IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, KIAGE & GATEMBU JJ.A)

CIVIL APPLICATION NO. NAI. 304 OF 2014 (UR 227/2014)

BETWEEN

PROF. NJUGUNA S. NDUNG'U ……..……..……..……APPLICANT

VERSUS

THE ETHICS & ANTI CORRUPTION COMMISSION …… 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTONS ……...….. 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE ……...……..….. 3RD RESPONDENT

THE ATTORNEY GENERAL ……...…… 4TH RESPONDENT

(Being an application for Conservatory orders pending the hearing and determination of an appeal against the judgment and decree (Odunga, J.) dated 17th November, 2014

in H.C. PETITION NO. 73 OF 2014)

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RULING OF THE COURT

The applicant Prof. Njuguna S. Ndungu has by a notice of motion application dated 25th November 2014 moved this Court for various orders the most germane one being prayers 3 and 4 as follows;

> ***"3. THAT conservatory orders do issue to the judgment delivered on 17.11.14 pending the hearing and determination of the appeal filed on 25.11.14 in Nairobi Civil Appeal No. 333 of 2014.***
>
> ***4. THAT, as the record of appeal is already filed, the hearing of the main appeal be proceeded to on a priority basis."***

The application is expressed as bought pursuant to **Articles 20(3**) and **23(3)** of the Constitution, **Section 3(2) and 3A** of the Appellate Jurisdiction Act, Cap 9, Rules 5(2) (b) 42, 49(1) and 101 of the Court of Appeal Rules, "and all enabling provisions of established laws", this is last phrase being in our view, no more than mere surplusage. The grounds on which it is premised are set out on the face of the motion as

including;

"(c) THAT the main appeal is ready for full hearing at the court's commencement (sic).

d. ***THAT the applicant has an arguable appeal with good prospects for success as per the annexed memorandum of appeal.***

e. ***THAT the appeal will be rendered nugatory should the conservatory orders not issue as the appeal seeks to stop the arrest and prosecution of the applicant.***

f. ***THAT the applicant is a distinguished professor of Economics and public servant of long record, whose public career is coming to an end in March 2015 or thereabouts and the intended arrest and prosecution will destroy the record.***

g. ***THAT to demonstrate the urgency and importance of the matter, the applicant has managed against all odds to prepare and file the record of appeal in the shortest time possible after judgment was delivered on 17.11.14."***

In support of the motion the applicant swore an affidavit on 25th November 2014. In it he swore that he had been in public service all his life as a distinguished professor of Economics at the University of Nairobi and as Governor of the Central Bank of Kenya ("the Central Bank"). He also made reference to and attached the petition he had filed at the High Court and which was dismissed by Odunga J. on 17th November 2014. That petition was filed by the applicant following a headline story carried in *The Daily Nation* of the 11th February 2014 to the effect that the Director of Public Prosecutions had accepted the recommendation of the Ethics and Anti Corruption Commission (EACC) for the arrest and indictment of the applicant with corruption over the alleged loss of Kshs. 400 million by the Central Bank, which the applicant heads. The loss was alleged to emanate from the award by the Central Bank of a tender for the installation and commissioning of the Integrated Security Management Systems (ISMS) to Horsebridge Network Systems EA ("Horsebridge") following a successful challenge by the said company before the Public Procurement and Administrative Review Board (PPARB).

The applicant had argued before the High Court that the DPP and the EACC had erred in law in seeking his prosecution for various reasons including;

a. ***The applicant as Chief Executive Officer of Central Bank was not involved in the tendering process.***

b. ***The award of the tender to Horsebridge was pursuant to and in compliance with a lawful binding order by the PPARB.***

c. ***The allegation of loss or potential loss of Kshs. 400 million was specious and speculative.***

d. ***Horsebridge was in any event the lowest bidder and no contract with it had yet been signed.***

e. ***The applicant was alleged to have ignored legal advice but advice is not binding and cannot override established law.***

The applicant had also alleged brazen and violent violation of his constitutional rights in the attempt to arrest and indict him. He charged that the DPP and the EACC were acting in a capricious and arbitrary manner; were breaching his rights to dignity and freedom; and had denied him the right to fair administrative action as well as negated his right to the presumption of innocence. The various provisions of the Constitution allegedly violated by the DPP and EACC were enumerated in the petition.

As we have stated, that petition was dismissed by Odunga J. and the applicant promptly filed a notice of appeal as well as a record of appeal. The applicant refers to the memorandum of appeal and states that the appeal has high chances of success. He also urges that unless this Court grants him the conservatory

orders he seeks, his said appeal will be rendered nugatory and its outcome purely academic as his arrest and prosecution would have destroyed his long career. He urges us to take the cue from Odunga J. who granted him conservatory orders for 14 days after the dismissal of his petition, to also grant him conservatory orders pending the hearing of his already filed appeal which he lauds as meritorious.

The application is vehemently opposed. On behalf of EACC (the first respondent) David K. Ruto, Advocate swore a replying affidavit on 1st December 2014 in which he averred that the application was incompetent and without merit and this Court was devoid of jurisdiction to entertain it. He also added that the High Court's decision was not capable of being stayed and did not call for conservatory orders. He swore further that the applicant's appeal is not arguable and that there was no irreparable harm likely to be suffered as the applicant would be subjected to a process that has sufficient safeguards against any infringement on his rights.

The Director of Public Prosecutions (the second respondent) on his part did not swear or file a replying affidavit. Rather, a notice of preliminary objection was filed on his behalf by Nicholas Mutuku an Acting Deputy Director of Public Prosecutions. The objection echoed the substance of the 1st respondent's affidavit and was premised on three grounds, namely;

> ***"1. The Court has no jurisdiction to grant the orders sought as the conservatory orders being sought by the applicant is (sic) neither an order of stay of execution or stay of proceedings nor an order of injunction as envisaged by Rule 5 (2) (b).***
>
> 2. ***The judgment of the superior court (sic) dated 17th November 2014 in High Court Petition No. 73 of 2014 was a dismissal of a suit, a negative order that is not capable of execution by enforcement and cannot therefore be stayed. Therefore the application for stay is to that extent misconceived.***
>
> 3. ***The application is incurably defective, bad in law and is an abuse of the court process."***

The second respondent thus prayed that in those premises, the application be struck out. When the motion came up for hearing before us on 2nd December 2014, learned counsel Mr. D.B. Kipkorir appeared for the applicant while his learned colleague Mr. D.K. Ruto appeared for the 1st respondent. The second respondent was represented by three learned counsel led by Mr. Mutuku, the others being Mr. Okello and Mr. Ashimosi. Even though the 3rd and 4th respondents had not filed any papers in the matter, they were represented by learned counsel Mr. C. Kamunya.

Being cognizant of this Court's primary duty to hear and determine substantive appeals in the most timely and efficient manner, we sought at the outset the respective parties' opinion on whether it would not conduce to the saving of the Court's resources to go into the already-filed appeal the hearing and determination whereof could be fast-tracked and take about the same time as the hearing and determination of this application but eliminate duplication. To this Mr. Kipkorir and Mr. Kamunya were agreeable. Mr. Ruto and Mr. Mutuku were not exactly opposed to the appeal being fast-tracked but after the time they asked of us for them to consult, they advised that they nevertheless preferred that the application be argued. With that indication we directed that the 2nd respondent's preliminary objection be incorporated in and be argued with that party's response to the application.

In support of the motion, Mr. Kipkorir submitted that what the applicant sought from this Court was a conservatory order. He was to later clarify in his reply that by this he meant an interim order to stop the arrest and prosecution of the applicant. Counsel took time trying to demonstrate to us that the applicant's appeal was arguable. He referred to the genesis of his client's travails as being a letter written to the 2nd respondent by the firm of Gitonga Mureithi & Co. Advocates on 25th July 2013 on behalf of an unnamed tenderer complaining about the subject tender. Mr. Kipkorir maintained that the applicant will be seeking to persuade the Court of Appeal that the said letter by advocates purporting to act for an unnamed 'ghost' client could not form the basis for the applicant's arrest and prosecution. This, he submitted, was an arguable point on appeal.

Mr. Kipkorir also submitted that the PPARB having by a ruling delivered on 14th January 2013 ordered that the tender be awarded to Horsebridge, the lowest tenderer, no criminal culpability could properly follow from compliance with those orders, another arguable point. Counsel proceeded to urge that as the Central Bank was not aggrieved by that decision, it had no obligation to appeal and he will be seeking to argue yet another point on appeal that a decision not to appeal a judgment or order of the PPARB cannot be tantamount to nor constitute a criminal offence for which the applicant could be arrested and prosecuted.

Counsel then proceeded to mention other matters which he submitted amounted to arguable points, namely;

- That no affidavit or other evidence was placed before the learned judge that the Central Bank by awarding the tender of the lowest tenderer would in fact incur a Kshs. 400 million loss.

- That there was no discernible nexus between the decision of the learned judge and the reasons be preferred therefor.

- That the learned judge did not at all address the applicant's complaints about the violation of the applicant's rights.

- That the learned judge's decision was not only incorrect and disjointed but also departed from his own earlier decisions.

Turning to the nugatory aspect, Mr. Kipkorir reverted to the oft-mentioned plea that to arrest the applicant would cause him irredeemable loss as it would unjustifiably stain and end his illustrious career. He urged us to take judicial notice of the abrupt end of the career of one Mulei a predecessor of the applicant brought about by similar criminal charges which in the result were found to have been unfounded.

On the law, Mr. Kipkorir submitted that this Court has jurisdiction to grant conservatory orders where the ends of justice require it. This flows, in counsel's submission, from the Constitution of Kenya 2010, itself, as well as from the overriding objective of the Appellate Jurisdiction Act and the Court of Appeal Rules and it behooves the Court to interpret and apply its **Rule 5(2) (b)** jurisdiction with all that in mind. Counsel therefore urged us to grant the application and dismiss the 2nd respondent's preliminary objection which he charged was based on pre-2010 judicial pronouncements and did not therefore reflect current law. Current law, counsel submitted, required courts to incorporate the Bill of Rights in decision-making and to take an expansive approach thereto as opposed to the narrow and constrictive approach proposed by the respondents.

Mr. Kipkorir rested by urging us to follow and give effect to various decisions of this Court and the Supreme Court on the subject. First is the 5- judge bench decision of this Court in **EQUITY BANK Vs. WEST BANK MBO LTD** 2013]eKLR where the rationale, proper place and province of interventionary or conservatory orders under **Rule 5(2) (b)** and this Court's jurisdiction to grant the same were pronounced upon. He drew our attention to the judgment of M'Inoti JA where the learned judge of appeal specifically used the phraseology of "conservatory orders" in his discussion of this Court's jurisdiction under **Rule 5(2) (b)**. Counsel also cited the Supreme Court's decision of **GATIRAU PETER MUNYA Vs. DICKSON MWENDA KITHINJI & 2 OTHERS** [2014] eKLR where the nomenclature of conservatory orders was employed in relation to interlocutory relief pending appeal as he emphasized that the applicant was essentially seeking a preservation of the status quo pending the hearing and determination of his pending appeal.

Opposing the application, Mr. Ruto first posited that it is never the duty of the High Court or the Court of Appeal to determine the sufficiency of the evidence that the respondents shall be presenting against the applicant, as that lies in the jurisdiction of the trial magistrate. He stated that the applicant's criminal culpability stemmed from his having "rubbished legal opinions" he had been given to the effect that the Central Bank should have appealed against the decision of the PPARB, which was indicative of a pre-determined mind to have the subject contract awarded to Horsebridge.

Mr. Ruto next criticized the prayers in the application as framed, terming them unintelligible as it was not clear what it is the applicant sought to 'conserve'. He was candid enough to concede, however, that the learned judge of the High Court understood the situation well enough to issue a conservative order post-judgment to enable the applicant to commence the appellate process. Counsel concluded his submissions by stating that the application ought to fall on both limbs as there was no positive order given to be stayed, and nothing would be rendered nugatory since no proceedings had commenced at the magistrate's court and it was unlikely that they would commence and the trial be concluded before the appeal was determined. Mr. Ruto was emphatic that should the 2nd respondent give his go-ahead, the 1st respondent was poised and ready to arrest and arraign the applicant.

Mr. Mutuku's submission was that once the applicant's petition was dismissed, the applicant 'no longer had a status to be preserved' and it is only the order as to costs that could be stayed. He asserted that the 2nd respondent had already made the decision to prosecute the applicant but this was not the same as an order to send him to jail and the applicant's rights were well-guaranted by **Articles 49 and 50** of the Constitution both in respect of arrest and a fair trial. He discounted as an exaggeration the argument that any arrest and consequential suspension of the applicant would be tantamount to an end to his carrier.

On the law, Mr. Mutuku urged us to follow a number of decisions of this Court which have stated that the Court should not, and cannot, grant a stay of execution against an order of the High Court couched in negative terms. He cited **MOMBASA SEAPORT DUTY FREE LTD Vs. KENYA PORTS AUTHORITY**, Civil Application No. Nai 242 of 2006 (unreported) which quoted and approved the earlier decision of **DEVANI & 4 OTHERS Vs. JOSEPH NGINDARI & 3 OTHERS**, Civil Application No. 136 of 2004, where the Court had stated, inter alia;

> ***"By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which was capable of execution. If the order is granted it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.***
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> ***It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impractical."***

He also called in aid the case of **MWAMBEJA RANCHING CO. LTD Vs. KENYA NATIONAL CAPITAL CORPORATION LTD & ANOR** Civil Application No. 40 of 2008 where the Court stated;

> ***"Before we conclude this ruling, we observe that even if we were minded to grant the application, we would have had difficulties in doing so as the order sought is not clear. This is because first, it does not state what the applicant wants the court to do as some words are apparently missing between the words 'to' and 'an' in the prayer and no attempt was made to clarify it.***
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> ***Further, we do not in our view think (sic) the order of status quo sought is provided for in Rule 5(2) (b) and even if it was provided for, we think it would not be proper to order it as such order might mean that the applicant continues to pay nothing notwithstanding that the debt will continue escalating. Such an order would not be fair."***

The same theme is evident in **DHIMAN Vs. SHAH** [2008] KLR 165 and **KILELESHWA SERVICE STATION LTD Vs. KENYA SHELL LTD** [2005] KLR 55 in the 2nd respondent's list of authorities, and was expounded on by Mr. Ashimosi who augmented Mr. Mutuku's submissions after him. Counsel pointed out that there was no prayer seeking to stop the commencement or continuation of the applicant's prosecution though conceding that the High Court did issue conservatory orders after delivering its judgment notwithstanding the absence of such prayer. He also conceded that if a prosecution were to proceed on "an obviously rights-violating approach" the applicant's appeal would be rendered nugatory. He was quick to add, however, that no such danger existed in the case of the applicant and so urged us to dismiss the application.

It is worth noting that in **DHIMAN Vs. SHAH** (supra), whereas the Court conceded the absence of any provisions in the Rules by which it could stop an eviction order in an application under **Rule 5(2) (b),** it resorted to the inherent jurisdiction with a view to making such orders as would meet the ends of justice. It allowed the applicant there to remain in possession of the premises in question, thereby maintaining the *status quo* pending appeal. That, for purposes of this case, addresses the argument about negative orders being incapable of being stayed. In appropriate cases they can, in much the same way as a judge who rejects an application for injunction may, nevertheless, in appreciation of the fact that he could be wrong, grant an injunction pending an appeal against his refusal to grant the injunction. See **ERINFORD PROPERTIES LTD Vs. CHESHIRE COUNTY COUNCIL** [1974] 2 ALL ER 448.

On his part Mr. Kamunya pointed out that the application did not concern his clients the Inspector-General of the National Police Service and the Hon. Attorney General. He therefore had no submissions to make save that he associated himself with the position taken by the other respondents.

Replying to those spirited submissions, Mr. Kipkorir reiterated that under **Rule 5(2) (b)** this Court has inherent jurisdiction to grant appropriate orders quite irrespective of what orders the High Court made and also bears a fundamental duty to preserve the *status quo* to obviate appeals pending before it being rendered nugatory. Pointing out that the applicant never sought conservatory orders when he filed his petition at the High Court yet that Court granted them during the pendency of the petition and after its determination, counsel pleaded with us to grant the same orders the High Court did, and specifically prayed that we issue interim orders to restrain the arrest and prosecution of the applicant.

Commenting on the case law cited, Mr. Kipkorir submitted that those decisions were made in the pre-2010 era and the judicial review jurisprudence reflected therein could not permissibly over-ride the Bill of Rights on which the petition at the High Court was founded.

At the end of those intense and involved submissions by all counsel before us, we reserved our decision but issued conservatory orders in the same terms as had been given by Odunga, J. pending this ruling. We have since carefully and anxiously perused the record and given due consideration to the rival submissions made before us and the law cited in aid. All parties are agreed that the principles upon which this Court exercises its **Rule 5(2) (b)** jurisdiction to grant orders of stay of execution, injunction or stay of any further proceedings are settled. The applicant must first satisfy the court that he has an arguable appeal which means an appeal that is not frivolous but raises a real issue to be urged and answered on appeal. Such an appeal is not one that necessarily succeeds and it need not raise a duality or multiplicity of points, a single one being sufficient. (See **DAMJI PRAGJI MANDAVIA Vs. SARA LEE HOUSEHOLD & BODY CARE (K) LTD** Civil application No. Nai. 345 of 2004; **JOSEPH GITAHI GACHAU & ANOR Vs. PIONEER HOLDINGS LTD & 2 OTHERS**, Civil

Application No. 124 of 2008.

The second limb, and the applicant must satisfy both (**STANLEY KANGETHE KINYANJUI Vs. TONY KETTER & 2 OTHERS** [2013]eKLR) is that the appeal would be rendered nugatory if a stay is not granted in the interim. The term 'nugatory' has to be given its full meaning which encompasses an appeal that is not only worthless, futile or invalid but also trifling. **RELIANCE BANK LTD Vs. NORLAKE INVESTMENTS LTD** [2002] 1 EA 27. Whether or not an appeal will be rendered nugatory will depend on whether or not what is sought to be stayed is reversible and if not whether damages can be reasonably compensate the party aggrieved (**STANLEY KANGETHE KINYANJUI Vs. TONY KETTER** (supra). In considering the nugatory aspect the Court has to be mindful that each case must depend on its own facts and peculiar circumstances **DAVID MORTON SILVERSTEIN Vs. ATSANGO CHESONI** [2002] 1 KLR 867. The entire application is an exercise of the Court's discretion which is wide and unfettered.

Is the applicant's appeal arguable? We think that it is, for it certainly is not frivolous. The applicant does raise an important point namely, to what extent can a person be criminally liable for apparent or ostensible compliance with the lawful rulings or orders of the Public Procurement Administrative Review Board? That question assumes a greater significance when viewed from our new rights-based

constitutional dispensation where even prosecutorial power is subject not only to the national values in **Article 10** but also the accountability markers in

Article 157(11) of the Constitution. That question and its various facets and permutations is variously formulated in the memorandum of appeal and in the submissions before us but it does suffice to trigger this Court's **Rule 5(2) (b)** jurisdiction to intervene if coupled with the second limb.

On whether the applicants appeal would be rendered nugatory if the orders sought were not granted, we are not without sympathy for the respondents' contention that the arraignment and trial of the applicant is hemmed in by sufficient procedural safeguards to secure a fair trial and the protection of his fundamental rights within that process. The position is not without juridical backing. In **UWE MEIXNER & ANOR Vs. THE ATTORNEY GENERAL**, Civil Appeal No. 131 of 2005, (unreported) for instance, this Court pronounced itself thus;

> ***"The criminal trial process is regulated by statute, particularly the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in Section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials."***

The Court there was declining to interfere, on an appeal, with the refusal by a judge of the High Court to issue orders of *certiorari* and prohibition against the prosecution of the appellants for murder. The appellants had contended that the trial was an abuse of the court process because all the evidence showed that they were innocent. Both the judicial review judge and this Court declined the invitation to enter upon the examination in *munitae* of the evidence including copies of statements of nearly 40 police witnesses in order to determine the propriety of the prosecution, finding, correctly in our view, that it is the trial court that was best equipped to deal with the quality and sufficiency of the evidence gathered in support of the charge. The **MEIXNER** decision has been followed by other decisions of this Court including, recently, in **DIRECTOR OF PUBLIC PROSECTIONS Vs. CROSSLEY HOLDINGS LTD & OTHERS,** Civil Appeal No. 1 of 2013.

It is noteworthy that in that line of cases, the Court was dealing with the substantive appeals while before us is an application for conservatory orders pending the hearing of the appeal. A decision on an interlocutory application such as the one before us does not involve a determination of, or even an opinion on, the merits of the appeal proper. As we have noted, the 2nd respondent did concede, correctly in our view, that a prosecution that is violative of the Bill of Rights can and should properly invite the Court's appropriate intervention.

The respondents have not minced their words that they intend to arrest and charge the applicant with the offence or offences of or relating to abuse of office under the Anti-Corruption and Economics Crimes Act, 2003. Moreover, the penalties, should the prosecution proceed and culminate in a conviction before the appeal is concluded, are dire.

A proper reading of this Court's decision in **EQUITY BANK LTD Vs. WEST LINK MBO LTD** (supra) shows that the Court has never been antipathetic towards the grant of what may be called conservatory orders in proper cases the aim being to preserve the substratum of the appeal, to maintain the *status quo* and to avoid a scenario where parties exercising their undoubted right of appeal are embarrassed by harm having been visited on them pending the appeal. It is accepted that other than flowing expressly from the Rules, the power to order a stay of execution in inherent in the Court and it may, in appropriate cases, invoke and deploy the same *ex-debito justiae*.

We have gone into some length over this issue if only to underscore that whereas **Rule 5(2) (b)** provides for specific species of orders that are grantable, namely stay of execution, injunction and stay of proceedings, there appears to us to be no impediment in doctrine or practical good sense to the issuance of what the applicant has called "conservatory orders" under the same Rule as read with **Sections 3A and 3B** of the Appellate Jurisdiction Act on the overriding objective ("the oxygen principle") and the Constitution. At any rate, as earlier indicated, M'Inoti JA, with whom we respectfully agree, in that case directly imported and applied the term "conservatory orders" to our **Rule 5(2) (b)** jurisdiction. His such

usage was not an accidental slip but deliberate and repeated;

> ***"I am not convinced as the respondent contends, that to 'hear appeals' on Article 164(3) must be interpreted to exclude a power in the Court of Appeal to issue conservatory orders pending the hearing and determination of the appeal or that when hearing an application for conservatory orders, the Court of Appeal is NOT hearing an appeal. Nor do I think that interpreting Article 164(3) to include such power is infidelity to the law, disingenuous, crafty or an unconstitutional elongation of a jurisdiction limited by the Constitution. The short answer is that the Constitution sanctions, nay demands a purposive interpretation of Article 259."***

And again;

> ***"I nevertheless empathize with [the respondent's] frustration. Over time, the Court of Appeal has tendered to give priority to the hearing and determination of Rule 5(2) (b) applications at the expense of hearing and determination of appeals. A substantial part of the backlog in the Court consists of applications for conservatory orders..***
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> ***I am convinced that under Article 164(3) the primary purpose 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 purpose of the Court. It certainly is not well when the collateral purpose takes precedence over the primary constitutional mandate of the Court. The Court is called upon, if it is to be absolutely true to Article 164(3), to introspect and review how it has treated appeals vis-à-vis conservatory applications … Ultimately, the remedy for this unsatisfactory state of affairs is not to deny the power of the Court of Appeal to issue conservatory orders."***

As we noted previously we did as a bench attempt to urge and nudge the parties towards the hearing of the appeal itself in lieu of the applicant's application but not all parties acceded to the proposal, which was perfectly within their right. The upshot, though, is that the application before us is in no way defective or incompetent by reason of seeking "conservatory orders" which, as clarified and understood, meant orders protecting the applicant from arrest and prosecution while his appeal pends.

It appears to us that the implication of the incorporation of "conservatory orders" into this Court's understanding of its **Rule 5(2) (b)** jurisdiction is a logical and inevitable consequence of fidelity to the Constitution and the overriding principle. If it in effect leads to a slight if nuanced, expansion of the traditional **Rule 5(2) (b)** considerations it would be a natural consequence to be embraced bearing in mind that the applicable principles are not in statute but have been developed by the Court over time. The object always must be the doing of substantial justice.

It is this that has informed the Supreme Court's jurisprudence on conservatory orders pending appeal which has borrowed heavily from this Court. In **THE BOARD OF GOVERNORS, MOI HIGH SCHOOL, KABARAK Vs. MALCOLM BELL AND HON.**

DANIEL TOROITICH ARAP MOI Sup Appl. 1 of 2013, the apex Court delivered itself thus;

> ***"…the Court, in its exercise of discretion, may consider the convenience of interlocutory orders within the context of the appeal itself. Interlocutory reliefs, in this respect, may be apposite by ensuring that the appeal is not rendered nugatory and this not only serves the cause of fairness in dispute settlement, but also ensures that the ultimate decision of the court bears the intended constitutional authority."***

The Court identified its jurisdiction as flowing from;

> ***"In our opinion the Supreme Court's Jurisdiction in respect of interlocutory orders such as a stay-of-execution orders, firstly emanates directly from the statute law and rules; and secondly, rests on the rational principle that the appellate power of 'review and possible reversal' of the***

substantive judgment appealed against, is destined to be lost unless a requisite interlocutory order was made.

The principle is well recognized in comparative judicial experience. In Bremer Vulcan Schiff-bar and Maschinen Fabrick Vs. South Indian Shipping Corporation Ltd [1981] AC 909, Lord Diplock in relation to the inherent powers of the High Court, typified such powers as enabling the court to take necessary actions to maintain its character as a Court of justice. According to Lord Diplock, it would stultify the constitutional role of the court if as a court of justice it were not armed with power to prevent its process being misused, in such a way as to diminish its capability to arrive at a just decision of the dispute. 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 the 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."

See also the Supreme Court's decision in **GATIRAV PETER MUNYA Vs. DICKSON MWENDA KITHINJI & 2 OTHERS** [2014]e KLR where it expanded the considerations for stay of execution beyond the twin limbs to include a third, "in the public interest," which it said is dictated by the expanded scope of the Bill of Rights. We have ourselves spoken of the obligations that flow from a rights-based approach to judicial adjudication and from **Articles 10** and **157(11)** as far as the institution or continuation for prosecution is concerned. It is telling that in that case the Supreme Court characterized the interim stay sought by the applicant as, "in its essence a conservatory order", which it proceeded to grant. The Court saw the applicant's main objective as being "to forestall a situation where he is forced to go through the rigours of an election, when there is a possibility that his earlier election could be upheld by this Court." In the application before us, we understand the applicant to be trying to forestall having to go through the rigours of a criminal trial when there is a possibility that such a prosecution could be held not to lie.

The powers of the court to prohibit or otherwise bar a prosecution in an appropriate case have long been recognized in this jurisdiction even before the coming of the new Constitution, most famously in **GITHUNGURI vs. REPUBLIC** (No 1) [1985] KLR 91 and **GITHUNGURI Vs. REPUBLIC** (No. 2) [1966] KLR 1. In the latter case, the Court (Madan Ag CJ, Aganyanya & Gicheru JJ) confronted squarely arguments akin to some made before us and we quote them only for the purpose of showing that as long as democracy and the rule of law endure (and long may they endure) citizens will always seek the protection of the courts and courts will hear them. Whether or not their pleas will be granted will depend solely on the strength of each individual case. It will be for the bench hearing the appeal to determine that issue, not for us. Said the Court;

"Mr. Chunga argued that Prohibition ought not to be granted where alternative remedies are available to an applicant. He said the applicant would be entitled to defend himself. He referred to appeal after conviction, bail pending appeal, review by the High Court. Mr. Chunga must have been speaking lightly for the impracticability of his proposition is brightly apparent. What kind of mad man who has an opportunity to apply for prohibition would opt for a trial, the risk of conviction and imprisonment [?]."

There, as here, the court appreciated that the granting of injunctive or conservatory orders in matters such as this involves a temporary bar to the exercise of the statutory and constitutional mandates of law enforcement agencies, and this is not lightly done. In the final analysis, it is a balancing of interests in the search for justice that is fair, efficient, timely and cost-effective. We were not urged, and nor do we see, that any harm, prejudice or inconvenience would befall the respondents or weaken whatever case they have against the applicant were they to wait until his appeal, on constitutionality no less, is heard and determined.

In view of the position we have taken that there is an important question as to the extent a person can be criminally liable for apparent or ostensible compliance with orders of the PPARB, and balancing that with our recognition that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished as stated by this Court in **NISHA SAPRA Vs. THE ATTORNEY GENERAL** Civil Application No. 62 of 2013 and upon consideration of the application, all the material placed before us and the submissions by counsel, the conclusion is inevitable that this application must succeed.

We accordingly grant a conservatory order to restrain the respondents from arresting, arraigning or prosecuting the applicant pending the hearing and determination of Civil Appeal No. 333 of 2014. We direct that the said appeal be fast-tracked for hearing and determination on priority basis, preferably in the next Court term.

The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 6th day of March, 2015.

J.W. MWERA

……

JUDGE OF APPEAL

P.O. KIAGE

……

JUDGE OF APPEAL

S. GATEMBU KAIRU

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR