



No. 35

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 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

0. The unsuccessful respondents have sought a stay of execution pending appeal from the ruling of the court made on the 30th April 2014 granting a stay of proceedings against the petitioners in the courts martial and an order for the release of the petitioners on bail pending the hearing and determination of the Petition. The respondents said they were aggrieved by the ruling and that they intended to exercise their right of appeal and therefore sought a stay of execution of the ruling contending that the appeal had chances of success. The specific request is made under Rule 32 (2) of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, (otherwise known as the Mutunga Rules) for a stay of execution for 14 days to bar the release of the petitioners and allow the respondents to file a formal application in that regard.
0. The petitioners opposed the informal application for stay, requiring an opportunity to respond to the application through a formal application and protesting that no prejudice or real danger had been shown by respondents to warrant the grant of the informal stay of execution because the petitioners are required to deposit their passports in the court martial among other terms of the

bail.

0. Rule 32 of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** is in terms as follows:

“32. (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.”

0. Although the principles for the grant of stay of execution under Rule 32 are not set out in the rule, I consider that same must accord to the traditional principles adopted by the court in the exercise of the jurisdiction to stay its own orders or to grant an injunction, as appropriate in the circumstances of the case, pending the appeal.
0. The Kenya Court of Appeal in ***Madhupaper International Ltd v. Paddy Kerr*** (1985) KLR 840 applied in Kenya the principles for the grant of injunction pending appeal as observed by Megarry J in ***Erinford Properties Ltd. v. Cheshire County Council*** (1974) 2 ALLER 443 that:

“When a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not rendered nugatory.”

The Court of Appeal, however, observed that –

“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.”

0. Accordingly, for the court to grant a stay or injunction pending appeal, the applicant must demonstrate that-
- a. There is a right of appeal;
 - b. The appeal is not frivolous; that there is an arguable case or serious questions to be presented to the appeal court for determination;
 - c. If stay is not granted the appeal will be rendered nugatory and correlatively that if stay is granted it will not cause greater hardship than it avoids.
0. At this informal stage of the application for stay of execution, the court may presume that the respondents have a right of appeal and proceed to consider whether there should be a stay pending the filing of a formal application where the respondents must fully satisfy the aforesaid requirements for the grant of stay or injunction pending appeal.
0. The question now before the court therefore is whether there is justification for the exercise of the discretion to grant stay on an informal application pending the filing of a formal application - whether there is any real danger or prejudice to be suffered by the respondents that cannot await remedy by an order after the hearing of a formal application where the petitioners have full opportunity to respond to the application. In its determination, the court must consider whether the grant of the stay of execution at the informal stage will cause greater hardship than it will avoid or whether its refusal will render the respondent’s formal application and the appeal nugatory.
0. What real danger or prejudice do the respondents/applicants suffer? The respondents only said they wanted to bar the release of the petitioners. No contest was raised on the part of the ruling that ordered stay of the courts martial for sixty days within which time to determine the High Court petition. The court ruled that the petitioners were to be released on bail pending the determination of the High Court petition conditional upon a bond with one surety of Ksh500,000/-, the deposit of their passports and their fortnightly report to the respondents’

- military bases. Apart from the contention that the respondents' appeal had chances of success, the respondents did not offer any compelling reasons to justify the refusal of bail to the respondents. The argument that the petitioners are not entitled to bail by virtue of the limitation with regard to persons serving in the Kenya Defence Forces under Article 24 (5) of the Constitution does not avail the respondents because the issue whether the petitioners are persons serving in the Kenya Defence Forces is one of the core disputes between the parties to be resolved by the constitutional petition. In my view, the respondents' formal application for stay of execution shall not be rendered nugatory as the petitioners who shall then be out on bail may have their bail cancelled upon successful application and they be retaken into custody.
0. On the other hand, the grant of the stay will prolong the detention of the petitioners pursuant to court martial proceedings whose legality and constitutionality in terms of the provisions of the Kenya Defence Force Act and the Constitution of Kenya 2010 are the subject of the challenge in the pending constitutional petition herein.
 0. Before the determination of the central question in these proceedings, that is whether the petitioners are persons serving in the Kenya Defence Forces to warrant the limitation of their fundamental rights and freedoms, the court must in applying the provisions of the Bill of Rights, in accordance with Article 20 (3) (b) of the Constitution, '*adopt the interpretation that most favours the enforcement of a right or fundamental freedom.*' The court, in enforcing the right to liberty contained in the various provisions of the Bill of Rights including the right to freedom (art.29), to freedom from slavery and servitude (art.30), to movement (art.39) and to bail (art.49), therefore declines to stay execution of the ruling of the court of 30th April 2014 with respect to the order for the release on bail of the petitioners pending the determination of the petition challenging the court martial trials.
 0. However, a stay of the order of the court for the hearing of the petitioners' petition within 60 days does no hardship or prejudice to the petitioners or respondents if the court martial trials do not proceed in the meantime. I would therefore grant a limited stay of 14 days with regard to the direction that the petition proceeds to trial within 60 days pending hearing and determination of a formal application for stay of execution.
 0. Accordingly, for the reasons stated above, I make the followings orders on the respondents' informal application for stay of execution of the ruling of the court made on 30th April 2014:
 - a. ***The application for stay of execution of the ruling of the court with respect to the release on bail of the petitioners is declined.***
 - b. ***The application for stay of the ruling of the court with respect to the direction for the hearing of the petitioners' petition within 60 days is granted for 14 days to the effect that the petition shall not be fixed for hearing before the determination of a formal application for stay to be filed by the respondents within 14 days.***
 - c. ***For avoidance of doubt, the court martial proceedings remain stayed until further orders of the High Court or the Court of Appeal on appeal from the ruling of 30th April 2014.***
 0. Costs in the cause.

Dated and delivered this 2nd day of May, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kamunda, Mr. Kurauka and Mr. Mwanyale (and holding brief for Mr. Mwalimu and Mr. Ondieki)
for Petitioners

Mr. Jami and Mr. Ngari for Respondents

Mr. Obart - Court Assistant