



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & WARSAME, JJA)

CIVIL APPLICATION NO. 67 OF 2018 (UR 59/2018)

BETWEEN

DR. FRED OKENGO MATIANG'I, CABINET SECRETARY,

MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....1ST APPLICANT

RTD MAJOR GORDON KIHALANGWA

DIRECTOR OF IMMIGRATION.....2ND APPLICANT

JOSEPH BOINNET, THE INSPECTOR GENERAL OF

POLICE THE NATIONAL POLICE SERVICE.....3RD APPLICANT

GEORGE KINOTI, DIRECTOR OF

CRIMINAL INVESTIGATIONS.....4TH APPLICANT

SAID KIPROTICH, OFFICER IN-CHARGE,

THE FLYING SQUAD OF KENYA POLICE SERVICE.....5TH APPLICANT

OCPD, OFFICER COMMANDING POLICE DIVISION

JOMO KENYATTA INTERNATIONAL AIRPORT.....6TH APPLICANT

ATTORNEY GENERAL.....7TH APPLICANT

AND

MIGUNA MIGUNA.....RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS....1ST INTERESTED PARTY

(An application against the Ruling and Orders of the High Court in Nairobi

(Justice E. Mwita) dated 26th February 2018

in

RULING OF THE COURT

1. This is an application for stay of execution pending appeal against the Ruling and Orders of Justice E. Mwita delivered on 26th February, 2018 in the High Court at Nairobi.
2. The genesis of this application is that the respondent filed an application dated 12th February, 2018 seeking several conservatory orders ranging from suspension of the declarations made under Sections 33(1) and 43 of the Act, suspension of the declaration made through Gazette Notice VOL CXX No. 15 of 30th January, 2018 declaring National Resistance Movement (NRM) a criminal organization, reinstatement of the respondent's Kenyan passport and facilitation of the respondent's re-entry into the country, and an order directing that the Chairperson of Kenya National Human Rights Commission or her representative be allowed access to the Immigration and Customs Clearance areas at the Airport of entry of the respondent's choice, to observe the extent of observance by the respondents of relevant constitutional, human rights and immigration laws applicable to the respondent's right to re-enter Kenya.
3. The respondent's application was supported by an affidavit sworn by one of the respondent's advocates, Mr. Nelson Havi. It was the respondent's position that on 2nd February, 2018, security officers broke into his home in Runda Estate, Nairobi using all manner of force, ransacked the house, dragged the respondent out of the house and drove with him to various police stations including Kiambu, Githunguri and Lari in Kiambu County.
4. The respondent contended that following this arrest, his advocates applied for and obtained orders from the Criminal Division of the High Court for his release on a cash bail of Kshs. 50,000. The orders were made on 2nd February, 2018. The court ordered that the respondent attend Court on 5th February, 2018 for inter parties hearing. The 3rd and 4th applicants did not comply with that order for they neither released the respondent nor produced him in Court on 5th February, 2018.
5. That on 6th February, 2018, the applicants' agents took the respondent to Kajiado Law Courts intending to charge him before a resident magistrate. The learned magistrate declined to take plea on being informed that the respondent was a subject of an application before the High Court and directed that the respondent be produced before the High Court before 3 p.m. on the same day. The respondent was to be returned to the Magistrate's Court for plea on 14th February, 2018.
6. The respondent further contended that he was not produced before the High Court as ordered by both the High Court and the Magistrate. The respondent was declared a non-citizen, and his passport withdrawn. He was also declared a prohibited immigrant, driven to Jomo Kenyatta International Airport and deported to Canada where he still is to date.
7. Based on the above the respondent filed the application against the applicants contending that those actions were unconstitutional and illegal thus the request for their suspension pending the hearing and determination of the petition.
8. The Court having duly considered the application, was satisfied that the respondent had raised substantial constitutional and legal questions regarding the actions taken against him by the respondents to justify this Court's intervention.
9. The Court granted the following Orders;
 - a. *A conservatory Order suspending the declaration by Dr. Fred Okeng'o Matiangi, made on 6th February, 2018 under Section 43(1) of the Kenya Citizenship and Immigration Act 2011 declaring Miguna Miguna not being citizen of Kenya and whose presence was contrary to national interests, be removed from Kenya, pending the hearing and determination of this petition.*
 - b. *A conservatory Order suspending the decision by Major (Rtd) Gordon Kihalangwa made on 5th February suspending Joshua Miguna Miguna's Kenyan passport No. A116842, pending the hearing and determination of the petition.*
 - c. *A conservatory Order suspending the order by Dr. Fred Okeng'o Matiangi made and published in Gazette Notice No. 932 of 30th January, 2018 declaring National Resistance Movement (NRM) a criminal organization, pending the hearing and determination of the petition.*
 - d. *An order directing the Director of Immigration, and in his absence, the most senior officer in the Directorate of Immigration to issue Joshua Miguna Miguna, with travel Documents to enable him re-enter and to remain in Kenya pending the hearing and determination of this petition. In default, Joshua Miguna Miguna, be at liberty to use the Canadian passport to re-enter and remain in Kenya pending the hearing determination of the Petition.*
 - e. *An Order directing the Applicants to facilitate Joshua Miguna Miguna's re-entry into Kenya on a date and time notified by Joshua Miguna Miguna.*
 - f. *An Order that during Joshua Miguna Miguna's first re-entry to Kenya, the Chairperson of Kenya National Commission On Human Rights, the 1st Interested Party, or her representative, be allowed access to the Immigration and Customs Clearance Areas at the Port, in order to observe the extent of the respondents' observance of the relevant constitutional, human rights and immigration laws applicable to the Joshua Miguna Miguna's right to re-enter Kenya.*

g. Parties to fast track the petition for hearing as a matter of urgency.

h. Costs of the application to the petitioner

i. This order may be served by publishing it once either in *The Standard* or *Daily Nation* newspapers at the Joshua Miguna Miguna's expense."

10. The applicants were aggrieved by this decision and filed the instant application seeking stay of execution of the decision and orders aforementioned herein above pending appeal.

11. The grounds relied on in the application are that if the orders sought are not granted, the appeal will be rendered nugatory in that the status quo *ante* the decision of the superior court would have been reversed as the orders of the superior court would have been effected.

12. The respondent did not file a replying affidavit neither did the parties file written submissions.

13. This Court has carefully considered the application before it.

14. It is trite that for this Court to grant an order of stay of execution, the applicant must demonstrate that its intended appeal is arguable and that if stay is not granted, the intended appeal would be rendered nugatory in the event that the appeal succeeds. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others (2013) eKLR**).

15. The first issue for consideration is whether the applicants have an arguable appeal. An arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a Court; a single bona fide issue would suffice. (See: **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001**).

16. On the first limb, the applicants have put forth Six (6) grounds relied on in the application. It is noteworthy that there is no draft Memorandum of Appeal attached to the application but this Court has in the past considered the position and rendered itself on the same. In the case of **Somak Travels Limited -versus- Gladys Aganyo (2016) eKLR** this Court held as follows:-

“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.”

17. In respect of the matter at hand, the Applicant seems to have pleaded its case on the face of the application and in clause 6 of the affidavit in support thereof. One of the distinctive arguable point, for instance, is whether the Learned Judge proceeded to give an order suspending the declaration of the National resistance Movement as a criminal organization in the absence of either submissions being made or evidence adduced in support of the same.

18. These are definitely not idle grounds and deserve to engage the mind of this Court on appeal. The limb on arguability has therefore been demonstrated.

19. On the nugatory aspect, the Court has to consider whether the applicants have demonstrated that unless the orders sought are granted, the intended appeal would be rendered futile or a mere academic exercise.

20. The Applicants in their application contend that if the orders sought are not granted, the appeal will be rendered nugatory in that the status quo *ante* the decision of the superior court would have been reversed as the orders of the superior court would have been effected.

21. It is not sufficient to merely state that the appeal will be rendered nugatory if the orders sought are not granted. The applicant must demonstrate to the Court the 'how' aspect. It is not obvious to the Court the harm, prejudice or loss the applicants would suffer, if the respondent were to return to the country pending the hearing of the appeals pursuant to the orders that made by the learned Judge. The applicants have in our view dismally failed to demonstrate the nugatory aspect.

22. As the applicants are required to demonstrate both limbs, having failed to demonstrate the nugatory aspect consigns their application to the realm of dismissal. Accordingly, we dismiss this application with no order as to costs as the same was not defended.

Dated and delivered at Nairobi this 4th day of June, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR