IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJ.A)

CIVIL APPLICATION NO. NAI. 1 OF 2017 (UR 1/2018)

IN THE MATTER OF THE INTENDED APPEAL

BETWEEN

DR. FRED MATIANG'I THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT …….…… APPLICANT

AND

MIGUNA MIGUNA …….....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE DIRECTOR OF CIMINAL INVESTIGATIONS .....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

LAW SOCIETY OF KENYA ..... 5TH RESPONDENT

(An application seeking stay of execution of the decision and orders made in High Court Misc. Criminal Application No. 57 of 2018 on 15th *February 2018 by Hon. Justice L. Kimaru, pending hearing and determination of the Intended Appeal)*

RULING OF THE COURT

This ruling relates to four applications, all brought against one **Miguna Miguna** (Miguna), that were filed between 19th and 21st February 2018 following a ruling delivered on 15th February 2018 by Kimaru, J. Those applications, which were consolidated by consent of the parties, were by Dr. Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government (**C.S**); the Director of Criminal Investigation (**DCI**) jointly with the Inspector General of the National Police Service (I.G); the Director of Public Prosecutions (**DPP**) and by Maj. (Rtd.) Dr. Gordon Kihalangwa who is the Director of Immigration Services (**DIS**). Also named as a respondent in two of the applications is the Law Society of Kenya (LSK).

It is common ground that the learned Judge delivered that ruling upon hearing that Miguna, who had been the subject of about half a dozen orders by the learned Judge, and then some by other courts, aimed at securing his liberty and/or production before the learned Judge, had instead been dramatically expelled, deported or otherwise conveyed out of the country. This was on the evening of the 6th February 2018

when he was forcefully deported to Canada aboard KLM Flight Number 0566 destination Amsterdam, then onward to Ontario. He was so deported by officers of the Immigration Department who had taken him into custody at the Inland Container Depot at Embakasi from police officers who had driven him there from the Magistrate's Court at Kajiado. Those officers had been expressly directed by the learned magistrate Hon. Mulochi, R.M., to produce Miguna before the learned Judge who, in the meantime, upon being informed, (duped, it would later emerge,) that Miguna had been brought to the Milimani Law Court?s, ended up waiting within the court precincts up to well beyond 7pm in the night, for a man who was not to be produced notwithstanding the plethora of court orders.

Before leaving court after what was essentially a day-long Godotesque wait for Miguna's production, the record shows that the following transpired, which we set out *in extenso* because it is relevant for placing the application before us in proper perspective;

> **"At 6.50 p.m. (In Chambers)**
>
> **6/2/2018**
>
> **Coram: Before Kimaru J**
>
> **Court Clerk – Victor**
>
> **Ondimu for the State (Holding brief for Mr. Mutuku)**
>
> **Dr. Khaminwa/Havi/Osundwa/Hon. Otiende Omollo/ Sifuna/Hon Kilonzo/Hon. Orengo/Julie Soweto/ Ombeta**
>
> **Hon. Millie Adhiambo Mabona**
>
> ***Ondimu:***
>
> ***I got information from the Director, Criminal Investigations Department. He is out of town. He was unable to reach them through their mobile phones. He has not been able to tell us where the Applicant is. I have not got in touch with the Officer in charge Flying Squad. I have tried to call him to confirm if the applicant has been brought. He has not responded. We have no information as to the whereabouts of the applicant.***
>
> **Dr. Khaminwa:**
>
> **I have a feeling the court is being manipulated. There appears to be no will to release Mr. Miguna. The court has only one recourse. Make orders citing the Director of Criminal Investigations for contempt of court. Cite the Inspector General of Police for contempt. They should be served by the Registrar of this court. That order should cease to have effect if the applicant is released. The matter should be mentioned before this court at 11.00 a.m. The court should further make an order that copies of the contempt order to be served on Attorney General and Chief Justice, Director of Public Prosecutions and the President of the Republic of Kenya.**
>
> **Mr. Orengo:**
>
> **The machinery of justice may be used to cause injustice. The applicant was supposed to be produced before this Court at 3.00 p.m. That was not done. We have further manipulation of the law by the police trying to select where the applicant shall be produced. The applicant must be produced before this court.**
>
> **Mr. Ondimu:**

I have nothing to say in response. There were 2 police officers present in court who heard the orders that were issued by the court. They are aware of the orders."

After hearing counsel, the learned Judge made the following ruling;

*"**It is apparent that the 2nd and 3rd respondents are in contempt of the orders of this court. They have refused or failed to surrender the applicant to this court so that he can be released in terms of the orders of the court issued today. It is clear that unless this court takes appropriate remedial action, the 2nd and 3rd respondents will continue to treat the orders of this court with impunity. In the premises therefore, the 2nd and 3rd respondents must produce the applicant before this court by 11.00 a.m. on 7th February 2018. To avoid any mischief and further disobedience of the orders of the court, this court hereby suspends any criminal proceedings against the applicant in any court in the Republic of Kenya until the 2nd and 3rd respondents abide by the orders of this court to produce the applicant before this court. The Director of Public prosecutions shall notify the Director of Criminal Investigations, Mr. George Kinoti and Mr. Said, the Officer In-Charge Flying Squad, to personally avail the applicant before this court unless they release the applicant to the custody of this court before 11.00 a.m. on 7th February 2018. Mention at 11.00 a.m. on 7th February 2018 for further orders."***

As we have already pointed out Miguna was removed and conveyed beyond our borders that very night.

The next morning, 7th February 2018 at the appointed time of 11.00 O'clock, a battery of Miguna's lawyers appeared before the learned Judge as did Mr. Ondimu, recorded as appearing for the State. Unsurprisingly, heated and impassioned submissions were made. They culminated in yet another ruling of that very day in which the leaned Judge delivered himself as follows;

RULING

"From the submissions made, it is clear to this court that there is an obvious contempt of the orders of this court and a deliberate attempt by State agencies to subvert the Rule of Law in this country. Court orders once issued must be obeyed. For this court to make an appropriate determination on what course of action to take, it hereby directs the 2nd and 3rd respondents (in person) to swear affidavits in regard to the circumstances under which the applicant was released from their custody to the Directorate of Immigration during the subsistence of a valid court order requiring them to produce the applicant before this court so that he could be dealt with in accordance with the law. The Director of Immigration, Maj. Gen. (Rtd) Gordon O. Kihalangwa must swear an affidavit to indicate under what circumstances he assumed custody of the applicant when he knew that he was under the custody of the court awaiting his release. The affidavits must be filed and served on Friday 9th February 2018. The applicant and the Interested Party have a right to file affidavits in response to the affidavits that shall be filed. Further, the 2nd respondent Mr. George Kinoti and the 3rd respondent Mr. Joseph Boinnet must further swear affidavits to show cause why they should not be punished in accordance with the Contempt of Court Act for disobeying the orders of this court. They shall be required to appear before this court in person on 15th February 2018 at 9.00am to show cause. These proceedings are adjourned to that date. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2018.

L. KIMARU JUDGE

The DCI, the I.G. and the DIS in compliance with the order to file affidavits did so between 8th and 9th February 2018. Come 15th February 2018, however, and notwithstanding the order that they were required to appear before the learned Judge in person at 9.00 am to show cause why they should not be punished in accordance with the statute for disobeying the orders of that court, the DCI and the I.G did not so appear. Indeed, they instructed counsel namely Mr. Kilukumi and Mr. Ngatia to appear for them, taking over from Mr. Ondimu who had previously spoken for and represented the duo.

Mr. Ondimu had in fact taken the rather curious and unusual step of addressing this 12-point letter to the registrar of that Court dated 13th February 2018 indicating in advance, that the DCI and the I.G. would not be attending court on the date expected;

"TO THE REGISTRAR,

HIGH COURT

CRIMINAL DIVISION

NAIROBI

RE: **MISC. CRIMINAL APPLICATION NO. 57 OF 2018**

1. Kindly refer to the above subject matter that is pending before Hon. Justice Kimaru and is due to be mentioned on the 15*th day of February 2018.*

2. On the 6th day of February 2018, the Honourable Court ruled that (2nd* Ruling) since the Applicant had been produced before a Court of competent jurisdiction, it was not necessary or appropriate for the attendance of the 2*nd and 3rd Respondent since it will not serve any purpose.

3. Based on the Ruling (2*nd Ruling) delivered on the 6th* day of February 2018, the application for habeas corpus was spent and it is our humble submission that there was no need to make subsequent orders;

4. As per the Honourable Court*'s directions, the 2d and 3rd Respondents did file detailed affidavits explaining their respective roles. Further the Director of Immigration, Maj. Gen (Rtd) Dr. Gordon Kihalagwa did file an affidavit explaining how the Applicant was arrested and subsequently deported;*

5. That based on the three (3) detailed affidavits filed by the 2nd, 3rd* Respondent and the Director of Immigration, Maj. Gen, (Rtd) Dr. Gordon Kihalagwa, it was our submission that it is not necessary for the 2*nd and 3rd Respondent toappear before the Honourable Court on the 15th day of February 2018;

6. Due to the nature of duties and responsibilities of the 2*nd and 3rd Respondent, it will not be in the interest of justice and issues surrounding national security for the 2nd and 3rd Respondent to appear before this Honourable Court on the 15th day of February 2018;*

7. That the 2nd* and 3*rd Respondent are scheduled to attend a crucial National Security Council (NSC) meeting on the 15th day of February 2018 and due to the fact that the 2nd and 3rd Respondent have already filed detailed affidavits, we pray that the same be relied upon by this Honourable Court;

8. That the 2*nd and 3rd Respondent hold the entire Judiciary and this Honourable Court in high esteem and would never disobey the directions of issued by Court;*

9. That one of the interested party (sic!) in the instant application, Law Society of Kenya (LSK) has already announced that it will be holding demonstrations on the 15*th day of February 2018. Further, LSK has commenced a campaign dabbed (sic) as "yellow ribbon Campaign" and is on (sic) the process of preparing "Yellow ribbon memorandum on court orders willfully disobeyed & rights violated by state & public officer (sic)."*

10. By the LSK commencing above proceeding (sic) mentioned in Para 9, is clearly affects how the current proceeding is being undertaken and infringes on the rights of the 2*nd and*

3rd Respondent.

11. That the Applicant has filed Constitutional Petition No. 51 of 2018 against 2*nd and 3rd Respondent, (sic) among other persons seekingorders which are related to the matter before this Honourable Court and to avoid any conflict, this matter should be treated as spent;*

12. That the 1*st, 2nd and 3rd Respondent hereby do request that the matter be placed before the Hon. Judge as matter of urgency. We further request that the matter be mentioned on the 14th day of February 2018 at 2.00pm to enable the Respondents make appropriate applications.*

Signed

…….

DUNCAN ONDIMU PRINCIPAL PROSECUTING COUNSEL OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS."

When that Court convened on 15th February 2018 and the learned Judge confirmed that the DCI and the IG were absent on the day they were to show cause, he delivered the ruling that has triggered the applicants 'quest before this Court. It restated the narrative of Miguna's trials, travails and tribulations in the hands of the police since 2nd February 2018 notwithstanding his being granted bail by Wakiaga, J. on the said date and several orders thereafter for his release. It mentioned efforts by the Canadian High Commission to have its consular staff visit Miguna, who also holds Canadian citizenship, to ascertain his well-being and how those efforts were unsuccessful as Miguna was being held ***in communicado***. It then adverted to the affidavit deposition by the DIS that he had advised the CS to have Miguna; declared a prohibited immigrant, withdraw his citizenship and passport and expel him.

It is common ground that Miguna was born on 31st December 1962 in Nyando area of present day Kisumu County to Kenyan Citizens, held a Kenyan National Identity Card, was a registered tax-payer and held Kenyan Passport **No. A004268202L**. That advice was evidently accepted and effected with alacrity by the CS who on 6th February 2018 published this notice;

"MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT DECLARATION UNDER SECTION 43 OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT 2011, LAWS OF KENYA

I, FRED MATIANG'I PHD, EGH, CABINENT SECRETARY, Ministry of Interior and Co-ordination of National Government responsible for Immigration matters, in exercise of the powers vested in me by Section 43 (1) of the Kenya Citizenship and Immigration Act 2011, do hereby declare that:

MIGUNA MIGUNA

Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest, be removed from Kenya to his country of origin Canada, and further direct that the said:

MIGUNA MIGUNA

Remain in Prison custody while arrangements for removal are being undertaken, and this order is sufficient warrant to keep the said MIGUNA MIGUNA in custody.

Dated this 6th day of February 2018.

FRED *MATIANG'I PhD, EGH CABINENT SECRETARY MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT"*

The DIS considered himself entitled to give effect to that declaration hence the deportation of Miguna. The learned Judge concluded from his analysis of the facts before him that Miguna's deportation was triggered by the letter from the Canadian High Commission raising concern over his detention and treatment that was not in accordance with the law and that the affidavits filed before the High Court by the DCI, DG and DIS revealed that the trio had acted in concert and in a coordinated manner to defeat the ends of justice. He found that the DCI and DG had acted in contempt of court by failing to produce Miguna before him on 6th February 2018 so as to be dealt with in accordance with the law and that their taking him to a different place altogether, the Inland Container Depot Police Station at Embakasi, was calculated to give him over to the custody of the DIS. Stated the Judge;

> **"It was not fortuitous or by chance that officers *under the Director of Immigration 'found' the applicant at the precinct of the said Inland Container Depot Police Station. This was planned. It was also in contempt of the orders of this court.***
>
> **It appears that the Director of Immigration was labouring under the illusion that since he was not a party to these proceedings, and further *since he purported not to be „aware of the orders of the court, then he would act with impunity and take custody of the Applicant. As stated earlier in this Ruling, both the Directorate of Immigration and the National Police Service are under the Cabinet Secretary, Ministry of Interior and Coordination of National Government. The Director of Immigration got access to a copy of the letter written by the Canadian High Commission to the Ministry of Foreign Affairs. He got access to the letter the same day that it was received because he is working for government which he has collective responsibility for its action. He acted upon it even when he knew that the Applicant was under the custody of this court."***

The learned Judge then made a determination that to remedy that contempt, he would give the DCI, the DG and the DIS the opportunity to purge their contempt of the court and that such would be achieved by restoring the *status quo* as it existed as at 3.00pm on 6th February 2018. To grant those offices opportunity to purge their contempt of the orders of the court, the learned Judge made these concluding orders;

> ***"(1) The declaration dated 6th February 2018 issued by Fred Matiang'i Cabinet Secretary,* Ministry of Interior and Coordination of National Government, in respect of the Applicant, on the advice of the Director of Immigration, under section 33(1) of the Kenya Citizenship and Immigration Act 2011 is hereby declared null and void and of no legal effect because it was issued in contempt of the orders of this court.**
>
> **2. The declaration dated 6*th February 2018 issued by Fred Matiang'i, Cabinet Secretary,* Ministry of Interior and Coordination of National Government in respect of the applicant, on the advice of the Director of Immigration, under section 43 of the Kenya Citizen and Immigration ct 2011 is hereby declared null and void and of no legal effect because it was issued in contempt of the order of this court.**
>
> **3. The valid Kenyan Passport of the applicant shall be surrendered to the Deputy Registrar of this court by the Director of Immigration within seven (7) days of this Ruling. That passport shall be dealt with by the court with jurisdiction in accordance with the law.**
>
> ***4. The 2nd and 3rd respondents shall personally give a written undertaking to this court that they shall comply and give effect to the orders of this court.***
>
> **The undertakings shall be presented to this court within seven (7) days of this Ruling.**
>
> **5. For avoidance of doubt, upon compliance with the orders of this court, the 2*nd and 3rd respondents and the Director of Immigration are at liberty to defend the validity of their action before a court of competent jurisdiction.***

6. Leave is granted to the 2*nd and 3rd respondents and any aggrieved party to appeal against the decision of this court.”*

Stung and aggrieved by those orders, each of the applicants herein filed separate notices of appeal and eventually the applications under consideration. Each filed a supporting affidavit providing evidentiary backing to the grounds on which the applications are premised. The applications are brought, essentially under **Rule 5(2)(a**) of the Court of Appeal Rules even though they do cite **Section 33** of the Contempt of Court Act. We do not consider it necessary to rehash the contents of those affidavits save to say that the CS?s main complaint is that the learned Judge issued orders against him in violation of his constitutional rights to a fair trial as he was not a party to the proceedings before the High Court; was not given an opportunity to be heard; and the orders nullifying his February 6th 2018 declaration prematurely and improperly pre-determined **Constitutional Petition No. 51 of 2018** filed by Miguna against him and which is awaiting determination. The CS as well as the other applicants contend that they have eminently arguable appeals which would be rendered nugatory unless this Court orders a stay of execution of the orders made on 15th February 2018.

In response and opposition to the applications, a single affidavit was filed. It was sworn on Miguna,s behalf on 26th February 2018 by his advocate **Nelson Andayi Havi**. In it was averred that Miguna, a citizen by birth, has never renounced his Kenyan citizenship. It goes on to detail what Miguna went through from the morning of 2nd February 2018 when officers from the DCI and the IG

“**blew up the gate and entry door to [his] house using military detonations, destroyed [his] property therein and seized him**.”

It is sworn of those officers at paragraph 20 that;

“They were not wearing police uniforms, were *not using marked police vehicles and they did not identify themselves before entering the 1st respondent?s home and abducting him. They did* not read for him his rights, refused to provide him with access to counsel. They took him to Kiambu Police Station and then to Githunguri Police Station on the same day where they held him incommunicado without *charge.”*

It gives an account of how Miguna was granted bail on 2nd February 2018 but was not released but instead was detained ***in communicado*** at Githunguri Police Station until 11.30pm when he was moved to Lari Police Station where he was;

“Detained in horrible conditions at the Lari Police Station from February 2*nd to 5th, 2018 in violation of numerous court orders and without any access to his advocates, family, physicians and friends even though he demanded to be given access to them.”*

Finally, on 6th February 2018 he was produced before the Miagistrate’s Court in Kajiado on the strength of a charge sheet signed by and having the stamp of the Officer in Charge of Central Police Station, Nairobi facing three counts, namely;

“BEING PRESENT AND CONSENTING TO THE ADMINISTRATION OF AN OATH TO COMMIT A CAPITAL OFFENCE NAMELY TREASON CONTRARY TO SECTION 59(a) OF THE PENAL CODE.

***MIGUNA MIGUNA*: *On the 30th* day of January 2018 at Uhuru Park in Nairobi county, jointly with others not before the court, were present and consented to the administering of an oath to Raila Amollo Odinga purporting to bind the said Raila Amollo Odinga to commit a capital offence of treason.**

COUNT II

CHARGE

TAKING PART IN UNLAWFUL ASSEMBLY CONTRARY TO SECTIONS (II) OF THE PUBLIC ORDER ACT CAP 56 LAWS OF KENYA.

PARTICULARS

***MIGUNA MIGUNA:- On the 30th* day of January 2018 at Uhuru Park in Nairobi County, jointly with others not before court, were concerned in organizing of a public meeting at the said place without having notified the Officer Commanding Central Police Station Nairobi in whose jurisdiction they were.**

COUNT III

CHARGE

ENGAGING IN ORGANISED CRIMINAL ACTIVITY CONTRARY TO SECTION 3(a) AS READ WITH SECTION 4(1) OF THE PREVENTION OF ORGANISED CRIME ACT NO. 6 OF 2010. *PARTICULARS MIGUNA MIGUNA:- On the 2nd* day of February 2018 at Okoa Kenya Offices Lavington in Nairobi County, professed to be a member of National Resistance Movement (NRM), a group declared an organized criminal group section 22 of the said act."

Those charges were not read to Miguna as the learned Magistrate ordered that he be produced before the High Court in Nairobi in compliance with subsisting orders from the Superior Court. It is then sworn at paragraph 19 ?0? that;

"Instead of complying with the court order that had directed him to present the 1st respondent before Justice Kimaru at the High Court in Milimani, Nairobi before 3:00 p.m., the applicant had the 1st respondent forcefully taken to the Inland Container Depot Police Station, illegally and physically threatened, seized and searched by his officers; his passports illegally taken from him; before he was driven against his will by the applicants? officers comprising police and immigration officers to the Jomo Kenyatta International Airport at 6 p.m.; illegally driven onto the runway by the applicants? officers; and forcefully placed on a KLM late night flight to Amsterdam. The applicant did not process the 1st respondent through immigration and customs. The 1st respondent was only given his Canadian passport, boarding pass, mobile telephone and a photocopied document after boarding the KLM flight that night."

The deponent took issue with the applicants? failure to comply with court orders or their partial compliance therewith as evidenced by their depositing before the High Court of "*a defaced and completely destroyed*" Kenya passport of Miguna's and failure to give an unequivocal undertaking to comply with and give effect to court orders. The affidavit concluded in paragraph 29 to 33 with averments that;

"29. In view of matters deponed hereinabove, I verily believe that [the conduct of] Joseph Kipchirchir Boinnet, George Kinoti and Kaj Gen, Gordon Kihalagwa disentitles them to a hearing or the exercise of discretion and that in any event, the 1st respondent stands to suffer extreme prejudice and irreparable damage should an Order of stay be granted.

30. On the other hand, Dr Fred Matiang'i, Joseph Kipchirchir Boinnet, George Kinoti and Maj. Gen (Rtd) Gordon Kihalangwa do not suffer any prejudice as they can either comply with the Order of 15th February, 2018 in its entirety by issuing a new Kenyan Passport tothe 1st respondent and defending their actions in Petition Number 51 of 2018 with the option of deporting the 1st respondent should they succeed in justifying the same.

31. Similarly, the fear by Dr Fred Matiang'*i, Joseph Kipchirchir Boinnet, George Kinoti and Maj Gen Gordon Kihalagwa that they will be declared unfit to hold public office unless the Order of 15th February, 2018 is stayed, is unfounded as any such determination can only be*

made in Petition Number 51 of 2018.

32. ***On 26th February, 2018, the High Court made an Order in Petition Number 51 of 2018, suspending the two declarations made by the applicant on 6th February, 2018, suspended the two declarations and directed the applicant to issue the 1st respondent with travel documents, to enable his unrestricted and unhindered re-entry to Kenya, pending the hearing and determination of the petition. Exhibited herewith and marked as***

"NH-19" is a true copy of the ruling in that regard.

33. It is clear from the Ruling aforesaid made in Petition Number 51 of 2018 that the Order sought to be stayed herein was made purely on the finding that the two declarations dated 6th February, 2018 by the applicant were made and the removal of the 1st respondent from the jurisdiction of the Republic of Kenya done in disobedience of Court Orders and therefore null and void. The substantive dispute in respect to the two declarations and the validity thereof is still pending for determination in Petition Number 51 of 2018 where the applicant and the other three applicants can justify and defend their actions."

It was Miguna's plea therefore that the motions before us be all

"dismissed with costs on a higher indemnity scale."

We have set out the background and the various depositions at some length because they form the factual background of the applications and counsel for the parties did make reference to various aspects of the same while arguing the applications before us.

In support of the motion were learned counsel **Mr. Ngatia** for the CS and the DIS, **Mr. Kilukumi** for the DCI and the DG and **Mr. Ondimu** for the DPP. For Miguna we had learned counsel **Mr. Orengo, SC** teaming up with **Dr. Khaminwa**, **Mr. Kilonzo Jr**; **Mr. Ombeta**, **Ms. Soweto**, **Mr. Havi** and **Mr. Sakwa**. The LSK was represented by learned counsel **Mr. Ndubi** and **Mr. Ongaro**.

After setting out the factual background in some detail Mr. Ngatia submitted that his client, the CS's main grievance was that the learned Judge issued final orders nullifying the Declaration of 6th February 2018 made under the Kenya Citizen and Immigration Act 2016 yet the same was the basis of an existing **Petition No. 51 of 2018** seeking to quash it and which was rendered an academic exercise thereby. The CS and the DIS were also not given a chance to be heard before adverse orders were made against them which showed that they do have an arguable appeal since there could never be guilt by reason only of association.

Mr. Ngatia further contended that the appeals by his clients would be rendered nugatory and of no assistance to them unless we grant the orders of stay sought as there can be no solace in the fact only that the appeal will be pending. The harm, if we understood counsel aright, is that;

> "The subject [Miguna] will now come back [to the Country] as of right but not after the procedure set out in the law."

He concluded by making a strong case for the respect of law thus;

> **"If we do not follow the law there would be anarchy. If we do not follow the law we shall be doomed."**

He beseeched us to grant the stay as an interim relief to avoid mischief.

On his part, **Mr. Kilukumi** pointed out that even though rules of procedure under the **Contempt of Court Act 2011** had not been made, **section 7(3)** of the Act imports **Articles 50(2)** and **47** of the Constitution on fair trial and fair administrative action, and submitted that the DCI and the DG were

found to be in contempt without compliance with those constitutional provisions in that the learned Judge started with the presumption of their guilt; did not advise them of their right to counsel, nor afford them the opportunity to challenge evidence of their contempt. It was erroneous, pressed Mr. Kilukumi, for the learned Judge to have assumed that the office of the DPP was the legal representative of the duo. For those reasons, counsel was of the view that the DCI and the DG do have an arguable appeal.

On the nugatory aspect, counsel urged that by reason of having been found guilty of contempt, the two State Officers could have removal proceedings instituted against them, which was a real fear, even though no such process had been initiated yet. He clarified, however, that his clients had nothing to do with, and were quite indifferent to Miguna's return to the country. He urged that the DCI and the DG were before us on account of **section 33** of the **Contempt of Court Act** which contemplates stay of punishment

Mr. Ondimu associated himself with the submissions by Mr. Ngatia and Mr. Kilukumi and urged us to grant the stay.

Going first in opposition to the applications, **Mr. Orengo, S.C**. sought to locate the contest herein in the rule of law and judicial authority context with the hortatory reminder that in our constitutional architecture, judicial authority is derived from the People themselves and it vests and is exercised on their behalf by the Judiciary. He went on to assert that what has given rise to these proceedings is the contumacious conduct of the applicants towards court orders that had decreed and directed the production of Miguna before the High Court. When the DCI and DG failed to do so, they were bound to personally attend before the Judge and they failed to do so. That failure called upon the High Court to stamp its judicial authority within the law. He cited for illustration purposes the pronouncement of the United States District Court for the Eastern District of Arkansas, Western Division in ***JONES vs. CLINTON*** **36F. Supp. 2nd 1118; 199 U.S dist. LEXIS 4515** in which the President of the United States was adjudged to have been in contempt of court for his failure to obey that court?s discovery orders. Chief Judge Susan Welber Wright, after acknowledging that the President occupied a unique office with vast powers and responsibilities requiring that he devote his undivided time and attention to his public duties, nevertheless, and with and no pleasure in holding him in contempt, expressed herself thus;

> **"In that regard, there simply is no escaping the fact that the President deliberately violated this *Court?s discovery Orders and thereby undermined the integrity of the judicial system. Sanctions must be imposed, not only to redress the President?s misconduct, but to deter others who might themselves consider emulating the President of the United States by engaging in misconduct that undermines the integrity of the judicial system. Accordingly, the Court adjudges the President to be in civil contempt of court pursuant to Fred r. Civ, P 37(b)(2) for his willful failure to obey this Court's discovery Orders .***

Senior Counsel was unimpressed by the fact that the best the DCI and DG did, even when the DPP had constantly admitted on the record that the duo had disobeyed the orders of the court, was to send representatives instead of appearing before the learned Judge in person as directed. To him, therefore, those applicants were given opportunity to be heard and they therefore had no arguable appeal. When pressed by this Court whether the same argument of opportunity to be heard being accorded applied to the CS, he conceded, as he had to, that it was not but added, tongue-in-cheek, and paradoxically (though he was later to unreservedly concede arguability) that;

> **"For the 1*st* respondent, it is arguable whether he was properly found guilty though it will be a frivolous argument." (sic!)**

He went on to explain that the orders the learned Judge made were not for punishing the applicants but rather for the protection of the dignity of the court and were merely affording them an opportunity to purge their contempt. He took issue with what he termed the applicants' compliance with the orders of the Court but only on their own terms as evidenced by their surrendering Miguna's passport but in a defaced and mutilated form and the giving of letters of undertaking to obey orders of the High Court but subject to the orders of this Court.

Senior counsel next submitted that the High Court did not issue a positive order capable of being stayed and that it allowed the applicants the opportunity to defend their actions so that its orders were essentially beneficial to them. There was nothing to stay and to grant the application would have the effect of undoing the very *status quo ante* the learned Judge sought to restore by his orders.

On the nugatory question, Mr. Orengo contended that the DCI and the IG are not removable otherwise than through a disciplinary process and on stated grounds by the President (for the IG) and no such process had been initiated. Their fears of removal were therefore far-fetched.

Going next, **Dr. Khaminwa** posited that whenever there is a threat to the rule of law, such as happened herein "by disobedience of High Court orders in a crude manner," then Judges must speak with one voice as the consequence of disobedience is chaos. To grant a stay in the present circumstances would be to set a dangerous precedent that would sow chaos in our constitutional order. He stated that the applicants had been unable to demonstrate what real harm or prejudice they would suffer were the application to be denied and Miguna returned to Kenya as he wishes to. His liberty was implicated and it should not be dealt with like a ping-pong game. To him, not only would the appeal not be rendered nugatory but the said appeal is itself „absolutely unarguable? and so the applications should be dismissed.

Mr. Kilonzo Jr. was of the same view. Citing this Court's decision of ***COMMERCIAL BANK OF AFRICA vs. NDIRANGU*** **[1990- 1994] EA 69,** counsel contended that whereas rules of natural justice are the foundation of a Judicial system as the applicant?s plead, a flagrant disobedience of court orders if allowed go on unchecked will result in the onset of erosion of judicial authority. In such circumstances, the applicants' arguments about being condemned without being heard "*lose their sting*" as Madan JA put it in that case.

Quoting from another of Madan's judgments, this time in ***GITHUNGURI vs. REPUBLIC [1986] eKLR*** when he was Chief Justice, counsel invited us to use our judicial analytical skills and insights into the minds of people, and assessment of patterns of human behaviour to come to the conclusion that the conduct of the applicants in this matter was a conspiracy that proceeded from criminal minds. To him, court orders are of such imperative force that once the court ordered that Miguna be produced before it at 3pm, it was up to the applicants to do everything „including sending a chopper to produce him at the appointed time. He sought to pour cold water on the applicant's complaints about not having been heard by posing what hearing they afforded Miguna when they resorted to deporting him yet such was a quasi-judicial act. He urged us to dismiss the applications.

After associating himself with those submissions by Miguna's legal team, **Mr. Ndubi** explained that the LSK's entry into the legal fray was informed by its having noted the blatant violation and disobedience of court orders. It considered Miguna's treatment to be a flagrant violation of the Constitution and therefore was opposed to the grant of a stay to the applicants who had come seeking an equitable remedy "*with bloodied hands*." He dismissed the intended appeals as being "*merely debatable but not arguable*." They would also not be rendered nugatory as Miguna's re-entry to Kenya would not upset the rule of law nor destroy the nation's peace. Rather than oppose Miguna's return, he charged, the applicants should support it so that he can come and argue the appeals they seek to file against him.

Responding, Mr. Ngatia reiterated that the orders said to have been violated were those of 7th February 2018 and they neither mentioned nor in anywise related to the CS, while the DIS was required to only file an affidavit, which he did. He lamented the direct finding of contempt against the two and apprehended that chapter 6 of the Constitution could at any time be triggered for the removal because "*a judgment or order for the court has compelling obligatory force from the day it is pronounced*." His clients are handicapped in their defence of their actions unless this Court suspends the High Court's far-reaching orders "*which are executable by any Kenyan*." He exhorted us "*in the name of the rule of law and equality before the law*" to allow the applications because without our intervention they are exposed.

Mr. Kilukumi sought to distinguish the ***COMMERCIAL BANK OF AFRICA vs. NDIRANGU*** case (supra) on the basis that it was decided in 1992 before the promulgation of the current Constitution that upholds fair trial rights. He also drew a distinction between the **GITHUNGURI** case (supra) and the case

at bar based on his contention that his clients were not granted an opportunity to be heard. He clarified that apart from the danger of removal pursuant to disciplinary proceedings under **Article 75(2)** of the Constitution for violation of Chapter 6, the DG faced the risk of removal under **Article 245(7) (a)** for violation of any other part of the Constitution.

Coming last, Mr. Ondimu when pressed confirmed having written the letter in which he expressed the opinion that the attendance of the DCI and the DG in court on 7th February 2018 as ordered was not necessary and conceded at last that the two did know that they were required in court on that date.

Even though we have set out exhaustively the background facts, the affidavit evidence laid before us and the rival submissions made on the applications, we are fully cognizant that our jurisdiction on these applications is essentially interlocutory and we shall not seek to interrogate the merits and demerits of the intended appeals which fall within the province of the bench that shall be seized of them. All we need do at this stage, as has been set out in a long line of authorities is determine whether; first, the intended appeal is arguable and, second, that such appeal would be rendered nugatory unless a stay of execution is granted in the interim. See **GITHUNGURI vs. JIMBA CREDIT CORPORATION LTD (NO 2) (1988) KLR 838**.

The principles applicable in dealing with such applications as established in many cases, including those cited by the applicants herein, were very aptly distilled and summarized by this Court in ***STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS*** **[2013] eKLR**, with which we fully concur, as follows;

> ***"(i)*** **In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others v Nderitu & Another (1989) KLR 459.**
>
> **ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.**
>
> **iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. (1990) KLR 365.**
>
> **iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case *must depend on its own facts and peculiar* circumstances. David Morton Silverstein v *Atsango* Chesoni, Civil Application No. Nai 189 of 2001.**
>
> **v. An applicant must satisfy the court on both of the twin principles.**
>
> **vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.**
>
> **vii. 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. Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.**
>
> **viii. 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. Damji Pragji (supra).**
>
> **ix. The term „nugatory? has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.**

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

(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

It is worth stating that even though most of the case law on this subject deals with stay of execution pending civil appeals under **Rule 5(2)(b),** the same principles are applicable in an application such as before us which, though expressed as brought under **Rule 5(2)(a)** as a criminal application, essentially seeks a stay of what is not a conviction proper with the threat of a sentence of imprisonment or execution of a warrant of distress as contemplated in the provision;

"5(2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution; but the court may –

a. In any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal."

(Our emphasis)

Our own reading of the impugned ruling of 15th February 2018 does not disclose anything in the species of sentence or penalty but rather determinations which are amenable to be dealt with in the normal way and with application of the general principles of stay of execution or proceedings as captured in the cases we have referred to. The applicability of those principles is, to our mind, unaffected by the reliance placed on **section 33** of the **Contempt of Court Act**, which provides as follows;

"33(1) An appeal shall lie *from any order or decision of the High Court in exercise of its jurisdiction to punish for contempt to the Court of Appeal only on points of law.*

2. Pending an appeal, an appellate court may order that –

a. the execution of the punishment or order appealed against be suspended

b. if the appellant is in confinement, the appellant be released on bail."

It is evident that even under that provision, the grant of stay of execution lies in the discretion of this Court and the same is exercisable in accordance with the principles and considerations that have crystallized in **Rule 5 (2)** applications. Far from affording a wider latitude and being favourable to an applicant, it appears to us that reliance on **section 33** of the Act in fact constricts an applicant?s wriggle room in that for a purely criminal appeal, stay is granted only exceptional circumstances and the threshold for grant of relief such as bail pending appeal is a lot higher in that one needs demonstrate an appeal with *overwhelming chances of success* (See ***OPONDO vs. R*** **[1978] KLR 251**) whereas in civil stay of execution all one needs show is a single arguable point which is not one that must necessarily succeed. Be that as it may, suffice that we are not satisfied that there was a conviction or that there is a sentence being executed as such and so the several principles adverted to herein are apt for application.

Before we go into a determination of the twin principles for grant of stay, we need to make it clear that as a Court we do not take lightly allegations of contempt of court.

No court should.

When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed.

Court orders issue *ex cathedra*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

We note that authorities have been placed before us which espouse the position that once a party is found to have breached, disobeyed or violated court orders such person will not be given audience before court until he first purges his contempt. In ***HADKINSON vs. HADKINSON*** **[1952] 2 ALL ER 562**, the English Court of Appeal returned these categorical holdings;

> **"Held (per Somervell and Romer, L.JJ.), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.**
>
> ***Held*** **Per Denning L.J,.: The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of *the party impeded the course of justice."***

The Court of Appeal for Ontario, Canada, in denying audience to the Attorney-General of Ontario who had been in flagrant and prolonged contempt of court orders, stated as follows in ***ONTARIO ATTORNEY GENERAL vs. PAUL MAGDER FURS LTD*** **10 0.R. (3d) 46;**

> **"As previously observed, even following the *finding of contempt of court and while invoking* the court's jurisdiction in appealing the order of *Chilcott J., the appellant persisted in its defiance of the law.***
>
> **It is in this context that the appellant seeks to have the discretion of the court exercised in its favour and to stay the hands of the Crown from enforcing the penalties imposed by Chilcott J.**
>
> **This is not a case of an appellant who has been found to have committed an act of contempt and is fined, who has a record of committing such offences in the past and who, while the appeal is pending, has ceased to commit the act which is the subject matter of the contempt proceedings. Under those circumstances, it may well be that the fine should not be enforceable until the appellant has had a reasonable opportunity to exercise its right of appeal.**
>
> **In this case for a period of over 11 years the appellant has exhibited a brazen disregard for the rule of law, has shown contempt for the orders of the superior trial court of this province and sought to make a mockery of the administration of justice. At the same time, it seeks to invoke the judicial process to suspend the operation of the very orders that it has defied for years. To stay the order of Chilcott J. pending appeal would be to countenance that conduct and to bring the administration of justice into disrepute."**

In deserving cases, this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in **Article 25** of the Constitution, we affirm with this Court in ***A. B. & ANOTHER vs. R.B*. 2016 eKLR** that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court. (See also

COMMUNICATIONS COMMISSION OF KENYA vs. TETRA RADIO LTD, [2013] eKLR.

Even though the learned Judge expressed himself manifold times that the applicants were in contempt of court, some more so than others, he himself did not deny them a hearing but in fact gave them yet other chances to get back to the straight and narrow. The applicants have sworn affidavits in compliance with the learned Judge's orders and have also given undertakings to obey as directed. The DIS have also deposited Miguna's affidavit though its state at deposit is hardly what the learned Judge expected. Be that as it may, we are quite clear that this may not be a proper case for denying the applicants audience and indeed there was not serious attempt to urge us to send them away.

So then, do the applicants have arguable appeals' Miguna's advocates spoke from both sides of the mouth regarding this issue as is apparent from the submissions of **Mr. Orengo SC** and **Dr. Khaminwa**.

The LSK's **Mr. Ndubi** did not shed much light on it either. What is clear though, bearing in mind that an arguable appeal is no more than one that raises a single *bona fide* point to be urged and worthy of response from the other side and interrogation by the Court, is that it is a gross exaggeration for the said appeals to be termed, as they were, as absolutely unarguable or a waste of time. As we pointed out, there was a patent contradiction in Mr. Orengo's referring to the CS's appeal especially, as "*arguable* but *frivolous*." We are satisfied that there are arguable points to be raised on whether the right to be heard was given effect; whether the Contempt of Court Act was properly applied and whether parties who had no role in the initial proceedings could be found liable in contempt of orders that were not directed at them, to mention but a few.

As we have indicated, those points or any one of them need not succeed, which is itself a matter in the purview of the Judges to hear the appeal. Prudence and principle dictate that we should not ourselves express any view on the said points, our remit being merely to be satisfied that a single *bona fide* arguable point has been disclosed. We have no difficulty finding in the affirmative.

The sticking point in these applications is whether the intended appeals would be rendered nugatory were the prayers to be denied. We did not quite receive a clear answer as to what the great harm, prejudice or loss would be were Miguna to return to the country pending the hearing of the appeals as a result of the orders that were made by the learned Judge. Neither in the supporting affidavits nor in submissions before us was the exact nature of the appeal-negating event disclosed. The issue of Miguna's possible return took an even more interesting dimension when it was revealed that the very declarations that were quashed by the learned Judge, improperly in the applicants' view, were ordered suspended by the High Court in **Petition No. 51 of 2018** on the eve of the hearing of these applications. That effectively means that even were we minded to stay execution, there would still be those other orders that would render such stay of no effect. We would in effect have acted in vain.

We also do not see how the return of Miguna portends a clear and present danger of social upheaval or a breakdown of law and order. Beyond the possibility that those whose acts were invalidated by the learned Judge may suffer some embarrassment, we are unable to discern any real loss or prejudice. Moreover, there is nothing irreversible that could occur as a result of those orders subsisting while the appeals intended are processed, prosecuted and decided by this Court. If anything, there is something to be said about a Kenyan born litigant being accorded the opportunity, consistent with his right to a fair trial, to

return to the country of his birth and attend to the cases filed by and against him.

The final basis for the plea that the appeals would be rendered nugatory relates to the possibility that the applicants could be impeached for violation of law and the Constitution, for which they have already been found culpable by the learned Judge. Even as that argument was being made before us, there was no case shown to have been filed or complaint made against any of the applicants. There was in fact nothing to indicate that such a process was being contemplated by any one. That means, naturally, that all the applicants voiced were apprehensions of indistinct-acts by unknown persons at some indeterminate time in future. With great respect, we think that those fears were still in the realm of speculation and conjecture and this Court cannot move to stay the orders made by a court of competent jurisdiction on the basis of such far-fetched fears.

As and when such process gets initiated, the applicants and each of them would be free to seek the High Court's intervention in the various proceedings involving Miguna or this Court itself, for which liberty to apply is hereby granted. We direct further that the appeals once filed be fast-tracked.

The applicants each and all having failed to satisfy us on the nugatory aspect, these applications lack merit and must fail. They are accordingly dismissed with costs.

Dated at Nairobi this 12th day of March, 2018.

R. N. NAMBUYE

……..…..

JUDGE OF APPEAL

P. O. KIAGE

……...

JUDGE OF APPEAL

K. M'INOTI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR