



**Mwakio & another v Senior Resident Magistrate’s Court Mombasa;  
 Director of Public Prosecutions (Interested Party) (Criminal Petition  
 E002 of 2021) [2024] KEHC 239 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 239 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT MOMBASA  
 CRIMINAL PETITION E002 OF 2021  
 A. ONG’INJO, J  
 JANUARY 18, 2024**

**BETWEEN**

**CHARLES MWAKIO ..... 1<sup>ST</sup> PETITIONER**

**JULIA KIMBIO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SENIOR RESIDENT MAGISTRATE’S COURT MOMBASA ..... RESPONDENT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**

**RULING**

1. On 31<sup>st</sup> day of May 2023, this Court dismissed the Applicants’ petition for lack of merit. Subsequently application dated 12<sup>th</sup> July 2023 was filed under Certificate of Urgency seeking that pending hearing and determination of the application interpartes an order of injunction do issue pending hearing of Court of Appeal CR. A. No E001 of 2023 to stop intended arrest and arraignment in court of the Petitioners to answer to charges of manslaughter or any other charge related to the death of Leonard Baraka Mramba.
2. It was also sought that the DPP be restrained from arraigning or changing the Petitioners pending hearing and determination of Appeal No E001 of 2023. This application is supported by grounds on the face of it and affidavit of Julia Kimbio the 2<sup>nd</sup> petitioner/2<sup>nd</sup> Applicant herein.
3. Directions were taken that application be canvassed by way of written submissions. When matter came up for directions on 1/08/2023, it was indicated that the Petitioners/Applicants were scheduled to appear in court on 4/10/2023 for plea. The Respondent was then granted 7 days to respond to the Application and matter fixed for further mention on 25/09/2023 to confirm Respondent had filed



response and Petitioners' advocate had filed further affidavit. By 25/09/2023 the Applicants' counsel had not filed further affidavit and the Respondent had not responded to the Petition.

4. On 12/10/2023, Mr. Gikandi Advocate said he had filed further affidavit and filed Notice of Appeal. Since the Respondent had not filed Replying Affidavit an order of status quo was made. This court then gave direction for filing of submissions and set date for ruling on 7<sup>th</sup> December 2023. When this court did not find the Petitioners' further affidavit and submissions in the file the ruling on application dated 12<sup>th</sup> July 2023 was deferred to 18<sup>th</sup> January 2024. Upon inquiries from the registry, it was established that both the further affidavit sworn on 11<sup>th</sup> October 2023 and Petitioners' submissions dated 10<sup>th</sup> November 2023 had been filed on 13<sup>th</sup> November 2023. The Respondents did not file a response or submissions to the application.
5. This court has considered the application, the supporting affidavit, the further affidavit and submissions by the Applicants/Petitioners and makes the following findings: -
6. When the Petition dated 17<sup>th</sup> November 2021 was dismissed, it was on account that this court did not find that the Petitioners' fundamental rights and freedoms had been violated by the decision in Inquest No 12 of 2017 that they should be charged with the offence of causing death and that it was in the province of the Director of Public Prosecutions to decide whether or not to proceed and charge the Petitioners.
7. Having made this finding, it would be contradictory to suspend the prosecution of the applicants pending hearing & determination of an appeal on the grounds that there is an overwhelming chance of success in the appeal. If that was the case it would have been very easy to say so and stop the prosecution of the Applicants/Petitioners in the petition.
8. The Court of Appeal would be in a better place to make a finding as to whether or not the Applicants' appeal raises triable issues with overwhelming chances of success. I find this application has no merit and is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 18<sup>TH</sup> DAY OF JANUARY 2024.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Etropia – Court Assistant

Mr. Ngiri for the Interested Party

Mr. Gikandi Advocate for the Applicants/Petitioners

No appearance for the Respondent

No appearance for the Applicants

Mr. Gikandi Advocate: I am going to file an application in the Court of Appeal. I seek for a stay for 2 months as I pursue the application.

Mr. Ngiri: We are opposed to grant of an order of stay.

Order: The court has declined to grant stay and/or an injunction in a substantive application. The oral application is a repeat of the one which a ruling has already been delivered.

**HON. LADY JUSTICE A. ONG'INJO**



**JUDGE**

