



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION 21 OF 2014

IN THE MATTER OF ARTICLES 2 (1) (4), 3 (1), 10 (1) 2 (A AND B), 19, 20, 21, 22, 23, 24, 25, 27 (1) (2) (4) (5), 28, 29, 30, 35, 39, 47, 48, 49, 50, 51, 52, 159 (1) (2), 165 (3) (4) (6), 169 (1) (C) 241, 258, 259 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF KENYA DEFENCE FORCES ACT, (ACT NO. 25 OF 2012)

BETWEEN

GABRIEL KIRIGHA CHAWANA & 26 OTHERS PETITIONERS

AND

THE KENYA DEFENCE FORCES COUNCIL & 6 OTHERS RESPONDENTS

RULING

1. This is a ruling on two counter-applications by the Respondents and the Petitioners, respectively for stay of proceedings pending the hearing and determination by the Court of Appeal of an application for stay of execution pending appeal, dated the 8th May 2014 and for leave of court to serve orders of the court by substituted service through advertisement in the national daily Newspapers, dated the 12th May 2014.

2. In sum, the parties' respective cases are as follows. The Respondents urge that the proceedings of the court should be stayed pending the ruling of the Court of application on application for stay of execution of the rulings of this court to avoid the rendering of the Court of Appeal ruling nugatory and likely embarrassment of the two courts by conflicting rulings on the matter; and as regards the application for substituted service, that service should be effected upon the Attorney general in terms of section 13 of the

Government Proceedings Act and Order 5 rule 9 of the Civil Procedure Rules.

3. The Petitioners oppose the application for stay emphasizing the petitioners' right to liberty and contend, relying on the ruling of the court of 2nd May 2014, that on the test of ***Madhupaper International Ltd. v. Paddy Kerr***, (1985) KLR 840, the respondents application for stay before the Court of Appeal cannot be rendered nugatory and that the grant of stay will occasion the petitioners greater hardship than it will avoid; and on the application for substituted service, the petitioners point to the alleged frustrations in the service of the court orders by the military protocol for service upon the Chief Legal Officer of the Kenya Defence Forces on behalf of the named respondents and his unavailability for personal service as deponed in their counsel's affidavit of service.

4. I have considered the matter and I find that the twin issue before the court is whether the court will stay the proceedings in this petition pending the ruling of the Court of Appeal scheduled for the 29th May 2014 on an application for stay of execution of this court's rulings of 30th April 2014 and 2nd May 2014 and whether directions for substituted service of the court orders will be made with respect to the release orders for the petitioners who have complied with the terms of bail granted by the court.

5. The procedure for the enforcement of the Bill of Rights under which this petition is brought is in accordance with Article 22 (3) of the Constitution of Kenya set out in ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*** which provides the scope and objectives of the Rules, in material parts, as follows:

3.(1) These rules shall apply to all proceedings made under Article 22 of the Constitution.

(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

(3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realising the—

(a) rights and fundamental freedoms enshrined in the Bill of Rights; and

(b) values and principles in the Constitution.

(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

(a) participate in the processes of the Court; and

(b) comply with the directions and orders of the Court.

(8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

6. The court in ***David G. Katiba v. District Land Registrar, Murang'a*** (per Ngaah J) cited by counsel for the respondents, with respect, correctly found in an application for leave to apply for judgment against the government that in civil proceedings against the Government, the service of summons is regulated by section 13 of the Government Proceedings Act which provides that:

"13. All documents required to be served on the Government for purposes or in connexion with any civil proceedings by or against the Government in accordance with the provision of this Act shall be served on the Attorney General."

7. The Civil Procedure Rules 2010 has similar provisions with regard to the service of documents

including orders upon the government, as follows:

9. (1) *The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.*

(2) *Service of a document in accordance with the said section 13 shall be effected—*

(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or

(b) by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid, and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.

(3) All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite.

(4) In this rule, “document” includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.

8. To be sure, however, the correct section of the Government Proceedings Act in relation to **orders** of the court is section 21 of the Act but as the rule on Civil Procedure Rules on service (Order 5 r. 9 (4)) include “orders” in the term ‘document’ under the rule nothing turns on this distinction.

9. It is sensible for Counsel for the petitioners to have *ex abundanti cautela* sought to have the orders of the court served **personally** upon the respondents and the officer in charge of the holding institution in whose custody the petitioners are detained in view of the release orders and the attached bond for the execution by the petitioners in the same fashion as with an order for release under the Criminal Procedure, and for purposes of supporting contempt of court charges should the respondents fail to comply with the court order upon service.

10. The court takes the view that although constitutional petitions under Article 22 of the Constitution are not civil or criminal proceedings *per se* and they have their own procedure rules, ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013***, the provisions for service of court process which are substantially set out only under Order 5 of the Civil Procedure Rules may be adopted in the absence of specific provisions for service under the applicable rules. Accordingly, the court may adopt rule 9 of Order 5 of the Civil Procedure Rules which prescribes that the orders of the court be served upon the respondents, without necessity of personal service, through the Attorney General’s office in the manner set out in rule 9 (2) thereof.

11. Upon such service, the respondents are obliged to give effect to the orders for the release of the petitioners by causing their release upon signing their personal bonds in accordance with the terms of bail. To this end, the Respondents and their counsel are enjoined pursuant to the overriding objective of ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*** required to facilitate the compliance with the court order in accordance with Rule 3(6) which is in the following terms:

(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

(a) participate in the processes of the Court; and

(b) comply with the directions and orders of the Court.

12. It is against public interest that, in reality or by perception, the Respondents, as senior government officers and organs, may be seen to defeat, or delay compliance with, orders of the court by avoiding service thereof or by making it unduly difficult to serve the orders upon them. The Rule of Law which depends on respect for court orders as one of its pillars is one of the national values and principles of governance of the Constitution of Kenya under Article 10 (2) of the Constitution. Needless to remind the respondents, who were represented by upto five senior counsel and assistants, under Article (10) (1) of the Constitution, ***“the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.”***

13. However, the decision of ***Hunker Trading Company Ltd v. Elf Oil Kenya Ltd*** Court of Appeal Civil Application No. 6 of 2010, cited by the petitioners’ counsel, that disobedience of a court order that was intended for the same purposes as pursued by a subsequent application for stay of execution offends the overriding objective principle is relevant where, unlike the case here, an applicant for stay of execution is guilty of disobedience of court orders. In the present case the, orders of the court are yet to be served, hence the prayer for substituted service on the respondents.

14. The Court of Appeal has under Article 164 of the Constitution appellate jurisdiction over the High Court and this court respectfully acknowledges the authority of the Court of Appeal and the binding nature of its judgments and rulings upon the High Court and courts subordinate to it in accordance with the doctrine of precedent. There is nothing embarrassing about two conflicting decisions of a trial and an appellate court - inescapably the Court of Appeal sometimes overrules the trial court - and that is the nature of the appeal process; the appellate court has power to affirm, reverse, vary or set aside the decision of the trial court.

15. The Court of Appeal did not immediately after the hearing, as it could have, stay the release of the petitioners on bail. The court may, however, order stay of execution of the orders and proceedings before this court when the court rules on the application on the 29th May 2012. The only question that remains to be determined is whether the ruling of the Court of Appeal, if the respondents be successful, will be rendered nugatory by refusal in the meantime of an order for the stay of order for the release on bail of the petitioners.

16. As a matter of principle, this court takes the view that the ruling of the Court of Appeal would not be rendered nugatory even if that court were to order a stay of execution and proceedings as the petitioners may be rearrested and taken into custody if the court were to so order. However, at the practical level, the court must take note of the changed circumstances since the order for the release on bail of the petitioners was made on the 2nd May 2013, which call for a nuanced approach to the question of the respondents’ application being nugatory.

17. At the time of the order on the 2nd May 2014, the respondents had not filed an application for stay before the court or before the Court of Appeal, and, in refusing the application for interim stay pending the filing of formal application for stay, the court found that the formal application for stay before the court could not be rendered nugatory. It was not certain at the time whether the respondents would file their application for stay within the prescribed 14 days or at all. The court therefore upheld, as it is constitutionally mandated, the fundamental right to liberty for petitioners as persons whose liability to be tried by the court martial, and therefore subject to the limitations restricting bail under Article 24 (5) of the Constitution, has not been determined.

18. Today, however, the Respondents have already filed and argued an application for stay of execution before the Court of Appeal being Mombasa Court of Appeal Civil Application No. 9 of 2014, which seeks stay of this court’s rulings of 30th April 2014 and 2nd May 2014, respectively staying the court

martial proceedings pending the determination of the petitioners' petition herein and granting their release on bail in the meantime. The Court of Appeal is scheduled to make its ruling nine days from today on the 29th May 2014, and this court must accept that the decision of the Court of Appeal may go one way or the other; to grant or refuse stay of execution of the two rulings.

19. If the Court of Appeal grants the stay sought, it may make a further order for the reinstatement of the status quo if the petitioners may already have been released on bail. The mental anguish and emotional and physical distress that the petitioners would no doubt suffer in their release and subsequent re-arrest so shortly thereafter, and the logistical difficulties in re-arresting the whole 26 petitioners, should it become necessary, as well as the negative public perceptions that such a dramatic event would have on the administration of justice require that this court, in deference to the hierarchical superiority of the Court of Appeal, holds its hand for the short period of nine days awaiting ruling by the Court on the matter.

20. In these circumstances, where the superior appellate Court will be making its ruling on the matter in question shortly, on a scheduled date, the lower court not having made its decision on the matter, is, in my view, properly obliged to defer to the decision of the higher Court. This court will therefore await the decision of the Court of Appeal shortly to be rendered on the question whether there shall be a stay of execution of the rulings of this court pending the hearing and determination of the intended appeal. The orders of this court should therefore aim to hold the status quo pending the scheduled ruling of the Court of Appeal but allowing the immediate implementation of the orders if the appellate Court declines the stay of execution sought by the respondents. To ensure that the petitioners are not further delayed if the Court of Appeal permits bail granted to stay, such of the petitioners who have not processed their bail bond approvals will have them done in the intervening period.

21. Accordingly, for the reasons set out above, the court makes the following orders on the applications by the respondents and the petitioners dated, respectively, the 8th May 2014 and 12th May 2014:

An order for stay the proceedings of the court to the extent that further steps towards the hearing and determination of the Petition herein challenging the court martial proceedings against the petitioners, including the directions on the programme or schedule for the filing by the parties of replying affidavits and further affidavits in reply and the mention of the matter for directions as to hearing of the petition previously scheduled for the 4th June 2014, are stayed pending the ruling of the Court of Appeal set for the 29th May 2014.

- a. **An order for the service of the court orders upon the Respondents within the next seven days through the Attorney General in accordance with Order 5 Rule 9 of the Civil Procedure Rules.**
- b. **An order that the release upon bail of the petitioners will be delayed to take effect on 12.00 noon on the 30th May 2014 unless the Court of Appeal, in its ruling of the 29th May 2014, directs otherwise.**
- c. **The petitioners will be at liberty to move the court for contempt of court orders against the respondents any time after the 30th May 2014, if, in the absence of any contrary orders from the Court of Appeal, the respondents do not release the petitioners on the date and time appointed herein.**
- d. **For avoidance of doubt, the petitioners who have not processed their bail terms may in the meantime have their bonds considered and approved to facilitate release as ordered by the court herein, should that be the outcome of the pending Court of Appeal ruling.**

Dated and delivered this 20th day of May, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... for Petitioners

..... for Respondents

..... Court Assistant