



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 120 OF 2020 (COVID 025)

LAW SOCIETY OF KENYA.....PETITIONER

-VERSUS-

HILLARY MUTYAMBAI, INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....1ST RESPONDENT

FRED MATIANGI, CABINET SECRETARY FOR INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

THE HON. CHIEF JUSTICE.....4TH RESPONDENT

MUTAHI KAGWE,

CABINET SECRETARY FOR HEALTH.....5TH RESPONDENT

-AND-

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS.....1ST INTERESTED PARTY

FIDA-KENYA.....2ND INTERESTED PARTY

INDEPENDENT POLICE OVERSIGHT AUTHORITY

(IPOA).....3RD INTERESTED PARTY

KITUO CHA SHERIA.....4TH INTERESTED PARTY

RULING

1. This ruling is in respect of the notice of motion application dated 21st April, 2020, through which Hillary Mutyambai, Inspector General National Police Service (1st Respondent), Fred Matiangi, Cabinet Secretary for Interior & Coordination of National Government (2nd Respondent), Attorney General (3rd Respondent), and Mutahi Kagwe, Cabinet Secretary for Health (5th Respondent), who are all represented by the Attorney General of the Republic of Kenya, seek orders as follows:-

“a.) That this application be certified urgent and service thereof be dispensed with in the first instance.

b.) That pending the hearing and determination of this application the Honourable Court be pleased to grant an interim stay

of execution of the decision and orders of this Court (Hon. Mr. Justice W. Korir) in Nairobi Petition No. 120 of 2020 dated and delivered on 16th April, 2020 Law Society of Kenya vs Inspector General of Police and 4 others.

c.) That pending hearing and determination of the intended appeal, this Honourable Court be pleased to grant a stay of execution of the decision and orders of this Court in Nairobi Petition No. 120 of 2020 dated and delivered on 16th April, 2020 Law Society of Kenya vs Inspector General of Police & 4 others.

d.) That the Honourable Court be pleased to issue any other/further order that it deems fit in the circumstances of the case.

e.) That costs of the application be in the cause.”

2. The Law Society of Kenya (Petitioner), Kenya National Commission on Human Rights (1st Interested Party), FIDA-Kenya (2nd Interested Party), Independent Police Oversight Authority (IPOA) (3rd Interested Party) and the Legal Advice Centre T/A Kituo Cha Sheria (4th Interested Party) all oppose the application.

3. A perusal of the applicants’ certificate of urgency, grounds in support of the application and the supporting affidavits of Mutahi Kagwe, the 4th Respondent and Dr. (Eng) Karanja Kibicho all indicate that the applicants’ case is that if the execution of the judgment issued by this Court on 16th April, 2020 is not stayed pending the hearing and determination of their intended appeal, they will suffer substantial loss in that the mischief sought to have been addressed by the Public Order (State Curfew) Order, 2020 which is to limit as much as possible human interaction and contain the spread of the highly contagious and deadly Covid-19 disease would have been frustrated; that the Public Order (State Curfew) Order, 2020 whose constitutional and statutory propriety has been established by this Court would have been amended and its efficiency severely impaired by the exemption of over seventeen thousand members of the Petitioner from application of the Order, that the applicants’ right to appeal would have been essentially taken away; and that considering the potential irreversible consequences of giving effect to the order of this Court that is, the escalation of incidences of human interactions and communal transmission of the deadly and contagious disease and attendant consequences thereto, the applicants would have been hindered in discharging their constitutional duty to protect and preserve both life and property.

4. The Petitioner opposed the application through grounds of opposition dated 12th May, 2020 erroneously titled “Petitioner’s Written Submissions against Application for Stay by the Attorney General”. The said grounds are as follows:-“a.) **Having delivered its Judgment on 16th of April 2020, the High Court cannot revisit its judgment and stay it, the only available remedy is in the Court of Appeal.**

b.) By relief granted being mandamus was a discretionary remedy, the Application for stay seeks to stop its operation, without any valid reason provided or advanced.

c.) The Attorney General and Cabinet Minister Interior have not complied with the order of the court issued on 16th of April 2020, within 5 days as required; they cannot therefore seek another intervention by way of stay.

d.) The stay sought is not merited and does not meet the tests set out in law”.

5. The 1st Interested Party opposed the application through a replying affidavit sworn on 4th April, 2020 by its Secretary, Dr. Bernard Mogesa. The 1st Interested Party’s case is that the applicants’ intended appeal is neither arguable nor capable of being rendered nugatory were it to ever succeed.

6. Anne W. Ireri, the Executive Director of the 2nd Interested Party opposed the application through her replying affidavit sworn on 12th May, 2020. Her averment is that the applicants have not complied with the court orders which were issued in the best interest of women and children and the public at large. She further deposes that members of FIDA-Kenya also constitute members of the Law Society of Kenya who provide essential legal services to women and children who continue to be vulnerable and as such it would be severely detrimental to this category of persons and the public at large if the orders sought by the applicants are granted.

7. The 3rd and 4th interested parties’ advocates indicated to the Court on 18th May, 2020 that they only filed submissions in response to the application.

8. In support of their application, the applicants filed written submissions dated 7th May, 2020 and further written submissions dated 18th May, 2020. The applicants’ starting point is that this Court has the requisite jurisdiction to hear and determine the present application. Support for this statement is hinged on the decisions in **Wangui Kathryn Kimani v Disciplinary Tribunal of Law Society of Kenya & another [2017] eKLR**, and **David Kipsang Kipyego & another (The Registered Trustees of the Serve in Love Africa (SILA) Trust) v Registrar of Documents, Ambrose Kiprop & 4 others, Eric Kiptum Teimuge (Interested Party) [2019] eKLR**.

9. As to what constitutes substantial loss, counsel for the applicants cite the decision in **James Wangalwa & another v Agnes Naliaka Chesoto** (citation not provided) for the holding that substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.

10. In regard to the application, counsel for the applicants submit that the order to be appealed requires that members of the Petitioner be exempted from the provisions of the Public Order (State Curfew) Order, 2020 (hereinafter simply referred to as the Curfew Order), the upshot of which is that their movement would be unrestricted. According to counsel, if the orders are not stayed pending the determination of the appeal, it means that by the time the appeal is heard and determined, the members of the Petitioner and the 3rd Interested Party would have done what the Curfew Order in the first place sought to restrict and if the appeal is successful the same would have already been

undermined. Further, that the Curfew Order has provision for permitting exceptions to its application on a case by case basis which avails the Petitioner and the interested parties an opportunity to get exemptions from application of the provisions of the Curfew Order, when necessary.

11. Counsel points out that in its judgment this Court appreciated that the Curfew Order was promulgated for the benefit of the general public, that is to help contain the spread of the deadly Covid-19 pandemic. Further, that the Court through its judgment provided reliefs against the actions of the police in enforcing the Curfew Order and which part of the judgment has not been appealed by the applicants and is therefore enforceable. It is therefore the applicants' case that the Petitioner and interested parties will not be prejudiced if an order of stay of execution as sought is granted.

12. As to the prejudice to be suffered by the applicants if the application is declined, counsel submits that the general public will suffer irreparable harm in that effecting the orders of this Court has the potential of precipitating adverse irreversible consequences, increasing incidences of unrestricted human interaction and spread of the highly contagious and lethal Covid-19 disease, which was the mischief sought to be addressed by the Curfew Order. Further, that if the stay order is not granted, a successful appeal will be merely academic and would thereby have occasioned the applicants substantial loss by taking away the substratum of their appeal that the members of the Petitioner and the 3rd Interested Party do not merit to be included in the list of "services, personnel or workers" exempted from the provisions of the Curfew Order. Such a consequence, in the applicants' view, would render otiose their right to appeal and to access justice.

13. Counsel for the applicants point out that special circumstances attend this application in that there is an increase in the number of confirmed infected persons and deaths attributed to Covid-19 in the country. Further, that the intended appeal is not frivolous as seen from the grounds set out in the supporting affidavit of Dr. Kibicho. Also, that there exists no overwhelming hindrance that militates against the issuance of orders of stay. The Court is therefore urged to allow the application.

14. In the further submissions, counsel for the applicants disagree with the 1st Interested Party's submission that the twin principles applicable to an application for stay before the Court of Appeal are applicable to an application for stay before this Court. Counsel points out that gauging the arguability of an intended appeal and its chances of success are not an undertaking expected of the High Court while considering an application for stay of execution of its own decision.

15. Counsel asserts that the application has been brought without delay and this is confirmed by the fact that none of the parties opposed to the application has stated that there was a delay in its filing.

16. The applicants' counsel states that contemporary jurisprudence provides that whenever a court is considering an application for stay, it should exercise its discretion so as not to prevent an appeal. He reiterates that if the orders of stay are not granted the status that will ensue will be irreversible and if they were to succeed on appeal, the appeal would have been rendered nugatory thereby occasioning the applicants substantial loss and essentially denying them access to justice.

17. Counsel for the applicants brushes off the 3rd and 4th interested parties' argument that the motion for stay should be declined on the ground that the applicants are allegedly in contempt of the Court's orders. According to counsel, the issue has not been pleaded by any of the parties and that in any event a finding of contempt is made based on a formal application and there is no such application before this Court. It is counsel's position that neither has any application been made for a finding of contempt nor has a finding of contempt been arrived at by the Court. In support of the argument, reliance is placed on the decision in **Rose Detho v Ratilal Automobiles Limited & 6 others [2007] eKLR**.

18. In opposing the application, counsel for the Petitioner through the submissions dated 12th May, 2020 submits that although the Curfew Order has since the date of the delivery of the judgment on 16th April, 2020 been extended twice on 17th April, 2020 and 16th May 2020 by the 2nd Respondent, there has been no compliance with the order of mandamus. According to counsel, the applicants have come to this Court with unclean hands since they seek stay against an order they have refused to comply with. The decision **Blusea Shopping Mall Ltd v The City Council of Nairobi & 3 others, Nairobi Civil Appeal No. 129 of 2013** is cited in support of the proposition that it is incumbent upon the court in exercising its judicial authority to ensure attainment of fairness. It is the Petitioner's case that an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. Stay, in the Petitioner's view, would therefore perpetuate the disobedience of this Court's order.

19. The Petitioner submits that this Court through its judgment established that advocates provide essential services. It is the Petitioner's case that in the current circumstances, lawyers do not only provide essential services required by their clients *inter se* but also play the role of guardian angels against excess by the state and its actors in enforcement of the curfew measures and its maintenance of the rule of law. The Petitioner's counsel quote some unnamed scholars as stating that:-

"Perceived emergencies threaten rule of law values most directly by serving as a pretext for governments to ignore or circumvent constraints that ordinarily prevent or minimize arbitrary exercises of power. Institutions charged with upholding the rule of law may see their powers weakened or displaced; regular processes of lawmaking may be bypassed; and ordinary protections for civil liberties and civil rights may be suspended.But even when regular courts continue to operate, they tend to show unusual deference to government."

20. According to the Petitioner's counsel, the 2nd Respondent has not indicated the great difficulty he is facing in the gazettelement of the Petitioner's members as providers of essential services. He points to the list of those exempted from the strictures of the Curfew Order and submits that the providers in that list would run into hundreds of thousands. Counsel does not therefore understand how the addition of lawyers or advocates to the list would cause any prejudice to the respondents.

21. Additionally, counsel for the Petitioner submits that it is now their time to enjoy the fruits of judgment. The Petitioner's counsel abhor

the respondents' attempt to take the members of the Petitioner round in circles and assert that the respondents should try their luck in the Court of Appeal. The decisions in the cases of **Republic v Permanent Secretary Office of the President Ministry of Internal Security & another Ex-parte Nassir Mwandih** [2014] eKLR, and **Republic v Attorney General & another Ex-parte Applicant Mike Maina Kamau [2020] eKLR** are cited in support of the argument that the enforcement of a judgement is part of the process of the law.

22. Through the submissions dated 12th May, 2020, counsel for the 1st Interested Party submits that the instant application does not meet the legal threshold for grant of stay of execution as set down by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others (2014) eKLR**.

23. On the averment by the applicants that the appeal is arguable because the Court gave orders not prayed for in the petition counsel submits that the applicants' averment is incorrect since the Petitioner had sought among other orders "*any other relief that this Honourable Court may deem fit and just to grant in the interests of justice and/or that may become apparent or necessary in the course of these proceedings.*" Further, that this Court is empowered by Article 23 of the Constitution to issue appropriate reliefs and has inherent power to fashion appropriate remedies to redress and/or prevent any human rights violations. The case of Kenya **Hotel Properties Limited vs. Attorney General & 5 others (2018) eKLR** is cited as defining the term "*appropriate remedy*". Also cited in that regard are the decisions in the **South African cases of Minister of Health & 5 others v Treatment Action Campaign & others [2002] 5LRC 216; and Hoffman v South African Airways (CCT17) [2000] ZACC 17** (as cited by Mwita, J in **Law Society of Kenya v Attorney General & another, Mohammed Abdulahi Warsame & another; (Interested Parties) [2019] eKLR**). The 1st Interested Party goes ahead to propose that it should indeed be listed among providers of essential services so that it can "*monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs.*"

24. Counsel for the 1st Interested Party urges that it is not in the public interest to allow the application for stay of execution. According to counsel, the right to a fair trial should be upheld at all times considering that it cannot be limited by virtue of Article 25(c) of the Constitution. It is the 1st Interested Party's position that the orders of the Court upheld the public interest in having a democratic governance. The Court is therefore urged to reject the application.

25. Through the submissions dated 13th April, 2020, which counsel indicated were actually dated 13th May, 2020, counsel for the 2nd Interested Party told the Court that the applicants have through their failure to implement the decision of this Court violated two of the principles of equity which provide that he who comes to equity must come with clean hands and that a party should not benefit from his own wrong doing.

26. It is the position of the 2nd Interested Party that the applicants do not have an arguable appeal. According to the 2nd Interested Party, the applicants have raised issues which touch significantly on the decision made and its validity contrary to the holding in **Mangungu v National Bank of Commerce Ltd (2007) 2 EA 285** that the correctness of the judgment should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction.

27. It is the 2nd Interested Party's submission that the application merely invites speculation since the applicants have failed to demonstrate that the enforcement of the orders of this Court will lead to the spread of the Covid-19 virus. Further, that the affidavits in support of the application do not show any causal link between the actions of the members of Law Society of Kenya and the spread of the Covid-19 virus. The Court is thus urged to find no merit in the application and dismiss it with costs.

28. Counsel for the 3rd Interested Party filed submissions dated 13th May, 2020. It is the position of the 3rd Interested Party that the orders which the applicants seek to stay were indeed issued upon merit. It is pointed out that members of the Law Society of Kenya provide a service that constitutes an integral part of fair trial as provided under Articles 25 and 50 of the Constitution.

29. The 3rd Interested Party recalls the background that led to its establishment and points out that the history of police brutality in Kenya is well documented culminating in the despicable shameful conduct of some of the members of the then police force during the 2007/2008 post-election violence as documented in various reports including the Waki Report and the Ransley Report. According to the 3rd Interested Party, failure to oversight the police in the enforcement of the curfew would amount to abdication of duty.

30. In specific response to the arguments of the applicants in support of the application, counsel for the 3rd Interested Party submits that an order of stay is a discretionary remedy and in view of the blatant contempt of the orders issued by the Court by the applicants, the Court should not exercise its discretion in their favour.

31. As for the grounds that should guide the court when considering an application for stay, counsel cites the decision of **Wangui Kathryn Kimani** (supra) and submits that the factors include whether the applicant will incur substantial and irreparable loss, the damage or injury to be sustained if stay is denied, the balance of convenience, and whether the applicant has a *prima facie* appeal with a possibility of success. It is counsel's contention that the judgment of this Court is based and founded on sound provisions of the Constitution and the law and there is therefore nothing to stay. Further, that the applicants have not demonstrated, even remotely, that they have an arguable appeal with chances of success.

32. The Court is urged not to allow the application for stay. Doing so, the 3rd Interested Party submits, will curtail it from doing what is demanded of it by the Constitution and the IPOA Act. Also, that there are containment rules which are equally effective in containing the spread of Covid-19 and there is therefore no reason for staying the orders issued by this Court. The Court is therefore asked to dismiss the application with costs.

33. The 4th Interested Party oppose the application for stay through submissions dated 13th May, 2020. It is the 4th Interested Party's case that to date there is no stay against the order of this Court directing the 2nd Respondent, to within five days from the date of the delivery of

the judgment, include members of the Petitioner and the 3rd Interested Party in the schedule of persons exempted from the Curfew Order, and it therefore follows that the 2nd Respondent is in contempt of the Court's order. Counsel urges that the applicants should therefore not be granted audience by this Court until they purge the contempt. It is asserted that the 2nd Respondent is bound by the provisions of Article 10(2)(a) of the Constitution which demands that the rule of law be adhered to, respected and followed. Reliance is placed on the often cited English case of **Hadkinson v Hadkinson [1952] 2 All ER 567** in support of the proposition that it is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. Several legal scholars are cited as holding that public officials are liable for contempt.

34. The 4th Interested Party support the validity of the order of this Court and submits that the applicants have not demonstrated an arguable appeal. Further, that there are other measures in place to combat the Covid-19 pandemic. The Court is therefore urged to dismiss the application.

35. Ideally, in an application for stay of execution pending appeal the only issue the court is expected to determine is whether the applicant has met the threshold for the grant of an order of stay. Sometimes the parties will, as the parties have done herein, introduce preliminaries that are meant to obfuscate the main issue. Two such issues were raised in this case.

36. The Petitioner through its grounds of opposition appeared to suggest that this Court has no jurisdiction to entertain this application. The Petitioner, however, correctly passed this argument in the submissions. The jurisdiction of this Court to entertain an application to stay its decision pending appeal is found in Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which allows this Court being the Court appealed from, to, for sufficient cause order stay of execution of its decree or order. I need not say more on the issue of jurisdiction.

37. The second issue is whether the applicants who are allegedly in contempt of the Court order should be heard before they purge the contempt. This Court's judgment was delivered on 16th April, 2020. The instant application was made on 21st April, 2020 which was within the five days the 2nd Respondent had been directed to include the members of the Petitioner and the 3rd Interested Party in the list of persons exempted from the Curfew Order.

38. A perusal of the application shows that the second prayer in the application is to the effect that pending the hearing and determination of this application the Court should grant an interim stay of execution of its decision and orders. It was reasonable of the applicants not to pursue that prayer because it could have simply delayed the hearing of this application. However, by including this particular prayer in their application the applicants have demonstrated that they did not have an intention of violating this Court's order.

39. The case of **Rose Detho v Ratilal Automobiles Limited & 6 others [2007] eKLR**, cited by counsel for the applicants also provides an answer to the claim that the applicants should not be heard because they are in contempt of court. In that case, counsel for the objectors had urged the Court of Appeal not to hear the applicant, who had been found guilty of contempt of court by the High Court, before she could purge the contempt. Declining the invitation, E.M. Githinji, JA held that:-

“The question which arises in this case is whether it would be a proper exercise of the courts discretion to decline to hear the applicant on the application for stay of execution of the orders of the superior court pending appeal.

Firstly, the order of stay of execution sought in the application the subject matter of the preliminary objection is a discretionary order. What the applicant therefore seeks, is the exercise of judicial discretion in her favour. As Sir Charles Newbold P. said in Mukisa Biscuits Co. Ltd v West End Distributors Ltd [1969] EA 696 at page 701 paragraph B, a preliminary objection cannot be raised where, among other things, “..... if what is sought is the exercise of judicial discretion”. For that reason, the preliminary objection is not maintainable and is incompetent.

Secondly, the applicant intends to appeal against the orders of the superior court dated 15th September, 2006 granting both leave to apply for Judicial Review and stay and has filed *Civil Application No. 247 of 2006* for stay of execution of the orders of stay pending appeal. The applicant intends to challenge the jurisdiction of the superior court to grant both leave and stay on grounds which *ex facie* cannot be said to be frivolous. Thus, the applicant intends to challenge by way of appeal to this Court the very foundation and the legality of the orders she was found to have disobeyed.

Thirdly, the applicant, in addition, intends to appeal against the order of the superior court dated 24th November, 2006 finding her guilty of contempt on the grounds of both facts and law. The applicant denies that, she, as a matter of fact disobeyed the court orders....

It is apparent therefore, that having regard to the law and circumstances of this case, the applicant would *prima facie* be entitled to be heard on appeal against the orders of committal although she has not purged the contempt.”

40. Indeed the failure by the applicants to implement the Court order does not augur well for the rule of law. However, the interested parties' attempt to deny audience to the applicants is not a panacea to the applicants' intransigence since it is also necessary to protect the applicants' right of appeal. In my view, the bigger picture requires that matters are heard on merit and that is what I will proceed to do.

41. The law applicable to applications for stay of execution pending appeal is now well settled. In **Butt v Rent Restriction Tribunal [1982] KLR 417** the principles governing the exercise of the court's discretion when considering an application for stay of execution were stated as follows:-

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

42. In *Attorney General v Okiya Omtatah Okoiti & another* [2019] eKLR the Court of Appeal held that:-

"The principles for our consideration in the exercise of our unfettered discretion under Rule 5(2) (b) to grant an order of stay are now well settled. Firstly an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the decision of *Multimedia University & Another vs. Professor Gitile N. Naituli* (2014) eKLR wherein it was stated:

"When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2103] eKLR as follows:

i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.

v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

Further, in *Gitirau Peter Munya vs. Dickson Mwenda Kithiji & 2 Others* [2014] eKLR (a decision cited by the applicant), the Supreme Court of Kenya added a third consideration, this being whether it is in the public interest that the order of stay be granted."

43. The Supreme Court had its say on the issue of stay of execution pending appeal when it held in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR that:-

"87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of

execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

[89] This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution.”

44. The applicants invited me to discuss the merits of my judgment through Dr. Kibicho’s averment that the order of mandamus was not based on any prayer; that the Court issued an order of mandamus despite having held that the Curfew Order was perfectly constitutional and legal; that the Court did not establish any failure by the 2nd Respondent to undertake any constitutional and statutory duty that merited the issuance of coercive orders against him; and, that the order of mandamus was based on grounds that fell outside the issues that the Court had framed for its determination. The opponents of the application put up a spirited fight in support of this Court’s judgment.

45. The Court is put in an awkward situation when it is asked to make a determination as to whether an arguable appeal arises from its decision. It is only the appellate court that can determine whether an appeal is arguable and has chances of success. If you ask the court which made the decision to determine whether there is an arguable appeal from such a decision, the honest answer would be that the appeal has no chances of success. However, it is always important to remember that the right of appeal is an important right in the justice system. I will therefore pass the question as to whether the applicants have established an arguable appeal. That is an issue that will be best dealt with by the appellate Court. In doing so, I find support for my action in **Mangungu** (supra) where it was stated that:-

“Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgment should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction.”

46. Whether or not the applicant’s application will succeed rests squarely on the questions as to whether they have established that they will suffer irreparable damage if stay is denied and whether they have shown that it is in the public interest to grant the stay order.

47. The applicants argue that the implementation of the orders of this Court may increase the Covid-19 disease thereby defeating the purpose of the Curfew Order. The Petitioner and the interested parties on the other hand assert that the applicants’ claim that infections will increase is speculative. Additionally, they state that the inclusion of the members of the Petitioner and the 3rd Interested Party on the list of persons exempted from the Curfew Order will not make any difference as there are already hundreds of thousands of persons on the list of those exempted from the Curfew Order.

48. The reason why the Court issued the order compelling the 2nd Respondent to amend the Curfew Order so as to include the 3rd Interested Party (IPOA) and the members of the Petitioner in the list of services, personnel or workers exempted from the provisions of the Curfew Order was premised on the finding that the 1st Respondent’s officers had used unreasonable force in enforcing the Curfew Order. The order was meant to enable the members of Petitioner reach out to clients who may need their services during curfew hours. The reason for exempting the 3rd Interested Party was so that it could police the police. The public interest would therefore easily tilt in favour of sustaining the orders issued by this Court and rejecting the applicants’ prayer to have the orders suspended. There is no evidence that the violation of rights during the curfew hours has ceased.

49. As for the alleged likely rise in infections, I agree with the opponents of the application that the averment is speculative. This Court did not tell the members of the Law Society of Kenya and the officers of the 3rd Interested Party to breach the Ministry of Health mantra of wash/sanitise hands; wear face masks; and keep social distance. The impression one gets from the applicants’ case is that the few members of the Petitioner and the officers of the 3rd Interested Party who will find it necessary to operate during the curfew hours will be so suicidal that they will seek out the little blobs of liquid released as someone coughs, sneezes or talks so as to breathe in viruses contained in these droplets. It goes without saying that the members of the Petitioner and the officers of the 3rd Interested Party, will like all the other exempted persons, be expected to comply with the disease containment rules. It is noted that the corona virus marches on undeterred notwithstanding the fact that advocates are currently not on the night beat. On the other hand, there is no evidence that the violation of rights during the curfew hours has gone down.

50. I therefore agree with the opponents of the application that there is no merit in the application. Indeed allowing this application will amount to a mockery of justice considering that the Curfew Order is a temporary measure and staying the order of this Court will amount to denying the Petitioner and the 3rd Interested Party the fruits of the judgment. The applicants’ application for stay of execution is therefore found to be without merit and is dismissed with costs to the Petitioner and the interested parties.

Dated, signed and delivered through video conferencing/email at Nairobi this 28th day of May, 2020.

W. KORIR,

JUDGE OF THE HIGH COURT