REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 153 OF 2012

REPUBLIC ……..…….....…….....……..……APPLICANT

VERSUS

THE ATTORNEY GENERAL.....…...……1ST RESPONDENT

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

COMMISSIONER OF POLICE..…..…….....……..3RD RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION….....4TH RESPONDENT

AND

BAHADURALI HASHAM LALJI…….....….....INTERESTED PARTY

DIAMOND HASHIM LALJI AND AHMED HASHAM LALJIEX .....EPARTE

RULING

Introduction

1. By a Notice of Motion dated 30th August, 2014, the *ex parte* applicants herein, **Diamond Hashim Lalji** and **Ahmed Hasham Lalji**, seek the following orders:

> **1. That this application be certified urgent, its service be dispensed with the first instance and it be admitted for hearing during the current court vacation.**
>
> **2. That the honourable Court be pleased to grant the *Ex parte* Applicants conservatory orders to restrain the Respondents from investigating, arresting and prosecution them in Mombasa Chief Magistrate's Court case number 1172 of 2014 (Republic –vs- Ahmed Hasham Lalji & Diamond Hasham Lalji), or in any other court in the Republic of Kenya, initially,**
>
> **(a) pending the hearing and determination of this application inter parties, and subsequently,**
>
> **(b) pending the hearing and determination of their intended appeal from the Judgment and order of this Honourable Court delivered on 28th July 2014.**

3. That the Honourable Court be pleased to issue directions and/or orders as it may deem fit and expedient to grant in the circumstances.

4. That the costs of this application be provided for.

2. This ruling is the subject of prayer 2(b) above.

Applicants' Case

3. The application was supported by affidavit sworn by **Diamond Hasham Lalji**, the 1st applicant herein on 30th August, 2014.
4. According to the deponent, following the dismissal of the applicants' application for judicial review on 28th July, 2014, this Court removed the protection from arrest and prosecution which the applicants had enjoyed during the trial.
5. It was deposed that the applicants had applied for copies of the Court proceedings and filed a Notice of Appeal a copy of which was annexed and that the applicants would be able to compile the Record of Appeal and lodge the Appeal as soon as the proceedings were ready from the Court Registry.
6. However on or around 28th July, 2014 the deponent started receiving numerous calls from unknown people threatening him that he would be arrested any Friday, incarcerated over the weekend and for a long time when charged and would not make it out of police cells and that if he survived the ordeal he would be subjected to inhuman treatment and extreme humiliation during the period of incarceration as well as wide negative coverage by both electronic and print media.
7. He also deposed that he had received calls from people claiming to be journalists from gutter press threatening to write an exceptionally damaging story the moment they were arrested and charged.
8. According to the deponent, the 2nd applicant who is his brother is well over 70 years old and has had very serious health challenges ranging from diabetes, hypertension, several heart surgeries, a stroke, neurological disorders and memory loss which he had disclosed to officers of the 4th Respondent. He further added that the 2nd Respondent is frail and sickly and his health has taken a turn for the worse and currently suffers from almost total memory loss and has been admitted in hospital since. To the deponent the arrest, confinement and trial of the 2nd applicant would invariably lead to his death.
9. On his part he deposed that he was almost 70 years old and was suffering from a myriad of heart and health complications exacerbated by extreme stress and anxiety from the aforesaid threats. Further prior to the judgement he was suffering from back pain which has worsened leading to recommendation by doctors for urgent spinal surgical intervention for which he was due to be admitted on 28th August 2014.
10. It was contended that the intended appeal is not frivolous since it raises serious legal and constitutional issues and that the application was not filed with undue delay and that the Court has jurisdiction to grant the conservatory orders sought awaiting the hearing of the appeal.
11. In the deponent's view the grant of the orders sought would not in any way prejudice the Respondents but on the other hand the applicants would suffer grave prejudice if the application was not granted. Since if the appeal was to succeed after their prosecution the appeal would be rendered nugatory.
12. There was also a supporting affidavit sworn by the 2nd Applicant on 30th August, 2014 in which he corroborated the averments by the 1st applicant.
13. In support of the application **Mr Omuga**, learned counsel for the applicants submitted while reiterating the contents of the aforesaid affidavits that the applicants had filed Appeal No. 274 of 2014 on 29th September, 2014 which in the assessment of the applicants was not frivolous but was arguable. According to him, since the applicants were seeking a stay from the Court from which the decision appealed against arose, there was no need to discuss the merits and demerits of the appeal lest the Court determines the matter which had arisen and thus sit on appeal.
14. It was submitted that should the appeal succeed after the applicants have been prosecuted, the appeal would be rendered nugatory because the applicants would have gone through the process of

litigation including adverse publicity while the respondents would not suffer any prejudice if the orders sought were granted. To learned counsel if the appeal is not successful the Respondents would still be able to prosecute the applicants. Having taken 20 years to institute the prosecution, it was submitted that the Respondents cannot say they would be prejudiced if they waited for the appeal to be determined.

15. It was learned counsel's submissions that under Article 23(3)(c) of the Constitution, this Court has the powers to grant the conservatory orders sought as well as the inherent jurisdiction to do so in order to meet the ends of justice. In support of the submissions, **Mr Omuga** relied on inter alia **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** and contended that every element of a prosecution involves taxpayer's money which ought to be saved. He therefore urged the Court to grant the conservatory orders in the public interest. He also relied on **Anami Silerse Lisamula vs. IEBC [2014] eKLR**, **Berkeley North Market vs. Attorney General [2005] EA 34** for the proposition that this Court in the circumstances of this case is empowered to grant a stay. He further cited **Shah Hirji Manek Ltd vs. Premchand Shah HCCC No. 883 of 1998** and contended that it should not be more difficult to obtain stay before this Court than in the Court of Appeal.
16. On his part **Mr Waweru Gatonye**, learned Senior Counsel who appeared with **Mr Omuga** submitted that at the heart of the matter was the freedom and liberty of a Kenyan citizen and that it was his right to access court for protection of the freedom and freedom once lost can never be regained hence it was important to weigh public interest to prosecute a wrong done with the interest of having access to court for determination whether they should be prosecuted.
17. It was submitted that when a party is exercising undoubted right of appeal the court should effectuate a decision which may protect his right and secondly while the appeal is pending the court should make it possible for him not to suffer substantial loss. Learned counsel submitted that if the orders sought were not granted there would be two possible aspects of substantial loss being the loss of freedom and adverse health effects. It was therefore submitted that the applicants had demonstrated severe substantial loss if the orders sought were not granted. It was submitted that based on the authorities cited by the applicant, where there is a possibility of arrest and prosecution conservatory orders have been granted liberally.
18. Learned senior counsel was similarly of the view that in these kinds of applications the court ought not to go into the merits of the appeal as opposed to the jurisdiction of the Court of Appeal when exercising powers under rule 5(2)(b) of the ***Court of Appeal Rules***. However the Court of first instance is empowered to grant and injunction pending appeal even in cases where an application for injunction has been dismissed. It was submitted that this Court has powers to grant conservatory orders under both Article 23 of the Constitution and in the exercise of the Court's inherent jurisdiction as well as the Oxygen Rules under sections 1A and 1B of the ***Civil Procedure Act*** as well as under equitable principles. In support of the submissions **Mr Gatonye** relied on **Equity Bank Ltd vs. West Link Ltd [2013] KLR**.
19. It was submitted that Kenyans have confidence in the protection by the judicial system and that the applicants are prepared to furnish any necessary.

4th Respondent's Case

20. The 4th Respondent in opposition to the application filed the following grounds of opposition:

1. **The jurisdiction of the court is limited at this stage of the proceedings to granting an order of stay of the decision or order appealed from. It cannot stay the proceedings before a different court even if those proceedings had given rise to the judicial review application that was heard and determined by this court.**
2. **There is nothing in the judgement of the court dated 28th July, 2014 that is capable of being stayed in the manner contemplated by the Applicants.**
3. **The aforesaid Application does not satisfy the legal conditions for the grant of a stay pending appeal.**
4. **No material has been placed before the court which can assist the court in making a determination on whether or not the Applicants have an arguable appeal. The memorandum of appeal has not been annexed to the aforesaid application.**

5. **No material has been placed before the court to demonstrate the loss that may be suffered by the Applicants if the orders sought are not granted. There are constitutional safeguards to ensure that an accused person receives a fair trial. In the event that the prosecution's case turns out to be unmerited any loss suffered by the Applicants can be remedied by way of a claim for malicious prosecution.**

21. It was submitted, by **Mr Waudo**, learned counsel for the 4th Respondent that section 8(3) and (5) of the ***Law Reform Act*** prohibits and takes away the Court's jurisdiction to hear this application and that the provisions of the Civil Procedure Act and Rules thereunder do not apply to judicial review matters since Order 53 of the ***Civil Procedure Rules*** draws its authority from the ***Law Reform Act***. In support of this submission counsel referred to **R vs. Minister for Local Government & Another ex parte Mwahima (No. 2) [2002] 2 KLR**.
22. It was submitted by learned counsel that prayer 2 cannot be granted since the Court can only stay a decision being appealed from yet the said prayer seeks stay of proceedings in the lower court. It was contended that while the applicants aver that the appeal is not frivolous, they in the same breath urge the Court not to deal with the issue of merit .

1st, 2nd and 3rd Respondent's Case

23. On behalf of the 3rd Respondent, it was submitted by **Miss Masaka** that the Attorney General was wrongly sued in these proceedings since by dint of the provisions of Article 156 of the Constitution the Attorney General has nothing to do with criminal proceedings and investigations.
24. **Mr Muteti**, for the 1st and 2nd Respondents on his part submitted that there was no demonstration of the arguability of the appeal and since the Court did not grant the judicial review remedies which were being sought there is nothing to be stayed. According to him, the Court cannot determine whether the criminal case would be determined before the appeal is heard and determined. In his view the sooner the trial commences the better since crucial evidence may be lost by the delay.

Interested Party's Case

25. In opposition to the application, the 4th Respondent filed the following grounds of opposition:

1. The application is frivolous, vexatious and a classic case of abuse of court process.

2. The application is fresh re-litigation of issues that were heard and determined by the court.

3. There is a great public interest and constitutional imperative to have this matter proceed to trial and for the *Ex parte* Applicant to take pleas quickly.

4. Order 53 Rule 1 and 2 does not provide the judicial basis for the application and orders sought and Order 42 and 6 is inapplicable at all to judicial review issues, moreso one pending appeal.

5. The intended appeal is not arguable and has no chance of success. The *Ex parte* Application will be protected by his constitutional right and will suffer no prejudice.

26. On behalf of the interested party, it was submitted by **Mr Abdulahi Ahmednasir** learned Senior Counsel that the most fundamental issue was the radical attempt to transform what was purely a public law issue into a Bill of Rights issue. According to him the applicants filed a judicial review application challenging statutory powers to investigate the matter but were now arguing on the Bill of Rights. He submitted that this matter was not a litigation on freedom and liberty of a Kenyan citizen which rights are in ant case not absolute.
27. With respect to loss of freedom on being charged **Mr Ahmednasir** submitted that it was not

shown that the offences in question were not bailable so that the issue of losing freedom will not arise and charging the applicants is provided for in the constitution. With respect to health issue he submitted that the same is irrelevant as there is no immunity from prosecution based on health matters and in any case there are enough safety nets to protect the applicants' rights when undergoing the trial and even when in prison.

28. Learned counsel submitted that the applicants had avoided to deal with the arguability of the appeal test which is an objective test and the applicants could have easily stated so. In his view the applicants had no arguable appeal in light of the fact that leave was only sought to apply for one remedy. Learned counsel reiterated that parties must satisfy the Court that they had an arguable appeal. On the issue of public interest he submitted that when the organs of the state want to punish aggressions, public interest is for quick trials. With respect to adverse publicity, he contended that the same are incomparable to the need to punish aggressions.
29. It was submitted that the orders sought herein amount to hearing the case afresh. It was contended that Article 23 deals with situations falling under Article 22 which provides for the Bill of Rights yet this matter is not a Bill of Rights litigation hence conservatory order sought are not warranted. With respect to the provisions of the ***Civil Procedure Act*** it was contended that the same do not apply to judicial review applications since Order 53 is a self pollinating Order which does not borrow from other provisions of the said Act. In his view Article 159 of the Constitution does not deal with conservatory orders while Article 259 deals with construction of the constitution and not jurisdiction. Dealing with the decision of the Court of Appeal it was contended that the same was an escapist decision and that the inherent jurisdiction is a power of last resort and ought not to be invoked in every situation. With respect to cases emanating from elections, he submitted that the same are distinguishable since in criminal cases, they deal with persons who have transgressed the law.
30. It was submitted that once the Court gives a decision there is no room under the ***Law Reform Act*** for any other application which allows fresh re-litigation and an aggrieved party can only appeal. On publicity it was submitted that the Court cannot insulate the applicants from the incidents which come with a trial.
31. In support of his submissions learned counsel relied on **Commissioner of Lands vs. Kunste Hotel [1995-1998] EA CAK**, **Republic vs. Kennya Bureau of Standards and Others [2006] 2 EA 286**, **Welamondi vs. The Chairman Electoral Commission of Kenya [2002] KLR 285**, **Kenya African National Union vs. Mwai Kibaki & 6 Others [2006] eKLR**, **Republic vs. Public Procurement Administrative Review Board & 3 Others ex parte Kenya Electricity Generating Company Ltd [2010] eKLR**, **Republic vs. Communications Commission of Kenya [2001] EA 199**, **Republic vs. C Lutta Kasamani T/A Kasamani & Co Advocates ex parte United Insurance Company Ltd [2005] eKLR**, **Republic vs. Municipal Council of Mombasa & 2 Others ex parte Adopt-A-Light Limited [2008] eKLR**, **Republic vs. Kahindi Nyafula & 3 Others ex parte Kilifi South East Farmers Co-operative [2014] eKLR.**

Applicants' rejoinder

32. In their rejoinder, **Mr Gatonye** and **Mr Omuga** asserted that the Attorney General was joined to these proceedings because he was the one who closed the file and recommended its reopening and secondly because the charge sheet is signed by the police who is not an employee of the 3rd Respondent. It was contended that the Constitution broadens circumstances under which the orders sought herein can be granted and the Court ought to avoid limited interpretation of the ***Civil Procedure Act*** and Rules and that where there is no express provision the Court ought to invoke its inherent jurisdiction to ensure the ends of justice are met.

Determinations

33. I have considered the application, the supporting affidavits and annextures thereto, the grounds of opposition, the submissions and authorities relied upon.
34. It was 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 respect, this position in my view is nolonger tenable. In **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011],** the Court of Appeal 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. This was the position in **Equity Bank Limited vs. West Link Mbo Limited [2013] KLR** in which **Musinga, JA** held that inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate and that inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.

35. In my view the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. 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.
36. It must however be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in **Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529**, section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi Hccc No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.
37. Similarly, with respect to sections 1A and 1B aforesaid in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010**, it was held by the Court of Appeal that:

"If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "*double O*" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained."

38. However it is clear that all that this Court did in the judgement against which the Applicant 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.**
39. To dispel the notion that the above thinking was only sound before the current Constitution was promulgated in **Kwench Limited vs. Nairobi City County & 2 Others Civil Application No. Nai. 106 of 2014,** the Court of Appeal on 10th October, 2014 expressed itself as follows:

"On the second limb on whether the success of the intended appeal would be rendered nugatory if the order sought is not granted, it is our view that this aspect has not been established. The reason for this is that, having regard to the impugned ruling before us, it is questionable whether or not there is any order capable of being stayed by this Court, save for costs. What is apparent from the ruling of the High Court under Judicial review is that, the learned judge limited his determination to the definition of an author of a nuisance within the meaning of the Public Health Act, and whether the 3rd respondent's decision to issue an *Exparte* Notice to the applicant as the author of the nuisance was correct, but did not go on to consider the merits of the case. He left those for determination by the magistrate's court. In the ruling, the court did not order the applicant to do or abstain from doing any act for which a stay order would be efficacious. Considering that the learned judge only gave an opinion, after which a negative order of dismissal was issued, we find that there was nothing capable of being stayed."

40. It is therefore my view that unless the Court grants a positive order a party may not invoke the provisions of Order 42 rule 6 of the ***Civil Procedure Rules***. I have however read the decision in **Berkeley North Market and Others vs. Attorney General and Others [2005] 2 EA 34** in which the Court of Appeal allowed an application for stay notwithstanding the fact that the decision intended to be appealed from was a decision dismissing an application for judicial review. However, the Court did not seem to have addressed its mind to the decisions referred to hereinabove. In the absence of that this Court has no benefit of what the Court's view would have been had it addressed itself to the aforesaid authorities. I am therefore of the view that in light of the recent decision cited hereinabove decided by a bench in which there was one Judge who also sat on the bench which decided the **Berkeley's Case**, I am free to follow any of the conflicting decisions and I choose to follow the most recent one in **Kwench Limited vs. Nairobi City County & 2 Others** (supra).
41. Having so held I am of the view that this Court cannot invoke its inherent jurisdiction to grant orders of stay when the authorities hold otherwise.
42. It was however argued that since the applicants have not shown that their appeal is arguable this Court ought not to grant the orders sought. On this issue I agree with the applicants' view that under Order 42 rule 6 aforesaid it is not a condition for grant of stay that the applicant satisfies the Court that its appeal or intended appeal has 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.
43. The applicants have however contended that what they seek is a conservatory order hence the issue of lack of a positive order does not apply. The Respondents have on the other hand contended that since these proceedings were a judicial review application rather than a petition for enforcement of a Bill of Rights the provisions of Article 23 which apply to issues under Article 22 do not apply. 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

can not be determined simply based on 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 applicants' case is that their right to fair trial is likely to be violated. Whether that issue is brought byway 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.

44. On the circumstances in which a conservatory order will be granted, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

45. Clearly therefore in an application for conservatory order as opposed to an application for stay pending an appeal, the existence of a prima facie case plays a central role in the Court's determination without which the order sought may not be granted. A conservatory order is meant to preserve the *status quo* since as was held by a majority **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

46. In this case the applicants are seeking conservatory orders to restrain the Respondents from investigating, arresting and prosecuting them in Mombasa Chief Magistrate's Court case number 1172 of 2014 (***Republic –vs- Ahmed Hasham Lalji & Diamond Hasham Lalji***), or in any other court in the Republic of Kenya, pending the hearing and determination of their intended appeal from the Judgment and order of this Honourable Court delivered on 28th July 2014.

47. Even if this Court was minded to grant the stay it would not grant the order in the manner in which it is sought since to do so would insulate the applicants from any criminal proceedings notwithstanding its nature and the circumstances and not just the proceedings related to this application. Secondly, it is clear that the criminal proceedings which the applicants intend to stay are not pending before this Court and the appeal is not directed to the said criminal proceedings but rather to the decision of this Court dismissing the application for judicial review. In other words the applicants intend to stay proceedings against which no appeal is directed. The issue whether a Court would competently grant an order of stay as opposed to an injunction pending an appeal where an application for injunction has been dismissed was dealt with by the Court of Appeal in **Umoja Service Station Ltd & 5 Others vs. Hezy John Ltd Civil Application No. Nai. 39 of 2006,** where it stated that a prayer seeking for the stay of an order dismissing an injunction application is futile as the grant of the same would not in any way advance the applicants' cause. In other words what the Court meant was that the grant of an order of stay would only have the effect of maintaining the status quo and since the applicant was denied what it did not have in the first place when it came to court a stay would only have the effect of maintaining the same status quo which would be of no use to the applicant.

48. In **The Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another**

Civil Application No. Nai. 273 of 2007, the Court of Appeal expressed itself as follows:

"It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2)(b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and the Court of Appeal has no jurisdiction to entertain it...Where the superior court merely upheld the preliminary objection and as a consequence stuck out the application for judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs. Moreover since the order of stay is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by Rule 5(2)(b), the Court has no jurisdiction to grant such an order since the orders sought do not relate to what the superior court decided."

49. Similarly, 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. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... 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."

50. Where therefore the application for stay is directed to a decision against which the intended appeal is not 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.**

51. In this case whereas the Court may grant conservatory orders as opposed to a stay, the applicants have not fulfilled the conditions for grant of the said order since they have not addressed the issue whether or not they have a *prima facie* case, in this case a *prima facie* appeal. In other words whereas the applicants were properly in order not to dwell on the merits when seeking an order for stay of execution a relief which this Court has found is not available to the applicants in the circumstances of this case, the applicants ought to have addressed the Court on whether they had a *prima facie* arguable appeal which issue, apart from bare averment in the affidavit they declined to address despite prodding from the Respondents and the interested party.

52. Apart from the competency of the application for stay, in an application for stay pending appeal to the Court of Appeal, one of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. In this case there are two grounds advanced towards this requirement. The first ground is that the applicants are elderly and in ill health. Whereas that may be a perfect ground for grant of bail, in my view that is not a ground for staying criminal proceedings since as recognised by all the parties there are sufficient constitutional and legal safeguards in our judicial system to protect persons undergoing criminal trials. On this point one needs to remind oneself of the decision in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** to the effect that:

"In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

53. Similarly, the applicants' fears that they are likely to be arrested on Friday and kept in custody over the weekend if real can be properly addressed by seeking appropriate protective reliefs from the Court in form of anticipatory bail. On the issue that the applicants are likely to be denied freedom and liberty I am not convinced that the applicants if arrested will not be admitted to bail. Again with respect to loss of memory the trial court would be in a better position to determine whether the applicants can stand trial. In other words I am not satisfied that sufficient material has been disclosed before me to enable me find that substantial loss is likely to be occasioned to the applicants if the orders sought herein are not granted. It must always be remembered that in an application for stay pending appeal the onus is always on the applicant to satisfy the Court that the orders sought ought to be granted.
54. With respect to adverse publicity it was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69:**

"The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence. However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial..."

55. I am also in agreement with the sentiments expressed in **Dream Camp Kenya Ltd vs. Mohammed Eltaff and 3 Others Civil Appeal No. 170 of 2012** that:

"Every litigation is inconvenient to every litigant in one-way or another. Also no one in his right senses enjoys being sued and ipso facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by way of costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs."

56. As was held in **Jago vs. District Court (NSW) 106**:

"..it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. This is a

lofty aspiration but it is not the law."

57. Accordingly the mere fact that the criminal trial may attract some media publicity some of which may not be flattering to the applicants does not necessarily warrant the stay of criminal proceedings.
58. Having considered the application herein it is my view that the instant application cannot succeed.

Order

59. In the premises, I find no merit in the Notice of Motion dated 30th August, 2014 and the same is dismissed with costs to the Respondents and interested party.
60. It is so ordered.

Dated at Nairobi this 28th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Waweru Gatonye with Ms Ondieki and Mr Omuga for the Applicants

Mr Muranga for Mr Muteti for the 2nd Respondent

Cc Patricia