



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. 159 OF 2018

WILLIAM ODHIAMBO RAMOGI.....1ST PETITIONER
 ASHA MASHAKA OMAR.....2ND PETITIONER
 GERALD LEWA KITI.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
 THE CABINET SECRETARY,
 MINISTRY OF TRANSPORT AND
 INFRASTRUCTURE.....2ND RESPONDENT
 KENYA PORTS AUTHORITY.....3RD RESPONDENT
 KENYA RAILWAYS CORPORATION.....4TH RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS.....1ST INTERESTED PARTY
 MAINA KIAL.....2ND INTERESTED PARTY
 COUNTY GOVERNMENT OF MOMBASA.....3RD INTERESTED PARTY

CONSOLIDATED WITH

PETITION NO. 201 OF 2019

KENYA TRANSPORTERS ASSOCIATION LIMITED.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....1ST RESPONDENT
 KENYA REVENUE AUTHORITY.....2ND RESPONDENT
 KENYA RAILWAYS CORPORATION.....3RD RESPONDENT
 JAMES MACHARIA, CABINET SECRETARY,

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING DEVELOPMENT AND PUBLIC WORKS.....4TH RESPONDENT

COMPETITION AUTHORITY OF KENYA.....5TH RESPONDENT

RULING

1. The Application before the Court is dated 6th September, 2020. The principal prayer in the application is for a stay of proceedings in these Consolidated Petitions pending the hearing and determination of the “Petition of Appeal at the Supreme Court on the Ruling dated 2nd day of November, 2018 (sic) from this Court.”
2. The brief history of the Consolidated Petition is as follows. There are two Petitions. They are *Mombasa High Court Constitutional Petition No. 159 of 2018* and *Mombasa High Court Constitutional Petition No. 201 of 2019*.
3. In *Mombasa High Court Constitutional Petition No. 159 of 2018*, the Petitioners are challenging the implementation of an agreement between the Kenya Ports Authority and the Kenya Railways Corporation dated 30th day of September 2014 which agreement obligated the Kenya Ports Authority to consign to the Kenya Railways Corporation as a carrier a set volume of freight or other cargo pursuant to commencement of the operations of the Standard Gauge Railway to the Kenya Ports Authority’s Inland Container Depot at Embakasi in Nairobi.
4. Kenya Transporters Association Limited, the Petitioner in *Mombasa High Court Constitutional Petition No. 201 of 2019*, challenged the directive issued by the Kenya Ports Authority and Kenya Revenue Authority requiring all imported cargo for delivery to Nairobi and the hinterland to be conveyed by the Standard Gauge Railway and be cleared at the Inland Container Depot at Nairobi.
5. The Attorney General and the Cabinet Secretary Ministry of Transport and Infrastructure raised a Preliminary Objection in *Petition No. 159 of 2018*. It was dated 4/09/2018. The Preliminary Objection variously impugned the jurisdiction of this Court including that the dispute was unjusticiable and that the parties had not exhausted the available alternative dispute resolution mechanisms prior to reverting to the Court.
6. This Court dismissed the objection *vide* the ruling rendered on 2nd November 2018. The Attorney General and the Cabinet Secretary Ministry of Transport and Infrastructure appealed the decision. They filed was *Civil Appeal No. 166 of 2018*.
7. In a judgment delivered on 26th September 2019 the Court of Appeal dismissed the appeal in its entirety. Thereafter, after the Honourable Chief Justice empanelled this bench to hear *Mombasa High Court Constitutional Petition No. 201 of 2019* in addition to *Mombasa High Court Constitutional Petition No. 159 of 2018*, this Court issued directions on 20th August 2020 which *inter alia* consolidated the two Petitions and set the hearing of the Consolidated Petitions from 22nd to 24th September 2020.
8. On 14th September 2020 the Attorney General filed the present Application. The application was under a Certificate of Urgency. It was supported by the Affidavit of *Nguyo Wachira*, the Principal Litigation Counsel at the Attorney General’s Chambers in Mombasa. The Affidavit was sworn on 11th September 2020.
9. The Honourable Attorney General argues that he has met the two conditions for grant of stay of proceedings. He describes the two conditions as follows:
 - a. That the appeal or intended appeal is arguable – that is to say, it is not frivolous.
 - b. That if the application is not granted, the success of the appeal if were to succeed, would be rendered nugatory.
10. In brief, the Honourable Attorney General argues that the Appeal it has filed before the Supreme Court is arguable and has high chances of success because the decision at the Court of Appeal delivered on 2nd November, 2020 (like the earlier one in the High Court) is contrary to the dispute settlement mechanisms pertaining to devolution as provided for in Articles 6, 159(c), and 189(3) and (4) of the Constitution. The arguability of the appeal, according to the Attorney General, is based on the doctrine of exhaustion of remedies in the dispute. In short, the Honourable Attorney General argues that both the High Court and the Court of Appeal erred when they held that they were no intergovernmental disputes in the Petition yet such disputes were manifest in the Petition.
11. The Honourable Attorney General further argues that if the application for stay is not granted the appeal will be rendered nugatory since that “may be equivalent to the setting aside and overlooking the existence of section 30-35 of the Intergovernmental Relations Act. No. 2 of 2012.” The risk, the Honourable Attorney General argues, is that this Court risks proceeding without jurisdiction and that this may result in harms which may be irreversible to the public.
12. Further, the Attorney General argues that the balance of convenience is in favour of granting a stay of proceedings. The Attorney General explains that if this case proceeds, there is a possibility that the Court may set aside the Take or Pay agreement dated 30th September, 2012 as prayed in the Petition. If the Court grants that prayer, the Attorney General argues, the effect would be to “cast doubts on the standard gauge railway of cargo which would be detrimental to the nation and beyond.” The Honourable Attorney General relied on *Nwesi Company Limited & 2 Others v Wendy Martin*.

13. The Attorney General says that they have been unable to expeditiously pursue the matter at the Supreme Court for three reasons:

- a. That there was a change/removal of the Court of Appeal from Mombasa to Nairobi in December 2019 where all the staff from that Court were transferred to Nairobi;
- b. That the Corona Virus Pandemic caused disruption in court services; and
- c. That there was a delay in the preparation and issuance of typed proceedings at the Court of Appeal.

14. The Application is opposed. Only the 4th Petitioner filed a Replying Affidavit and Written Submissions. In summary, the 4th Petitioner argues that conditions have not been satisfied for the grant of the remedy of stay of proceedings. The 4th Petitioner's counsel submitted that there are three principles which the Court ought to take into account in deciding whether to grant a stay of proceedings:

- a. Whether the Attorney General has established that it has an arguable appeal.
- b. Whether the Attorney General filed the Application for stay of proceedings was filed expeditiously;
- c. Whether the Attorney General has established sufficient cause to the satisfaction of the Court that it is in the interests of justice to grant the orders sought.

15. The 4th Petitioner's Counsel argues that the answers to all three questions must be in the negative. First, the 4th Petitioner argues that all the Honourable Attorney General has in place at the Supreme Court is an application seeking to extend the time for filing of the Petition out of time – and not an appeal. As such, it is not possible to determine the arguability of an appeal which is not yet in existence.

16. In any event, the 4th Petitioner argues the best Court to determine whether stay should be granted or not in the circumstances of the case should be the Court of Appeal or the Supreme Court not this Court. The 4th Petitioner points out that it is critical to note that the Honourable Attorney General did not make any application for stay of proceedings before the Supreme Court or the Court of Appeal.

17. The 4th Petitioner also points out that there was an inordinate delay in filing the application for stay between the time directions were given on 20th August, 2020 and when the Application for stay was filed more than 19 days later. As it were, the 4th Petitioner's counsel points out that the Honourable Attorney General only filed the present Application after the Honourable Attorney General was served with the submissions of the Petitioners to the Consolidated Petitions. The 4th Petitioner, therefore, submitted that the Application was not made in good faith.

18. The 4th Petitioner relied on *Global Tours & Travels Limited (Nairobi Winding Up Cause No. 43 of 2000)* and Halsbury's Laws of England, 4th Edition, Vol. 330 and 332. The Counsel also cited Articles 47 and 48 of the Constitution.

19. Mr. Owuor, counsel for the 3rd Interested Party, agreed with Mr. Gikandi that there is no appeal at the Supreme Court which could warrant the grant of stay of proceedings. He also submitted that the the Petitioners and the Interested Parties right to fair hearing will be prejudiced if a stay of proceedings is granted for the reasons that the Interested Parties are representing people of Mombasa and a delay in determination of the case unfairly delays the case. Mr. Oginga, appearing with Mr. Owuor, insisted that the Application is an afterthought and that it offends Rule 3(5) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.

20. A scan of our decisional law reveals that our Courts have established the following principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR*; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni [2002] eKLR*:

- a. *First*, there must be an appeal pending before the higher Court;
- b. *Second*, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. *Third*, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. *Fourth*, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. *Fifth*, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. *Sixth*, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

21. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330:

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.

22. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*:

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously (emphasis added)

23. In the present case, the 4th Petitioner and the 3rd Interested Party have pointed out that there is no pending appeal at the Supreme Court to warrant grant of the stay being sought. Mr. Nguyo, appearing for the Honourable Attorney General, insisted that there is an appeal to wit *Petition No. 14 of 2020* at the Supreme Court. He stated that the same was filed on 13th July, 2020. He, however, conceded that the Petition was filed out of time but that the Honourable Attorney General has filed an Application to be permitted to file the Appeal out of time. That application is dated 25th June, 2020 and is still pending before the Supreme Court. Mr. Nguyo's position is that it is not for this High Court to assess the merits of that application but for the Supreme Court where the application lies.

24. The plain fact is that there is no appeal pending before the Supreme Court of Kenya. Rule 38 of the Supreme Court Rules, 2020 provides that an appeal to that Court must be filed within 30 days of the delivery of the judgment by the Court of Appeal which is being appealed against. In this case, the 30 days expired on 26th October, 2019. Any appeal filed thereafter could only be filed after leave has been granted by the Supreme Court to file the appeal out of time. It is disingenuous to file a patently incompetent appeal more than nine months out of time and then approach this Court with the claim that an appeal is pending at the Supreme Court. The give-away point here is that the Honourable Attorney General has filed an Application to extend time to file an appeal out of time at the Supreme Court. There would be no need to file such an application if an appeal was already in place.

25. If there is no appeal before the Supreme Court, can a stay of proceedings be issued as prayed? The obvious answer is in the negative. The radical remedy of stay of proceedings cannot be granted merely on the speculation that a properly filed appeal might be in place *au futuro*. The Court can only consider a prayer to stay its proceedings once it is confirmed that an appeal has been properly filed before the Supreme Court. As things stand, none has been filed. The Honourable Attorney General will, of course, be at liberty to approach this Court once such an appeal is filed.

26. The second factor the Court needs to consider is whether a reasonable explanation has been provided why the Applicant has approached this Court for a stay rather than file the application in the Court of Appeal or the Supreme Court. The Honourable Attorney General gave no explanation why he chose to file the application in this Court. We cannot think of any reason either. It is optimal for such application to be filed at the higher Court to which the Appeal is preferred because one of the factors to be considered in deciding whether to grant stay of proceedings is the time it might take to conclude the application. The higher Court, aware of its docket, would be best placed to make appropriate orders on such an application.

27. Based on the material placed before us and sensitive not to embarrass the issue the Honourable Attorney General wishes to pursue on appeal, we would be willing to concede that the intended appeal raises arguable points of law. In doing so, we are quick to point out that an applicant in such an application is only required to demonstrate the arguability of his appeal – not the fact that the appeal has a high probability of success. The requirement is for the Applicant to demonstrate that he has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. The Applicant need not persuade the Court that his appeal is certain to succeed. In the present case, the Honourable Attorney General intends to take up the issue of exhaustion of remedies as the main point on appeal. The Honourable General is persuaded, despite the decision by this Court and the Court of Appeal, that the controversy at hand involves an inter-governmental dispute and that the provisions of the Intergovernmental Relations Act (sections 30 -35) should have applied to debar the present Petitions. As aforesaid, we would concede that to be an arguable point of appeal.

28. However, we are less sure about whether the intended appeal would be rendered nugatory. Mr. Nguyo, for the Honourable Attorney General, argued that the public interest in this case warrants the stay orders. He argued that it should be borne in mind that one of the orders sought in the Petition is the setting aside of the Take or Pay Agreement dated 30th September, 2012 between the 3rd and 4th Respondents. If the Court grants that prayer, the Honourable Attorney General argues, the effect would be to “cast doubts on the standard gauge railway of cargo which would be detrimental to the nation and beyond.”

29. In the event that the hearing of the Consolidated Petitions proceed, will the Honourable Attorney General's intended appeal be rendered nugatory? First, it is impossible to answer that question when there is no appeal in place. Second, while the Consolidated Petitions raise issues of immense public interest and substantial questions of law necessitating the empanelling of this five-judge bench, that fact *per se* does not militate in favour of a stay being granted. Indeed, the opposite might be the case. There is a general judicial policy against allowing piecemeal interlocutory appeals in cases. The latest statement in this regard was made by the Supreme Court in *Joseph Lendrix Waswa v*

Republic [2020] eKLR although this was in the context of criminal matters. As a general matter, absent exceptional circumstances, appeals over interlocutory applications should be deferred until the final determination of the trial so that a single appeal is preferred. An appeal over an interlocutory appeal would not usually be rendered nugatory if stay is not granted since the dissatisfied party retains the right to pursue the appeal on the point at the conclusion of the case. Where there is apprehension that there may be execution based on the impugned position the Trial Court has taken, the dissatisfied party is always at liberty to apply for an appropriate stay of execution after the judgment has been entered in the matter.

30. Our analysis above also apprehends the question whether the Honourable Attorney General has placed any material before us to demonstrate the exceptional circumstances warranting the grant of this radical remedy of stay of proceedings. He has failed to do so.

31. Similarly, the Honourable Attorney General has failed to demonstrate that he brought the present application without undue delay. The judgment in the Court of Appeal was delivered on 26th September, 2019. The Honourable Attorney General explains that the transfer of staff from the Mombasa Court of Appeal Station and the COVID-19 Pandemic situation prevented him from expeditiously pursuing the appeal at the Supreme Court. However, the Honourable Attorney General does not explain why he did not file the Application for stay of proceedings in this Court sooner. Neither does he explain why he did not file the instant Application soon after this bench of five judges gave its directions on 20th August, 2020. Instead, the Honourable Attorney General waited for more than nineteen days – after the Petitioners had already filed and served their submissions to the case and after the five judges from various parts of the country had cleared their diaries for the hearing of the Consolidated Petitions before filing the present Application. No explanation was given for this delay. We find the unexplained delay to be inordinate and to be undeserving of the exercise of Court’s discretion in favour of the Applicant.

32. In summary, the Honourable Attorney General has failed to satisfy the conditions required to benefit for an order for stay of proceedings in that:

- a. There is no appeal existing at the Supreme Court;
- b. The Honourable Attorney General has not offered satisfactory explanation why the Application was not filed in the Supreme Court or the Court of Appeal;
- c. Whereas the intended appeal raises arguable points of law, there has been no demonstration that it will be rendered nugatory if the stay of proceedings is not granted;
- d. Further, the Attorney General has failed to show what exceptional circumstances exist in this case to warrant the grant of the radical remedy prayed for; and
- e. Finally, the Honourable Attorney General has failed to explain the inordinate delay in filing the present Application before this Court – both before and after directions for hearing of the Consolidated Petitions were given.

33. **The upshot is that the Application dated 9th September, 2020 is dismissed with costs.**

Dated, Signed and Delivered at Mombasa this 21st day of September, 2020.

L. ACHODE	J. NGUGI	P. NYAMWEYA
<u>JUDGE</u>	<u>JUDGE</u>	<u>JUDGE</u>

E. OGOLA	A. C. MRIMA
<u>JUDGE</u>	<u>JUDGE</u>