IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MARAGA & MWERA, JJA.)

CIVIL APPLICATION NO.NAI.87 OF 2013 (UR.57/2009)

BETWEEN

INTERNATIONAL CENTRE FOR

POLICY AND CONFLICT.....APPLICANT

AND

KAMLESH MANSUKHLAL DAMJI PATTNI.....1ST RESPONDENT

ELIJAH KIPNG'ENO ARAP BII.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

COMMISSIONER OF POLICE.....5TH RESPONDENT

CHIEF MAGISTRATES COURT, NAIROBI.....6TH RESPONDENT

(Being an application for stay pending appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mutava, J.) dated 20th March, 2013 and delivered on 25th March, 2013

in

J.R. MISC. CIVIL APPLIC. NO.305 OF 2012)

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RULING OF THE COURT

By the notice of motion dated 22nd April, 2013 and lodged in court on 23rd April, 2013 the applicant, International Centre for Policy and Conflict (ICPC) sought orders under Rules 1(2), 5(2)(b) of the Rules of this Court in the main:

"That the judgment and decree dated 20th March, 2013 in HC.JR.Misc.App.No.305/12 be stayed pending hearing and determination of the intended appeal."

Some twelve grounds (A1 to 12) were set out on the arguability of the intended appeal. Three grounds (B a-c) contended that the intended appeal would be rendered nugatory if the sought stay order was not granted. During the proceeding Mr. Havi, learned counsel for the appellant told us that indeed the intended appeal had since been filed and served, being C.A. No.101/2013.

In paraphrase, it was contended in the grounds, that the notice of motion dated 28th August, 2012 was heard by Mutava J. He delivered the judgment herein. To the applicant the motion ought to have been heard by a judge in the High Court Division dealing with Constitutional and Judicial Review matters and not in the Commercial Division where Mutava J was when he heard the motion. The remedies sought in the notice of motion dated 28th August, 2012 were time-barred; the learned Judge had only begrudgingly allowed the applicant to participate in the hearing of that motion. The learned judge ought only to have considered the legality or otherwise of the process leading to the making of the decisions/actions complained of, and not the substance and merits of those decisions/actions. Mutava J erred in holding that prosecuting the 1st respondent (applicant in the notice of motion dated 28th August, 2012 regarding CMCR.C. No. 518/06) violated his constitutional rights – a matter that should have been subject of a constitutional petition and not judicial review proceedings. The learned Judge fell in error to hold that the "***Goldenberg"*** Inquiry Report was flawed and it impaired the 1st respondent's presumption of innocence. The Judge relied on some stated decisions which were not binding on him. The judge erred in holding that the 1st respondent had not been accorded a trial within reasonable time. The 2 orders of prohibition granted to the 1st respondent in the judgment of 20th March, 2013 were of no effect, since the actions to be prohibited namely initiating prosecution had already taken place. The learned judge abused this judicial authority by failing to promote the Constitution. He relied on irrelevant considerations to arrive at the judgment in question. Those grounds with those in the memorandum of appeal were said to make out an arguable appeal.

Turning to whether that appeal could be rendered nugatory in the event the stay order was not granted, it was contended that the 1st and 2nd respondents ***(Kamlesh Pattni, Elijah Bii***) would proceed to apply in CM.CR.C.518/06 to have their sureties released and with that the two could flee from the jurisdiction of the court, making it near impossible to resume the prosecution against them in the event the appeal succeeds. The decision of 20th March, 2012 had in effect quashed the entire findings of the "***Goldenberg***" Inquiry Report, thereby thwarting the applicant's petition No.279/11 pending before the High Court, seeking to recover Sh.5.8m allegedly stolen by the 1st respondent. In the result the 1st to 5th respondents remained to abuse the Constitution and the rule of law. One ***Ndungu Wainaina,*** the executive director of the applicant (ICPC) filed a supporting affidavit which in essence expounded on the grounds reproduced above. He also exhibited the applicant's memorandum of appeal containing twelve grounds.

In opposition to this motion there were two replying affidavits sworn by ***Kamlesh Pattni*** and ***Elijah Bii***, 1st and 2nd respondents respectively. Mr. Mwenesi, and Mr. Simani, learned counsel representing them relied on those affidavits in arguments before us.

The brief background herein is that the 1st and 2nd respondents were charged with others in CMCR.C.No.518/06 with various offences ranging from conspiracy to defraud, abuse of office and others. Criminal proceedings commenced but the 1st respondent filed the notice of motion dated 28th August, 2012 in the High Court seeking judicial review orders of *certiorari* and *prohibition* against the on-going trial in the magistrate's court. The 2nd respondent ***Arap Bii*** joined as an interested party. At the end of hearing that motion Mutava J granted two orders prohibiting the prosecution against the two respondents. A decree was extracted and served on the chief magistrate who then made an order of 3rd May, 2012 "***terminating***" the said criminal proceedings. All that is what gave rise to CA. No.101/13, hence the prayer to stay execution. A notice of appeal dated 3rd April, 2013 was filed so as to give a basis of the present application for stay.

Mr. Havi, learned counsel for the applicant opened his case by asserting that the learned judge granted a

prayer, which was the first order in the decree dated 24th April, 2013, prohibiting the Attorney General, the DPP and the Commissioner of Police from prosecuting or continuing to prosecute the respondents and others in matters connected with the "***Goldenberg***" Inquiry Report rendered by the "***Bosire***" Commission. That prayer, was not borne out in the motion dated 28th August, 2013. Putting to rest this point before going further, is considered prudent and time-saving. On perusal of the prayers sought in the motion of 28th August, 2012 it became obvious that the said prayer featured in that motion. No more needs be said.

Learned counsel then moved to the order by the Chief Magistrate to "***terminate***" the criminal proceedings after being served with the decree herein. To Mr. Havi, that "***termination***" amounted to quashing the proceedings – an order that can only follow successful proceedings seeking an order of *certiorari*, not following an order of *prohibition*. The applicant's position is that after the order of prohibition was granted the criminal proceedings ought only to have been adjourned sine die and not terminated and ***S.8 of the Law Reform Act*** was cited. We heard that the criminal proceedings started in 2006 and with several witnesses having testified, the same could not be prohibited. They could only be properly quashed following an order to quash. Counsel told us that they would argue on appeal that the learned Judge had no jurisdiction to entertain the judicial review before him after six months as it was time-barred.

The other point intended to be argued on appeal is that the learned judge went outside the realm of judicial review when he overlooked the "***Bosire***" Report in the light of the criminal proceedings before the lower court.; That in effect the judge quashed the "***Bosire***" Report by relying on cases termed ***Saitoti*** and ***Kotutt***. To support that position, the case of **Judicial Commission of Inquiry VsKillach Civ. Application No.77 of 2003** was cited. For the rest we were referred to the memorandum of appeal.

Moving to whether the appeal herein will be rendered nugatory if the stay order is refused Mr. Havi referred to the alacrity with which the respondents moved to extract and serve on the chief magistrate the decree following Justice Mutava's decision which decree had not been approved by the applicant. On receipt of the same the chief magistrate terminated the criminal proceedings. The respondents also moved to retrieve the securities deposited by the sureties (log books). While conceding that there was a letter from the court stating that these securities were released Mr. Havi stated that the same were not exhibited here. To the applicant, the securities were still held in court.

Mr. Mwenesi, learned counsel appearing with Mr. Kalove for the 1st respondent (***Pattni***) opposed the motion. Learned counsel brought up the issue that ICPC had no *locus standi* to bring the appeal and therefore seek stay orders. We note that that issue stands to be decided in two consolidated notices of motion No.89 and 94 of 2013 and so need not be revisited here. Mr. Mwenesi moved to the fact whether a prayer for prohibition featured in the motion of 28th August, 2012. This point has already been addressed above. We were satisfied that it did.

Turning to point that the judicial review proceedings before Mutava J, Mr Mwenesi posited that when an order of certiorari is not available, the one of prohibition should and can be issued. He urged that whereas prohibition has no time limit, certiorari does. It was added that if the applicant was dissatisfied with the magistrate's order terminating the criminal proceedings against the two respondents then it could appeal to the High Court. It was submitted that the "***Bosire***" Report was before the learned Justice Mutava and so he was justified to refer to it. The Judge did not quash or countermand that report. That the report recommended further investigations in the whole saga, before any prosecutions, yet the two were charged before such further investigations were done. To the respondents, such a move constituted oppressive prosecution, which was open to orders of judicial review and hence the orders of prohibition that were granted. The point that the learned Judge relied on the ***Saitoti*** and ***Kotutt*** decisions was not arguable on appeal because the Attorney General did not appeal those decisions. And that the ***Killach*** case was before the "***Bosire***" Report.

Coming to whether the appeal would be rendered nugatory, we heard that there was no positive order in the judgment/decree that could be stayed. If an order of prohibition operated forwards, one had already run and so there was nothing to stay.

Mr. P. Simani, learned counsel for the 2nd respondent adopted arguments by Mr. Mwenesi save with a plea that the criminal proceedings having been terminated, his client do proceed to release his surety as there was no basis to maintain or retain him further. Mr. Simani, asked us not to extend the last orders given earlier, to the effect that *status quo* be maintained in both the High Court and the magistrate's court files as we heard the present proceedings.

On his part Mr. S. Kaumba, learned counsel for the 3rd and 6th respondents, the Attorney General and the chief magistrate, in opposing the application, urged that the applicants had no arguable appeal. He told us that the 3rd respondent had no more interest in this case because the 4th respondent (DPP) took over all matters of prosecution since the coming into effect of the current Constitution.

Mr. M. Warui learned counsel for the 4th respondent, repeated his stand with other notices of motion No.89 and 94 of 2013, pending ruling, that his client was the sole and only state organ with exclusive authority to handle prosecutions including appeals arising therefrom. ICPC could only join the DPP in the appeal lodged in this matter and not file one of its own and also seek stay orders. While conceding that the appeal in question is arguable, Mr. Warui urged that the same could not be rendered nugatory if the stay orders sought were denied as indeed there was nothing to stay in this matter.

It is trite law that for an application under **Rule 5 (2) (b)** of the Court of **Appeal Rules** to succeed, the applicant needs to satisfy the well known twin principles, namely:-

i. ***That the intended appeal is arguable,i.e, that it is not frivolous while bearing in mind that an arguable appeal is not necessarily one that will succeed;***

and

ii. ***Secondly, that if the orders sought are not granted, and the appeal succeeds, then the same would be rendered nugatory.***

We should point out however, that the twin principles are conjunctive and not disjunctive.

It is not enough for an applicant to prove either of them. An applicant who expects to benefit from an application under the **rule 5(2)b** must prove both limbs. See **Reliance Bank (in liquidation) vs Norlake Investments Ltd, Civil Application No. Nai 98 of 2003 (unreported) and IL Nwessi & 2 Others vs Wendy Martin, Civil Application No. Nai 291 of 2010 (UR 20/20103).**

This brings us to the two issues for determination before us. Does the applicant have an arguable appeal and is it entitled to the stay orders it entreats this Court to grant?

On the issue of arguability, we note also that an applicant only needs to establish one arguable ground of appeal. In our view the issue as to whether the learned Judge while hearing prayers for judicial review, which centre on the process leading to making of decisions or taking actions, instead proceeded to consider the substance and merits of the decisions or actions is an arguable one. It is also an arguable ground of appeal whether the learned Judge properly entertained claims for violations of the respondent's rights, citing trial within reasonable time and presumption of innocence in a judicial review proceeding or such claims should have been laid in a constitutional petition. There are several other issues which are also arguable but we need not point them out for purposes of this ruling as the burden on the applicant was to establish only one of them. Those are all grounds to be ventilated on appeal.

As regards the appeal being rendered nugatory if the stay order is not granted, the respondents appeared to argue that there were no positive orders to warrant a stay. But there is evidence that the criminal proceedings have been terminated and the securities have been discharged (see the CM's letter dated 6thMay, 2013).It is only the securities lodged by the second respondent's sureties that remain to be released. Mr. Simani, learned counsel for the second respondent, asked us to allow the said sureties to take their securities as there is no reason whatsoever for their continued retention.

There is no doubt that the criminal case facing the respondents was terminated in execution of Mutava J's judgment. The sureties have already been discharged by the court. We are not persuaded that there is anything to stay in this matter. Besides, in the event of a successful appeal, the criminal proceedings can resume from where they were as at the time of "***termination***". If the respondents will have fled the jurisdiction, as the applicant appears to claim, all will fall on the shoulders of the DPP to trace and bring them to justice. That office has also filed an appeal against Mutava J's same decision. There is no aspect of the appeal that is capable of being rendered nugatory if the stay orders sought are not granted.

In sum, this application in our considered view fails to meet the threshold required for applications of this nature to succeed. We find that the same lacks merit and we dismiss it with costs in the appeal.

Dated and delivered at Nairobi this 12th day of July, 2013.

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

……..……..

JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR