REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 2 OF 2019

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 25, 27, 28, 30,

40, 43, 50, 159, 117, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE PROVISIONS OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA

BETWEEN

GEORGE KITHI.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

FRED TSOFA MWENI.....1ST INTERESTED PARTY

YEHUDA SULAMI.....2ND INTERESTED PARTY

CORAM: Hon. Justice R. Nyakundi

Ms. M. N. Mwanyale for the Petitioner

Ms. Otieno B. N. for the 1st Interested Party

Ms. Munyithya for the 2nd Interested Party

RULING

In a notice of motion to stay execution of the Ruling of this court dated 15.10.2019 pending an appeal, the applicant sought the following orders:

> ***a) That aggrieved by the entirely of the said Ruling, the applicant/petitioner has preferred appeal pursuant to Notice of Appeal lodged on 16/10/2019 against the Ruling dismissing his application dated which application had interim orders and by dint of the dismissal the orders have lapsed. The effect is that the applicant is apprehensive of being arraigned and charged to answer to criminal charges, which charges he has challenged in his petition pending court and that the petition shall be rendered nugatory if he were to be charged.***
>
> ***b) That by dint of foregoing it is clear beyond peradventure that:***
>
> > ***(i) The applicant/petitioner has a substantially credible appeal against the impugned decision, which appeal ought to be ventilated prior to execution of the impugned Ruling against him.***

(ii) This application has been lodged without any delay whatsoever immediately after delivery of the Ruling.

(iii) Unless the Honorable Court grants orders sought herein with the urgency they merit, the applicant's petition will be defeated and be rendered nugatory as now the orders which the applicant was seeking in the application dated are now been vacated by virtue of the dismissal.

c) That the applicant is now at risk of apprehension that he will be arrested and arraigned in court and he is now seeking an injunction pending appeal to safeguard his rights pending hearing of the appeal as the orders sought have now been vacated by virtue of dismissal of the application.

d) That the applicant is prepared to abide by any conditions the honorable court may impose on grant of the orders sought herein.

e) That it is only in the interest of justice, fairness, equity, constitutionalism, principles of the rules of law and Natural Justice and Protection of Fundamental Rights and Freedoms enshrined in the Constitution of Kenya, 2010 that this application ought to be allowed as prayed.

f) That significantly, no prejudice shall befall any of the parties herein should the instance orders sought be granted.

The grounds on which the applicant sought the above order are set out in the supporting affidavit by George Kithi filed in court on 16.10.2019. The interested party filing grounds of opposition dated 21.10.2019. As at the time of writing this ruling the respondent was yet to file their response to the application. The parties also did not file any skeleton submissions.

Analysis

In this application stated to be brought under Order 42 Rule 6 of the Civil Procedure Rule the general principle of law is that the power to order stay of execution of any Ruling or Judgment upon which an appeal is predicated is a discretionary depending on the peculiarity of the circumstances in each case.

Under Order 42 Rule 6, the provisions require that the applicant demonstrate the following conditions:

1. That the application has been filed without undue delay.

2. That the applicant would suffer substantial loss or put in another language irreparable harm which he might not be compensated by way of damages.

3. That he is able to provide security for due performance of the decree. This is more purposeful if the impugned Judgment of the court is a money decree.

4. If there is overwhelming prospect of succeeding in his appeal.

Therefore, when considering the application of granting stay of execution, the application is to be tested within the ambit of the above conditions.

In essence the applicant in his affidavit contend that his appeal has high chances of success and if the orders of stay are not granted he is likely to suffer prejudice and injustice by virtue of threats or violations of his fundamental rights and freedom under the bill of rights in the constitution. As a consequence, the petitioner prayed for an order of prohibition against the respondent or any person, agent acting in tis instructions from arresting or ordering the arrest of the petitioner or arraigning him in court to take plea, or preferring charges on matters incidental to the commercial transactions involving the 1st and 2nd interested party.

As the law contemplates the court in an application for stay of execution to appeal on the Judgment of the trial court, the matter in essence should be subjected to the prejudice and interest of justice test.

The persuasive authority in the case of **Combi (Singapore) Pte Limited v Ramnath Sriram and another 1997 EWCA 2164** restated the criteria as follows:

"In my Judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant. If it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if stay is not ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not show no stay of execution should be ordered. But where there is a …….. of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

In **Linotype – HCCC Finance Ltd v Baker 1992 4 ALL GR 887 Slaughton C. J.** said:

"It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which

has some prospect of success, that is legitimate ground for granting stay of execution."

It is also vital to determine at this interlocutory stage before an appeal is heard whether the expediency of the case demands exercise of discretion to safeguard the right to access to court by the petitioner as provided for in Article 48 of the constitution. Similarly, on a facts based approach the court though not sitting on appeal to determine whether the intended appeal if successful is not rendered nugatory.

In the same vein the persuasive authority by the Court of Appeal in Australia in **Vosebe Pty Ltd Trading as Batemans Bay Window and Glass v Bakavgas [4] [2008] NSWCA 55** through **McColl JA** put it like this:

> ***"The principles concerning an application for stay of execution are well known, the overriding principle being to determine what the interests of justice require, the court tending in favour of granting a stay where there is a risk that the appeal will prove abortive if the applicant succeeds and a stay is not granted."***

I am further guided by the Court of Appeal's decision in **Carter & Sons Ltd v Deposit Protection Fund Board & Two Others Civil Appeal No. 291 of 1997,** states:

> ***"… the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay ….. the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."***

The concept of sufficient cause being shown by the applicant seeking stay was also reaffirmed in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR**

> ***"The principles governing the exercise of the court's jurisdiction under rule 5(2)(b) of our Rules are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory."***

In short, Order 42 (6) is eminently a discretionary provision where the Court undertakes a balancing act of the competing rights between the two litigants in a dispute. Indeed, the indispensable proposition of law in all these is to consider the criterion of the interest of justice of the matter.

According to the petitioner, the application for stay of execution is grounded upon the principles that the intended appeal is substantial and would be based on serious tribal issues specifically whether the application to decline grant of conservatory orders was merited.

On the other hand, the interested party vehemently opposed any such grant of the stay orders in this matter that his purpose may be to delay justice as there are no chances of the petitioner succeeding in his appeal. In the case of **Ramnath Sriram and Another [1997] EWCA 2164** state as follows:

> ***"In my Judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not, then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."***

I have agonized on the question whether the petitioner should be granted stay of execution pending appeal or not. On the strength that he has not demonstrated that intended appeal is an arguable one with high probability of success. However, on the justice of the case, it is undoubtedly clear that failure to stay execution on matters involving enforcement of fundamental rights and freedoms of a nature the petitioner is agitating on against the respondents may be prejudicial to the petitioner.

That being the view of the matter, and in view of what I have stated the notice of motion dated 15.10.2019 is hereby allowed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF OCTOBER, 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Aoko for Gikandi for the Appellant

2. Ms. Kihara for the 2nd interested party.