of abuse of the court process and violation of their constitutional rights and freedoms.

The facts upon which the constitutional petition was based were as follows: By an agreement dated 12th December 2002 the 1st respondent agreed to purchase the suit property from the 5th respondent for Kshs 18 million. The 1st respondent paid the deposit of Kshs 9.5 million and borrowed the balance of Kshs 8.5 million from the 6th respondent, **Kenya Commercial Bank Ltd** upon a charge on the suit property. The agreement for sale was drawn by the applicant, **Peter Odiwour Ngoge,** who at the time was acting for both the purchaser and the seller. The transaction was completed and the transfer registered in favour of the 1st respondent.

Matters took a twist when the 5th respondent filed **HCCC No 705 of 2009** some four years later against the 1st and 2nd respondents amongother defendants, seeking among other reliefs, a declaration that the transfer of the suit property to the1st respondent was null and void for fraud, misrepresentation and want of consideration and an order for cancellation and revocation of the same. Among other things, it was alleged that the 1st respondent had not paid the full purchase price.In their defence and counterclaim the 1st and 2nd respondents defended the transaction as genuine and prayed for vacant possession of the suit property.

Another four years down the line, the applicant filed **HCCC No 48 of 2013** against the 1st respondent among other defendants, once again relating to same transaction. He pleaded that he had not drawn and witnessed the transfer pursuant to which ownership of the suit property moved from the 5th to the 1st respondent. Like the 5th respondent in HCCC No 705 of 2009, the applicant sought cancellation of the transaction on the basis of fraud.

While the two cases were pending for hearing, the 5th respondent lodged a complaint with the police, resulting in the criminal prosecution which we have already referred to and the subject of the constitutional petition.

In a considered judgement dated 10th March, 2014, **Majanja, J.** held that continuation of the criminal proceedings would be abuse of the process of the court and issued an injunction stopping the prosecution of the 1st and 2nd respondent in regard to the transaction until the hearing and determination of **HCCC No 705 of 2009.**

In arriving at that conclusion, the learned judge took into account a number of issues,among them, that the 5th respondent had failed to establish a prima facie case against the 1st respondent in an application for injunction it had filed against her in HCCC 705 of 2009; that although the order refusing the injunction against the1st respondent was subsequently set aside, it was on grounds other than the merits; that while the transaction was completed in 2005, the suit by the 5th respondent was not filed until 2009 and the complaint to the police was not made until 3 years after the suit without any explanation; and that the 5th respondent, which had lodged the complaint with the police, had actively participated in the perfection of the transfer by appointing the firm of **Musyoka & Wambua Advocates** to act for it in the finalization of the transaction and to receive the balance of the purchase price.

Other additional considerations that weighed on the mind of the learned judge were that directors of

the 5th respondent had signed the allegedly forged transfer without any complaint; that in written correspondence they had acknowledged possession of the transfer which they forwarded to their advocates for registration; that in those circumstances the 5th respondent could not turn round and allege the transfer was a forgery; that in its pleadings in HCCC No 705 of 2009, the 5th respondent had made averments under oath that were materially at variance with the complaint to the police such as admitting that it had executed the transfer; that indeed in the said suit the 5th respondent had not alleged the transfer was a forgery; and that in a different suit, namely **HCCC No 105 of 2005,** a director of the 5th respondent had allowed the 1st respondent to lodge objection proceedings in 2008 as the registered owner of the suit property. From all those considerations, the court drew the inference that the purpose of the criminal proceedings was to achieve an ulterior purpose, namely to derail the civil proceedings between the parties.

It appears that neither the 5th espondent,who had lodged the criminal complaint, nor the 3rd respondent, who was prohibited from continuing the prosecution of the 1st and 2nd respondent, was sufficiently aggrieved by the judgment to appeal against it. The applicant however filed a notice of appeal on 12th March, 2014 and followed it up by filling **Civil Appeal No 51 of 2014** which the parties inform us is scheduled to be heard before this Court on 23rd October, 2014.

Pending the hearing of that appeal, the applicant filed the application now before us under **Rule 5(2) (b)** seeking the following three prayers:

> (i) **Stayof further proceedings of the High Court Petition No. 471 of 2013;**
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> (ii) **Stay of execution of the judgement and decree of the High Court dated 10th March, 2014 and all consequential orders; and**
>
> (iii) **"A mandatory injunction restraining the 1st and 2nd respondent herein from moving the High court again to block their criminal prosecution in Kibera Criminal Case No 6531 of 2012 and 2178 of 2013 or consolidation thereof or at all.**

Before us **Mr Ngoge**, who appeared in person submitted that this was a suitable application for the grant of the orders prayed for because he had an arguable appeal which would be rendered nugatory if the orders sought were not granted. He informed us that in his Civil Appeal No 51 of 2014, he had raised as many as 35 substantial, weighty and arguable grounds of appeal. It was his submission that on the facts of this case the High Court did not have jurisdiction to stop the criminal proceedings against the 1st and 2nd respondents and that by stopping the proceedings, the court had violated his fundamental rights and freedoms by denying him the right to a fair trial, the right to access justice and the right to equality. Mr Ngoge further contended that the stoppage of the criminal proceedings had insulated the 1st and 2nd respondents from accountability under the criminal process and had prejudiced him and endangered his legal career by attributing forged documents to him. Lastly the applicant submitted that by expressing the view that the grievances between all the parties could be settled in HCCC No 705 of 2009, the learned judge had ignored the fact that the applicant was not a party to that case and had prejudiced the applicant's own case, namely HCCC No 48 of 2013, which stood the risk of not being heard, thus denying him access to justice and the right to a remedy.

On how the intended appeal would be rendered nugatory in the event that the orders sought were not granted, Mr Ngoge submitted as long as the order of the High Court was not stayed, he could not proceed with his HCCC No 48 of 2013. Consequently, counsel continued, if the appeal was ultimately successful,he will have been denied his right to prosecute his case, exonerate himself and uphold his honour, dignity and professionalism. On the same vein,learned counsel argued that if the criminal prosecution was not allowed to proceed to its logical conclusion, he will have beendenied an opportunity to clear his name in the criminal case, if the appeal succeeds.

Mr Ngoge's position was embraced and supported by **Mr Ashimosi**, learned counsel for the 3rd and 4th respondents and **Mr Nyarigo**, learned counsel for the 5th respondent. Mr Ashimosi added the further view that the appeal was arguable because the High Court had erred by delving into the

merits of the prosecution as though it were the trial court and also by holding that the existence of concurrent criminal and civil proceedings over the same subject matter amounted to abuse of court process. It was counsel's contention that the appeal will be rendered nugatory if it is ultimately successful because the criminal trial will resume but the prosecution witnesses may not be available.

Mr Nyawara, learned counsel for the 1st and 2nd respondents vigorously opposed the application as frivolous, misconceived and disclosing neither an arguable appeal nor one that would be rendered nugatory if successful. Counsel submitted that the prayer for stay of proceedings in the petition was spent because the petition had been finalized and no costs were awarded to any party so as to contemplate taxation or execution proceedings. Mr Nyawara supported the judgement of the High Court and in particular the considerations relied upon by the learned judge to conclude that the prosecution was an abuse of the process of court. He submitted that from the record, it was patently clear that the criminal prosecution was motivated by malice and ulterior motives rather than the upholding of the criminal law, because the 5th Respondent had in its own averments embraced the transfer as genuine and had confirmed receipt of the full purchase price and yet was pursuing a criminal prosecution based on contrary averments. Learned counsel in particular referred to an affidavit sworn by the applicant on 2nd September 2008, wherein he had deponed as follows in paragraph 17: **"That Rose Mbithe Ndetei alias Rose Mbithe Mulwa is a director of Sehit Investments Limited (5thRespondent) whichs old LR No 1160/784 Nairobi (the suit property) the subject matter of taxation proceedings herein, to Josephine Akoth Onyango (the 1st respondent)."**

Mr Nyawara trashed the argument that the appeal would be rendered nugatory, arguing that the High Court had not stopped the applicant from proceeding with his HCCC No 48 of 2013 if he so wished. In counsel's view, if the appeal is successful, the criminal proceedings will simply re-start and therefore the question of the appeal being rendered nugatory did not arise. The decision of this Court in **SILVERSTEIN VS CHESONI (2002) 1 KLR 867** was cited regarding the principles that guide this Court while considering applications under rule 5 (2) (b).

Mr Nyawara was joined by **Mr Kithinji**, learned counsel for the 6th respondent in opposing the application. In Mr Kithinji's view, the applicant had not satisfied any of the twin principles as required by rule 5(2) (b).

We have anxiously considered the pleadings before the High Court, the judgment by the learned judge, the application before us and the affidavits in support and in opposition together with the annextures thereto, the submissions of learned counsel and the authorities cited.

The applicant intends to argue in Civil Appeal No 51 of 2014, among other things, that the existence of concurrent criminal and civil proceedings is not ipso facto evidence of abuse of the process of court. The proper interpretation of **section 193A of the Criminal Procedure Code** which provides that the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings, is also implicated. Also at issue, in light of section 193A of the Criminal Procedure Code is the concomitant and undoubted power of the courts to stop abuse of the criminal process.

We are prepared to find that the pending appeal is arguable, bearing in mind that an arguable appeal is not one which will necessarily or definitely succeed, but rather, is one in which there are serious questions of law or reasonable argument deserving consideration by this Court. **(KENYA RAILWAYS CORPORATION VS. EDERMANN PROPERTIES LTD, Civil Application No. Nai 176 of 2012)**. It is not necessary for us to consider all the applicant's 35 grounds of appeal, because as this Court has stated time and again, even a single bona fide arguable issue will suffice. (**KENYA TEA GROWERS ASSOCIATION & ANOTHER VS. KENYA PLANTERS & AGRICULTURAL WORKERS UNION**, **Civil Application No. Nai. 72 of 2001).**

Has the applicant established that if the orders sought are not granted, his appeal will be rendered nugatory? We are far from satisfied in that regard. An appeal is rendered nugatory when it succeeds

and it is not possible to reverse the intervening situation so as to reflect the outcome of the appeal. In **AHMED MUSA ISMAEL VS KUMBA OLE NTAMORUA & 4 OTHERS (Civil Application No. 256 of 2013),** this Court expressed the purpose of the requirement that a successful appeal should not be rendered nugatory to be:

> **"to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual."**

What may render a successful appeal nugatory must be considered within the circumstances of each particular case. (**RELIANCE BANK LTD VS NORLAKE INVESTMENTS LTD (2002) 1 EA 227**, **SILVERSTEIN VS CHESONI (supra)** and **KENYA COMMERCIAL BANK LTD VS BENJO AMALGAMATED LTD & ANOTHER, Civil Application No. Nai 50 of 2001).** In the circumstances of this application, if the applicant's appeal is successful, Kibera Chief Magistrate's Court Criminal Case **No 2178 of 2013** which has been stopped by the judgment appealed from will simply resume. In such an eventuality, we cannot see how it can be contended that the applicant's rights will have been violated because of stoppage of the prosecution of the 1st and 2nd respondent to enable this Court determine on merit whether their prosecution should indeed be stopped. On the other hand, if the appeal does not succeed, the 1st and 2nd respondents will have been taken through an oppressive and unconstitutional criminal process tainted by malice and ulterior motives. As the High Court observed in the celebrated case of **GITHUNGURI VS REPUBLIC (1986) KLR 1**, **"it is as much in the public interest that breaches of the law should be punished, as it is to ensure that in the process of doing so the people are not bashed about so that they lose respect for the law."**

It is also not lost to us that Civil Appeal No 51 of 2014 which challenges the stoppage of the criminal prosecution is scheduled to be heard on 23rd October, 2014, barely a month away. The fact that the appeal has been fast tracked puts paid to the argument advanced on behalf of the 3rd respondent that by the time the prosecution resumes in the event of a successful appeal, the prosecution witnesses may not be available. It is instructive too that the key witnesses are the same parties before us in this application.

In the exercise of its discretion under Rule 5(2) (b), this Court has maintained that it will also weigh the respective claims of the parties and take into account the relative convenience or inconvenience that the granting or refusing of the order will occasion**. (ORARO & RACHIER ADVOCATES VS CO-OPERATIVE BANK OF KENYA LTD, C.A No Nai. 358 of 1999, NATION MEDIA GROUP & 2 OTHERS VS JOHN JOSEPH KAMOTHO & 3 OTHERS, C.A No. 108 of 2006** and **ERWEN ELECTRONICS LTD & 3 OTHERS VS. RADIO AFRICA LTD & ANOTHER, C.A No Nai. 82 of 2011).**

In the application before us, granting the orders sought will mean that the 1st and 2nd respondent will have to immediately go through a prosecution whose validity is the subject of the appeal. Refusing the application on the other hand will mean waiting for a month or two for the fast tracked appeal to be determined, after which, if it is successful, the prosecution will resume. In the latter case, the inconvenience is a short delay, while in the former, it involves taking a citizen through a process that has been impeached, with all the attendant costs. The convenience is manifestly in favour of declining to grant the orders sought.

Before we conclude this ruling, we would like to say a word on the applicant's third prayer for a mandatory injunction to restrain the 1st and 2nd respondent from applying to the High Court again to block their prosecution. Other than the fundamental principal that a mandatory injunction does not issue at the interlocutory stage except in the clearest of cases, of which this is not one, it would be rather unusual for a court of law, outside the purview of vexatious litigation, to restrain a suitor from approaching a court for a remedy in the face of apprehended violation of rights. The prayer is more remarkable, coming from the applicant who in these proceedings has spared no effort to protect and safeguard what he considers his own constitutional rights. We have come to the conclusion that the applicant has failed to satisfy, as it was his duty to do, the twin principles under Rule 5(2) (b) that

would have otherwise entitled him to the orders prayed for, it being axiomatic that satisfaction of only one limb of the principle is not good enough. (**PETER MBURU NDURURI V JAMES MACHARIA NJORE Civil Application No. 29 OF 2009 (UR 14/2009).** Accordingly, the Motion on Notice dated 17th March,2014 is hereby dismissed with costs to the 1st, 2nd and 6th respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. N. WAKI

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR