



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 457 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE
NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF DECISION BY CABINET SECRETARY, STATE MINISTRY FOR WATER
AND IRRIGATION

AND

IN THE MATTER OF SECTION 7 OF THE STATE CORPORATIONS ACT

AND

IN THE MATTER OF ARTICLE 10.22.23, 47 AND 48 OF THE CONSTITUTION OF KENYA

BETWEEN

AINSWORTH MARAGARA KITHINJI.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS2ND RESPONDENT

RULING

1. By a chamber summons dated 28th September 2016 under certificate of urgency, the exparte applicant **MR AINSWORTH MARAGARA KITHINJI** seeks from this court orders that:

i. Spent

ii. Leave be granted to apply for the following orders.

iii. An order of certiorari be granted by this court to bring into this court and quash the respondent's decision of 7th September 2016 or arraigning, charging and or prosecuting the applicant.

iv. An order of prohibition be issues by this Honourable court to prevent the respondents from continued prosecution pending the hearing and determination of this suit.

v. Grant of leave to act as stay of the proceedings in **MILIMANI CM CRIMINAL 1373 OF 2016 REPUBLIC VS AINSWORTH KITHINJI MARAGARA.**

vi. Costs of and incidental to the application be in the cause.

2. The application is supported by the statutory statement , the verifying affidavit sworn by the applicant and Annexure "AMK1" which is copy of charge sheet and bond deposit receipt dated 7th September 2016 for kshs 100,000 issued to the applicant in criminal case No.1373/2016.

3. The exparte applicant's case as per the grounds on the face of the statutory statement as verified by the affidavit is that on 6th September 2016, the 2nd respondent Director of Criminal Investigations arrested the applicant in a grotesque commando style while jetting back from Rio De Janeiro where he was executing his official duties as an official of Athletics Kenya and Deputy Coach of field and track events.

4. That the 1st respondent Director of Public Prosecutions made a decision to charge the applicant on 7th September 2016 for stealing contrary to Section 268(1) as read with Section 275 of the Penal Code , Cap 63 Laws of Kenya;

5. That the said decision to charge the exparte applicant is irregular, irrational, whimsical, in bad faith and an abuse of the prosecutorial powers and full of apparent bias, unreasonableness or false innuendos. That the said alleged things capable of being stolen were seized from the safe custody of NOCK and not AK after safe keeping;

6. That the respondent's decision to charge the applicant is political and made in bad faith to appease the public and as a cover up to mismanagement issue of sports in Kenya which the applicant has no control save for National Olympics Committee of Kenya.

7. That the said decision to charge the applicant is prima facie unconstitutional for being against fair exercise of prosecutorial discretion and against the faith of criminal justice system.

8. That the said decision sets a dangerous precedent and stand out as dangerous rodents eating at the very roots of prosecutorial discretion, constitutionalism and the rule of law that ought to be safeguarded by the constitution of Kenya 2010 and all persons responsible for implementation and execution of the Constitution.

9. That there is real and present danger that unless halted by this Honourable court, criminal justice process will be used as a cover up of mismanagement issues and manipulation by Cabinet Secretaries who fail in their part and hence further the unconstitutional acts and set in motion foundations of blatant disregard for the constitution and statute criminal law.

10. That there is urgent need for this court to move with speed as a custodian of the majesty of the constitution and strike a blow for the principles of reasonable prosecutorial discretion, constitutionalism and the rule of law by halting the said decision made by respondents in bad faith.

11. That it is just and equitable that this application be heard and determined on priority basis.
12. That the applicant is apprehensive and concerned that if the respondents are allowed to continue prosecuting him, then the prosecutorial discretion and independence will be dealt a great blow and the people of Kenya will suffer considering the ongoing investigations of corruption in the sports sector and the applicant being used as a sacrificial lamb.
13. That the applicant is apprehensive that unless this court issues certiorari order quashing the decision of the respondents and a prohibition order preventing the respondents from continued prosecution, then innocent citizens will suffer in the altar of prosecutorial bias and being used as scapegoats while real culprits are scot free.
14. The verifying affidavit by the applicant who is also the Principal of Itugururu High School verifies the above stated grounds as stated in the statutory statement while annexing the exhibited charge sheet and deposit receipt for bail in criminal case No.1373 of 2016.
15. When this application came before me on 28th September 2016 under certificate of urgency, I certified it as urgent and directed the applicant to serve the respondents for interpartes consideration on 4th October 2016.
16. On the latter date, the respondents appeared through Mr Okello advocate who sought time to file a replying affidavit and was granted 15 days, but he did not file any replying affidavit.
17. When the matter came up for hearing yesterday which was 16th November 2016, the respondent's counsel was nonetheless permitted to respond to the application on points of law only.
18. The chamber summons was prosecuted orally with Mr Karugu advocate for the applicant submitting that the applicant has a prima facie case because the decision to charge the applicant was irrational, irregular, and that unless the court intervenes in the matter then the prosecutorial powers will be abused.
19. Further, that the ex parte applicant has been framed up. That the hearing of the criminal case is fixed for 17th November 2016 and that it should be stopped until the court determines whether the decision by the respondent to charge the applicant was logical or rational. He relied on the list of authorities filed on 3rd October 2016 thus -**Kenafic Industries Ltd & Another V Anti – Counterfeit Agency & 3 others [2015] e KLR** where the court held that leave to apply for judicial review and stay to issue would issue when the decision has not been implemented or where the same is in the course of implementation and secondly, as highlighted in the rationale column, that where the imminent outcome of the decision challenged is likely to render the success of the Judicial Review proceedings nugatory or an academic exercise then the court is entitled to stay the said proceedings, the strength or otherwise of the applicant's case notwithstanding.
20. Reliance was also placed on the **Republic V Director of Public Prosecutions & Another Ex parte Patrick Onyango Ogolla [2016]** where the court held that Order 53 Rule 1 (4) of the Civil Procedure Rules confers wide powers on the court to grant stay on such terms that are just including the period for which the stay is to last.
21. In addition, the applicant cited **Wilfred Josiah Manda & Another vs Patrick Mukua Muthani & 2 Others [2016] e KLR** where it was held that the Director of Public Prosecutions discretion can be interfered with where the court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence.
22. Further reliance was placed on the case of **Car Importers Association of Kenya Vs Kenya Bureau of Standards & 5 Others [2014] e KLR** where the court held that the court having granted

leave, the question of leave operating as stay must start from the point that leave has already been granted and therefore the determination on the question should rest on the further tests whether damages are adequate remedy and where the balance of convenience lies.

23. The applicant further relied on **Republic V Chuka University Exparte Kennedy Omondi Waringa & 35 Others [2016] e KLR** where the court held that courts are the ultimate custodians of the rights and liberties of people, whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.

24. The applicants counsel also relied on the grounds, statutory statement and verifying affidavit in his submissions, urging the court to grant leave to apply for Judicial Review orders and that such leave once granted to operate as stay of any proceedings in the pending criminal case against the applicant herein.

25. In opposing the application for leave and stay of proceedings pending before the criminal court against the exparte applicant, Mr Okello counsel for the respondents submitted that there is no affidavit filed in support of the chamber summons and that there was only a verifying affidavit.

26. Further, that should this court be inclined to grant leave to the applicant to institute Judicial Review proceedings, the court should not grant any stay of proceedings pending in the criminal court. In Mr Okello's view, the grounds upon which the leave to apply is predicated do not demonstrate a prima facie case.

27. Further, that the exparte applicant is trying, by these proceedings, to put up a defence before this court that he was framed. That circumstances under which the applicant was arrested and charged cannot be subject of Judicial Review.

28. Further, that Judicial Review is not concerned with merits of the case but with the decision making process. Mr Okello submitted that the exparte applicant herein has not demonstrated as to what was wrong with the process that led to his being charged and therefore the pending prosecution.

29. Counsel for the respondents relied on the case of **Penina Nandako Kiliswa V IEBC Petition No. 28/2014** where the court set out principles for granting of Judicial Review, citing with approval **Pastoli V Kabale District Local Government Council & Others [2008] 2 EA 300-301**.

30. According to the respondent's counsel, there is no illegality, or error of law demonstrated and that it was not demonstrated as to how the Director of Public Prosecution's decision to charge the applicant with a criminal offence is unreasonable.

31. It was further submitted by the respondent's counsel that the applicant in this application is merely expressing his disagreement with the prosecution by saying that these are management issues and manipulation, by giving his defence evidence as to his role in the whole process.

32. Mr Okello submitted that our legal system provides all the necessary safeguards to ensure fair trial for the applicant. Reliance was placed on **Petition No. 46 of Pauline Adhiambo Raget v Director of Public Prosecutions & 5 others [2016] eKLR** where Honourable Onguto J emphasized at page 7 of the judgment that the Director of Public Prosecution and the Inspector General of Police are independent offices. Further that the respondents are enjoined to investigate any allegations against the applicant.

33. In Mr Okello's view, therefore, this case is a non starter from the onset and that the request for leave and stay is a ploy to delay the trial. Counsel urged the court to reject the application.

34. In a brief rejoinder, Mr Karugu submitted on behalf of the exparte applicant that there were several misrepresentations by Mr Okello and that one such misapprehension is that there was no verifying affidavit yet the chamber summons is supported by a verifying affidavit sworn by the exparte applicant. Further, that the respondents are administrative bodies subject to Judicial Review. Mr Karuga

submitted that the question in this matter is whether the decision to charge the applicant was unreasonable. He referred the court to paragraphs 5 of the verifying affidavit sworn by the *ex parte* applicant which shows that the *ex parte* applicant was charged with things were found in the custody of the National Olympics Committee of Kenya and not the applicant herein. He maintained that his client has a *prima facie* case to warrant leave and that leave once granted should operate as stay of criminal proceedings facing the applicant as per the annexed copy of charge sheet in criminal case No. 1373 of 2016.

Determination

35. I have carefully considered the *ex parte* applicant's chamber summons seeking for leave of this court to apply for Judicial Review orders of certiorari and prohibition; to quash the decision of respondents to charge the applicant with stealing the items listed in the charge sheet; and to prohibit the prosecution which is ongoing at the Chief Magistrate's Court, Nairobi vide criminal case No. 1373 of 2016; and that the leave so granted do operate as stay of the criminal proceedings before the Chief Magistrate's court.

36. In my humble view, the issues for determination are whether the *ex parte* applicant is entitled to the orders of leave; and stay.

37. On the first issue of whether leave sought is warranted, the principles that guide the grant of an order for leave to institute Judicial Review proceedings were explained by a three judge bench decision comprising Bosire, Mbogholi-Msagha & Oguk, JJ in **Matiba Vs Attorney General Nairobi HC Miscellaneous Application No. 790 of 1993** wherein the court held that it is supposed to exclude frivolous or vexatious applications which, *prima facie* appear to be abuse of the court process or those applications which are statute barred.

38. Nyamu J in **Republic Vs Land Disputes Tribunal Court Central Division and Another Ex parte Nzioka [2006] 1EA 321** held that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court action which might turn out to be unmeritorious.

39. In **Ex parte Worth [1985] STC 564** cited in **Regina V Criminal Injuries Compensation Board Ex parte A (AP)** by the House of Lords HL 1998-1999 it was held:

“.....The judge's task on the ex parte application was to do no more than to decide that there was an arguable case for Judicial Review and not to “determine any issue finally in favour of the applicant.”

40. In the same case, the House of Lords stated:

“On an ex parte application, leave to apply for Judicial Review can be refused, deferred to the substantive hearing or given.”

41. In the instant case, the court at the first instance certified the matter as urgent but deferred the hearing of the application for leave and the prayer for stay at the interpartes hearing.

42. In **Re- International SA Bureau Ventas [2005] EA 43**, the court stated:

“ Application for leave to apply for orders of Judicial Review are normally ex parte and such an application does restrict the court to threshold issues namely, whether the applicant has an arguable case and whether if leave is granted, the same should operate as stay.

Whereas Judicial Review remedies are at the end of the day discretionary, that discretion is a Judicial discretion and , for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the court's discretion. There should be an arguable case which , without delving into the details could succeed and an arguable case is not ascertained by the court tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the Judicial Review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps given a applicant his day in court instead of denying him. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megany J. In the case of John V Rees [1970] ch 345 at 402. In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”

43. The above position was also stated in **Republic Vs County Council of Kwale & Another Exparte Kondo & 57 Others Mombasa HC Miscellaneous Application No. 384/1966**, as cited by Honourable Odunga J extensively in **Re of John Wachira Wambugu vs The Disciplinary Tribunal of the Law Society of Kenya [2015] e KLR**.

44. Again in **Meixner & Another V Attorney General [2005] e KLR 189** cited in **John Wachira Wambugu** (supra) case, it was held that the leave of the court is a pre requisite to making a substantive application for Judicial Review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave of otherwise involves an exercise of judicial discretion.

45. In **Mirugi Kariuki Vs Attorney General CA 70/1991 [1992] KLR 8** the court stated:

“ 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 is 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 busy bodies, cranks and other mischief-makers...”

46. The thread that is common and which runs through all the above authoritative decisions that have stood the test of times is that the grant of leave to institute Judicial Review proceedings is not a mere formality and that the court shall not grant leave as a matter of course. The applicant who seeks leave of court is obliged to demonstrate to the satisfaction of the court that he has a prima facie case that is arguable for the grant of leave.

47. However, the applicant at this stage is not expected to delve into the depth of the application. He must, nonetheless demonstrate that he has not come to court after an inordinate delay and that the application is not frivolous, malicious or futile.

48. In the decision of **Kenafric Industries Ltd & Another Anti Counterfeit Agency & 3 Others** (supra) which decision was relied on by the exparte applicant, Honourable Odunga J citing several other decisions held inter alia:

“.....it must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charges with the responsibility of making the decisions to charge act in a reasonable manner, the High court would be reluctant to intervene.”

49. Concerning the duty to investigate crimes, the case of **Republic vs Commissioner of Police and Another exparte Michael Monari & Another [2012] e KLR** cited in **Kenafric Industries** (supra)

case is instructive that:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High court would be reluctant to intervene.”

50. In the instant case, therefore in order for the applicant to succeed in the application for leave, he must show that the investigations leading to the charges facing him and as being prosecuted by the Director of Public Prosecutions, were laced with ulterior motives; that the predominant purpose of conducting the prosecution against him is to achieve some collateral result; not connected with vindication of an alleged commission of a criminal offence, that there has been failure on the part of the respondents to perform a public duty; that the decision to charge the applicant is irrational, illogical and irregular and amounts to abuse of process.

51. The applicant claims that on his arrival from Rio de Janeiro Olympics in Brazil, he was unceremoniously arrested and charged with the offence of stealing items which are incapable of being stolen; that he is being framed and that the charges are a cover up of mismanagement at the Athletics Kenya where he is an official hence the decision to charge him should be quashed and the prosecution prohibited.

52. The impugned charges are already before the Chief Magistrates Court at Nairobi. The Chief Magistrates Court is not enjoined to these proceedings.

53. The power to prosecute is statutory power vested in the Director of Public Prosecution by the Office of Director of Public Prosecution Act and Article 156 of the Constitution.

54. This court cannot prohibit the Director of Public Prosecutions from performing his statutory and constitutional mandate unless it is demonstrably clear at this stage that the Director of Public Prosecutions is abusing his powers to warrant a check on that power through Judicial Review. No such prima facie evidence of abuse of power is shown.

55. On the other hand, even if this court were to grant the leave to apply for Judicial Review orders of certiorari, what will be challenged is the decision to charge the applicant with the offence of stealing. The decision to charge him was already been made and he is facing the impugned charges.

56. There is no prayer seeking for the leave to apply for the quashing of the criminal proceedings pending before the Chief Magistrate’s Court from continuing with the trial of the applicant.

57. What is sought as against the proceedings in Milimani CM Criminal 1373/2016 is stay of the proceedings, which, in itself is not a Judicial Review remedy but a consequential order. I say so because in the two Judicial Review prayers reproduced in this ruling, Milimani CM criminal case No. 1373/2016 is not mentioned. On that ground alone, this court would proceed to dismiss the application for leave in limine.

58. But there is more. The applicant claims that he was framed and that the case against him is a cover up of mismanagement at Athletics Kenya and further that the goods allegedly stolen were incapable of being stolen because they were in safe custody of National Olympics Committee.

59. Without delving into the depths of that kind of deposition and averment, what the applicant has disclosed is in the nature of a defence evidence that would best be adduced at the criminal trial since it has not been demonstrated to the satisfaction of this court that the trial is prima facie a sham or that it lacks any factual foundation or that it is intended to achieve some collateral purpose than to

vindicate the public for the alleged criminal acts.

60. In addition, the applicant was charged in court in September 2016, the same month that he approached this court to intervene in the matter. Nonetheless, he has not attempted to annex to his statutory statement any witness statements of proposed prosecution witnesses for the court's perusal to show that the criminal trial has no factual foundation or that on the face of it, there is malafides, and neither has he demonstrated to the satisfaction of this court that since the inception of the criminal charges, the applicant has discovered any new and important matter that he is pretty sure will vitiate the trial.

61. On the relevance of the case of Patrick Onyango Ogola (supra) as relied on by the applicant, this court notes that there was no issue raised on the grant of leave to apply as the court in that case had granted orders *ex parte* as sought and proceeded to hear and determine issues relating to stay of proceedings in the trial court pending hearing and determination of the substantive motion.

62. It should be noted that where the court finds that no *prima facie* arguable case is made out then the court would not be inclined to grant any stay, although the court would nonetheless grant leave and deny stay orders depending on the circumstances of each case and where there is demonstration that if stay is denied and yet leave is granted then the substantive motion, if successful, would be rendered nugatory and a mere academic exercise and therefore rendering the applicant a pious explorer in the corridors of justice, then stay would issue.

63. In **Wilfred Josiah Manda & Another vs Patrick Mukua Muthomi & 2 Others**(supra) relied on by the *ex parte* applicant, regrettably the decision favours the respondent's position. In that case Honourable P. Nyamweya J in **Machakos JR Miscellaneous Application 218/2015** dismissed an application for leave to apply for Judicial Review orders and the prayer that leave do operate as stay.

64. It therefore follows that the applicant's authorities relied on focused only on stay of criminal/proceedings pending before the trial magistrate yet he did not even seek for leave to apply to bring into this court and quash or prohibit those proceedings. Neither did he enjoin the court that is involved in trying him. Stay being a consequential order depends on the merits of the prayer for leave.

65. In the **Wilfred Josiah Manda**(supra) Honourable Nyamweya J further citing **Republic vs Attorney General & 4 Others ex parte Kenneth Kariuki Githii [2014] e KLR** (Odunga J) stated:

“ The court ought not to usurp the constitutional mandate of the Director of Public Prosecution to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of Judicial Review since Judicial Review proceedings are not conceived with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a good ground that ought not to be relied upon by a court on order to halt criminal undertaken bona fide since the defence is open to the applicant in those proceedings. However if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that facts constituting the basis of a criminal proceeding may similarly be a basis for a similar civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, Ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognized claim.”

66. In the instant case, other than rhetoric mentioning of the words illegality, irrationality and unreasonableness, and the use of extremely strong terminologies against the respondents by the applicant,

there is absolutely no material availed to the court to demonstrate that prima facie, the decision to charge the applicant with stealing was illegal and or that such decision was arrived at in an irrational and or unreasonable manner such that a prudent person would not have arrived at the impugned decision given the same facts.

67. There is even no demonstration, that prima facie, that the respondent's decisions to charge the applicant were arrived at in breach of the rules of natural justice or that objectively, there is unfairness in those decisions or that it was oppressive or vexatious.

68. Again the decision in **Car Importers Association of Kenya vs Kenya Bureau of Standards & Others** (supra) relied on by the applicant's counsel never concerned the question of leave to apply since leave had already been granted and so the ruling by E. Mureithi J concerned whether the leave granted to apply should operate as stay of the decision challenged in the Judicial Review proceedings.

69. Finally in **the Republic v Chuka University exparte Kennedy Omondi Waringa & 35 Others** (supra) the application was for leave to commence Judicial Review proceedings. In that matter, Honourable Odunga J after brilliantly and elaborately analyzing the chamber summons before him, the learned judge proceeded to strike out the chamber summons for leave on several grounds among them, failure of the exparte applicants to resort to the available remedies provided for under the respondent's disciplinary procedure.

70. The above decision therefore also does not come to the aid of the exparte applicant herein who relied on it and selectively quoted some part thereof that appeared to favour the exparte applicant's case. Quite unfortunately for the applicant, this court does not focus on cut and pasted points but on the decisions cited and the *raison detre* thereof.

71. On the other hand, the respondent's decision in **Pauline Adhiambo Raget** (supra) was a judgment by Honourable Onguto J on the merits of challenging a criminal trial before the constitutional court. That decision did not concern an application for leave. For, in constitutional petitions no leave is required. Moreso, when deciding a Constitutional Petition, the court fully determines the merits of the decision maker and not the process unlike in Judicial Review proceedings.

72. Similarly, the Supreme Court decision in **Petition No.28/2014** the matter related to an appeal that sought to revoke and annul elections and the matters adjudicated upon therein related to the merits of the substitutive Judicial Review application and not an application for leave as is the case herein.

73. On the whole, I find that the exparte applicant has failed to demonstrate before this court that he has a prima facie arguable case for leave to be granted to him to challenge the decisions to charge him with the criminal offences preferred against him in criminal case No. 1373/2016.

74. Accordingly, the application for leave is dismissed.

75. And with the prayer for leave falling by the wayside, there is no pedestal upon which the prayer for stay of proceedings in the criminal trial can anchor. Consequently, that prayer for stay does not lie and therefore I need not delve into the principles applicable in applications or prayer for leave to operate as stay of the impugned decisions or criminal proceedings as the case may be.

76. The chamber summons dated 28th September 2016 fails. The same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 17th day of November 2016.

R.E. ABURILI

JUDGE

In the presence of :

Mr Karugu for the applicant

Mr Ndege h/b for Mr Okello for the Respondents

CA: Adline