



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL CASE NO. 435 OF 2014

**IN THE MATTER OF ARTICLES 19, 20, 21, 23, 24, 25, 27, 28, 29, 36, 47, 49 & 50 OF THE
CONSTITUTION OF KENYA**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 19, 25, 27, 28, 29, 36 & 47 OF THE CONSTITUTION OF
KENYA**

IN THE MATTER OF INTENDED ARREST AND/OR CRIMINAL PROSECUTION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DIRECTOR OF CRIMINAL

INVESTIGATION DEPARTMENT.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

AND

BRITISH AMERICAN INVESTMENTS

COMPANY (K) LTD.....INTERESTED PARTY

EX PARTE:

EDWIN HAROLD DAYAN DANDE.....1ST EX PARTE APPLICANT

ELIZABETH NKUKUU.....2ND EX PARTE APPLICANT

SHIV ANOOP ARORA.....3RD EX PARTE APPLICANT

PATRICIA NJERI WANJAMA.....4TH EX PARTE APPLICANT

CYTONN INVESTEMENT

MANAGEMENT LIMITED.....5TH EX PARTE APPLICANT

RULING

1. On 4th September, 2016 I delivered a judgement in this matter in which I declined to grant the orders in the manner sought by the applicants in the Notice of Motion dated 17th November, 2014, but issued an order prohibiting the 1st and 2nd Respondents from taking any action in the nature of criminal proceedings against the applicants until the DPP makes a determination on whether the applicants ought to be prosecuted.

2. For completeness of the record the prayers which were sought in the said Motion were as follows::

1. An order prohibition, prohibiting the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigation whether by themselves, their servants and/or agents rom arresting, harassing and/or in any other manner interfering with the liberty and/or property of the ex parte applicants.

2. An Order of mandamus compelling the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigation to return forthwith the cellphones impounded from Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama and Shiv Anoop Arora.

3. Costs of and occasioned by the Application.

3. The Applicant is back before this Court, this time round with a Notice of Motion dated 21st October, 2016, seeking the following orders:

1. That this application be heard inter partes on a date to be fixed by this honourable court.

2. That an order of stay staying any arrest and/or prosecution of the ex parte applicants do issue restraining either the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigations whether by themselves, their servants and/or agents from arresting, harassing and/or in any other manner interfering with the liberty and/or property of the applicants;

a. Initially until the hearing and determination of this application; and

b. Thereafter, until the hearing and determination of the applicant's Intended Appeal against the judgment delivered by this honourable court on 14/9/2016.

3. That any intended action and/or decision by the Director of Public Prosecutions be stayed:

a. Initially until the hearing and determination of this application; and

b. Thereafter, until the hearing and determination of the applicant's Intended Appeal against the judgment delivered by this honourable court on.

4. That the costs of and occasioned by this application be provided for.

4. According to the applicants, they have lodged a notice of appeal of their intention to appeal against the said judgment to the Court of Appeal and also applied for proceedings which intended appeal, in their

view, is arguable and has a high chance of success.

5. It was averred, based on legal advice, that unless the relief sought is granted as aforesaid, the intended appeal will be rendered otiose as it is highly likely that the tainted investigations whose propriety the ex parte applicants' challenged before this Court and will be challenged on appeal, will form the basis of any prosecution against the ex parte applicants. It was contended that should the respondents and/or the Director of Public Prosecutions take any action before the intended Appeal is heard and determined, the ex parte applicants' undoubted right of appeal will be extinguished by a side-wind without a hearing.

6. By way of a supplementary affidavit the applicants denied that their application was based on speculation as to what might or might not happen. They explained that while the applicants did not, at the time of filing the application for stay have direct evidence, from reliable information, it was clear that there were plans afoot that the respondents and the DPP were preparing to arrest and lodge criminal proceedings against the ex parte applicants. This position, the applicants averred was confirmed by the DPP in an interview to the *Standard on Sunday* of 30th October, 2016 entitled "*Britam ex-staff face Sh 1B theft suit.*" The article quoted directly from correspondence between the 2nd respondent and the DPP and also referenced an interview during which "*Tobiko confirmed to the Standard on Sunday that his office has since allowed the prosecution of the four accused persons.*"

7. The applicants lamented that while the DPP was only too ready to speak to reporters, requests for information by the directly affected persons, whose liberty is in jeopardy and reputations are being tarred, were ignored. By a letter dated 1st November, 2016, the Applicants through their advocates requested information from the DPP seeking confirmation as to the accuracy of the newspaper article as well as details of the correspondence between the 2nd respondent and the DPP and/or the Interested Party but this request was ignored.

8. According to the applicants, instead continuing the pattern of trial of the applicants via the media, the DPP has continued with the *Standard on Sunday* edition of 6th November 2016 publishing yet another article on the prosecution of the applicants once again referencing correspondence which the *ex parte* applicants have requested for in vain.

9. It was averred that confirming the contents of those articles, on 7th November, 2016, a CID officer purported to serve summons requiring identical summons to be issued against each of the ex parte applicants to appear before the Resident Magistrate's Court at Nairobi on 10th November, 2016 at 8.00 am. In other words the same day on 4th November, 2016 on which the DPP on behalf of the respondents was filing before this Court the grounds disclaiming any intention to institute criminal proceedings against the ex parte applicants, the criminal suit was filed and fixed for 10th November, 2016 to take plea.

10. It was the applicants' contention that not only is that in contempt of this Court's orders on 31st October, 2016 the DPP a constitution office holder who is mandated to act independently without direction of any person and have regard solely to the "*public interest, the interest of the administration of justice and the need to prevent and avoid abuse of legal process*" appeared to be acting at the behest of the interested party contrary to the public interest as well as aiding and abetting the abuse of the criminal process. In addition, the DPP is not being straight with this Court contrary to a public authority's duty of candor.

11. It was averred that the replying affidavit sworn in opposition to the instant application confirms that the first interested party is hell bent on ensuring that the applicants are on the dock for the trumped up charge of theft by servant when to their knowledge, and as confirmed by their own audited financial reports and communication to their clients, that no such theft took place, and where they wholly withdrew all the civil suits namely HCCC Nos 352, 353, 354, 361 and 362 of 2014, and continue to raise applicants' reputation and their business.

12. On behalf of the applicant it was submitted by **Mr. Amoko**, their learned counsel who appeared with **Miss Rachier**, that all that they were seeking is a stay and not a review of the judgement. In learned

counsel's view, there is no inconsistency in the Court issuing temporary conservatory orders despite having dismissed the application since the Court ought to acknowledge that a higher court may take a different view. It was therefore submitted that the order sought was merely meant to maintain the status quo. Learned counsel submitted that the applicants' application was grounded on Articles 22 and 23 of the Constitution as well as the inherent powers of the Court. In support of his submission he relied on **Prof. Njuguna S. Ndungu vs. Ethics & Anti-Corruption Commission & Others Civil Appl. No. Nai. 304 of 2014.**

Respondents' Case

13. The application was opposed by the Respondents.

14. In opposition to the application, the Respondents filed the following grounds of opposition:

1. That the Director of Public Prosecutions against whom stay are sought is not a party to the application and has no opportunity to respond. The Director of Public Prosecution has appeared as counsel for the respondents in the application but not as a party.

2. That the applicant's application succeeded to the extent that prohibition was granted against the respondents taking any action until the director of public Prosecutions makes a determination on the criminal investigation.

3. That the applicant has not demonstrated how failure to grant stay order would occasion them substantial or any loss it at all.

4. That a stay will only to maintain the status quo and only the Court of Appeal can grant substantive stay orders under Rule 5(2) (b) of the Court of Appeal Rules.

5. That the Director of Public Prosecutions should not be hindered from carrying out his mandate under the constitution and should he so determine that the applicants should face trial, all constitutional and legislative safeguards found in our law will be available to the applicants.

6. That the court cannot grant stay orders on a speculative action which may or may not be taken by the Director of Public Prosecutions.

7. That similarly the court cannot grant stay orders against a party not having been the subject of the orders sought in the Judicial review application that was dismissed.

15. In his submissions, **Mr Ashimosi**, learned counsel for the Respondents contended that the suit was only challenging the arrest and not the prosecution of the applicants and that explains the reason why the DPP was not party to the suit. To the learned counsel, the applicants are not aggrieved by the decision of this Court since the order they were seeking was granted as the issue of prosecution was not an issue before the Court.

16. While conforming that the DPP had now made a decision to charge the applicants, it was submitted that if the applicants are aggrieved by the decision of the DPP, they ought to challenge the same in the right forum rather than by way of an application seeking stay pending appeal in which the DPP is not a party. This, it was submitted was what informed the applicants' decision to abandon prayer 3.

17. It was however contended that even prayer 2 cannot stand as it seeks to stay prosecution which has never been challenged. To the Respondents, the applicants in these proceedings have introduced a totally new cause of action against a non-party. It was further contended that by relying on Articles 22 and 23, the applicants were contending the violation of their constitutional rights yet that was not the issue in the original application.

18. It was submitted that since no order can issue in these proceedings against the DPP, to issue orders against the other two Respondents who have no power to prosecute would be in vain.

The Interested Party's Case

19. The interested party similarly opposed the application.

20. According to the interested party, the order sought by the applicants seeking stay of any arrest and/or prosecution is so general and wide. By granting the aforesaid order, the court will be giving the applicants blanket immunity from police action whatsoever since the applicants are seeking immunity from the legal process yet they are subject to law and cannot expect to be granted immunity from the law.

21. It was the interested party's position that the DPP has a constitutional mandate to independently institute and undertake criminal proceedings. To them, the interested party did not place before court any sufficient material to form a basis for the court to interfere with the said constitutional and discretionary mandates. To grant the orders sought, it was contended would amount to the court interfering with the constitutional mandates of other constitutional bodies without a proper basis in law. Hence, the court was urged not to stay any action and/or intended action by the DPP.

22. It was the interested party's position that issuance of the orders sought herein will have the indirect effect of granting the orders that the applicant had sought in the notice of motion dated 17th November, 2014 which this Court declined to grant.

23. Based on legal advice, the interested party took the position that:

a. Judicial review proceedings are anchored under the **Law Reform Act** and under section 8 thereof this Court has no jurisdiction to grant an order of stay of a decision arising from judicial review proceedings. The only recourse available to any person aggrieved by a decision of the high court arising from judicial review proceedings is to appeal against the aforesaid decision. Consequently, the notice of motion filed herein ought to be dismissed with costs to the respondents and the interested party.

b. By granting the orders sought herein, this Court will be sitting on appeal on its own judgment which is not permissible in law.

c. If the orders sought herein are not granted, the intended appeal will not be rendered nugatory since in the event that the applicants are arrested and prosecuted and the intended appeal is determined in favour of the applicants, the applicants have a remedy under Article 22 and 23 of the Constitution.

d. The applicants have sought orders against the director of Public Prosecutions and yet the director Public Prosecutions has not been made a party to this application. No orders can be issued against the DPP who is not a party to the present application.

24. It was submitted by **Mr. Ngatia** who appeared for the interested party that the issue before this Court is whether this Court can grant a stay in light of the provisions of the **Law Reform Act**. According to him, the only option available is for the aggrieved party to appeal.

25. It was submitted that since the DPP has made a decision that criminal charges be preferred against the applicants, and no challenge has been taken to that decision, stay cannot be granted as sought. **Mr. Ngatia** was of the view that there is a distinction between judicial review proceedings and constitutional petitions and that the **Njuguna Ndungu Case** (supra) arose from the latter while these are judicial review proceedings. In any case one of the parties therein was the DPP, It was submitted that by granting the orders sought herein, the applicants would in effect be annulling its judgement without going through the appellate process.

Determination

26. I have considered the foregoing. I appreciate that in an application for stay pending appeal, it is permitted for the applicant to disclose the nature of his intended appeal so that the Court satisfies itself that in determining whether or not to exercise its discretion in favour of the applicant, it is not doing so on frivolous grounds. However under Order 42 rule 6 of the **Civil Procedure Rules**, it is not a condition for grant of stay that the applicant satisfies the Court that his appeal or intended appeal has overwhelming chances of success. In my view the omission to include such a condition is for good cause. It is in my view meant to insulate the Court from which an appeal is preferred from the embarrassment of holding a mini-appeal as it were. Accordingly whereas the Court of Appeal is in a better position to gauge the chances of success of an appeal or intended appeal, this Court in an application seeking stay of execution of its decision pending an appeal to the Court of Appeal is not enjoined to consider such condition. In fact it would be highly undesirable to do so, though it may superficially make reference to the grounds of the intended appeal. This was the position adopted in **Universal Petroleum Services Limited vs. B P Tanzania Limited [2006] 1 EA 486** where the Court held that:

“The granting or otherwise of an order of stay of execution under rule 9(2)(b) is at the discretion of the court and in the exercise of that judicial discretion the court as and where is relevant considers a number of factors, notably, whether the refusal to grant stay is likely to cause substantial and irreparable injury or loss to an applicant, whether the injury or loss cannot be atoned by damages, balance of convenience, and whether prima facie the intended appeal has likelihood of success. Above all, further to considering the above factors the court takes into account the individual circumstances and merits of the case in question...At this stage one has to be careful not to pre-empt the pending appeal and for that reason, the court has to discourage a detailed discussion of the weaknesses or otherwise of the decision intended to be impugned on appeal... There is also a danger in saying or making a finding that an appeal has an overwhelming chances of success.”

27. In **Mangungu vs. National Bank Of Commerce Ltd [2007] 2 EA 285**, the Court expressed itself on the issue as follows:

“Generally the merits of a party’s case in a stay application is not a particularly relevant matter for consideration at this stage. Although it is true that the Court under rule 9(2)(b) has discretion to stay execution, but only on grounds which are relevant to a stay order. Whether or not the appeal has good chances of success is a matter, which should be raised in the appeal itself. The correctness of the judgement should not be impugned in an application for stay of execution save in very obvious cases such as lack of jurisdiction.”

28. Accordingly, I will avoid the temptation to embark on such a potentially perilous and embarrassing voyage.

29. An attempt was made do distinguish judicial review applications from constitutional petitions. In order to determine this matter, one ought to appreciate the current Constitutional dispensation. In my view the decisions which were handed down before the Constitution of Kenya, 2010 must now be read in light of the provisions of the Constitution of Kenya 2010. Decisions such as **Republic vs. The Hon. Chief Justice & Others ex parte Roseline Nambuye Nairobi HCMisc Appl. No. 764 of 2004** which was handed down on 22nd April 2005 before the promulgation of the current Constitution may not be wholly reflect good law when the holdings are not in consonance with the provisions of the current Constitution. In that case **Nyamu, J** (as he then was) held that an attempt to enforce constitutional rights by way of a Notice of Motion seeking Judicial Review orders of certiorari, mandamus and prohibition rendered the application defective under the law. He further held that where the application seeks Constitutional remedies and reliefs by way of a judicial review application, the application is incompetent. Similarly, in **Republic vs. The Commissioner of Police Ex Parte Nicholas Gituku Karia Nairobi HCMA No. 534 of 2003 (HCK) [2004] 2 KLR 506, Nyamu, Ibrahim, JJ & Makhandia, AJ on 5/11/04** held that:

“It is improper to combine both judicial review applications with constitutional application,

as both are special jurisdiction with a set of special rules. And secondly the Constitution is the supreme law and all other laws must conform to it and its interpretation, methods of amendment or repeal is different from that of the ordinary Acts of Parliament.”

30. Our circumstances are reflective of what Lord Denning appreciated O’Reilly vs. Mackman [1982] 3 WLR 604, 623 when he expressed himself as follows:

“Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty.”

31. In our case, it is my considered view that this Machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

32. The current Constitution provides in Article 47 as follows:

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

33. It is therefore clear that the right to fair administrative action is no longer just a judicial review issue but a Constitutional issue as well. As was appreciated in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK) judicial review has been said to stem from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. In my view it is no longer possible to create clear

distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. It must be appreciated that the Fair Administrative Action Act, 2015, an Act enacted pursuant to Article 47 aforesaid has now expanded remedies which the Court exercising judicial review jurisdiction may grant to include declaratory orders, injunctions and compensation.

34. It is therefore my view and I so hold that no useful purpose may be served by trying to create substantial distinctions between judicial review applications and constitutional petitions. That was this Court's view in **Republic vs. Director of Public Prosecutions & 4 Others Ex parte - Senator Johnson Nduya Muthama [2015] eKLR** where it was held that:

“This Court no doubt has the power under Article 23 of the Constitution to grant conservatory orders. Whereas I agree that the provisions of Article 23 can only be invoked in situations where Article 22 applies, a determination of whether the issues in question fall under Article 22 cannot be determined simply on the basis of whether the proceedings are judicial review application or constitutional petition. The Court in determining such issue must look at the substance rather than the form of pleading. In this case the substance of the applicant's case is that his right to fair trial is likely to be violated. Whether that issue is brought by way of judicial review application or a constitutional petition it is clear that it is an issue which touches of the fundamental rights and hence a Bill of Rights issue. It follows that conservatory orders can if merited be properly granted.”

35. It was further contended that by virtue of sections 8 and 9 of the ***Law Reform Act***, Cap 26 Laws of Kenya, once the Court finally determines the application for judicial review, the only option available is that of appeal and the Court cannot revisit the said matter by way of a stay of the decision as that would amount to reversal of the final decision. With due respect, this position in my view is no longer tenable. In **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011]**, the Court held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the ***Civil Procedure Act*** which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the ***Civil Procedure Act*** is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

36. It is therefore my view that where the orders granted by the High Court be it in judicial review proceedings or civil proceedings are capable of being executed, the same are amenable to stay of execution. I gather support for this position from the decision of the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572**, where the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. In that case the High Court ordered the University to “*convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling.*” The Court of Appeal noted that there was no prayer before the Court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the University acting in obedience to the said order. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted.

37. However it is clear that all that this Court did in the judgement against which the Applicants intend to appeal was to dismiss the Applicant's application for judicial review. There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for judicial review, the superior court does not grant any positive order in favour of the Respondents which is capable

of execution. See Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004, Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006 and William Wambugu Wahome vs. The Registrar of Trade Unions & Others Civil Application No. Nai. 308 of 2005.

38. In this case the applicants, by their learned counsel's concession are seeking an order that until the hearing and determination of their Intended Appeal against the judgment delivered by this Court on 14th September, 2016 there be an order staying their arrest, harassment and/or in any other manner interference with the liberty and/or property and/or their prosecution. That order is however only directed at Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigations. Under Article 157 of the Constitution the authority to undertake public prosecution is conferred on the DPP unless Parliament exercises its powers under Article 157(12) which provides that:

Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

39. Since the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigations have no power to prosecute the applicants, granting orders prohibiting them from undertaking a function which they do not have would be superfluous unless it is contended that they and not the DPP intend to do so. Even if the orders sought herein could be competently granted, the DPP is not a party to these proceedings for the simple reason that he was never a party to the proceedings appealed from as by that time he had not made a decision on whether to charge the applicants or not. The decision to charge the applicants was therefore not challenged before me and this Court did not deal with it. Yet the effect of the grant of the orders sought herein would be to bar the prosecution of the applicants.

40. In their intended appeal, the applicants can only challenge the decision of this Court by which the Court declined to prohibit the Inspector General of the National Police Service and the Director of the Directorate of Criminal Investigation whether by themselves, their servants and/or agents from arresting, harassing and/or in any other manner interfering with the liberty and/or property of the ex parte applicants. It is however sought to stay the decision to prosecute the applicants which is clearly not the decision intended to be appealed against as that decision did not exist by the time the judgement being appealed against was delivered.

41. In Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J (as he then was) held:

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree.”

42. Where therefore the application for stay is directed to a decision against which the intended appeal is not directed, and cannot possibly be directed, a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score. See Muhamed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.

43. That was the position which was adopted in Republic vs. Director of Public Prosecutions & 4 Others Ex parte - Senator Johnson Nduya Muthama [2015] eKLR where the Court held that:

“ this case, if I understood the submissions made on behalf of the applicant correctly, he is seeking conservatory orders to restrain the Respondents from proceeding with the criminal

proceedings before the trial court...This Court however can only grant conservatory orders in respect of the orders against which an appeal is directed. In other words conservatory orders would only have the effect of preserving the *status quo* rather than granting fresh orders which confer benefit on the applicant which the applicant was not enjoying before the decision intended to be appealed against was made.”

44. In this case the DDP is not a party to these proceedings. In my view, whereas the Court ought not to be enslaved to procedural technicalities as Article 22(3) (d) of the Constitution provides:

the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.

45. In other words the Court cannot disregard the rules of natural justice under the guise of avoiding procedural technicalities. The law is clear that a Court of law ought not to grant orders adverse to a person without that person being accorded an opportunity of being heard. In **Adolf Gitonga Wakahia & 4 Others vs. Mwangi Thiongo 1 KAR 1028; [1986-1989] EA 589**, the Court of Appeal expressed itself as follows:

“The claim here was of a piece of land in the names of six people, five of whom are parties to the suit. When the hearing went on before the arbitration they were not present yet the district Officer proceeded to hear the matter in their absence, giving away a piece of land to the claimant. When judgement was delivered, all the defendants including those who were not present were condemned to pay costs to the plaintiff. Their complaint was laid down before the Judge on an application to review the judgement but the court overlooked this vital allegation that vitiates the judgement. It was up to the Court when it was pointed out in an application for review that Judgement was entered against some defendants without being heard, to hold that the whole arbitration proceedings were a nullity in the interest of justice and judgement should be set aside as to conduct arbitration without all the parties present, and while some had no notice of the hearing is a misconduct of an arbitrator under Order 45 , rule 15. On the face of it the legality of the award was questionable because all the parties were not present. The award could also be set aside under rule 15(1)(b) as the arbitrators misconducted themselves by allowing the proceeding to commence and in the end made an award that affected parties who were not before them to give evidence...It is basic law that no one should be condemned, to a Judgement passed against him without being afforded a chance of being heard...The chance is by being summoned but if he is served and chose not to attend, then he should be bound by the Judgement unless he can show cause why he failed to attend...The issue of the denial of the right to a hearing is a point of law, which underlie the proceedings the effect of which is to render the proceedings a nullity”.

46. The general rule is that a non-party to legal proceedings is not bound with the decision emanating therefrom and that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995**, **Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95**, **The Town Council of Ol’kalou vs. Ng’ang’a General Store Civil Appeal No. 269 of 1997** and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995**.

47. In my view to grant orders whose effect would be to prohibit the DPP from undertaking the process of prosecution against the applicant would be in vain as the DPP, not being a party to these proceedings would not be bound by the same. To do so would similarly violate the rules of natural justice and would amount to a contravention of Article 47 of the Constitution.

48. Having considered the foregoing, I find no merit in the instant application.

Order

49. In the result the Notice of Motion dated 21st October, 2016 fails and the same is dismissed with costs.

50. It is so ordered.

Dated at Nairobi this 20th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amoko for the applicants

Mr Ashimosi for the Respondents

Miss Macharia for Mr Ngatia for the interested party

CA Mwangi