IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, GITHINJI & NYAMU, JJ.A.)

CRIMINAL APPLICATION NO. NAI. 8 OF 2010 (UR. 6/2010)

BETWEEN

1. GODDY MWAKIO

2. JOSEPH MWANGI MUIRU.....APPLICANTS

AND

THE REPUBLIC.....RESPONDENT

(Application for stay of proceedings from the ruling of the High Court of Kenya at Nairobi (Warsame, J.)

dated 30th April, 2010

in

H.C.CR. REVISION NO. 49 OF 2009)

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RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for stay of proceedings in Chief Magistrate's Court, Kibera – *Criminal Case No. 3827 of 2009* pending the hearing and determination of the intended appeal against the ruling of the superior court (Warsame, J.) declining to revise the ruling of the Chief Magistrate.

This is a brief background to the application.

On or about 30th April, 2009, **George Gachimu Gachihi** and **Nancy Wanjiru Gachihi** (plaintiffs) filed, Nairobi *High Court ELC Civil Case No. 200 of 2009* against Balozi Housing Co-operative Society (BHCS); **Gedion Karagia Berenju** and **Mrs. Berenju** the 1st, 2nd and 3rd defendants therein respectively alleging, among other things, that they were owners of plot No. 311 Phase II of L.R. No. 28030 which BHCS alloted to **Mr. and Mrs. Charles Muchina Kanyi**; that the latter subsequently sold the plot to the plaintiffs and that BHCS later after November, 2008 sold the same plot to 2nd and 3rd defendants. The plaintiff sought a *"mandatory"* injunction to restrain BHCS from transferring or selling the suit plot and also a *"mandatory"* injunction against the 2nd and 3rd defendants restraining them from dealing or

interfering with the suit plot.

Sometime in July, 2009, **Goddy Mwakio Wakesho**; **Joseph Mwangi Muiru** (the two applicants) and another were charged as officers of BHCS in *Criminal Case No. 2746 of 2009* of Chief Magistrate's Court, Kibera with the offence of making a false statement contrary to **Section 329 (a)** of the *Penal Code*, the charge alleging that they had made a false statement on account of plot No. 311 with intent to deceive or defraud **Nancy Wanjiru Maina** and **George Gachihi Gachimu**.

The applicants appeared before Mr. Maundu, Senior Resident Magistrate (SRM) for plea but the applicants' advocate successfully applied for deferral of the plea. When the applicants appeared again for plea, Mr. Nyakundi, the applicants' counsel raised a preliminary objection to the charge and asked the court to reject the charge on the grounds that the charge was an abuse of the process of the court as the dispute regarding plot No. 311 was already the subject matter of *Civil Case No. 200 of 2009*. The SRM, Mr. Maundu upheld the preliminary objection and rejected the charge under **Section 89 (5)** of *Criminal Procedure Code* (CPC) which gives court power to reject a charge which does not disclose an offence saying that the issues and facts relating to the making of a false statement can be canvassed in the pending civil case, and, further that, it was incorrect, illegal and improper for the prosecution to prefer charges.

That was not the end of the matter for applicants were subsequently charged before the Chief Magistrate, Kibera in *Criminal Case No. 3827 of 2009* with the offence of Falsification of Register contrary to **Section 361** of the *Penal Code* it being alleged that the applicants as officer of BHCS knowingly permitted the entry of plot No. 311 in the Register to read **Gedion Karugia Berengu** which to their knowledge was false as the plot was the property of **Nancy Wanjiru Maina** and **George Gachihi Gachimu**. After the plea was taken and after the applicants had pleaded not guilty, Mr. Nyakundi again raised a preliminary objection to the charge. He raised a plea of *autrefois acquit* and submitted that a court of competent jurisdiction had already rejected the charge. The Chief Magistrate ultimately dismissed the objection holding, among other things, that a discharge under **Section 89 (5)** CPC was no bar to further prosecution of the applicants on the same charge or slightly amended charge; that the finding of Mr. Maundu, SRM was not binding to any other magistrate and that the plea of *autrefois acquit* was not available to the applicants.

The applicants' advocates subsequently by a letter dated 25th November, 2009 applied to the High Court for revision of the decision of the Chief Magistrate under **Section 362** of CPC.

The superior court (Warsame, J) invoked its revisionary jurisdiction, called for the proceedings from the subordinate court, reconsidered the matter and ultimately rejected the application for revision saying, in part:

"In conclusion, it is my determination that there was no error or omission that was committed by the trial court to warrant the interference of the High Court. The fact that there is a civil case cannot be a reason to stop the charges against the applicants. Section 193 (a) of the CPC is a clear manifestation to that effect. In any case, the applicants are not a party to the proceedings before the High Court and the fact that they are employees to one of the parties cannot be a reason to say that the outcome would have a direct bearing on their trial before lower court. In short there is no basis or reason for me to interfere with the ruling that dismissed objection raised by the applicants. The revision has no merit ….".

The applicants being dissatisfied by the ruling of the superior court filed a notice of appeal and thereafter made the present application.

We have considered the submissions of Mr. Nyakundi, learned counsel for the applicants and the submissions of Mr. Monda, Senior State Counsel who opposes the application.

By **Section 362** of the CPC the High Court has power to call for and examine the record of any criminal proceedings before any subordinate court for purposes of:

"satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court".

The applicants' advocate in essence by a letter applied to the superior court to revise the decision of the Chief Magistrate and reject the charge. The superior court in a considered ruling made a finding that the application for revision had no merit.

In our view, the present application is beset by several hurdles. We refer to only two.

The first is that of jurisdiction. The application is brought under **Rule 5 (2) (b)** which expressly applies to civil proceedings. The proceedings in the subordinate court which are the subject matter of the application are criminal proceedings and therefore governed by **Rule 5 (2) (a)** which gives this Court power specifically to do two things, firstly, to order an appellant to be released on bail, and, secondly, to suspend the execution of any warrant of distress. The applicants advocate made no effort whatsoever to show that the Court has, in addition, jurisdiction under **Rule 5 (2) (a)** to order stay of criminal proceedings pending in a subordinate court. The applicants have not invoked the courts inherent jurisdiction.

Secondly, assuming but without deciding that, the court has jurisdiction to entertain an appeal from dismissal of an application for revision, the applicants have not shown that there are valid grounds of appeal. By **Rule 361 (7)** of CPC an order made by the superior court in exercise of its revisionary jurisdiction is deemed to be a decision made in exercise of its appellate jurisdiction. It follows that pursuant to **Section 361 (1)** CPC such an appeal is considered as a second appeal which is appealable to this Court only on a matter of law.

It is plain from **Section 138** of CPC that a plea of *autrefois acquit* can only arise where a person has been tried by a court of competent jurisdiction and acquitted.

Further, it is plain from **Section 193 A** of CPC that the fact that any matter in issue in criminal proceedings is also directly or substantially in issue in any pending civil proceedings should not be a ground for any stay, prohibition or delay of the criminal proceedings.

The applicants have not disclosed the grounds of the intended appeal on the body of the application or in the supporting affidavit. Furthermore, the applicants' counsel has not identified any specific errors of law made by the learned judge, which would form the grounds of the intended appeal. Lastly, the applicants do not claim that they will not get a fair trial.

An order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances (see *Halsbury's Laws of England*, *4th Edition Re-issue* page 290 paragraph 926). The order is not given as a matter of course.

In the light of the foregoing, the application has no merit. It is dismissed with no orders as to costs. Order accordingly.

Dated and delivered at Nairobi this 18th day of March, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR