



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 179 OF 2020**

**BETWEEN**

ABDALLA SALIM ABDALLA.....1<sup>ST</sup> APPLICANT

SHEIKH ALI YASIN BAJABER.....2<sup>ND</sup> APPLICANT

JOSEPH MUNYAU.....3<sup>RD</sup> APPLICANT

**-VS-**

REPUBLIC.....RESPONDENT

**RULING**

**The Application.**

1. By a Notice of Motion Application dated 13<sup>th</sup> January, 2021, brought under Article 159 and 164 of the Constitution of Kenya, 2010 and Section 362 of the Criminal Procedure Act, ABDALLA SALIM ABDALLA, SHEIKH ALI YASIN BAJABER, JOSEPH MUNYAU (*the Applicants*) prays for the following orders: -

1. **THAT** this matter be certified as urgent and service of the same be dispensed with at first instance.
2. **THAT** this Court be pleased to order stay of execution and implementations of the rulings and order of the learned trial Judge given on 18<sup>th</sup> December, 2020 pending the hearing of this application *inter-partes*.
3. **THAT** this Court be pleased to order stay of execution and implementation of the Ruling and Order of the Learned Trial Judge given on 18<sup>th</sup> December, 2020 pending the hearing of the intended appeal.
4. **THAT** costs of the application be provided for.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Abdalla Salim Abdalla the 1<sup>st</sup> applicant herein sworn on 13<sup>th</sup> January, 2021.

3. Prayers 1 and 2 were granted *ex parte* pending the hearing and determination of the main application and were thus spent.

4. In response thereto, the respondent filed a Preliminary Objection dated 20<sup>th</sup> January, 2021. The Preliminary Objection was premised on the following grounds:

1. **The court has no jurisdiction to stay criminal proceedings pending before subordinate courts, where a judge of competent and concurrent jurisdiction has directed that matter proceeds to its logical conclusion.**
2. **This court has no jurisdiction to issue an order of stay of execution and implementation of the decision by Hon. Justice Njoki Mwangi made on 18<sup>th</sup> December, 2020, who is a judge of competent and concurrent jurisdiction.**
3. **The provisions of Article 159, 164 and Section 362 of the Criminal Procedure Act do not provide for application for stay of**

**ruling pending hearing and determination of an Appeal before the Court of Appeal.**

**4. The application is incompetent, misconceived, and an abuse of the court process.**

**5. This application has not been filled before the Court of Appeal instead it has been filed before a judge of competent and concurrent jurisdiction who cannot superintend or revise orders of a judge of concurrent and competent jurisdiction.**

**6. This application ought to be filed under Rule 5 (2) (a) of the Court of Appeal Rules, 2010.**

5. Accordingly, the Respondent prayed that the application dated 13<sup>th</sup> January, 2021, be dismissed with costs to the Respondent. Directions were given that the Preliminary Objection be canvassed by way of written submissions which were highlighted on 8<sup>th</sup> February, 2021.

#### **Submissions.**

6. **Mr Masila** who submitted on behalf of the Respondent, that the Applicants were charged in Shanzu Senior Principal Magistrate's Court Criminal Case No. 141 of 2020, on 28<sup>th</sup> July, 2020 and the Applicants' advocate made an oral application before the trial magistrate for the applicants to be discharged from the proceedings due to a defective charge sheet and lack of jurisdiction as the offence was committed in Malaba.

7. Counsel submitted that the trial Magistrate dismissed the application and that order was the subject of the Applicants revision filed on 29<sup>th</sup> July, 2020 before this Court. Upon hearing the application for revision, Hon Lady Justice Njoki Mwangi on 18<sup>th</sup> December, 2020 delivered a ruling dismissing the application and directed that the lower court file be returned to Shanzu Law Courts for mention of the case on 22<sup>nd</sup> January, 2021 for fixing of a hearing date.

8. **Mr Masila** submitted that when filling the application, the Applicants invoked Article 159 and 164 of the Constitution and Section 362 of the Criminal Procedure Act to clothe this court with jurisdiction to handle this application. He further submitted that by virtue of the Applicants filing a Notice of Appeal pursuant to the provisions of Section 59 of the Appellate Jurisdiction Act, the application before the Court ought to be directed to the Court of Appeal since the said notice of appeal invoked the Court of Appeal's jurisdiction by dint of Section 3(1) of the Appellate Jurisdiction Act.

9. In **Mr Masila's** view, by invoking the jurisdiction of the Court of Appeal, essentially the High Courts' jurisdiction has been ousted and cannot therefore entertain the application dated 13<sup>th</sup> January, 2021. Counsel submitted that the Court of Appeal jurisdiction to grant stay is derived from Rule 5 of the Court of Appeal Rules, 2020, and by the Applicants failure to invoke the relevant sections of the law and to file the application in a proper court, they cannot purport to rely on the inherent powers of the court, since the same is only invoked where there is no express provision in the law or rules. He cited section 361(7) of the Criminal Procedure Code which states as follows;

***“For the purposes of this section, an order made by the High Court in the exercise of its revisionary jurisdiction or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction.”***

10. **Mr Masila** submitted on the doctrine of *functus officio* as was expounded by the Supreme Court in **Election Petition Nos. 3, 4 & 5 Raila Odinga & Others vs IEBC & Others** (2013) eKLR that upon the High Court delivering its ruling on 18<sup>th</sup> December, 2020 it became *functus officio* and the court cannot reconsider its decision by issuing of stay orders. He further submitted that the applicants by seeking this court to review its order is equivalent to asking the court to sit on appeal of its orders. It was submitted that the review application was dismissed by the learned judge, thus this was a negative order he relied on the case of **Devani & 4 Others vs Joseph Ngindari**.

11. **Mr Masila** contend that no exceptional circumstances have been demonstrated by the applicants to warrant stay of criminal proceedings in the Magistrate Court and that no memorandum of appeal has been placed before this court. Reliance was placed in the case of **Mary Nge'tich Ngethe v The AG & Another** and the Supreme Court decision in **Joseph Lendrix Waswa v Republic** (2020) eKLR

12. Counsel further submitted that the Applicants are denying the Respondent the right to prosecute this matter to its logical conclusion by the denial of a speedy trial as enshrined under Article 50 of the Constitution and relied on the case of **Diana Kethi Kilonzo v Republic** (2016) eKLR, thus during the trial, the applicants will be under the Constitutional safeguards of fair trial under Article 50 of the Constitution. **Mr Masila** urged the court to dismiss the applicants' application with costs to the respondent.

13. **Mr. Adalla** who submitted on behalf of the applicants first defined a Preliminary Objection by relying on the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** which provided as follows:-

***“a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”***

14. Counsel further submitted that this court based on the authorities cited by the applicants should evaluate whether the grounds raised by the Respondent pass the test of a preliminary objection properly so called. It was submitted that the correct position for stay pending appeal in criminal division is found in Section 356 (1) of the Criminal Procedure Code, that should be read together with Article 159 (2) of the Constitution, thus stay of execution cannot be limited to only prison sentences or convictions but also to orders as may seem reasonable to the High Court or the Subordinate Court.

15. Counsel also submitted that the application dated 13<sup>th</sup> January, 2021 has been brought in the same file as the one that was before Hon. Lady Justice Njoki Mwangi, that the applicants have not directed the file to be brought before this Court since they are not in charge of the administration of the registry and movement of files. It was also submitted that this court is in similar standing as the court that delivered the ruling sought to be stayed pending appeal, thus raising a preliminary objection is not only mischievous but also a distortion of facts and it therefore fails as a preliminary objection.

16. **Mr. Adalla** submitted that the Respondent's argument that the High Court does not have jurisdiction to stay its order pending appeal and the application for stay by law must have been to the Court of Appeal is not accurate as there are a myriad of authorities that show that a High Court can indeed stay its orders pending an appeal to the superior court. He further submitted that the Applicants application was on jurisdiction and when it is determined that a court has no jurisdiction, it cannot proceed further. Counsel submitted that the Superior court can and is likely to arrive at a different decision from the High Court hence the importance of a stay to allow the superior court make a determination on the issue of jurisdiction.

17. **Mr. Adalla** indicated that the court has got inherent powers to issue orders to ensure the ends of justice and in this case that would be that the Court of Appeal be allowed to make a finding whether the conclusion of this Court was right. He pointed out the provision of Article 159 of the Constitution of Kenya, 2010 and submitted that the said provision gives this Court the latitude to exercise its wide powers for the purposes of the ends of justice and that the Respondent's arguments can only be made in a substantive hearing vis a vis the grounds relied on in support of the application.

18. Counsel further submitted that Rule 2 (b) of the Court of Appeal Rules deals with a particular scenario which is not the Applicants' case since they have not been convicted, they are not seeking a bar nor is there a warrant of distress that they seek to have suspended which is what the said rules deals with hence on this point, the preliminary objection is misguided. Counsel submitted that the Respondent has failed in its preliminary objection and urged the court to determine the application dated 13<sup>th</sup> January, 2021 on its merit.

### **Analysis and Determination.**

19. I have considered the preliminary objection together with the parties written submissions and the oral arguments by counsel in this matter. The issue for determination is whether the Preliminary Objection dated 20<sup>th</sup> January, 2021 is merited.

20. The case relied upon by counsel for the applicants **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696** defines what a preliminary objection is made up of as follows:

*"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

21. **The preliminary objection filed by the Respondent raises several issues among them being the jurisdiction of this court as in grounds 1, 2, 5 and 6 of the preliminary objection in staying its orders; and that the application has been brought under the wrong provisions of the law namely Articles 159 and 164 of the Constitution of Kenya, 2010 and Section 362 of the Criminal Procedure Act (code?).**

22. **On 18<sup>th</sup> December, 2020, this Court dismissed the Applicants application for revision. By virtue of dismissing that application, the orders staying the lower Court proceedings were automatically vacated.** The doctrine of *functus officio* is one of the expressions in law that seeks to achieve finality in litigation. In **Telkom Kenya Limited vs. John Ochanda (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** the Court of Appeal held that :-

**"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."**

23. In **Mohmed Dagane Falir v Alfonse Mutuku Muli & another [2020] eKLR**, Odunga J on the doctrine of *functus officio* held as follows;

*"I associate myself with the position adopted by the Supreme Court decision in **Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 to the effect that:*

*"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."*

*That position however clearly applies to a situation where the Court has pronounced itself on merits. It cannot once more revisit the same decision with a view to arriving at a different decision. However, the court is not barred from dealing with the matter in order to facilitate its decision."*

24. Before allowing an application for stay pending appeal, the Court would have to determine whether the Applicants have an arguable appeal with high chances of success. In light of the authorities cited herein above, I find that this Court cannot do so since it has already dismissed the application for revision in its capacity as an appellate Court and on that ground this Court is *functus officio*.

25. **The application dated 13<sup>th</sup> January, 2021 was brought under** Article 159 and 164 of the Constitution and Section 362 of the Criminal Procedure Act. Article 159 provides as follows;

***“Judicial authority***

***(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— Constitution of Kenya, 2010 Const2010 69***

***(a) justice shall be done to all, irrespective of status;***

***(b) justice shall not be delayed;***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

***(e) the purpose and principles of this Constitution shall be protected and promoted.***

***(3) Traditional dispute resolution mechanisms shall not be used in a way that—***

***(a) contravenes the Bill of Rights;***

***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***

***(c) is inconsistent with this Constitution or any written law.”***

26. While Article 164 provides;

***“(1) There is established the Court of Appeal, which—***

***(a) shall consist of the number of judges, being not fewer than twelve, as may be prescribed by an Act of Parliament; and Constitution of Kenya, 2010 Const2010 71***

***(b) shall be organized and administered in the manner prescribed by an Act of Parliament.***

***(2) There shall be a president of the Court of Appeal who shall be elected by the judges of the Court of Appeal from among themselves.***

***(3) The Court of Appeal has jurisdiction to hear appeals from—***

***(a) the High Court; and***

***(b) any other court or tribunal as prescribed by an Act of Parliament.”***

27. Section 362 of the Criminal Procedure Code provides that;

***“Power of High Court to call for records***

***The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose 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.”***

28. I have considered the preliminary objection and found that the Articles of the Constitution and the Section of the Criminal Procedure Code pursuant to which the application for stay of the orders made on 20<sup>th</sup> December, 2020 are not applicable. The Applicants having filed a notice of appeal ought to have filed the application under Rule 5 (2) (a) of the Court of Appeal Rules, 2010 in the Court of Appeal for hearing and determination. The said rule provides as follows:

“5 (1) ...

**2. Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -**

***a. in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, 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;***

29. As correctly submitted by the Applicants' counsel, in the present case, the Applicants' have not been convicted and they are not seeking a bar. However the Applicants seek to stay the order of Hon. Njoki Mwangi which directed the criminal case in Shanzu Law Courts to proceed. In my view this falls under the provisions of **Rule 5 (2) (a) of the Court of Appeal Rules, 2010.**

30. In **Diana Kethi Kilonzo v Republic [2016] eKLR** the Court of Appeal observed that:

***“It is plain to us that the format of the above rule demonstrates beyond peradventure that an order of stay of execution, an injunction or stay of further proceedings is available where both sub-rules 5(2) (a) and sub-rule 5(2) (b) are invoked. A stay of execution, injunction and stay of proceedings is not therefore limited to sub-rule 5(2) (b) of the rule. If the framers of the Rules intended so, the paragraph "order a stay of execution, an injunction or stay of any further proceedings on such terms as the court may think", would come immediately below and after the sub-rule. Here, it is designed to apply to both sub-rules 5 (2), (a) and 5 (2) (b).”***

31. It is not in dispute that the applicants have filed a Notice of Appeal pursuant to the provisions of Section 59 of the Appellate Jurisdiction Act in respect of the decision of the High Court on revision and as stated above the same ought to have been filed in the Court of Appeal which is seized with the jurisdiction to issue the orders being sought for.

**32. For the reasons explained herein above and in light of the fact that the application has been brought under the wrong provisions of the law and the court has no jurisdiction to hear and determine it I find that the Preliminary Objection dated 20<sup>th</sup> January, 2021 is merited. The Notice of Motion dated 13<sup>th</sup> January, 2021 is struck out with no orders as to costs.**

It is so ordered.

**Dated, signed and delivered at Mombasa, this 25<sup>th</sup> day of February, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**