



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & WARSAME, J.J.A.)

CIVIL APPLICATION NO. 386 OF 2018 (UR. 314/2018)

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 OCPD.....5TH APPLICANT
 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
 LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

(Being an Application against the Judgment and Decree of the High Court (Justice E. Mwita) delivered at Nairobi on 14th December 2018

in

Petition No. 51 of 2018)

RULING OF THE COURT

1. This is an application for stay of execution pending appeal against the Judgment of E. Mwita, J delivered in Nairobi on 14th December, 2018.
2. The genesis of this application is that the respondent herein filed before the High Court a Petition seeking a myriad of reliefs. In the said petition, the respondent claimed that on 2nd February, 2018, a group of police officers led by the 3rd, 4th and 5th applicants broke into his house at Runda Estate, Nairobi, arrested him and drove off with him in a convoy of police cars and took him to Kiambu Police Station where he remained for some time. They later moved him to Githunguri Police station before taking him to Lari Police station where he was held for several days.

3. The respondent contended that he was held incommunicado for most of the period he was in police custody and was subjected to torture; inhuman treatment; was made to stand for long periods and was only given food twice for the entire period under incarceration and was later moved to the Internal Container Depot Police Station in Industrial Area Nairobi for another round of confinement before he was taken to Kajiado Law Courts with an intention to charge him.
4. It was averred that the respondent was to be taken to the High Court but instead, was taken to JKIA and deported to Canada since he had been declared a prohibited immigrant and his passport suspended by the 1st Respondent on grounds that he was an unwanted person in the country and had to be deported out of the country.
5. Based on the above the respondent filed the petition challenging the various acts committed by the 1st to 6th applicants herein or under their watch on grounds that they not only violated the respondent's rights and fundamental freedoms, but also breached the Constitution of Kenya and the rule of law.
6. **Dr. Fred Matiang'i**, the 1st applicant herein, opposed the petition and filed a replying affidavit deposing that as the Cabinet Secretary responsible for matters relating to citizenship and management of foreign nationals, he did not mastermind the destruction of respondent's property and that under section 97 of the repealed Constitution, a citizen who acquired citizenship of another country lost the Kenyan citizenship, that he was informed by the 2nd applicant that although the respondent was a Canadian citizen, he had not renounced the Canadian citizenship prior to being issued with a Kenyan passport. He contended, therefore, that the respondent illegally obtained the Kenyan passport contrary to express provisions of the repealed constitution through political patronage.
7. **Retired Major Gordon Kihalangwa**, the 2nd applicant filed a replying affidavit deposing that he was mandated by the Kenya Citizenship and Immigration Act to advise the 1st applicant on matters relating to grant and loss of citizenship, issuance of passports and travel documents as well as on declaration and removal of prohibited immigrants and undesirable persons from the country. That according to the record held by his department, the respondent was born on 31st December, 1962 in Nyando, Kisumu County; that sometime in 1987, the respondent applied for a Kenyan Passport to enable him travel to Havana Cuba for the 15th Congress of International Union of Students and the World Students' Conference as a student leader, but his application was rejected owing to adverse reports from the office of Director of Security Intelligence implicating the respondent in involvement in student riots at the University of Nairobi in the same year, that the department of Immigration then wrote to the respondent on 15th December, 1987 informing him of the decision to reject his application.
8. The 3rd, 4th, 5th and 6th applicants filed a replying affidavit through **Chief Inspector Robert Owino**, sworn on 16th February, 2018 deposing that on 30th January, 2018, the 1st applicant issued **Gazette Notice Vol. CXX-No 15** outlawing **National Resistance Movement (NRM)** by declaring it a criminal gang. He deposed that subsequent to that declaration, the respondent held a press conference on 1st February, 2018 declaring himself the leader of **NRM** which was by then an outlawed organization and that section 35 of the National Police Service Act allowed the DCI to collect intelligence on criminal activities including investigating crimes and maintaining law and order; that on the basis of the above facts, a search warrant was obtained vide **Misc Criminal case No 375 of 2018** authorizing searches at the respondent's premises.
9. According to **CI Owino**, a search was conducted at the respondent's premises on 2nd February, 2018 and the respondent was arrested for his association with an out lawed criminal organization; that the respondent was taken to different police stations in search of space and for his own safety away from crowds that kept on swelling at police stations whenever they learnt of the respondent's presence at a particular police station; that the respondent was held together with other inmates; that police cells were standard with facilities required by those in custody, that the respondent was not denied access to his property and that he was accorded all his rights as a suspect. It was CI Owino's deposition that the respondent was charged in **Criminal Case No 174 of 2018** with the offence of being present and consenting to administration of an oath which amounted to committing a capital offence namely treason under Section 59(a) of the Penal Code.
10. **Kenya National Commission of Human rights**, the 1st Interested Party, through an affidavit sworn by Bernard Mogesa its secretary/CEO filed an affidavit, deposing that it was empowered under Article 59(1) (d) of the Constitution to monitor, investigate and report on the observance of human rights in all respects including by national security organs, that it received a complaint on 2nd February, 2018 that police officers had forcefully broken into the respondent's house and destroyed property in violation of Article 40 of the Constitution; arrested the respondent and took him to an undisclosed location. It was deposed that although court orders had also been issued to have the respondent produced in court, none had been complied with but instead, the respondent was deported outside the jurisdiction of the court, a threat to the Constitution and the rule of law, that following court orders of 26th February, 2018 allowing the 1st Interested Party's to access immigration areas to monitor the respondent's re-entry into the country, the commission observed the respondent's re-entry on 26th March, 2018 and compiled a report documenting various human rights violations; that between 2nd February, 2018 and 29th March, 2018, the applicants jointly and severally disobeyed court orders and violated the respondent's fundamental rights and freedoms.
11. **The Law Society of Kenya (LSK)**, the 2nd Interested Party through Mercy Wambua, its C.E.O. filed a replying affidavit deposing that the respondent is an advocate of the High Court of Kenya; that the 2nd Interested Party had the mandate to uphold the Constitution and advance the rule of law among others, that on 2nd February, 2018 police officers under the command and direction of the 5th applicant forcefully invaded the respondent's house and arrested him and that they not only held the respondent incommunicado in various police stations but also ignored various court orders. LSK also stated that the respondent was deported from the country on 6th February, 2018 in defiance of valid court orders, that the applicants jointly and severally failed to facilitate the respondent's re-entry into the country in breach of court orders and that the 1st to 6th applicants' conduct violated the Constitution and the respondent's fundamental rights and freedoms.
12. According to the Court, the three questions that arose for determination, were; whether the respondent was a citizen of Kenya; whether the 1st and 2nd applicants acted lawfully in declaring the respondent a prohibited immigrant and suspending his passport and whether the respondent's rights and fundamental freedoms were violated.
13. The Court found that the respondent was illegally held and later deported from the country and his rights and fundamental freedoms were also grossly violated as a consequence.

14. The petition was allowed and the Orders of Certiorari, Mandamus and Declarations sought granted. General Damages of Kshs. 7 Million were awarded and Kshs. 270,000/- as damages for his damaged/ vandalized house together with costs.

15. Being aggrieved by this decision, the applicants filed the instant application seeking stay pending appeal. The supporting affidavit was sworn by Alexander Muteshi, the Director of Immigration Services and successor to the 2nd applicant herein.

16. Mr. Muteshi avers that the intended appeal has excellent chances of success and it raises important points of law as set out in the Memorandum of Appeal and that unless the Court intervenes, the decision made by the High Court exposes the 1st to 6th applicants to a threat of being held in contempt of court orders.

17. The respondent has not filed a replying affidavit and no submissions were filed in the matter by either party and it would appear that the parties herein could have lost interest in this matter altogether. We shall nonetheless consider the application based on the record before us and the law.

18. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) of the Court of Appeal Rules to grant an order of stay are now well settled. Firstly, an applicant has to satisfy that it has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle.

19. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the decision of **Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR** wherein it was stated:-

*“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide **whether the applicant has presented an arguable appeal** and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR** as follows:*

viii. An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

xii. The term “nugatory” has to be given its full meaning.

It does not only mean worthless, futile or invalid. It also means trifling.

xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

20. 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**).

21. In determining whether this appeal is arguable, the Court has to revert to the draft memorandum of appeal that is annexed to the notice of motion by the applicant. The applicant has set out about Fourteen (14) grounds of appeal in the memorandum of appeal.

22. We have considered the grounds of appeal raised by the applicants in the memorandum of appeal. The grounds include the point that the learned Judge erred by failing to appreciate that the documents and clearances were obtained by non – disclosure of material particulars to the relevant authorities and through political patronage. There is also the very important question as to whether a citizen by birth can lose his/her citizenship upon acquiring citizenship of another country. These is in our view are not idle issues and they call for determination after the hearing of the substantive appeal.

23. Given the fact that an applicant only needs to demonstrate a single arguable point, we are persuaded that the appeal/intended appeal is not frivolous and is indeed arguable.

24. On the second limb as to whether the intended appeal will be rendered nugatory if the orders sought are not granted, we reiterate that an applicant needs to demonstrate both limbs and demonstrating only one limb will not suffice. Strictly speaking, the applicants did not canvass the nugatory principle in their grounds on the face of the application or even in the supporting affidavit sworn by Alexander Muteshi.

25. The grounds supporting the application are that unless there is prompt intervention of the Court, the decision as it stood exposed the 1st to the 6th applicants (who are senior state officials within the Ministry of Interior and Coordination of National Government) to the threat of

being held in contempt of Court orders, that the decision of the High Court sets a bad and dangerous precedent on interpretation of fundamental rights and freedoms of individuals under the Constitution.

26. Those are nonetheless issues to be canvassed in the substantive appeal. The applicants have not demonstrated how the intended appeal will be rendered useless if the orders appealed against are not stayed. We are unable to discern any real loss or prejudice that the applicants would suffer, if the Orders sought are not granted.

27. In view of the foregoing, our conclusion is that the applicants have failed to satisfy both considerations under **Rule 5(2)(b)** of this Court's Rules and are therefore not deserving of the orders sought. Accordingly, we dismiss this application with no order as to costs as the application was not defended.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

R. N. NAMBUYE

.....

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