



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 142 of 2012

JOSEPH MBURU GITAU.....1<sup>ST</sup> APPLICANT

ISAAC MBURU NJUGUNA.....2<sup>ND</sup> APPLICANT

VERSUS

THE PRINCIPLEMAGISTRATE'S COURT AT NAIROBI.....1<sup>ST</sup> RESPONDENT

THE HON. THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

*(An Application for stay of execution or stay of further proceedings pending the intended appeal against the order of the High Court of Kenya at Nairobi (Warsame, J.) dated 6<sup>th</sup> January, 2011*

*in*

*HC. MISC. NO. 95 OF 2010)*

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**RULING OF THE COURT**

This is an application under **Rule 5(2) (b)** of the Court of Appeal Rules for two orders, firstly, stay of the order of the High Court granted on 20<sup>th</sup> January, 2011 to the effect that criminal case No. 1733 of 2008 against the two applicants to proceed with no reference to judicial review application and, secondly, a stay of further proceedings or hearing of the said criminal case pending the hearing and determination of the appeal against the said order.

The two applicants and one Fracia Njoki Muiruri are charged in the Chief Magistrate Criminal Case No. 1733 of 2008, with various offences relating to land parcel No. L.R. 209/10610 comprising of 26.93 Hectares situated in South C in Nairobi. The charges included a charge of making a false Letter of Allotment, making a false Deed Plan; making a false fee receipt, all contrary to section **357(a)** of the Penal Code and conspiracy to defraud the Kenya Government of Land Parcel L.R No. 209/10610 contrary

to **section 317** of the Penal Code.

In essence the Government claims that the land belongs to the Government and is registered in the name of the Government as LR No. 209/10610 but which applicants have altered to read L.R No. 209/14582 and that there are incomplete government houses constructed by the government for occupation by police officers on the land at a cost of over Shs. 2 billion.

On the other hand, the applicants claim that the land was allocated by the Commissioner of Lands to Wilson Mutumba Women Group, an organization consisting of 626 members of which they were officials and that there are 300 incomplete houses on the land constructed by a donor on their behalf.

The basis of the charges is that the documents of ownership in possession of the applicants are forgeries.

On 11<sup>th</sup> March 2010, the applicants filed a judicial review application, Miscellaneous Criminal Application No. 95 of 2010 in the High Court seeking orders of prohibition to prohibit the Principal Magistrate's Court from hearing the criminal case and to prohibit the Attorney General from prosecuting the two applicants. When the application ultimately came for hearing before **Warsame, J.** (as he then was) **Mr. Ngugi** the Counsel instructed by the applicants, stated that he had no instructions on the judicial review application and that he was not ready to proceed. On his part **Mr. Tanui**, a State Counsel, stated that he was not ready to proceed. The High Court there upon ruled thus:

***“Since the parties are not ready to proceed with the application which was filed way back in March, 2010 and the same is delaying the criminal trial [sic]. Consequently I am inclined to discharge the stay orders granted on 4<sup>th</sup> March, 2010. I direct the trial court to proceed with the hearing of the Criminal Case 1733 of 2008 and ensure the same is concluded within the next six months.*”**

***The two applicants to appear before the trial court on 31<sup>st</sup> January 2011 for purposes of fixing an urgent hearing date for the criminal case.***

***The trial court to proceed with the hearing with no reference to this judicial review application.***  
(emphasis added).

The applicants filed a notice of appeal against the ruling which was lodged in the High Court on 4<sup>th</sup> February, 2011. Meanwhile the hearing of the criminal case started before G. W. Ngenye Macharia the Principal Magistrate on 8<sup>th</sup> May, 2011 but it was adjourned from time to time for various reasons. On 18<sup>th</sup> November, 2011, Miss Mwaniki the prosecuting counsel objected to the cross-examination of the 9<sup>th</sup> witness **Philip Onyango Sika**, regarding the judicial review application, Misc. Criminal application No. 95 of 2010 saying:

***“I raise an objection to the defence referring to the issues raised in 95/2010 because Hon. Justice Warsame in order of 31/1/2011 clearly indicated that the trial should proceed with this trial [sic] without reference to the judicial review”.***

The trial magistrate upheld the objection saying:

***“My understanding of this order is that the judge meant that no reference should be made to the evidence adduced or proceedings or pleadings made and filed before this application.”***

Further hearing of the criminal case stalled because **Mr. Kamwenda**, counsel representing the applicants in the criminal case withdrew from appearing for the applicants immediately after the ruling. The copy of the proceedings in the record go up to 3<sup>rd</sup> December, 2012. However **Mr. Mailanyi** the learned state counsel disclosed that eleven prosecution witnesses had given evidence before the trial magistrate was promoted to a Judge and that when the trial was to start before another magistrate, the magistrate, on the application of the applicants herein, ordered the trial to start *de novo*.

The orders sought by the applicants are discretionary. It is clear from the application, the affidavit of **Isaac Mburu Njuguna** ( 2<sup>nd</sup> applicant) in support of the application, the draft memorandum of appeal and the submissions of **Mr. Nyang'au**, learned counsel for the applicants, that the applicants are particularly aggrieved by the highlighted order, in essence, that the trial magistrate should proceed with the hearing of the criminal case with no reference to the judicial review application.

The applicants interpreted the order as not only dismissing the judicial review application but also forbidding them from referring to any documents filed in the judicial review application and thus from mounting a defence.

The applicants referred to the interpretation of the order of the High Court by both the state counsel and the trial magistrate in the criminal case.

It would be a grave matter if indeed the impugned order bore the meaning ascribed to it by the trial magistrate – that no reference should be made to the evidence adduced or proceedings or pleading made before the judicial review application.

That construction would no doubt deny the applicants a fair trial. Happily both the respective counsel for the parties are in agreement that the construction of the order given by both the state counsel and the trial magistrate is erroneous.

When the order of the High Court is read as a whole it is apparent that the High Court did not deal with the application. It merely discharged the temporary order staying the criminal proceedings and ordered the trial to proceed notwithstanding that the judicial review application was still pending. The phrase “**the trial court to proceed with the hearing with no reference to this judicial review application**” contextually directs the trial court to proceed with the trial as if there was no pending application for judicial review.

It seems that the applicants correctly understood the order of the High Court for they participated in the trial without any objection and did not make the present application until 16 months later. It is also apparent that the present application was precipitated by the erroneous interpretation of the order by the trial magistrate and the order for hearing *de novo* following the taking over of the trial by another magistrate. Apparently, the applicants fear that they would be denied a fair trial if the interpretation of the order of the High Court by the previous magistrate still stands.

Nevertheless, since the High Court neither considered the merits of the judicial review application nor dismissed it for want of prosecution, but rather left it in abeyance, and since the High Court did not forbid or restrict the applicants from adducing any evidence or referring to any previous proceedings or pleadings in the trial as we have endeavoured to show, the application for stay of the order or stay of the criminal proceedings has no basis.

Moreover, the presiding magistrate will not be bound in the re-trial by interpretation of the order of the High Court by the previous magistrate, and the trial magistrate being guided by the views we have expressed above on the meaning of the order of the High Court, there is no fear that the applicants will not get a fair trial.

Lastly, the fact that the application has been brought after an inordinate delay which has not been explained disentitles the applicants of exercise of our discretion in their favour.

For those reasons the application is dismissed with costs to the respondent.

**DATED and DELIVERED at Nairobi this 20<sup>th</sup> day of March, 2013.**

**E. M. GITHINJI**

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***JUDGE OF APPEAL***

***P. O. KIAGE***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**