



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & OTIENO-ODEK, JJ.A)

CIVIL APPLICATION NO. NAI. 31 OF 2016 (UR 22/2016)

BETWEEN

DR. ALFRED N. MUTUA APPLICANT

AND

THE ETHICS & ANTI-CORRUPTION

COMMISSION (EACC) 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

SENATOR JOHNSTONE MUTHAMA INTERESTED PARTY

(Being an application for injunction pending hearing and determination of an intended appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Lenaola, J.) dated 5th February, 2016

in

PET. NO. 310 OF 2016)

RULING OF THE COURT

1. The applicant is the ***Governor of Machakos County*** in the Republic of Kenya. The 1st respondent is the ***Ethics and Anti-Corruption Commission*** while the 2nd respondent is the ***Director of Public Prosecution***. At all material times, the 1st respondent invited the applicant to appear before it for purposes of investigation, interview and or recording a statement in relation to procurement of motor vehicles by the Machakos County Government. The investigation arose pursuant to allegation that the subject motor vehicles were procured corruptly and in violation of procurement and tender rules.

2. Following an interview and recording of statement before the 1st respondent, the applicant is apprehensive that the respondents are likely to apprehend, arrest and charge him with an offence in relation to acts and or omissions pertaining to procurement of the said motor vehicles. On 8th July 2014, the applicant lodged a Constitutional Petition before the High Court seeking *inter alia* injunctive orders to restrain the respondents from preferring any charges and or interfering with the applicant's fundamental rights and freedoms based on any investigation, whether commenced, ongoing or concluded relating to the purchase of motor vehicles the subject of 1st respondent Inquiry No. EACC/FI/INQ/51/2014. The applicant also sought a declaratory order that he cannot be held liable in economic or anti-corruption courts for acts and or omissions of County Accounting Officers in charge of County entities in exercise of functions under **Articles 226, 227 of the Constitution and Sections 148 and 149 of the Public Finance Management Act, 2012** and the **County Government Public Finance Management Act, 2013**.

The applicant also sought orders to prohibit the respondents from arresting or apprehending him and or preferring any charges against him based on the procurement process of the motor vehicles purchased pursuant to the County of Machakos Tender Committee resolutions made on 19th April 2010.

3. Upon hearing the parties in an interlocutory application, on 5th February 2016, the High Court (Lenaola, J.) dismissed the applicant's application for injunctive and prohibitory orders. In declining to grant the conservatory orders sought, the trial court in relevant excerpts of the ruling expressed as follows:

“29. In that context, in his application and in his affidavit...the Petitioner explains that his rights to dignity would be infringed upon if he is charged and therefore associated with a procurement crime and his right to continue to hold office would also be infringed upon by his being arrested. On the other hand, counsel for both the 1st and 2nd respondents have argued that the Petitioner's allegation that his rights are threatened with violation by way of arrest and charge by the 2nd respondent is premature and speculative.

30. Having reflected on the matter, I would agree with the respondents because the Petitioner has not convinced me that the 2nd respondent, by doing his work in the ordinary course of his mandate, i.e. reviewing investigation files that have been forwarded to his office and deciding to prefer criminal charges on persons implicated with any alleged crime, poses or represents any sort of menace that might harm him or infringe upon his rights. It is not clear and unambiguous what rights will be violated and what actions stand to violate the specific rights. The allegations of potential threats are at most hypothetical and it is obvious why.

31. In addition, to submit that one's rights will be violated through employment of a fairly predictable procedure that he has not yet even been subject to is indeed merely speculative and premature. In fact, I find that the premature nature of his claim is the very reason why the Petitioner is unable to clearly demonstrate, with the specificity required, how his rights are at threat of being violated...

34. The question that emerges is this – would the risk of injustice that would be occasioned by my not granting these conservatory orders to the Petitioner be greater than the risk of injustice to the respondents? The Petitioner in this instance is opposed to being arrested and charged by the Respondents whose discharge of mandate would require them to arrest and charge the Petitioner if they have just cause to do so. This would indeed be in the interest of justice and any risk of injustice on the Respondents occasioned by the orders that would require them not to discharge their mandate is representative of a risk of injustice on the public as the respondents work on behalf of and for the public. I have already stated that the Petitioner only faces a routine procedure employed by the Respondents. The procedure, in and of itself does not typify any risk of injustice to the Petitioner, more so where there is prima facie nothing on the record to show that the Respondents are abusing the court process or are acting against public interest.

35. Addressing my mind therefore to the proportionality consideration of granting conservatory

orders, I find that there would be a much larger risk of injustice if this Court found in favour of the Petitioner at this stage.

36 ...The conservatory orders being sought by the Petitioner call for this Court to interfere with the 2nd respondent's office in the carrying out of its duties....

41The conservatory orders which would prohibit arrest and charge of the Petitioner would only be allowable if the Petitioner demonstrated that the 2nd respondent's conduct thus far and at this stage, regarding the case has been unlawful, unreasonable, contrary to public interest, the administration of justice or has abused the legal process....

42. At this stage, I cannot find reason to find that the 2nd respondent has acted in contravention of the law at all.

46. It is obvious that none of the prayers sought can be granted and for the above reasons, I do not see any merit in the application....and it is hereby dismissed.”

4. Aggrieved by the dismissal of his application, the applicant lodged a Notice of Appeal to this Court and filed a Notice of Motion dated 10th February 2016. In the foretasted Notice of Motion, the applicant has moved this Court under the provisions of **Rules 5 (2) (b), 42, 43, 47 and 49** of the Rules of this Court and **Sections 3A and 3B** of the **Appellate Jurisdiction Act (Cap 9)** and **Article 159 & 164** of the Constitution seeking *inter alia* the following orders:

“1.

2. *That pending the hearing and determination of the intended appeal herein an injunction and or conservatory orders do issue restraining the respondents whether by themselves, in any court against the applicant based on the procurement of motor vehicles subject of the 1st respondent inquiry No. EACC/FI/INQ/51/2014 (sic).*

3. *That this Honourable Court be pleased to make such other orders as may be appropriate in the preservation of the subject matter hereof and for the expeditious hearing and determination of the intended appeal herein.”*

4. We note that prayer 2 of the Motion is neither concise nor comprehensible. However, the substance of the instant application is discernible from the record and prayers made before the trial judge. Be that as it may, the grounds in support of the Motion as stated on the face of the application are that under **Section 148** of the **Public Finance Management Act, 2012** as read with **Sections 26 and 27** of the **Public Procurement and Disposals Act, 2005** and the Constitution of Kenya,

Accounting Officers for respective county entities are responsible for procurement in the county the county being the procuring entity; that the applicant is neither an Accounting Officer nor head of the Machakos County Procuring Entity as provided by the laws on public finance; that at the time of purchase of the motor vehicles subject of inquiry by the 1st respondent, the head of procurement at Machakos County was an officer deployed by the Transition Authority on secondment; that under **Section 17** of the **Transition to Devolved Government Act, 2012**, a public officer seconded to the Transition Authority shall be deemed to be an officer of the Authority and shall be subject only to the direction and control of the Authority; that the applicant as head of Machakos County Government was only engaged in policy formulation and did not in any way participate in procurement and or influence the Tender Committee in its decision to purchase the motor vehicles in issue; that if arrested and charged, the applicant's right to dignity is likely to be infringed and this might portray the applicant in the public domain in bad light despite there being no nexus between the applicant and the allegations; that the applicant's right to hold and continue to hold office is likely to be infringed without justification if he is arrested and or charged with an offence in relation to acts or omissions devoid of nexus under the Constitution and statute which may occasion the applicant to step aside from office pending the hearing and determination of the

proceedings; that the 1st respondent has violated the applicant's right to administrative action that is reasonable and procedurally fair; that the respondents by dragging the applicant into matters of procurement are likely to infringe the applicant's fundamental rights in a process where there is abuse of mandate and powers conferred by statute which amounts to violation of **Articles 157 (11)** and **Article 249 (c)** of the Constitution; that the 1st respondent has abdicated its duty to appreciate that the applicant is not an accounting officer; that the steps taken by the respondents are tainted with witch-hunt bent on soiling the applicant's clean reputation and that the respondents have abdicated their role to observe national values and principles of governance outlined in **Article 10 of the Constitution** and more particularly, the rule of law, human dignity, equity and social justice by dragging the applicant into procurement matters in which he had no role.

5. At the hearing of this application, the applicant was represented by learned counsel Messrs Mohamed Nyaoga, Mr. Kioko Kilukumi and Mr. Wilfred Nyamu. The 1st respondent was represented by learned counsel Ms Waihinyolo Simiyu; the 2nd respondent was represented by the Senior Assistant Director of Public Prosecution Mr. Njagi Nderitu while the 3rd and 4th Respondents were represented by State Counsel Ms Githua Doris and the Interested Party was represented by learned counsel Mr. Harun Ndubi.

6. Through the State Counsel, The Attorney General and the Inspector General of Police the 3rd and 4th Respondents respectively did not oppose the present application while the 1st and 2nd respondents and the Interested Party opposed the application.

7. At the outset, the applicant submitted that the instant application was not an abuse of court process as all persons have a right to access courts of law. In his submission, Mr. Nyaoga urged us to grant the conservatory orders as prayed; he emphasized that this Court has jurisdiction to grant conservatory orders sought by the applicant; counsel cited dicta by G.B.M. Kariuki, JA in **Justice Kalpana Rawal -v- Judicial Service Commission, Nairobi Civil Application No. 300 of 2015** where the learned Judge of Appeal expressed that the jurisdiction of this Court is conferred by **Article 164 (3)** of the Constitution and not **Section 3** of the **Judicature Act**; it was submitted that under **Article 23 (2) (c)** of the Constitution as read with **Rule 5 (2) (b)** of the **Rules** of this Court, this Court has jurisdiction to grant conservatory orders; that if any litigant is excluded from seeking conservatory orders before this Court, this shall be unconstitutional and a violation of **Article 23 (2) (c)**. Counsel further submitted that this Court has inherent powers to grant conservatory orders under **Rule 5 (2) (b)**; he cited dicta by K. M'Inoti, JA in **Equity Bank Limited -v- West Link Mbo Limited (2013) eKLR** where the learned Judge of Appeal expressed that "under **Article 164 (3)**, the primary purposes of the Court of Appeal under the Constitution is to hear and determine appeals. The power to hear and determine conservatory applications is an incidental or collateral power that is supposed to support and actualize the primary purposes of the Court." Counsel further submitted that in **Cortec Mining Kenya Limited -v- Cabinet Secretary & The Attorney General & Others (2015) eKLR**, this Court held that pursuant to **Section 3 (3)** of the **Appellate Jurisdiction Act**, this Court in hearing an appeal is to apply the law applicable to the case in the High Court and consequently, since the High Court has jurisdiction to grant conservatory orders, this Court equally has jurisdiction to grant conservatory orders. Counsel cited dicta in **Malcolm Bell -v- Daniel Toroitich arap Moi & Another (2013) eKLR** to support submission that this Court has inherent powers to grant conservatory orders.

8. On the merits of the application, it was submitted that the 1st and 2nd respondents are keen to arrest and charge the applicant with a criminal offence; that such arrest and prosecution will involve expenditure of public resources; that if the applicant is arrested and prosecuted and after the hearing of his Petition before the trial court and the intended appeal the Petition and appeal succeeds, public funds would have been wasted; that the Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithiji & 2 Others (2014) eKLR** expressed that the Courts must ever have an interest in contributing to the safeguarding of scarce public resources.

9. Turning to the twin principles of arguability and nugatory aspects, the applicant submitted that the intended appeal was arguable; that several arguable issues are to be urged in the appeal; that the trial judge erred in holding that the applicant had not demonstrated violation of his constitutional rights; that

whereas the judge correctly identified what amounts to real threat of violation of rights and correctly established the test to be applied, the judge erred in finding that there was no danger or threat to the applicant's arrest and prosecution; that the constitutional validity of the intended charges is in issue and conservatory orders should be issued pending the determination of constitutionality of the charges; that the judge erred in law in failing to take into account the findings in the case of **Martin Nyaga Wambora -v- Speaker of Senate & 6 Others (2014) eKLR** where it was stated that there must be an element of personal knowledge that includes intentional, brazen or willful act and nexus that links the applicant to the procurement of motor vehicles; that trial court erred in failing to find that the respondents did not exercise their powers to determine if a nexus existed; that the Director of Public Prosecution has exceeded his powers; that the Petition and intended appeal raise the issue of a Governor's criminal liability for actions of individual officers; that the principle of collective responsibility does not exist in criminal law; that it would amount to gross abuse of process to prosecute the applicant simply because he is the head of Machakos County; that the High Court failed to appreciate that the 2nd respondent was abusing his powers and that the trial court failed to appreciate that the procurement of the motor vehicles was done when the Transitional Authority was responsible for procurement in the County of Machakos.

10. Submitting on the nugatory aspects of the intended appeal, Mr. Nyaoga urged that if the applicant is to be arrested and prosecuted before the intended appeal is heard and determined, the substance of the appeal shall have been overtaken and the intended appeal shall be rendered nugatory. In concluding his submissions, counsel urged us to strike out the Interested Party's submissions which had been filed without leave of this Court.

11. Mr. Nyamu for the applicant reiterated the submissions by Mr. Nyaoga and emphasized that the threatened prosecution of the applicant by Director of Public Prosecution (DPP) was contrary to **Article 157 (11)** of the Constitution; that the powers of the DPP to prosecute is capped and such power is only exercisable in public interest and must not be abused; that the DPP seeks to abuse his prosecutorial powers in arresting and charging the applicant whereas the officers who were responsible for procurement of the subject motor vehicles were answerable to the Transitional Authority; that the applicant did not have the Authority to Incur Expenditure (A.I.E) and he was not an A.I.E. holder; that the trial court abdicated its supervisory role to inquire if the intended and threatened arrest and prosecution of the applicant was constitutional; that if the applicant is arrested and prosecuted, both the Petition now pending before the trial court and the indented appeal shall be rendered nugatory and that once the Petition and intended appeal are rendered nugatory and the applicant's right to knock at the doors of justice and be heard shall have been taken away.

12. Learned counsel Ms Simiyu for the 1st respondent vehemently opposed the instant application. She submitted that intended appeal was neither arguable nor could it be rendered nugatory if conservatory orders are not granted; that this Court has no jurisdiction to grant conservatory orders under **Rule 5 (2) (b)** of the rules of this Court; that the ruling of the trial court was a negative order as it did not direct any party to do anything; that in **Gatirau Peter Munya -v- Dickson Mwenda Kithiji & 2 Others (2014) eKLR** the Supreme Court defined the nature and extent of a conservatory order and this Court has no jurisdiction to grant the same. She submitted that the trial court did not misdirect itself in arriving at the decision made; that the applicant has not demonstrated how the 1st respondent has violated or threatens to violate his constitutional rights and that the present application is speculative and the applicant seeks to stop the exercise of lawful actions by the 1st respondent. Ms Simiyu urged us to adopt and follow the decision in **Michael Sistu Mwaura Kamau -v- Ethics & Anti-Corruption Commission & 3 others (2015) eKLR**, where this Court held that proceedings before a court of law should not be stopped on the basis of speculation or appreciation. Counsel submitted that the applicant should await for his Petition to be heard on merit by the trial court; that the instant application was a delaying tactic to prevent the Petition before the trial court from being heard and determined; that if the orders prayed for are not granted, the 1st respondent will continue to abide by and follow the due process of law in matters relating to investigation and recommendations to the DPP as regards economic and anti-corruption offences and that the 1st respondent stands to be prejudiced if conservatory orders are granted as it will be prevented from discharging its constitutional and statutory obligations. Counsel cited the cases of **Mary Ngechi Ngethe -v- Attorney General & Another (Civil Application No. Nai 157 of 2012; Printing Industries**

Limited & another -v- Bank of Baroda Kenya Limited (2014) eKLR and **James Titus Kisia -v- Said Majid Said (2015) eKLR** in support of her submissions.

13. The Assistant Director of Public Prosecution Mr. Njagi Nderitu, in opposing the application urged that the intended appeal was neither arguable nor shall it be rendered nugatory if the conservatory orders were not granted. He strenuously submitted that the present application was an attempt by the applicant to obtain orders that he failed to obtain on merit before the trial court; that while prayer No. 2 in the application did not make sense prayer No. 1 had lapsed upon the hearing of the application; that the applicant's Petition before the trial court is slated for hearing on 14th April 2016 and the instant application is intent to delay and derail the hearing of the fore stated Petition on merit; that grant of injunctive orders shall stall the Petition before the trial court; that the present application was a classic example of abuse of court process; that the record before the trial court shows that there is a link or nexus between the applicant and the procurement of subject motor vehicles; that in his present application, the applicant deliberately failed to attach the affidavit filed before the trial court that shows the link and nexus between him and procurement of the motor vehicles; that perusal of the record shows that the applicant has admitted being involved in the formulation of the policy for purchase of the motor vehicles; that the application for conservatory orders is premature as it seeks to stop the DPP from exercising his mandate under **Article 157** of the Constitution and **Section 6** of the **Office of DPP Act**; that the DPP is only guided by facts, evidence and the law; that there is no evidence or proof that the DPP has violated the provisions of **Article 157** of the Constitution or **Section 6** of the **Office of DDP Act**; that the applicant is seeking orders to grant him immunity from being investigated and a possible arrest and prosecution; that this Court should not immunize the applicant.

14. Relating to the jurisdiction of this Court to grant conservatory orders, Mr. Njagi submitted that the present application invokes the inherent jurisdiction of this Court under **Rule 5 (2) (b)**; citing the case of **Mary Ngechi Ngethe -v- Attorney General & Another (Civil Application No. Nai. 157 of 2012)**, it was submitted that inherent powers of a court does not create jurisdiction; that what the applicant is asking this Court to do is to occupy the position of the DPP and determine if the applicant can be charged and that the applicant is asking this Court to play the role of EACC and examine the evidence to determine if a *prima facie* case has been revealed for recommendation to the DPP and finally this Court is being urged to take the role and place of the trial court and evaluate the defence and prosecution case in advance.

15. The ADDP submitted that what the applicant is asking this Court to do is un-procedural and unlawful. He reiterated that the applicant does not have an arguable appeal and all he is seeking is to stop the DPP from exercising his powers; that both proportionality and the interest of the public dictate that the DPP should be allowed to exercise his constitutional and statutory mandate; that public interest demands that this Court should not immunize the applicant; that he should be investigated just like any other citizen; that the applicant has not demonstrated with certainty what rights are being violated and that if the applicant is arrested, he will be entitled to due process of law and he can as well apply for bail. The ADPP also submitted that the intended appeal shall not be rendered nugatory if the orders sought are not granted. He distinguished all cases cited by the applicant stating that the cases cited did not seek to immunize the applicants or insulate them from arrest as is in the present case.

16. Appearing for the Attorney General and Inspector General of Police, State Counsel Ms Dorris Githua submitted that the present application for conservatory orders was not opposed. She observed that the 3rd and 4th respondents did not file any replying depositions and her instructions were to support the instant application and that the intended appeal is arguable and shall be rendered nugatory if conservatory orders were not granted.

17. Learned counsel Mr. Harun Ndubi for the Interest Party opposed the application and adopted submissions by the 1st and 2nd respondents; he urged that the present application is seeking an evaluation of how the trial judge exercised his discretion; that no sufficient material had been placed before this Court do demonstrate and determine if the trial judge erred in the exercise of his discretion; that learned counsel Mr. Nyaoga, for the applicant, did not describe any indiscretion on the part of the trial judge that would invite and make this Court interfere with the decision of the trial court; that in making the present application, the applicant is behaving as if he has a right not to be arrested; that even arrest is a judicious

process. Learned Counsel submitted that the argument that public resources shall be wasted does not hold water; that it is in public interest to show that all men and women are equal before the law; that the applicant is guilty of material non-disclosure as he failed to annex an affidavit filed before the trial court that connects him to the procurement of the subject motor vehicles; that every person is entitled to protection of their dignity and that when corruption is suspected, we must allow investigation so that the dignity of all Kenyans is respected and restored; that in law there is no immunity of a Governor.

18. In replying to the submissions; learned counsel Kioko Kilukumi urged that what the applicant is seeking is not stay of negative orders but stay of proceedings; that the Petitioner does not challenge the carrying out of the DPPs constitutional mandate; that what the applicant is challenging is abuse of the legal process and the extraneous purposes through which the 1st and 2nd respondents plodded on by the Interested Party are abusing the investigative and criminal processes. It was submitted that in exercising his discretion to refuse to grant the conservatory orders sought, the trial court did not consider the entire replying affidavit filed by the applicant; counsel conceded that the instant application was speculative but it is a speculation that is ordained and sanctioned by **Articles 22 (1) and 258** of the Constitution; that **Articles 258 and 22 (1)** of the Constitution allow any person whose rights are threatened to move the court for appropriate orders; that if your rights are threatened with violation you can Petition the Courts that this is a speculation that is written in the Constitution. On the issue of proportionality, counsel submitted that the issue at hand involves the Bill of Rights and this Court is required to enforce the Bill of Rights to the greatest extent possible; that the proportionality test demands that this Court should give greater premium to the Bill of Rights; that the Bill of Rights is not for monetization with compensation; you cannot give us money so that you violate our basic human rights.

19. We have considered the present application and grounds in support thereof. We have taken into account submissions by counsel as well as the authorities filed and cited by the parties. Before we consider the merits of the application under **Rule 5 (2) (b)** of the rules of this Court, we must determine the issue of jurisdiction of this Court to grant the conservatory orders sought.

20. The nature and extent of jurisdiction of a court to grant interlocutory and or conservatory orders is well stated by the Supreme Court in **Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell**, SC Applications Nos. 12 and 13 of 2012. At paragraph 33, the Court stated

“It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court’s capability to arrive at a just decision on the merits of an appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case.”

21. In **Equity Bank Limited -v- West Link Mbo Limited** (2013) eKLR, the learned Judge of Appeal K. M’Inoti, JA observed that the power to hear and determine conservatory applications is an incidental or collateral power of this Court. In **Hon. Peter Anyang Nyongo & Two Others vs. The Minister for Finance & Another**, Civil Application No. Nai. 273 of 2007 (unreported) it was stated:

“It is trite law that this Court is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of this Court to grant interim reliefs in Civil Proceedings pending appeal is circumscribed by Rule 5 (2) (b). It is apparent that under Rule 5 (2) (b) this Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction, and a stay of further proceedings. This Court has consistently construed Rule 5 (2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from.” Two principles emerge from a consideration of Rule 5 (2) (b) and the two authorities to wit, that, the jurisdiction of the court under Rule 5 (2) (b) is restricted to decisions made in Civil Proceedings and that the reliefs sought must relate to the decision of the superior court in its original or appellate jurisdiction.
“

22. Guided by the dicta expressed by the Supreme Court and the decisions of this Court as cited above,

we are of the view that this Court has jurisdiction to hear, determine and grant interlocutory injunctive orders and or conservatory reliefs and or stay of proceedings.

23. Having held that we have jurisdiction to grant interlocutory conservatory orders, we now consider the merits of the instant application. This is an application under **Rule 5 (2) (b)** of the rules of this Court and we must be satisfied on the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088 and Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported).**

24. The instant application lodged pursuant to **Rule 5 (2) (b)** seeks a stay order. The trial judge declined to grant stay orders. We remind ourselves that the decision to grant or not to grant a stay order is a decision made in exercise of discretion by the trial court. In the instant case, the intended appeal is a challenge on the exercise of discretion by a trial court. The Supreme Court in **Teachers Service Commission - v- Kenya National Union of Teachers & 3 Others, SC Application No. 15 of 2015** expressed the view that a court lacks jurisdiction to entertain an application challenging the exercise of discretion by another court.

25. Whereas the applicant contends that the intended appeal is arguable, the 1st and 2nd respondents assert the intended appeal is not arguable. This Court has on numerous occasions stated that in an application for stay, it suffices that a single arguable point is identified.

26. In the draft Memorandum of Appeal attached to the application, the applicant lists various arguable points *inter alia*: that the learned judge erred in law and fact by failing to appreciate the need to preserve the subject matter of the Petition; that despite appreciating the fact that the applicant has the right to challenge the constitutional and legal propriety of the respondents exercise of authority and mandate, the judge erred and failed to appreciate that based on the affidavit in opposition to the Petition, there was eminent threat of arrest and charging of the applicant whilst his Petition is pending for hearing and determination before the trial court; that the judge erred in law and fact by finding that the court did not have authority to interrogate facts, evidence and law in relation to the subject matter of Petition; the court erred and failed to appreciate that by virtue of **Article 165 (3) (d) (ii) of the Constitution**, the court had a duty to interrogate all facts and endeavor to determine whether the 1st and 2nd respondents in exercise of their constitutional mandate are inclined to violate **Article 157 (11) of the Constitution**; that the judge disregarded the doctrine of *stare decisis* in the case of **Nyeri Civil Appeal No. 21 of 2014 Martin N. Wambora & Another -v- The Country Assembly of Embu & Others**; that the judge erred in law and fact by finding that no *prima facie* case had been made out yet it appreciated that the applicant was entitled to question the manner in which the 2nd respondent exercises its authority under the Constitution and that the learned judge erred in law and fact by failing to appreciate that the question as to whether a County Governor could be held responsible for procurement during transition is a matter falling within the jurisdiction of the High Court under **Article 165** of the Constitution.

27. In contrast to the applicant's submission, the 1st and 2nd respondents' contend that the issues listed by the applicant do not disclose any arguable appeal.

28. We have considered the proposed grounds of appeal as per the draft Memorandum of Appeal. We remind ourselves that a single arguable ground of appeal suffices in a **Rule 5 (2) (b)** application. Further, an arguable ground need not be one that must succeed but one that is arguable. Analysis of the draft Memorandum of Appeal and the affidavit in support of the present application convince us that the intended appeal evinces arguable grounds. It is arguable whether a County Governor can be held responsible for procurement during the transition period; it is arguable whether a County Governor who is not the accounting officer can be held criminally liable for acts of omissions or commissions of the procurement Tender Committee; it is arguable whether there is a nexus or link that connects the applicant to the procurement of motor vehicles in issue.; it is arguable whether the record reveals facts that prove that the respondents have threatened to violate any right or fundamental freedom of the applicant and it is

also arguable whether the respondents in exercise of their constitutional and statutory mandate have abused or exceeded their powers. Some of these arguable grounds are matters of fact to be determined on merit by a trial court. Considering the identified grounds in the draft memorandum of appeal, we are satisfied that the applicant has satisfied the first limb to be fulfilled in a **Rule 5 (2) (b)** application.

29. On nugatory aspects, the applicant contends that if conservatory orders are not granted, the intended appeal shall be rendered nugatory. The premise of this contention is that the subject matter in the intended appeal and Petition pending before the trial court is the person of the applicant; that if the applicant is arrested and charged, the intended appeal shall be rendered nugatory because that which was to be enjoined or prohibited would have happened and the appeal would be an academic exercises in vain. Conversely, the 1st and 2nd respondents submitted that the intended appeal shall not be rendered nugatory if conservatory orders were not granted; the reason being that there is no threat of arrest and prosecution of the applicant but more importantly a court of law, and this Court in particular, should not curtail and restrict the constitutional and statutory mandate of the 1st and 2nd respondents; that a court should neither prohibit nor injunct a State Organ from exercising its constitutional and statutory mandate unless it has been demonstrated that such State Organ has acted in excess of its mandate; that in the present case, there is no such proof.

30. We have considered the rival submissions on the nugatory aspects of the intended appeal. We emphasize that in a **Rule 5 (2) (b)** application, it is the intended appeal to this Court that must be rendered nugatory and not any proceedings pending before the trial court. In this context, it is the intended appeal to this Court that must be rendered nugatory and not the Petition pending before the trial court. Both the intended appeal and Petition pending before the trial court seek to determine constitutionality of exercise of power by the 1st and 2nd respondents in relation to investigations on procurement of motor vehicles by the Machakos County Government. The *inter partes* hearing and determination of the Petition pending before the trial court is not dependent on whether or not the applicant is arrested and or prosecuted. It is immaterial for the determination of the issues urged in the Petition whether or not the applicant has been arrested and or prosecuted. In our view, the core legal issues in the Petition and the intended appeal is not the arrest and or prosecution of the applicant, but whether the 1st and 2nd respondents in investigating procurement of the alleged motor vehicles have exercised their constitutional and statutory mandate in accordance with the law. In our view, the law is to be applied irrespective of the status of the individual(s) suspected to have committed an alleged offence; a specific individual becomes relevant only when he/she is the subject of investigation or is a suspect or an accused. In such a case, **Article 49** of the Constitution comes into play to safeguard the rights of the arrested person.

31. The applicant submitted that the intended appeal would be rendered nugatory because there is a real threat of his arrest and prosecution; that the threat violates not only his personal dignity as protected in **Article 28** of the Constitution and his other constitutional rights and freedoms; that the threatened arrest and prosecution violates his right to continue to hold office as Governor of Machakos County; that his arrest and prosecution may require him to step aside and or vacate office as Governor of Machakos Count and that the intended appeal would be rendered nugatory if he is arrested and arraigned in court for procurement offences committed whilst he is not the accounting officer nor is there any link or nexus connecting him to the procurement of the motor vehicles.

32. On their part, the 1st and 2nd respondents contend that the intended appeal shall not be rendered nugatory as due process of law has been followed and will continue to be followed in the investigation, arrest if at all and prosecution for offences relating to procurement of the motor vehicles; that an appeal cannot be rendered nugatory when due process of law is followed and that the applicant's allegation of threat of arrest and prosecution is speculative and premature since the Director of Public Prosecution is yet to determine if the investigations conducted by the 1st respondents reveals a *prima facie* triable case to enable the applicant to be arraigned before a court of law.

33. Concerning submissions on threat of violation of the applicants rights and fundamental freedoms and speculation of threat of arrest and prosecution, we have considered the same in light of **Articles 22 (1) and 258 (1) of the Constitution**. **Article 258 (1)** provides that "Every person has the right to institute court

proceedings, claiming that this Constitution has been contravened or is threatened with contravention.” **Article 22 (1)** provides that “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened”.

34. Guided by the provisions of these Articles, we find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat.

35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant’s fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the Petition. This Court, being an appellate court, does not have the benefit of determination by the trial court on merit of existence nor non-existence facts that constitute threat of violation. Whereas it is an arguable ground whether the trial judge erred in fact and law arriving at the decision that there was no threatened violation of the applicants rights and freedoms, we are of the considered view that the intended appeal shall not be rendered nugatory if no conservatory orders are granted because the existence of threat of violation of rights and freedoms shall be determined by the trial court on merits if conservatory orders are not granted in this application. We believe it is in the interest of justice that alleged facts constituting threatened violation of the applicant’s rights should be canvassed and a determination made whether or not such facts exist.

36. The applicant in replying submissions urged this Court to stay proceedings before the trial court. In the Notice of Motion dated 10th February 2016, there is no prayer for stay of the High Court proceedings in **Petition No. 310 of 2016**. The main prayer in the application is for conservatory orders and injunction to restrain the respondents from arresting and or pressing any criminal charges in any court against the applicant based on procurement of motor vehicles subject of the 1st respondent’s Inquiry **No. EACC/FI/INQ/51/2014**.

37. Having considered the twin principles of arguability and nugatory aspects of the intended appeal, we remind ourselves that the instant application is an application for conservatory orders and we must consider and apply the law relating to grant of conservatory orders. In **Judicial Service Commission -v- Speaker of the National Assembly & Another (2013) eKLR**, the High Court correctly expressed that:

“Conservatory orders are in my view not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the Land. They are not remedies between one individual as against another, but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders why only attaché to a particular person may.”

38. In **Gatirau Peter Munya -v- Dickson Mwenda Kithiji & 2 Others (2014) eKLR**, the Supreme Court at paragraphs 83 to 89 and paragraphs 93 and 95 considered the principles for grant of conservatory orders in public interest. More specifically, at paragraph 86 the Court stated:

“[86] Conservatory orders” beara more decided public- law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. **Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.** (Emphasis ours).

39. The Supreme Court further expressed that in an application for conservatory orders and any other

interlocutory relief, public interest is a factor to be taken into account and public interest is a condition dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution.

40. In our view, to ascertain what public interest would dictate given the facts and submissions made in this application, we examine the grounds in support of this application in light of the constitutional and statutory mandate of the Director of Public Prosecutions. Of relevance to this application are the provisions of **Article 157 (4), (6), (10) and (11)** of the Constitution.

“Article 157 (4):

The Director of Public Prosecution shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.

Article 157 (6):

The Director of Public Prosecution shall exercise State powers of prosecution and may-

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

Article 157 (10):

The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

Article 157 (11):

In exercising the powers conferred by this Article, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.”

41. Whereas the applicant in his submissions urged that they are not seeking to restrain the DPP from discharging his constitutional mandate, the legal and practical consequence of the instant application is that the applicant is seeking orders to stop the Director of Public Prosecution from exercising the powers conferred under **Article 157 (4) and (6)** of the Constitution. The conservatory orders sought seek to stop investigations, arrest and prosecution of the applicant for any alleged offence related to procurement of the subject motor vehicles.

42. The Kenya Constitution is replete with the provisions on separation of roles, powers and functions. The Office of Director of Public Prosecution is an independent office with clear defined functions. In principle, it is not the work of courts to interfere with other State organs unless it can be shown that they violate the constitution; each State Organ must be allowed to function without interference. (See also **Judicial Service Commission v. Speaker of the National Assembly and 8 Others, Nairobi HC Petition No.518 of 2013**). It is the duty of this Court to protect not only the functional, administrative and operational independence of the Office of Director of Public Prosecution but also to protect the applicant and ensure that in exercise of his functions, the DPP must have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

43. In this context, functional, administrative and operational independence entails that the Office of DPP and EACC in exercising their autonomy and carrying out their functions they do so without receiving any instructions or orders from other State organs or bodies and have regard to *inter alia* public interest and not to abuse the legal process. The Office of DPP must also adhere to the national values in **Article 10** of the Constitution and in the context of this application the principles of good governance, transparency and

accountability in exercise of its functions.

44. In considering public interest as a criterion for determining whether we should grant conservatory orders as prayed for in this application, we have asked ourselves whether as a general rule it is in public interest to stop the DPP from investigating any criminal offence on the basis that such investigation is a threat to fundamental rights and freedoms because it may lead to arrest and prosecution of an individual. The *raison detre* for the existence of the Office of Director of Public Prosecution is investigation and prosecution of any and all alleged criminal offence. The functionality of the Office of DPP is ensured *inter alia* through **Article 157 (4), (6), (10) and (11)** of the Constitution. If this Court is to grant the conservatory orders sought by the applicant, the Court would be imposing a restriction on the constitutional powers of the Office of DPP and thus violating **Article 157 (10)** of the Constitution. Under **Article 157 (10)**, the DPP does not require the consent of the Court to undertake any investigation or prosecution of an individual. The instant application is an indirect application to this Court to grant or decline consent to the DPP to investigate and prosecute the alleged offences relating to procurement of motor vehicles for Machakos County Government. One of the instances in which a court can intervene in relation to the powers of the DPP is if **Article 157 (11)** is violated. In such a case, an applicant has to prove that public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process demand intervention by the court.

45. In further consideration of public interest in relation to the conservatory orders sought, we have evaluated the instant application in light of the submission that there is a real threat of arrest and prosecution of the applicant and that this is a threatened violation of his dignity and fundamental rights under the Constitution. Arrest leads to many serious consequences not only for the arrested individual but for his family, close relations and friends particularly as most people do not make any distinction between arrest at a pre-conviction or post-conviction stage. In our view, arrest should be the last option and should be restricted to those exceptional cases where arresting an individual is imperative in the facts and circumstances of the case. Personal liberty is a very precious fundamental right and should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. The importance of personal liberty as a fundamental right cannot be gainsaid; all other fundamental rights and freedoms cannot be enjoyed without life and liberty. Life bereft of liberty is without honour and dignity and loses significance and meaning and life itself would not be worth living; that is why liberty is the very quintessence of a civilized existence.

46. Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, the Constitution anticipates arrest of individuals and that is why **Articles 49 and 50 (2)** make provision for the rights of arrested persons. In our view, a threat of arrest or any arrest *per se* is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.

47. In the application before us, there is no evidence on record to show that the applicant's rights under **Articles 49 and 50** are threatened with violation if he were to be arrested.

48. The applicant submitted before us that the intended appeal shall be rendered nugatory if he is arrested and prosecuted when he was not the A.I.E. holder and that his rights stand to be violated as the procurement of the motor vehicles was done under the auspices of the Transition Authority. These submissions identify defences that may be raised by the applicant if at all he is arraigned before a court of law. We have considered this submission and we are of the view that the trial court is the best forum to hear and evaluate the evidence tendered and the merits of any defence raised. In this regard, we adopt the statement by this Court in **Uwe Meixner & Another -v- The Attorney General, Civil Appeal No. 131 of 2005** where it was stated that it is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge.

49. In the case of **Peter O. Ngoge vs. Francis Ole Kaparo and Others, SC Petition No. 2 of 2012,**

Court observed that in the interpretation of any law, the guiding principle is that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law.

50. In our considered view, if at all the applicant were to be arrested and arraigned for trial, the trial court has the professional competence to consider and evaluate any constitutional issues urged and any applicable defence raised. Any trial court has competent office holders with requisite training and skills to hear and determine any defence that the applicant may proffer. This Court is not a trial court to determine the factual merits and cogency of defenses available to the applicant; the proper forum to raise and urge any defence is the trial court. In our view, public interest dictates that the rights of the applicant cannot be violated if he is given an opportunity to raise and urge his defence before a trial court. In this regard, we adopt the dicta by this Court in **Helmuth Rame -v- R Criminal Application No. 1 of 2015** where it was stated that an intended appeal shall not be rendered nugatory if criminal proceedings are not stayed because should it be found that the applicant will have been subjected to an unfair trial, then he has a remedy in damages.

51. We have also considered the applicants submissions in light of **Article 182 (1) (d)** as read with **Articles 180 (2)** and **Article 193 (2) (f) and (g)** and more particularly **Article 193 (3)** of the Constitution that requires a public officer to vacate office if convicted of a criminal offence; pursuant to **Article 193 (3)**, such vacancy shall not arise until all possibility of appeal or review of the relevant sentence or decision has been exhausted.

52. The applicant contends that if he is arrested and prosecuted he may be required to step aside and or vacate office of Governor of Machakos County. In our considered view, presently, it is premature and there is a remote possibility that if arrested, the applicant shall be required to step aside and or vacate the office of Governor of Machakos County. If read *mutatis mutandis*, **Article 193 (3)** of the Constitution expressly provides that the possibility of appeal or review of the sentence upon conviction must have been exhausted before a Governor can vacate office.

53. In the present case, the applicant has neither been arrested, charged, tried, convicted nor sentenced. The conditions for the applicant to vacate office upon conviction do not exist in law. Further, neither the Constitution nor any statute provides for the concept of stepping aside of a Governor or any public officer. Accordingly, we find that the applicant's submission that he may be required to step aside and or vacate office of Governor has no merit. We are fortified in our view by the ripeness doctrine. The applicant raises the issue of vacating office too early in the day. The matter for the applicant vacating office is not ripe for consideration or determination by any court. (For discussion of the ripeness doctrine, **Jeffrey Tobin** in his book "**The Oath: The Obama White House and The Supreme Court**", page 71-72; see also Supreme Court **Petition No, 27 of 2014, Yusuf Gitau Abdallah -v- The Building Centre (K) Ltd & 4 Others**).

54. In totality, we are of the view that in public interest, the intended appeal shall not be rendered nugatory if investigations and due process of law is observed in relation to inquiry and investigations pertaining to procurement of the subject motor vehicles.

55. However, the applicant has a fundamental right to protection of the law under article 27(1) of the Constitution. He has, in addition, a right under Article 22(1) to institute court proceedings for the enforcement of the right. By Article 159(2), the Court in exercising judicial authority is required, *inter alia*, to administer justice without undue regard to procedural technicalities and also to protect and promote the purpose and principles of the Constitution. The Court has in addition, inherent power under Rule 1(2) of the Court of Appeal Rules to make such orders as they be necessary for the ends of justice or to prevent abuse of the process of the court.

56. It has been correctly said that the juridical basis of inherent jurisdiction is the authority of the court to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. The jurisdiction can be invoked in relation to matters not raised in litigation between parties and also where the statute or rule do not specifically confer jurisdiction on the court.

57. Rule 5(2) (b) of the Court of Appeal Rules which gives court power to grant orders only pending appeal is subordinate to the inherent jurisdiction of the court and to the Constitution.

58. By the petition, the applicant seeks a public law remedy. The Constitution has conferred on the High Court power to grant remedies including conservatory orders for the enforcement of fundamental rights (Article 23(3)). The Court in exercise of its appellate jurisdiction has corresponding powers. As the Supreme Court said in **Gatirau Peter Munya v Kithinji Dickson Mwenda and 2 Others Civil Application No. 5 of 2014**, conservatory orders are intended to facilitate orderly functioning within public agencies as well as to uphold the adjudicatory authority of the court in public interest.

59. As indicated above, it has come to the attention of the Court that notwithstanding the pendency of the applicant's petition alleging abuse of legal process by the 1st and 2nd respondents, the 1st and 2nd respondents have preferred charges against the applicant and bonded him to appear before the Magistrate Court to answer the charges which are the subject matter of the petition.

60. If that is allowed to happen, the constitutional right of the applicant to the protection of the law and his right to institute legal proceedings to enforce his rights will be breached and the Court will have failed to protect and promote the purpose and principles of the Constitution including the rule of law. Moreover, the prosecution will undermine the authority of the High Court to administer justice in an orderly and effective manner, bring the administration of justice into disrepute and render the petition futile. The courts should not be seen to be impotent.

61. We would for those reasons invoke the constitutional principles and the inherent jurisdiction of the Court and in spite of the dismissal of the application, grant a conservatory order suspending the charges and the arraignment of the applicant until 27th May, 2016 when Petition No. 310 of 2014 is scheduled to be heard. Thereafter, the applicant is at liberty to move to the High Court and the High Court has liberty to make any further orders.

Dated and delivered at Nairobi this 6th day of May, 2016

E. M. GITHINJI

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR