



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

JUDICIAL REVIEW NO. 12 OF 2019

FRANCIS KIBARU KARANJA.....1ST APPLICANT

MARTHA WAIRIMU WAITHAKA..... 2ND APPLICANT

V E R S U S

THE DIRECTOR OF

CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

RULING

1. By a Chamber Summons dated 7th May 2019, and filed on 8th May, 2019 Francis Kibaru Karanja and Martha Wairimu Waitthaka (hereinafter referred to as the “1st and 2nd Applicants respectively”), moved to this court pursuant to Order 53 Rule 1 and 2 of the Civil Procedure Rules seeking for orders;

(1) That this application be certified as urgent and service thereof be dispensed with in the first instance.

(2) That leave be and is hereby granted to the applicants to commence proceedings in the nature of Judicial Review for the following orders;

(a) An order of certiorari to remove into this Honourable Court to and quash the decision of the 1st, 2nd and 3rd respondents to prosecute the applicants for the offences of conspiracy to commit an offence of corruption contrary to Section 47(A)(3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act Cap 65 Laws of Kenya.

(b) An order of prohibition to prohibit the 1st, 2nd and 3rd respondents jointly and or severally from prosecuting and or conducting proceedings including but not limited to the court appearances, taking of pleas and taking of evidence against the applicants in Nairobi Chief Magistrate’s Court at Milimani ACC No. 6 of 2019 or any other court proceedings.

(3) That the grant of leave herein does operate as a stay of prosecution and all proceedings including but not limited to the court appearances, taking of plea and taking of evidence against the applicants in Nairobi Chief Magistrate’s Court at Milimani ACC No. 6 of 2019 or any other court proceedings based on the same factual and evidentiary basis at Nairobi Chief Magistrate’s Court at Milimani ACC No. 6 of 2019.

(4) Costs of this application be provided for.

2. The application is premised upon grounds stated on the face of it, statutory statement and verifying affidavit sworn on 1st May 2019 by Francis Kibaru Karanja.

3. Originally, this application was filed before the Judicial Review Division where it was directed that it be served upon the respondents and interpartes hearing on 15th May 2019. On that day, parties agreed by consent to have the file transferred to Anti-Corruption Division which

has jurisdiction over Anti-corruption related matters.

4. Subsequently, the 3rd Respondent filed its response vide a replying affidavit sworn on 19th September 2019 by Catherine Ngari an investigator working with the EACC.

5. On their part, the 1st and 2nd Respondents lodged Grounds of Opposition dated 4th March 2020 as their response. Before the hearing could commence, parties expressed their desire to record a settlement out of court. On 3rd July, 2019 Mrs. Odipo informed the court that the applicants had proposed to refund Kshs. 9,050,000/- the subject of the pending criminal proceedings against them (applicants). The matter was then fixed for mention on 20th September 2019 to record a consent on settlement. On that day, Mr. Maina appearing for the applicants informed the court that, a sum of Kshs. 1,000,000/- had been paid.

6. Parties kept requesting for extension of time to complete negotiations on refund of the money in question until 26th February 2020 when they informed the court that negotiations had broken down. They therefore sought a fresh hearing date to canvass the application.

Applicants' Case

7. The applicants Kenyans by birth are husband and wife currently living and working for gain in the United States of America being citizens of that country as well.

8. According to the affidavit sworn on 1st May 2019 by the 1st applicant with authority from the second applicant before a Notary Public, it was averred that sometime on 18th April 2019, he received a surprise message from one Catherine Ngari of EACC to the effect that he (1st applicant) and his wife (2nd applicant) were due to be arraigned before the Anti-Corruption court for committing the offence of conspiracy to commit an offence arising from money received from one Sostenah Ogero who had bought his (1st applicant's) house in L.R. No. 1333/163 Thome Estate using proceeds of crime. That he was further informed that, part of the purchase price amounting to Kshs. 9,050,000/- received by him out of a total purchase price of Kshs. 42,500,000/- was under investigation.

9. He attached a money transfer document through RTGS to show that he had indeed received the money while in America being part of the sale price of his aforesaid property (see FKK-1).

10. He averred that he and his wife had bought the property in question in 1996 using proceeds raised from their salary while working in America after which they constructed a 5 bedroomed mansionette. That having put their property on sale, they entered into a commission agreement with a broker Henry Bundi who undertook to look for a buyer for the said property.

11. He further averred that sometime on 6th November 2017, he was introduced to one Sostenah Ogero the prospective buyer of the property. That while in Sostenah's office at Kariobangi South, the said Sostenah introduced himself as a Real Estate businessman operating M-pesa and Pharmacy shops and that he had several rental houses within Kariobangi and Zimmerman areas in Nairobi.

12. Following their negotiations, they agreed on drafting a sale agreement through their respective lawyers which they did on 20th November 2018 (see sale agreement marked FKK-3). According to the applicants, the purchase price was Kshs. 42,500,000/- payable within 90 days. That at the expiry of the said period, the applicant had paid the agreed amount less Kshs. 2,500,000/- which is still outstanding thus holding the transfer of the property to the said Sostenah. He attached rates clearance certificate and consent to transfer land as a sign of their readiness to transfer the property to the buyer (FFK-4).

13. He contended that he had no idea that the money used to purchase his property was out of corruption or proceeds of crime. He stated that he had cooperated with the EACC with whom he recorded a statement (See FFK-5). He expressed shock that he and his wife (co-applicant) were to stand trial for selling their property genuinely and in good faith without knowledge that the money used to buy the property was out of corrupt activities.

14. He termed the decision to charge him and his wife as tainted with malice, was in bad faith and unreasonable based on irrelevant considerations as there is no fraud committed on their part with the intention of covering up an illegality.

1st and 2nd Respondents' response

15. The 1st and 2nd Respondents herein filed their response by way of Grounds of Opposition stating;

(i) That the application is incompetent and lacks merit and should accordingly be dismissed *sua sponte*.

(ii) That the decision to institute and undertake criminal proceedings against any person is a preserve of the Director of Public Prosecutions as per Article 157 of the Constitution of Kenya, 2010.

(iii) That the application goes against the Constitution as it indirectly challenges the validity and or legality of a Constitutional provision to wit Article 157 and purports to take away a Constitutional power granted to the Director of Public Prosecutions.

(iv) That the application is a legal misadventure and an abuse of the court process as the same attempts to abuse the court process by seeking orders that would subvert the Constitutional mandate of the 1st, 2nd and 3rd Respondents.

(v) That the applicants have neither specified nor particularized how any of their constitutional rights and or fundamental freedoms have been violated and or infringed.

3rd Respondent's Response

16. The 3rd Respondent filed a replying affidavit sworn by Catherine Ngari on 19th September 2019. She averred that on various dates between the year 2015 and 2017, the National Land Commission embarked on compulsory acquisition of land to pave way for construction of SGR, roads in Nairobi and Mombasa out of which several awards were made and payment released to various beneficiaries as compensation. That it later emerged that some of the awards and payments were fictitious, inflated and tainted with corruption as the government made payment in respect of millions claimed through conspiracy between some officials of the Commission in particular Valuers and the purported sellers of land.

17. She averred that part of the monies received from the government through illegal compensation landed in the hands of the applicants being payment of Kshs. 9,050,000/- paid to them through the firm of C. W. Chege Advocate, through the 1st applicant's Account No. 1108568173 KCB Bank.

18. That further investigations revealed that the sum of Kshs. 9,050,000/- was paid to the applicants under the instructions of Sostenah Ogero Taracha and his spouse Dr. Salome Indayi Munubi an officer working with the NLC for the purchase of L.R. 13330/163 Thome estate. A copy of the sale agreement between the applicants and Sostenah Ogero Taracha and Salome Munubi dated 20th November 2017 was attached as 'CN 26'.

19. She averred that the transfer of the money for the purchase of property by Sostenah and Munubi was a conspiracy between the two and the applicants. She further stated that, the money paid to the applicants is public money which is available for forfeiture to the State.

20. M/s Ngari argued that, the applicants had not proved that the investigations and prosecution are illegal, unreasonable, unprocedural, or made in bad faith. That the commission cannot be restrained from discharging its constitutional and statutory mandate without any evidence or proof of impropriety on its part. That the applicants shall be afforded an opportunity to defend their suit before the trial court.

21. As to whether leave should operate as a stay, she deposed that the applicants have not demonstrated that; they have a prima facie case with a likelihood of success; the grant of stay will be rendered nugatory if the application is not allowed or, that the orders sought will not be in public interest.

Applicants' Submissions

22. On behalf of the applicants, the firm of Kimani Makome and Co. Advocates filed their submissions on 1st July 2020 reiterating the averments contained in the affidavit in support of the application. Mr. Maina appearing for the applicants submitted that, the applicants are innocent sellers of their land for value and that they had no knowledge that the money used to buy the land was from corruption related activities.

23. He contended that the purpose for Judicial Review proceedings is to eliminate at the earliest opportunity possible frivolous, vexatious and hopeless suits which is the case in this case. That a court should only proceed with a substantive suit if there is a lead that there is a substantive suit to proceed with for hearing which according to him they have established. In support of this submission, counsel made reference to the decision in the case of **Misc. C. A. Appl. No. 136/2020 Paul Kihara Kariuki and Others v Law Society of Kenya and 13 Others.**

24. Counsel contended that the Criminal Justice System is being misused by using it to seek refund of the money in question from the applicants. He therefore urged the court to find that a seller without any knowledge of the source of money for the purchase of his property should not be victimized.

25. Concerning stay, counsel urged that the intended Judicial Review proceedings if successful will be rendered nugatory unless the criminal proceedings are stayed. Again counsel relied on the **Paul Kihara Kariuki** case above quoted.

1st and 2nd Respondents' Submissions

26. Mr. Kinyanjui appearing for the 1st and 2nd Respondents relied on his Grounds of Opposition and written submissions filed on 1st July 2020. Touching on joinder of the 1st respondent (the DCI) Mr. Kinyanjui submitted that there is no specific grievance pleaded or leveled against the DCI hence leave cannot issue against him.

27. Touching on the legality of the application, Mr. Kinyanjui submitted that the suit was not filed with the Republic as the applicant and applicants as Exparte Applicants thus contravening Order 53 of the Criminal Procedure Act. That on that ground alone the application is defective and bad in law hence available for dismissal.

28. Learned counsel further submitted that the applicants are residents of America who have refused to record a statement with EACC nor attend court to take plea. On that ground alone, Mr. Kinyanjui urged the court to find that there are no proceedings against them to be quashed and that in any event they have come to court with dirty hands hence does not deserve court's intervention.

29. Learned counsel stated that the DPP acted independently, in good faith, without any malice, influence or direction from anybody in compliance with Article 157(6) of the Constitution. That the application amounts to abuse of the court process and that the issues raised are

issues of defence evidence which should await full trial before the Magistrate's Court.

30. Mr. Kinyanjui urged that the grant of leave is not automatic and that the applicant must demonstrate that he has a good or prima facie case to warrant further consideration. In support of this proposition, counsel made reference to the decision in the case of **Ethics and Anti-Corruption Commission and Another; Mike Mbuvi Sonko and another (Interested Party) Ex-parte Paul Ndonye Musyimi**, where this court held that leave to institute Judicial Review proceedings is not automatic and that an applicant must meet well laid down parameters and that it is intended to sieve and separate deserving cases from hopeless ones to save on precious judicial time and possible costs to be incurred by parties.

31. Further reference was made to the holding in the case of **Republic v. County Council of Kwale and Another Exparte Kondo and 57 Others Mombasa H.C.C.A No. 384/1996** where the court stated the purpose of seeking leave in Judicial Review proceedings as intended to eliminate frivolous, vexatious and hopeless proceedings and only to allow and proceed with substantive hearing if the court is satisfied that the case is deserving.

3rd Respondents' Submissions

32. M/s R. Munyi counsel appearing for the 2nd respondent filed her submissions on 1st July 2020 reiterating the content contained in their replying affidavit. Learned Counsel submitted on five issues.

33. Firstly, counsel submitted on the issue whether the decision to prosecute the applicant was unreasonable, irrational or made in good faith. Counsel further submitted that the applicants are trying to raise a defence before this court instead of the trial criminal court. That the 3rd respondent had proved that money obtained from government corruptly was used to purchase the property from the applicants illegally hence the decision was legal and fortified as the purchase of the property was a method of money layering and or laundering.

34. Counsel submitted that there is no evidence that besides the Kshs. 9,050,000/- received, the balance of Kshs. 32,500,000/- was paid. That failure to refund public money after they were made aware of the illegal activities is proof enough that the applicants were party to the conspiracy.

35. Counsel submitted that it is not for this court to determine whether the applicants are guilty or not as that role is reserved for the trial court. To fortify that position, counsel relied on the holding in the case of **Total Kenya Limited and 9 Others v. Director of Criminal Investigations Department and 3 Others (2013)eKLR** where the court held that in exercise of its inherent jurisdiction, the High Court has powers to stop criminal proceedings where the former is said to be oppressive or otherwise an abuse of the court process and that such power must be exercised cautiously so as not to stifle constitutional mandate of the police service or DPP.

36. Touching on the issue whether the Commission considered relevant evidence before recommending prosecution of the applicants, counsel contended that the commission has a constitutional mandate to make independent decisions after evaluating evidence before it. That they considered the version given by the applicants and finally made a conclusion that there was prima facie evidence against them. That the applicants have a duty to prove any ulterior motive on the commission's part which they have not discharged. To strengthen this argument, reliance was placed on the finding in the case of **Republic v. DPP and 2 Others, Misc. Civil Case NRB 417/2014** where the court held that the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious.

37. Regarding on the second issue on whether the applicants have met the threshold for grant of leave to institute Judicial proceedings, counsel submitted that grant of leave is not automatic and that the intended Judicial Review application is frivolous, vexatious and hopeless and does not warrant further consideration. In support of this position, counsel made reference to the decision in the case of **LMN v RWK and 4 Others (2015)eKLR** and **Republic V. County Council of Kwale and Another Ex-part Kondo and 57 Others (supra)**.

38. Further, counsel argued that the applicant has not established that he has an arguable case with proof of reasonable ground for believing that there has been a failure of public duty. On this argument, counsel referred to the wisdom contained in the decision in the case of **Mirugi Kariuki v. Attorney General Civil Appeal No. 70/1991 (1990-(1996) and 156: (1992) KLR 8**.

39. On the 3rd issue, counsel submitted on whether the court ought to interfere with the mandate of the commission to investigate. M/s Munyi submitted that the Commission is independent and thus executes its mandate without any influence or direction. That courts should not make decisions which should usurp the mandate of other independent bodies. To support this argument counsel relied on Prof. Wades passage in treatise on Administrative Law 5th Edition at page 362 which was cited with approval in the case of **Boundary Commission (1983)2 ULR 458, 475**, where the court stated;

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the Court must not usurp the discretion of the public authority which Parliament appointed to take the decision.”

40. On the 4th issue, counsel submitted that leave if granted should not operate as stay of criminal proceedings. She submitted that since **ACC NO. 6/19** was filed in court on 18th April 2019, the applicants have not turned up to take plea. That the applicants have not come to court with clean hands hence should be ordered to come to court. That if the order for stay is granted, it will prejudice the intended criminal proceedings thus further delaying the process. To support this argument, reference was made in respect of the holding in the case of **Thuita Mwangi and Another v. The Ethics and Anti-corruption Commission and 5 others Petition No. 153 and 363 of 2013**.

Analysis and Determination

41. I have considered the application herein, respondents' respective responses and rival submissions. Issues that arise for determination are;

(a) Whether the applicant has met the threshold for grant of certiorari and prohibition orders.

(b) Whether grant of leave should operate as stay of criminal proceedings pending against the applicants in Milimani ACC No. 6/19.

42. This suit has been instituted under Order 53 Rules 1 and 2 of the Civil Procedure Rules which provides;

“Sub-Rule 1 - No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

Sub-Rule 2 - An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

Sub-Section 3 - The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.

Sub-Section 4 - The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

43. Order 53 Rule 2 goes further to provide that;

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

44. Besides Order 53 of the Civil Procedure Rules, Section 9(3) of the Law Reform Act does emphasize on the time factor in that Judicial Review proceedings should not be instituted not later than six months after the cause of action complained of arose. See Wilson Osolo v. John Ojiambo Ochola and Another (1996)eKLR.

45. What objective is served by seeking leave to file substantive Judicial Review proceedings? Guided by the reading of several judicial precedents, the main purpose of obtaining leave to institute Judicial Proceedings is to guard against busy bodies filing trivial, misconceived, frivolous, vexatious and hopeless suits which will otherwise amount to abuse of the court process and a waste of court's precious time. This position was properly articulated in the case of LMN v RWK and 4 Others (supra).

46. The power to grant leave for a party to institute Judicial Review proceedings is discretionary which discretion must be exercised judiciously for the ends of justice to be met. See Kihiumwiri Farmers Co. Ltd v. Registrar General Misc. application No. 1115 of 2002 (unreported).

47. It is trite that leave must be sought and obtained before any attempt to file for Judicial Review is made. The requirement is mandatory and any omission to apply for it renders the whole proceedings a nullity *ab initio*. This position was clearly emphasized by the Court of Appeal in the case of Walter Fredrick Odhiambo v. Registrar of Trade Unions (1990)GWR 58.

48. A court confronted with an application for leave to institute Judicial Review proceedings must examine and assess whether the party seeking the order has satisfied certain parameters inter alia; whether he has an arguable or a prima facie case with probability of success; that the applicant has locus standi; that the application is not time barred and, that the application will be rendered nugatory if not granted.

49. Regarding time factor, the application herein was filed on 7th May 2019 almost a month after the decision to charge the applicants and presentation of charges against them and others was filed on 18th April 2019. Time started running from the date charges were presented in court for prosecution. In my view the application is not time barred.

50. Concerning locus standi; the applicants have been charged already. They are claiming that their rights have been or are being violated and that the intended prosecution is malicious, illegal and made in bad faith without due consideration of their story. From the criminal charges preferred, the applicant's liberty and fundamental freedom is at stake. They have a reasonable cause to worry hence the existence of locus standi.

51. However, the most critical consideration is the twin issue as to whether there is a prima facie case which is arguable and has high chances of success. A prima facie case should therefore not be frivolous, vexatious or hopeless. There must be something substantial in controversy worthy consideration and determination on merit.

52. This proposition was fully captured in Mirugi Kariuki v. Attorney General Civil Appeal No. 70 of 1991 (1990-1994)EA. 156 (supra) where the court held that:-

“If the (applicant) fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there

has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers.”

53. A prima facie case therefore is not a case that must succeed. It falls within the requirement that, the applicant has the burden to prove that, without examining the matter in depth, there is an arguable case and that the reliefs sought might be granted on the hearing of the substantive application. See **Samwel Muhuri W’Njuguna and Others v. Minister for Agriculture Civil Appeal No. 144 of 2000 (UR)**.

54. Similar position was held in the case of **Agutu Wycliffe Nelly v. Office of the Registrar Academic Affairs Dedan Kimathi University of Technology DeKUT (2016)eKLR** where the court held that:-

“The leave stage is used to identify and filter out at an early stage, claims which may be trivial or without merit. At the leave stage an applicant must show that he/she has ‘sufficient interest’ in the matter otherwise known as locus standi. In other words, the applicant must demonstrate that he/she is affected in some way by the decision being challenged. An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success.”

55. In the instant application, the applicants have been charged with others with the offence of conspiracy to commit an offence of corruption. The 2nd and 3rd respondents have been accused of maliciously recommending and preferring prosecution for an offence that the applicants did not commit. The applicants were brought on board to the criminal justice system by virtue of the fact that they sold their house located on L.R. 13330/63 situate at Thome to one Dr. Salome Munubi and Sostenah Ogero who are alleged to have used money purportedly obtained through corrupt conduct or activities.

56. According to the DPP and EACC, the applicants are beneficiaries of the alleged money obtained through corruption. That they ought to have inquired on the source of the money before accepting to be a conduit for cleaning illegally acquired money.

57. On their other part, the applicants have expressed their innocence. They deny having knowledge that the money used to buy their property was obtained through criminal activities. From the face of it, the assertion by the applicants that they had no duty to find out on the source of the money used to buy their property and that it was willing buyer willing seller is prima facie an arguable ground worthy consideration in a substantive suit.

58. A careful evaluation or consideration of the set of facts as presented herein will before a reasonable jury definitely attract or call for further interrogation. In the absence of any further interrogation, from the face of the facts at hand, the applicants have a good ground to deny liability. In my view, they have an arguable case which deserves further adjudication before the court can make a final determination.

59. It is trite that at the leave stage, this court cannot delve into finer details as to whether the decision to charge the applicants was indeed irrational, unreasonable or justified. In a persuasive decision in the case of **Inland Revenue Commissioner v. National Federation of Self-Employed and Small Business Ltd (1982)AC 617** the House of Lords had this to say:-

“The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a quick perusal of the material available, the court thinks that it discloses what might on further considerations turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give leave to apply for that relief.”

60. Ordinarily, in property sale transactions in an open market economy, sellers ordinarily do not go into the business of asking buyers the source of their money unless manifestly clear that the seller was / is aware or ought to have known in the prevailing circumstances that the money being used to purchase his or her property was / is money tainted with corruption. To establish that, a full hearing will need to be conducted to ascertain the truthfulness of the allegation.

61. For the DPP and the EACC to argue that the applicants will have their day in the criminal trial court is to imply that Judicial Review proceedings do not serve any purpose. There are situations where courts have found that the DPP and EACC have abused and misused their office in recommending and commencing prosecution.

62. Where there is justifiable ground, a litigant should be given an opportunity to prove the respondents’ acts of irrationality, illegality or mischief in recommending or commencing prosecution against him or her. He or she should not be shut out prematurely from articulating his or her case. Consumers of justice have a right to seek redress without arbitrarily being locked out of the legal or judicial process. Otherwise, the constitutional right to access justice under Article 48 of the Constitution will be a dream pipe hence a miscarriage of justice. See **Paul Kihara Kariuki and 3 Others v. Law Society of Kenya (supra)** where Justice Mativo held that the right to access courts is now constitutionally guaranteed thus making the requirement for leave unnecessary.

63. Having held that the applicants have established a prima facie case with probability of success, I am inclined to direct that, leave be and is hereby granted for the applicants to file a substantive motion within seven (7) days. Upon service, the respondents to file their response within seven (7) days from the date of service.

64. During the oral submissions, Mr. Kinyanjui raised the issue that the application was defective by virtue of the fact that the applicants did not commence the application with the Republic as the applicant and the applicants as the Ex parte applicants. Mr. Maina countered that argument stating that, it is until leave is granted that the Judicial Review motion will be filed with the Republic as the applicant and the applicants as the Ex-parte applicants. I am totally in agreement with Mr. Maina that by now, there is no substantive application in place for the Republic to be incorporated as a party. It is until leave is granted that the Republic will step in as the applicant and the current applicants as Ex-parte applicants.

65. As to whether the application will be rendered nugatory if leave does not operate as stay, it is admitted that the applicants are in America. They have never taken plea. They will not suffer prejudice if the criminal proceedings are not stayed. To stop the entire criminal proceedings, the court must strike a balance between what prejudice will the applicants suffer if criminal proceedings are not stayed vis a vis public interest. Further delay of this matter will contravene Article 50 and 159 of the Constitution on fair trial and Sections 1A and 1B commonly referred to as the oxygen principle which are anchored on the understanding that disputes must be resolved expeditiously if society is to have faith and confidence in the Judicial System.

66. For those reasons, I am not persuaded that the intended application will be rendered nugatory as the criminal proceedings are at the preliminary stay given its history and intervention of corona virus. The court shall fast track the hearing of the substantive application and make a determination as soon as possible. Accordingly, leave granted herein shall not operate as stay of the pending criminal proceedings.

67. Regarding costs, I will direct that same shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF AUGUST 2020.

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J. N. ONYIEGO

JUDGE