



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 10 OF 2018

FRESHCO INTERNATIONAL LIMITED.....1ST APPLICANT

JAMES GIGHANGA KARANJA.....2ND APPLICANT

VERSUS

KENYA PLANT HEALTH INSPECTORATE

SERVICES (KEPHIS).....1ST RESPONDENT

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

CHIEF MAGISTRATE’S COURT, NAKURU.....3RD RESPONDENT

RULING

1. Can a party obtain a stay of execution against a judgment by the High Court refusing to grant a writ of *certiorari* to quash a decision by the Director of Public Prosecutor to commence or continue criminal proceedings against the party? That is the singular question presented by this Application.
2. The facts can be simply stated. On 20/03/2018, officers from the 1st Respondent, Kenya Plant Health Inspectorate Service (KEPHIS), went to the factory/warehouse of the 1st Applicant (“Freshco”) in Nakuru where they seized and impounded some seeds, documents and equipment. They also temporarily shut down the warehouse – until that decision was varied by an order of this Court. KEPHIS maintains that as its inspectors were carrying out “usual” inspection they discovered what they call “wanton non-compliance” with the law by the two Applicants.
3. KEPHIS inspectors carried away some of the impounded goods from the warehouse which were tested and allegedly found to be non-conforming. These impounded goods became the basis of a criminal prosecution of the 2nd Applicant by the 2nd Respondent in the 3rd Respondent Court.
4. The Applicants approached this Court seeking, among other prayers, for orders stopping the DPP from continue to prosecute *Nakuru Criminal Case No. 900 of 2018: R v James Karanja*, vide an order of *certiorari* on the ground that it was an abuse of the Criminal Justice Process.
5. In a considered judgment delivered on 14/12/2018, the Court ruled that the institution and maintenance of *Criminal Case No. 900 of 2018: R v James Karanja* is **not** an abuse of the Criminal Justice Process and is **not** otherwise an abuse of the process of the Court. The Court, thus, refused to grant both a *certiorari* quashing the charging decision and a prohibition prohibiting the prosecution of the 2nd

Applicant in that criminal case. However, the Court made certain other findings and gave certain other orders which were favourable to the Applicants.

6. In the instant Application dated 12/02/2019, the Applicants seek a stay of execution against that portion of the Court's determination and disposition that held that the institution and maintenance of **Criminal Case No. 900 of 2018: R v James Karanja** is **not** an abuse of the Criminal Justice Process and is **not** otherwise an abuse of the process of the Court. But, in essence, what the Applicants seek is a stay against the continued prosecution against the 2nd Applicant in **Criminal Case No. 900 of 2018: R v James Karanja**.

7. The Application is opposed. The Respondents filed Grounds of Opposition. Both parties appeared before me for oral arguments. The oral arguments mainly centred on the question whether the terms for grant of a stay pending appeal prescribed in Order 42 Rule 6 have been met in the present case.

8. Order 46 Rule 6 reads as follows:

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (1) unless—

The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

9. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in **Rhoda Mukuma v John Abuoga (1988) eKLR**:

It was laid down in M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979, (following Wilson v Church (No 2) (1879) 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security.

10. Under our established jurisprudence, our Courts consistently hold that to be successful in an application for stay, Applicants have to satisfy a four-part test. They must demonstrate that:

a. The appeal they have filed is arguable;

b. They are likely to suffer substantial loss unless the order is made. Differently put, they must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. They have given or are willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on them.

11. The Applicants in this case have argued strenuously that there is no requirement for arguability of the appeal under Order 42 Rule 6. The Respondents have resisted this – arguing that it is a necessary condition to the grant of stay under the Rule. As I alluded above, many of cases have found that arguability is a factor to be considered in the grant for stay of execution by the High Court. I fall into that school of thought. However, I must hasten to add that the requirement is aruability: to be entitled to a stay of execution, one is **not** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. In my view, the Applicants have easily met that standard and no laborious analysis is required to demonstrate this: they hope to persuade the Court of Appeal that the 2nd Applicant is being tried for acts committed by the 1st Applicant which is a separate legal person. They also hope to persuade the Court of Appeal that this Court was wrong in not making a finding that it is not the DPP who is undertaking the criminal trial but a third person is doing so by proxy. Lastly, they hope to persuade the Court of Appeal that the criminal prosecution was commenced without any investigations which, they argue, renders it void *ab initio*. Under any standards, those are arguable points of law and fact.

12. I would also easily hold that the Application for stay was brought without undue delay. The judgment was given on 14/12/18. The present Application was brought on 12/02/2019. That is exactly sixty (60) days. If one considers that there was the intervening Christmas holiday (when time tolls for civil matters), I do not think one can, in good faith, say that there was undue delay in bringing the present Application.

13. But what is the substantial loss that the Applicants are likely to suffer if the order is not granted? For an Applicant to demonstrate that she will suffer substantial loss if her application for stay is not granted, she is required, primarily, to show that her appeal will be rendered nugatory is the order for stay is not granted. For an Applicant to meet this condition, she must demonstrate that there is an order capable of execution which if it is not stayed will render the subject of the appeal nugatory.

14. Hence, in ***Titus Kiema v North Eastern Welfare Society [2016] eKLR*** the Court stated:

I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed" I have been unable to see any such threat.... The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn.

15. Similarly, in ***AG v James Hoseah Gitau Mwara [2014] eKLR (Court of Appeal No. 121 of 2013)*** the Court of Appeal remarked that in order for a Court to exercise its discretion to grant stay, it must first ask itself the question whether there is anything capable of being stayed in the ruling or decision sought to be impugned.

16. In the present case, the Applicants brought an application for Judicial Review seeking to quash the decision of the DPP to prefer charges against the 2nd Applicant. That specific prayer was dismissed by this Court. What, then, is there to stay? The stay order is not being sought against the order refusing to quash the decision of the DPP. Instead, the stay is really against the continuation of the criminal case against the 2nd Applicant. Yet, it is not the order by this Court in its judgment of 14/12/2018 which ordered the case to be commenced or continued. The judgment of 14/12/2018 only refused to stop its continuation. How, then, can the Applicant seek a stay of execution against the judgment of 14/12/2018 when what is hoped to be achieved is the stoppage of the criminal prosecution in a different criminal case?

17. I had occasion to wrestle with this question in John **Mbua Muthoni & Another v Ruth Muthoni Kariuki (2017) eKLR** where, after reviewing applicable case law, I concluded thus:

*33. I have anxiously given thought to this question. I have looked at the cases cited by the parties. In addition, I have returned to Justice Odunga's decision in **R v The Commissioner for Investigations & Enforcement Ex Parte Wananchi Group of Kenya Limited [2014] eKLR**. In that case, Justice Odunga declined to grant a stay pending appeal after dismissing a Judicial Review Application on the ground that where the High Court has dismissed an application for judicial review, the Court does not grant any positive order in favour of the Respondents which is capable of execution. As such a stay of execution is not available in such circumstances.*

*34. I am persuaded that the circumstances here are the same as those in the **Wananchi Group Case** which I find to be persuasive. It is in accord with the **James Hoseah Gitau Mwara Case** cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be "executed." A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.*

18. I have reached the same conclusions in the present case. After due consideration of the case law and the circumstances of this case, I have come to the conclusion that the orders sought cannot be granted. I say so for two reasons. First, it is not envisaged in our law that an order of refusal against the grant of prerogative writ can be stayed pending appeal. I am here referring to section 8(3) of the Law Reform Act. I am also referring to our case law which is equally clear that a decision refusing to grant a prayed prerogative writ is not an order capable of execution and that therefore a stay of execution cannot be granted against such an order. A negative order (declining to grant an order for Judicial Review) is not an executable order capable to drawing an order for stay of execution.

19. Second, even if such an order were, in fact amenable to a stay order, I would not grant one in the present circumstances. I am simply not persuaded that defending the criminal case brought against the Applicants in the present case is in any way prejudicial enough to warrant the conclusion that it would warrant the appeal nugatory. At the very worst, the Applicants will be forced to spend resources to defend a suit which they are persuaded is hopeless and ill-advised anyway. There is, therefore, no question that they will prevail in the suit if their assertions are correct. In that case, I see no aspect of the appeal being rendered nugatory even if the appeal they have filed against the decision of this Court succeeds.

20. If I were to hold the opposite, the effect would, in my view be to create a judicial doctrine capable to being utilized by Accused Persons to indefinitely delay their criminal trials: once charged with a criminal offence, an Accused Person would take out Judicial Review proceedings. If declined in the High Court, the Accused Person would seek stay pending appeal at the Court of Appeal. Six or seven years later, if the Applicant fails at the Court of Appeal, it would probably be too late to pursue the criminal trial. It appears obvious, therefore, as a matter of judicial policy, this would be an improper doctrinal development.

21. The upshot is that the Application dated 12/02/2019 is without merit. It is hereby dismissed with costs.

22. Orders accordingly.

Dated and delivered at Nakuru this 28th day of March, 2019.

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JOEL NGUGI

JUDGE