



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPLI 51 OF 2008

REPUBLIC.....APPLICANT

AND

THE KENYA ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

KIBERA SENIOR PRINCIPAL MAGISTRATE' S COURT....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(An application for stay of proceedings in Kibera Senior Principal Magistrate’s Court Criminal Case No. 4271 of 2006 in an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nyamu, J) dated 7th March, 2008

in

Misc. Civil Application No. 569 of 2006

RULING OF TUNOI, J.A.

Before us is a notice of motion brought pursuant to **rule 5(2) (b)** of the Court of Appeal Rules (the Rules) seeking an order for a stay of proceedings in a criminal prosecution against the applicant, George Wambua, in the Senior Principal Magistrate’s Court at Kibera, Nairobi, pending the hearing and determination of an appeal from a judgment of the superior court (Nyamu, J) which dismissed a judicial review application by the applicant for orders of certiorari and prohibition. The orders sought in that court were:-

(a) An order of certiorari to remove into the court and quash the decision of the 1st and 3rd respondents dated the 1st August 2006 purporting to charge the applicant with the offence of abuse of office contrary to section 46 of the Anti Corruption and Economic Crimes Act;

and

(b)An order of prohibition to prohibit the 2nd respondent from taking evidence or in any other manner conducting proceedings in the matters the subject of Criminal Case No. 4271 of 2006.

As was in the superior court and also in this Court the 1st respondent is the Kenya Anti Corruption Commission; the 2nd respondent is the Senior Principal Magistrate at Kibera Court and the 3rd respondent is the Honourable the Attorney General.

The applicant is an employee of the Public Service Commission but had been posted to serve as City Treasurer, Nairobi, in 2003. Towards the end of that year, a group of councillors and officers of the Council intended to travel to Italy on a fact finding tour in relation to a proposed waste management project. The applicant authorized payment of per diem allowances to them without first seeking and obtaining approval of the Permanent Secretary, Ministry of Local Government. He alleges that as a result of this, he was sent on compulsory leave and in late 2004 he was summoned by the 1st respondent to record a statement over the said payments. It is however common ground that the applicant was on 1st August, 2006 arraigned before the Chief Magistrate, Kibera, on a charge of abuse of office contrary to **section 46** of the Anti-Corruption and Economic Crimes Act as read with **section 48** thereof it being alleged that the applicant as the City Treasurer, with the Deputy Town Clerk of the City Council of Nairobi being persons employed in the Public Service, respectively, jointly used their said offices to improperly confer benefit to officers and councillors of the City Council of Nairobi by irregularly authorizing payment of full per diem instead of quarter per diem to cover expenses of the aforementioned officers while traveling to Italy and Egypt on official duties. It is apparent that the charges were framed on the basis that the allowances paid contravened the Local Government Act and the applicable Government financial regulations.

On 4th October 2006, the applicant filed Misc. Civil Application No. 56 of 2006 in the High Court of Kenya at Nairobi seeking leave under **order 53** of the Civil Procedure Rules to apply for an order of prohibition to prohibit the Resident Magistrate's court at Kibera from hearing the criminal case against him. The applicant also sought an order that the grant of leave to apply for orders of prohibition do operate as stay of the criminal case until the hearing and determination of the application. The leave and the order of stay sought were granted by the superior court.

Subsequently, the applicant filed an application for judicial review seeking for orders of prohibition and certiorari which he had been allowed to apply for. The grounds in support of the application are to be found on the body of the application.

On 7th March 2008 Nyamu J dismissed the application. He held, first, that the offence charged is an offence defined by law and whether the applicant was immune from criminal proceedings in the light of the provisions of **Section 87** of the Local Government Act was a matter for determination by the trial Court and not the superior Court; second, that there is no public policy or interest being contravened or threatened in prosecuting the applicant; third, that there is no evidence of oppression or malice in the undertaking of the prosecution of the applicant; and finally, that it had not been shown that there was any threatened or actual contravention of the applicant's guaranteed constitutional right. The learned Judge concluded that a direct challenge by the applicant of his prosecution under the Judicial review application was misguided.

It is on the basis of this decision that the applicant filed a notice of appeal against the whole of the said decision. The appeal thereto has already been lodged in this Court and is pending determination.

The applicant during the pendency of the hearing of the appeal has now filed this application under **rule 5(2) (b)** of the Rules seeking a stay of proceedings in the Senior Principal Magistrate's court at Kibera, being Criminal Case No. 4271 of 2006 **Republic vs George Wambua and another** pending the hearing and determination of the appeal.

Mr Ongoya for the applicant, in his submission before us, averred that the appeal is arguable, mainly, first, on the ground that the decision to charge the applicant with the offence of abuse of office under the Anti-Corruption and Economic Crimes Act violated the personal immunity guaranteed to him under the Local Government Act and that the said decision was actuated by malice; and second, that the decision was oppressive and unreasonable in the circumstances. He submitted further that the learned Judge had

failed to pronounce a decision on these issues and on others that were canvassed before him. Mr. Ongoya has further stressed that if this Court does not intervene before the appeal is heard and determined the trial in the magistrate's court may commence and the applicant may be convicted and may start serving a jail term thereby being deprived of his liberty. Thus, the success of his appeal could be rendered nugatory.

Both Mr. Rinkanya and Mr. Mbai for the respondents, on the other hand, submitted that the application should be declined as the applicant had not demonstrated that his appeal was arguable.

The law as regards the principles that guide the Court in such an application brought pursuant to **rule 5(2) (b)** of the Rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb – See this Court's decisions in the cases of **Reliance Bank Ltd vs Norlake Investments Ltd. (2002) IEA 227 and Githunguri vs Jimba Credit Corporation Ltd. & Others (No.2) [1988] KLR 838**. In Githunguri's Case, this Court held, inter alia, as follows:-

“The general principles on which the Court would base its unfettered discretion were first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the Court should ensure that the appeal, if successful, should not be rendered nugatory.”

As stated earlier on in this ruling, an appeal against the judgment of Nyamu, J has been lodged and is pending hearing before this Court. Further, it is common ground that despite the dismissal of the application for judicial review on 7th March, 2008 the criminal proceedings at the Kibera court have not been commenced.

It is plain that this Court has jurisdiction under rule 5(2) (b) of the Rules to grant three kinds of orders pending appeal. These are:-

(i) a stay of execution of the decree or order appealed from;

(ii) an order of injunction;

and (iii) an order of stay of any further proceedings. See **Yagnesh Devani & 4 Others v Joseph Ngindari & 3 others Civil Application** No. Nai. 136 of 2004 (UR 72/2004) unreported.

The question then that arises is under which category does the applicant's prayers fall? The superior court dismissed his application for judicial review and no positive orders were granted in the respondents' favour, save of course, for costs which is the only order capable of execution. Again, this Court cannot at this stage set aside the dismissal order of the superior court. This can only be done after the pending appeal has been heard and determined. It must follow therefore that in the circumstances an order of stay of an execution of the dismissed Judicial review application cannot be granted.

Equally, so an order of injunction cannot be issued because the superior court has already acted and dismissed the application.

As **rule 5(2) (b)** of the Rules clearly makes reference to any civil proceedings and any further proceedings on such terms as the court may think just, it would follow that if there are no proceedings of a civil nature in the superior court then this Court cannot issue orders of stay in vain. This means then that this Court will not have jurisdiction to issue orders of stay of proceedings where the proceedings are non-existent.

The other vexing issue we have to grapple with is whether this Court under **rule 5 (2) (b)** of the Rules has

jurisdiction to stay criminal proceedings in the magistrate's court which proceedings do not form part of the substantive appeal before the Court as the applicant has petitioned the Court to do in the matter now before us. It would appear logical to say that it seems that the Court can do so if petitioned on time to stay the order and/or decree of the superior court which will in turn have the effect of staying the criminal proceedings in the superior court. Further, as to whether it can do so or not depends on the particular circumstances of each case and especially so, what exactly the applicant is asking the Court to do and how the Court is approached.

In Republic v Isaac Theuri Githae & Another Civil Appeal No. 11 of 2002 this Court held:

“In the circumstances, while it is generally undesirable to stop criminal proceedings by order of prohibition there may arise circumstances which when looked at objectively may justify intervention to obviate improper treatment against certain accused persons. It is our view that Githae's was such a case, and Rimita J. properly exercised his discretion in the matter.”

Also, in Dr. Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another, the Court held inter alia.

“We think we should stay and we hereby do, the implementation and enforcement of the NOTICE dated 9th January, 2006 issued by the Director of the Commission to the applicant and since Criminal Case No. ACC 11 of 2006 in the magistrate's court was instituted pursuant to that Notice, the hearing of that case is also hereby stayed pending hearing and determination of the appeal brought to this Court or the hearing and determination of the applicant's originating summons in the High court whichever is the earlier”

Stay orders prohibiting magistrate's courts from continuing with criminal proceedings were also issued by this Court in Joram Mwenda Guantai vs Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (unreported) and in the cases of Yagnesh Devani & 4 Others v Joseph Ngindari & 3 Others Civil Application No. 136 of 2004, in Civil Application No. 246 of 2005 (between the same parties) and in Berkeley Northmarket & 3 Others v Attorney General & 3 Others Civil Application No. NAI 74/2005 (unreported).

However, in Yagnesh Devani & 4 Others v Joseph Ngindari & 3 Others Civil Application No. Nai 136 of 2004 (unreported) the Court in an application seeking an order under **rule 5(2)(b)** of the Rules:-

“1.

2. THAT this Honourable court be pleased to order an interim stay of execution of the order, Decree of the superior court issued on 28th May, 2004 in the superior court in Misc. Civil Application No. 935 of 2002.”

held that:-

“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage, what the superior court has done. It can only do so after hearing the appeal. It seems to us that the application for the stay of execution of the dismissal order was not brought in error. It was deliberately designed to achieve that result which regrettably is impracticable”.

From my consideration of the above somewhat conflicting decisions I would hold therefore that whether **rule 5(2)(b)** of the Rules does apply to criminal proceedings and as to whether this Court can issue an order for prohibition in a criminal case against the magistrate's court pending appeal depends on what prayers an applicant is seeking under the rule and the particular circumstances of each case. I hasten to add that the issue of jurisdiction herein was raised **suo motu** and we were not addressed by either counsel

on it.

I have anxiously considered the notice of motion before us, the affidavits, the ruling of the superior court, the rival submissions by the learned counsel and the law, with the above legal principles as my guide. Without going into details, lest I prejudice the hearing of the appeal, I am prepared to accept that the intended appeal is arguable.

I am also satisfied that if I do not grant a stay and the appeal were to succeed the applicant would have undergone an expensive trial which could result in his being sent to prison and thus denying him his liberty.

In the result, I would allow the application as prayed. There shall be a stay of proceedings in Senior Principal Magistrate's Court Criminal Case No. 4271 of 2006 **Republic vs. George Wambua & Another** pending the hearing and determination of the appeal against the judgment and decree of the superior court (Nyamu, J.) delivered on March 7, 2008. I would make no order as to costs.

As Waki, JA agrees these shall be the orders of the Court.

Dated and delivered at Nairobi this 20th day of February, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

RULING OF GITHINJI, J.A.

This application by **George Wambua** (applicant) is brought under **Rule 5 (2) (b)** of the Court of Appeal Rules (Rules) for an order of stay of proceedings in Senior Principal Magistrate's Court *Criminal Case No. 4271 of 2007*:

“pending the hearing and determination of the intended appeal against the judgment and decree of the Honourable Mr. Justice J. G. Nyamu delivered on March 7, 2008 in High Court Miscellaneous Application No. 569 of 2006 dismissing the applicant's application for Judicial Review orders of certiorari and prohibition against the respondent”.

On 1st August, 2006, the applicant and another were charged before the Senior Principal Magistrate's Court at Kibera with the offence of abuse of office contrary to **Section 46** of the Anti-corruption and Economic Crimes Act as read with **Section 48** of the Anti-corruption and Economic Crimes Act. The applicant was the 1st accused while co-accused was the 2nd accused. The particulars of the charge alleged that on 28th November, 2003, the accused and his co-accused being persons employed in Public Service to wit, City Treasurer and Deputy Town Clerk of Nairobi City Council respectively, jointly used their offices to improperly confer benefit to officers and councilors of City Council of Nairobi by irregularly authorizing the payment of full per diem instead of quarter per diem to cover expenses of the aforementioned officers while traveling to Italy and Egypt on official duties.

Sometime in October, 2006, the applicant filed an application in the superior court *Miscellaneous Civil Application No. 569 of 2006* for leave to file a Judicial Review application for orders of certiorari to remove into the High Court and quash the decision of **Kenya Anti-corruption Commission (KACC)** dated 1st August, 2006 purporting to charge the applicant with the offence of abuse of office and for an order of Prohibition to prohibit Kibera Senior Principal Magistrate (Magistrate) from taking evidence or in any other manner conducting proceedings in *Criminal Case No. 4271 of 2006*. The applicant also sought a further order that leave so granted do operate as a stay against the Magistrate from taking evidence or in any other manner conducting proceedings in the criminal case. The superior court duly

granted leave to apply for Judicial Review on 5th October, 2006 but declined to order such leave to operate as a stay. The applicant promptly filed an application for Judicial Review for orders of certiorari and prohibition. The application was duly heard on the merits and dismissed by Nyamu J. on 7th March, 2008. Thereafter, the applicant filed a notice of appeal on 18th March, 2008 indicating that he intended to appeal against the whole decision of Nyamu J.

The application is supported by the affidavit of the applicant. He deposes, among other things, that the appeal is arguable and meritorious and that unless stay is granted, the criminal proceedings will have been heard and determined by the time the appeal is heard thereby rendering the intended appeal nugatory and academic.

The application is opposed by the respondents on the grounds that the intended appeal has no merit; that matters the subject of the intended appeal should be raised as defences at the trial and that stay is not necessary as the trial has not commenced and is unlikely to be concluded before the appeal is heard.

The principles upon which the court exercises its original and discretionary jurisdiction under **Rule 5 (2) (b)** are notorious. The court will not exercise its discretion in favour of an applicant unless the applicant satisfies the court that the intended appeal is arguable and that unless the order is granted the intended appeal would be rendered nugatory.

At the hearing of the application, Mr. Rinkanya, learned counsel for the 1st respondent raised an important legal issue. He submitted that the application for stay of criminal proceedings is incompetent as it is brought under **Rule 5 (2) (b)** which deals with civil proceedings:

Rule 5 (2) gives court discretion:

“(a) In any criminal proceedings, where a notice of appeal has been given in accordance with rule 58, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal”;

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution; an injunction or stay of any further proceedings on such terms as the court may think fit”.

In my view, to get the true construction of **Rule 5 (2) (b)** the phrase *stay of further proceedings*, must be read *ejusdem generis* to the preceding phrase – *in any civil proceedings where a notice of appeal has been lodged in accordance with rule 74*.

By **Rule 74** as read with **Rule 73**, a notice of appeal lodged under Rule 74 must relate to an appeal from superior court acting in the original or appellate jurisdiction in *civil cases*.

This Court has held on many occasions that its jurisdiction under **Rule 5 (2) (b)** is derived from the lodging of a notice of appeal. The notice of appeal filed herein indicates that the applicant intends to appeal against the decision of Nyamu J. delivered on 7th March, 2008.

In **David Thiongo T/A Welcome General Stores vs. Market Fancy Emporium**, *Civil Application No. Nai. 47 of 2007* (unreported), this Court said in part:

“It is obvious from rule 74 (1) as read with Rule 74 (6) a Notice of Appeal relates to a decision of the superior court. It is the lodging of the notice of Appeal which gives this Court jurisdiction to grant any order of stay of execution under Rule 5 (2) (b) of the rules. It follows therefore that the stay of execution can only relate to subject matter of the Notice of Appeal which is the decision of the superior court – that is the decision appealed from”.

That principle was reiterated in the **Hon. Peter Anyang Nyong'o & Two Others vs. The Minister for**

Finance & Another, *Civil Application No. Nai. 273 of 2007* (unreported) where the court said:

“It is trite law that this court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5 (2) (b). It is apparent that under Rule 5 (2) (b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction, and a stay of further proceedings. This Court has consistently construed Rule 5 (2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.”

Two principles emerge from a consideration of **Rule 5 (2) (b)** and the two authorities to wit, that, the jurisdiction of the court under **Rule 5 (2) (b)** is restricted to decisions made in Civil Proceedings and that the reliefs sought must relate to the decision of the superior court in its original or appellate jurisdiction.

In the light of the foregoing the true construction of the phrase *stay of further proceedings* in the context of **Rule 5 (2) (b)** is, in my view, that, the phrase means, stay of continuation of civil proceedings pending in the superior court pending appeal from the impugned decision.

Even in the cases where the jurisdiction of the court under **Rule 5 (2) (b)** is properly invoked this court has been reluctant to expand the scope of the reliefs beyond the matters decided in the superior court (see **Krought Grant vs. Kenya Commercial Finance Co. Ltd and two others** – *Civil Application No. Nai. 227 of 1995* (unreported). In that case the Court said:

“Moreover the Notice of Motion now filed before this Court seeks an injunction from further transfer of property This was not before the superior court. Nor did the superior court decide on the issue. It is, in our judgment, not open to us on consideration of an application under Rule 5(b)(sic) thus to expand or extend the scope or ambit of the original application.”

I am satisfied from the foregoing that the application is outside the scope of **rules 5 (2) (b)** and that the Court has no jurisdiction under that rule to grant the stay in terms sought. The application is grossly incompetent.

That is not to say that the Court cannot in exercise of its inherent jurisdiction under **Rule 1 (3)** grant any orders as may be necessary for the ends of justice. The applicant has not however invoked the inherent jurisdiction of the court.

That finding is sufficient to dispose of the application. However, in deference to the respective counsel it is necessary to consider other aspects of the application.

Turning to the merits of the intended appeal, the applicant intends to appeal against the dismissal of application for orders of certiorari and prohibition. Although the applicant applied for both orders, the purpose of the application of judicial review was principally to obtain an order of certiorari to quash the charge and the grounds of the intended appeal solely deal with the dismissal of an order of certiorari. Leaving aside the merits of the intended appeal against the dismissal of the application for an order of certiorari, the applicant has not attempted to show that the intended appeal against dismissal of the order of prohibition has any merit. The order of prohibition sought to prohibit the Magistrate from embarking on a trial of the criminal case. There was however no basis laid in the application in the superior court to support the order of prohibition. The order of prohibition as it is known in judicial review is a term of art. The purpose of prohibiting order is to prohibit a public body from acting unlawfully. It can issue against a Magistrate in respect of criminal proceeding pending in court if, among other things, it is claimed and demonstrated that the magistrate is acting without or in excess of jurisdiction or that accused will be denied due process. The applicant did not allege any of those things against the Magistrate. He did not even complain that he will not get a fair trial. It is apparent that the applicant did not, in the application for judicial review, use the word “*prohibition*” in its technical form but loosely to refer to merely stopping the Magistrate from hearing the criminal case. A Magistrate cannot however be stopped from executing official duties – that is conducting trials, for no reason.

Furthermore the applicant has not shown that he will suffer injustice unless the application for stay in the terms sought is granted. The applicant claims that the appeal would be rendered nugatory unless the stay is granted as the trial is likely to be concluded before the appeal is heard.

In my view, the test of nugatory is not appropriate in the circumstances of this case where the applicant in effect seeks a stay of prosecution. It would be against public policy or public interest to halt or paralyze the prosecution of a person suspected to have committed a crime unless there are good reasons for doing so. The Attorney General has a duty to prosecute people suspected of having committed crimes speedily in the public interest. The suspect has the protection of law in the event of such a prosecution as enshrined in **section 77** of the Constitution to ensure that he gets a fair trial.

In those circumstances I think the appropriate consideration is whether the applicant would suffer injustice unless an order of stay of prosecution or proceedings is granted.

As I have observed above, the applicant did not allege or demonstrate in the application for judicial review that the Magistrate has no jurisdiction to try him or that due process will not be observed at the trial or that he would not get a fair trial.

Further, the grounds on which the application for judicial review was based can be raised as defences at the trial as the superior court found. Therefore, if the trial proceeds the applicant will be afforded an opportunity of advancing the matters he intends to raise in the appeal. Lastly, there is no certainty that if the criminal trial proceeds the applicant would be convicted. If however, he is ultimately convicted he can resort to appeal mechanism to ensure that justice is done.

In those circumstances it would be a blot in criminal justice system to stay the criminal proceedings in the Magistrate's court.

For those reasons I would, on my part, dismiss the application with costs to the respondents.

Dated and delivered at Nairobi this 20th day of February, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

RULING OF WAKI J.A

I have had the advantage of reading in draft the ruling of Tunoi J.A.

I concur with the reasoning and conclusion made therein and have nothing useful to add.

Dated and delivered at Nairobi this 20th day of February, 2009.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR