



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 318 OF 2019

BETWEEN

HENRY KANDIE, CHIEF INSPECTOR OF POLICE,

OCS ONGATA RONGAI POLICE STATION.....1ST APPLICANT

DAVID NDIEMA, INSPECTOR OF POLICE

DEPUTY OCS ONGATA RONGAI POLICE STATION.....2ND APPLICANT

ELIUD NJAGI, CORPORAL

ONGATA RONGAI POLICE STATION.....3RD APPLICANT

ZEDEKIAH NYANGOYE, POLICE CONSTABLE

ONGATA RONGAI POLICE STATION.....4TH APPLICANT

TERESIAH WANJUE, POLICE CONSTABLE

ONGATA RONGAI POLICE STATION.....5TH APPLICANT

SIMON NAMSHURUHI, POLICE CONSTABLE

ONGATA RONGAI POLICE STATION.....6TH APPLICANT

DIANA KIRUI, POLICE CONSTABLE

ONGATA RONGAI POLICE STATION.....7TH APPLICANT

THE ATTORNEY GENERAL.....8TH APPLICANT

NATIONAL POLICE SERVICE COMMISSION.....9TH APPLICANT

DIRECTOR OF PUBLIC PROSECUTION.....10TH APPLICANT

AND

MOHAMMED FEISAL.....1ST RESPONDENT

JOHN MUGWE NGURE.....2ND RESPONDENT

DAVID MUNGAI MBURU.....3RD RESPONDENT

LYDIAH MUTHEU.....4TH RESPONDENT

KELVIN MUKAE ANGWENYI.....	5TH RESPONDENT
ALEX MAKORI MOGAKA.....	6TH RESPONDENT
KALVIN MBUGUA.....	7TH RESPONDENT
JUSTIN RIUNGU MATI.....	8TH RESPONDENT
KENNEDY MBARU.....	9TH RESPONDENT
ESAU KIMANI.....	10TH RESPONDENT
JOHN GITONGA.....	11TH RESPONDENT
ERICK NYAKUNDI CHARLES.....	12TH RESPONDENT
KAREN GITAU KATHURE.....	13TH RESPONDENT
SHAD JACKSON GERALD.....	14TH RESPONDENT
PATRICK MUTISYA.....	15TH RESPONDENT
JOHN NDARUKA KINYUA.....	16TH RESPONDENT
JOHN MARE WARUTERE.....	17TH RESPONDENT
ISAAC CHERULE.....	18TH RESPONDENT
JAMES MUTURI MUTUKU.....	19TH RESPONDENT
STEVEN NZAKU.....	20TH RESPONDENT

(An application for stay of the execution of the judgment and decree of the High Court of Kenya at Kajiado (Nyakundi, J.) delivered on 20th December, 2018

in

Constitutional Petition No. 14 of 2017)

RULING OF THE COURT

In a petition filed at the High Court of Kenya at Kajiado the respondents, **Mohamed Feisal, John Mugwe Ngure, David Mungai Mburu, Lydia Mutheu, Kelvin Mukae Angwenyi, Alex Makori Mogaka, Kalvin Mbugua, Justine Riungu Mati, Kennedy Mbaru, Esau Kimani, John Gitonga, Erick Nyakundi Charles, Karen Gitau Kathure, Shad Jackson Gerald, Patrick Mutisya, John Ndaruka Kinyua, John Mare Warutere, Isaac Cherule** and **James Muturi Mutuku** alleged contravention of their constitutional rights when they were arrested and detained by the applicants. The 20th respondent **Stephen Nzaku** is an advocate of the High Court of Kenya and came into the proceedings when he was called by the other respondents to rescue them when they had been arrested. He was equally detained by the police. **Nyakundi, J.** in a judgment delivered on 20th December, 2018 found that the respondents constitutional rights had been infringed; that their rights and freedoms under **Articles 25, 27, 28, 29, 39 and 49** of the **Constitution** had been contravened. The 1st to 19th respondents were awarded general damages of Shs.100,000 each and a similar sum for exemplary damages. The 20th respondent was awarded Shs.3,000,000 for general and aggravated damages.

The applicants are dissatisfied with those findings and filed a notice of appeal dated 21st December, 2018.

In the motion before us brought under **rule 5(2) (b)** of the rules of this **Court** we are asked in the main to grant an order of stay of execution of the said judgment pending hearing and determination of this application and pending hearing of the intended appeal. In the grounds in support of the motion and in an affidavit of **Robi Mwise Deborah**, an advocate of the High Court practicing as a State Counsel at the Office of the Attorney General, it is stated that the intended appeal is arguable because, according to the applicants the judge erred in law and fact by holding that the applicants violated the rights of the respondents despite the respondents' failure to discharge their constitutional burden required to warrant the grant of the reliefs sought. It is also said that the judge erred in holding the applicants jointly and severally liable for infringement of rights of the respondents; that the judge erred in law and fact by failing to consider and appreciate the testimonies given in court by the applicants; that the judge erred in awarding the 3rd to 19th respondents general and exemplary damages without the said respondents appearing in court and without submitting any evidence in support of their case; that the judge erred in law and fact by holding that the 1st and 2nd respondents had *locus standi* to represent the 3rd to 19th respondents when there was no nexus between the 1st and 2nd respondents and the 3rd to 19th respondents. It is also said that the judge erred in law and fact by determining that the 20th respondent was

arrested without any reasonable cause. There is also an attack on the award of damages. It is further contended that the intended appeal will be rendered nugatory as the applicants stand to suffer substantial hardship and loss as the respondents will be unable to refund the sums awarded by the judge.

All those matters are repeated in a draft memorandum of appeal attached to the application.

There is a replying affidavit sworn by the 20th respondent which we shall come to shortly in this ruling.

When the Motion came up for hearing before us on 11th November, 2019 the applicant had filed written submissions on 11 that day.

Miss Deborah M. Robi, learned counsel for the applicants on behalf of the Attorney General invited us to peruse the written submissions and in a brief highlight it was counsel's submission that an arguable appeal is one that elicits cognizable controversies as was held by the Supreme Court in the case of **George Mike Wanjohi v Steven Kariuki [2014] eKLR** where it was held:

“However, it must be clear that an arguable appeal, properly conceived within the meaning of Article 163 (4) (a) of the Constitution must be one that elicits cognizable controversies that purely bear constitutional dimension and effect.”

Learned counsel submitted that the intended appeal questions liability of police officers in arresting the respondents and the basis for granting an award of Shs.3,000,000 to the 20th respondent and the High Court’s interpretation of various articles of the Constitution. Counsel cited the case of **Kenya Hotel Properties Limited v Willesden Investments Limited and 6 Others [2013] eKLR** where it was held by this Court that one arguable point has to be demonstrated and if that is done stay should be granted. On the nugatory aspect it was counsel's submission that the total sum awarded was colossal and that the respondents had prepared a notice to show cause in a sum of excess of Shs.9,500,000. Counsel submitted that the respondents would not be able to refund that sum if the intended appeal succeeded.

The 20th respondent who is a lawyer and who appears for himself and for the other respondents filed a replying affidavit where he stated amongst other things that the application was defective; that the applicants had applied for certified copies of the proceedings and judgment which it was within his knowledge that proceedings were ready for collection; that there was no pending appeal before us; that there was an inordinate delay in bringing the application; that the application before us was incompetent, frivolous and an abuse of the court process and should be struck out with costs.

In an address before us Mr. Nzaku informed us that the application should not have been filed without leave of the trial court but did not cite any authority to support that proposition. He admitted that there was a notice of appeal which was filed after judgment. According to him the respondents should not be denied the right to enjoy the fruits of the judgment. He did not address us on the respondents' ability to repay should the intended appeal succeeds.

The principles that we apply in consideration for an application for stay of execution pending appeal like this one are well settled. An applicant has to demonstrate that the appeal or intended appeal is arguable which is the same as saying that it is not frivolous. If such an applicant succeeds in that limb he must also show that the appeal or intended appeal would be rendered nugatory absent stay. That is the effect of the holding in **George Mike Wanjohi** (supra) amongst other cases on this point. It is also true that an arguable point in an appeal is not one that must succeed.

We have considered the submissions made and have perused the draft memorandum of appeal. The 1st to 7th applicants are police officers while the 8th applicant is the Attorney General. The 9th applicant is the National Police Service Commission and the 10th applicant is the Director of Public Prosecutions.

One point raised in the draft memorandum of appeal is whether all the applicants are jointly and severally liable for infringement of rights of the respondents. Another point raised is whether the judge was right to find in favour of parties and award them damages when they did not testify before the court. These are not frivolous points. They are arguable points.

The respondents have not shown that they would be able to repay the monies set out in the notice to show cause which is in excess of Shs.9,500,000 which to us is not a small sum of money.

The applicants have shown that the intended appeal is arguable and they have also shown that the same will be rendered nugatory if the judgment is not stayed. We are satisfied that the applicants are entitled to orders of stay of execution pending appeal. The judgment of the High Court of Kenya at Kajiado being Kajiado Constitutional Petition No. 17 of 2017 is hereby stayed pending the hearing and determination of the intended appeal. The applicants to file appeal within 30 days of this ruling. Costs of the motion will await hearing and determination of the intended appeal.

Dated and delivered at Nairobi this 24th day of January, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR