



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWERA & MWILU, JJ.A)

CIVIL APPLICATION NO. NAI. 173 OF 2015

BETWEEN

ENG. MICHAEL SISTU MWAURA KAMAU.....APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

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

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

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

(An application for stay of proceedings in the Anti-Corruption Case No. 11 of 2015 pending in the Chief Magistrate’s Court, Nairobi in an intended appeal from part of the Ruling and Orders of the High Court (Mumbi Ngugi, J.) delivered on 9th June, 2015

in

CONSTITUTIONAL PETITION NO. 230 OF 2015)

RULING OF THE COURT

[1] Eng. Michael Kamau, the applicant herein, filed a constitutional petition before the High Court in which he challenged the constitutionality of a warrant of his arrest and the ensuing prosecution of a criminal nature before the magistrate’s court for charges of abuse of office. The applicant contended that the said prosecution was instituted in contravention of express provisions of **Articles 79**, as read together with **Article 249 (2)** of the Constitution and **section 28** of the Ethics and Anti-Corruption Commission Act (hereinafter referred to as the Act); the Ethics and Anti- Corruption Commission (EACC) as constituted lacked locus to initiate, conduct and/or carry out investigations as the Commission was not legally constituted according to the provisions of **Article 250 (1)** of the Constitution and **section 28** of the Act; allowing the applicant to be prosecuted on the basis of flawed recommendations was

tantamount to sanctioning an illegality; the applicant therefore sought orders declaring the intended prosecution a nullity *ab-initio*.

[2] The application was heard by Mumbi Ngugi, J., and by her ruling dated 9th June 2015, the learned Judge declined to issue an order of stay of prosecution but directed that the matter be placed before the Chief Justice for him to empanel a Bench of uneven number of judges to determine certain issues the judge identified. This is what the judge posited in a pertinent part of the said ruling;

“In the circumstances, I decline to grant orders staying the prosecution of the petitioner as prayed. The application dated 2nd June 2015, is therefore dismissed. Costs shall await the outcome of the petition. While I am not satisfied that the petitioner has made out a case of violation or threat of violation of his constitutional rights that would merit the grant of conservatory orders, I am concerned at the issues that the present application raises. Of particular concern is the vexed question of the composition of the EACC, and whether, in the absence of commissioners, it is properly constituted. As I have observed above, this question has been addressed in the transition process separately by two judges of the High Court. However, as this petition illustrates, it is a question that requires serious consideration, given the public interest in having an anti-corruption body that is properly constituted, and that the people of Kenya can trust to deal diligently and with integrity, with what Majanja J., in African Centre for International Youth Exchange (supra) referred to as “the cancer of corruption” in Kenya.

A second critical question that this petition raises is whether or not the EACC acted at the direction of the Executive, and if so, whether it can properly do so, and the implication of such action on the independence of the Commission and the DPP, and their capacity to competently spearhead the war on corruption.

In the circumstances, and though none of the parties has made an application in this regard, I am satisfied that it raises a substantial question of law in terms of Article 165 (4) to merit referral to the Chief Justice for the empanelling of a Bench of an uneven number of judges to hear and determine the core issues underlying the petition...”

[3] The applicant was dissatisfied with the orders allowing the prosecution to proceed in the magistrate’s court before the High Court determined the aforementioned issues which the leaned judge identified in the ruling. The applicant thus promptly filed a Notice of Appeal on the 11th June 2015, in which he intends to appeal against part of the ruling that declined to stay the criminal proceedings against him in Anti- Corruption Case No. 11 of 2015 pending before the Chief Magistrates Court. The applicant also filed the instant application under the provisions of **Rule 5(2) (b), 42** of the Court of Appeal Rules and **section 3A** of the Appellate Jurisdiction Act. The applicant is seeking one principal order to wit;

“That this Honorable Court be pleased to grant a stay of proceedings in Anti-Corruption Case No. 11 of 2015, pending the hearing and determination of the intended appeal”.

[4] The application was argued before us on the grounds that the intended appeal was arguable and had good prospects of success; if the stay order is not granted the applicant is likely to suffer irreparable damage and the appeal will be rendered nugatory. According to Mr. Muite, SC appearing for the applicant with Mr. Njuguna, there are two core issues which must be determined by the High Court or the intended appeal, before the Director of Public Prosecutions can be allowed to continue with the criminal case against the applicant;

These issues are;

1. Whether EACC can be said to be legally constituted in the absence of commissioners because under **Article 250 (1)** of the Constitution, every commission is supposed to constitute of 3 commissioners. As at the time the applicant was arraigned in court to answer charges of abuse of

office, the EACC commissioners had left office.

2. The EACC is an independent body whose mandate was interfered with by the Head of State when he directed the office of the Director of Public Prosecution, an independent office, to prosecute the persons named in a report that was presented to him by EACC. According to counsel for the applicant the Head of State cannot direct an independent office on how to execute its mandate. That was a violation of the Constitution, consequently if the criminal case were to proceed before these issues are determined, either by the High Court or the Court of Appeal, the applicant will suffer prejudice.

[5] Mr. Muite further submitted that the learned judge having made a finding that there were issues of substantial public importance to be determined, and having done so *suo moto*, it was a misdirection on the part of the judge to decline to issue a stay of the criminal proceedings pending the determination of those issues. Should the issues so identified, be determined in favour of the applicant he will suffer prejudice because he will have gone through a criminal trial whose outcome may be a conviction and possibly loss of liberty. The issues identified by the learned judge are weighty and clearly demonstrate that the applicant's intended appeal is arguable. Counsel cited the case of; -

Christopher Ndarathi Murungaru v Kenya Anti –Corruption Commission & Another [2006] e KLR.

In that case, the applicant was served a notice pursuant to the provisions of **section 26** of the then Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003 by the respondent requiring him to furnish them with a detailed schedule and particulars of all his bank accounts and assets. This was on the grounds that the applicant was reasonably suspected of having committed corruption and economic crimes. The Court of Appeal allowed the application and granted the orders staying the implementation and enforcement of the said notice and also a criminal case which had been instituted in the magistrate's court pursuant to the said notice. The Court stated as follows;-

“Will the appeal be rendered nugatory if we do not grant a stay and the appeal were to succeed? As we have said, the applicant has already been charged before a magistrate's court with the offence created by section 26(2) of the Act. If the trial of the applicant were to proceed before the magistrate, he risks being fined Ksh 300,000/= or going to prison for three years or to both fine and imprisonment.

In cases which are purely civil, this Court hardly grants a stay of proceedings on the basis that even if the proceedings to be stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial court would be nullified and an appropriate order for costs in respect of the abortive hearing can be made – see for example SILVERSTEIN V. CHESONI, [2002] KLR 867. But matters involving penal consequences must, of necessity, be treated differently. It can be of no consolation to tell a man that his appeal will not be rendered nugatory even if he went to prison for only one week. The appeal would have been rendered nugatory”

Similarly in a recent ruling by a separate bench of this Court, in the case of; **Prof. Njuguna S. Ndungu v Ethics & Anti-Corruption Commission & 3 Others [2015] e KLR**, an order was made to restrain EACC from arresting or prosecuting Prof. Njuguna Ndungu pending the hearing and determination of an appeal he had filed. The judges were persuaded that under the overriding objective, and also vide the provisions of **Article 159** of the Constitution, this Court has considerable latitude in interpreting the law and in exercise of discretion that is aimed at achieving substantive justice in every case.

[6] Regarding the directions given to the Director of Public Prosecutions by the Head of State to institute criminal charges against all the persons named in the report (the applicant was one of the persons named in the said report), counsel for the applicant drew a parallel with the case of; -**Justice Philip Tunoi SCJ., & Another, Civil Appl. No. NAI 122 of 2015** where the Chief Justice gave directions, *inter alia* that the

petition be heard on two consecutive dates not later than 26th march, 2015 and that judgment thereof be delivered on or before 30th April 2015. Those directions were perceived as interference with the independence of the judges and although they had been overtaken by events by the time the petition came up for hearing, counsel for the applicants protested against the said directions.

[7] Lastly the directive by the President to the Director of Public Prosecutions was faulted by counsel for the applicant as an interference with the independence of institutions. The independence of the office of the 2nd respondent is anchored under **Article 157 (10)** of the Constitution; in that he cannot be directed or controlled by any person or authority in the discharge of his mandate. Counsel for the applicant urged us to find that there are serious triable issues on whether the President interfered with the independence of the office of the DPP.

[8] This application was opposed by M/s Shamalla, learned counsel for EACC and Mr. Okello teaming up with Mr. Shitambasi for the 2nd and 4th respondents, while Mr. Njoroge appeared for the 3rd respondent, respectively. Responding to the issue of the composition of EACC, M/S Shamalla referred to the report by EACC dated 20th March 2015, which triggered this matter. It is titled **“REPORT ON THE CURRENT STATUS OF CORRUPTION MATTERS UNDER INVESTIGATION TO THE PRESIDENCY”**. According to counsel, this was a status report that was given to the President under **Article 254** of the Constitution, thus there was no interference with the independence of EACC. The case in respect of the applicant was reported way back in January 2013 and again in February 2015. These cases that involved offences of abuse of office contrary to **sections 46 and 48 (1)** of the Anti-Corruption and Economic Crimes Act were already under investigations. At the time the report was tabled, the EACC was properly constituted, the investigations were concluded and the report indicated that the evidence was being analyzed.

[9] On the issue of whether the learned judge of the High Court failed to appreciate that the applicant’s constitutional rights were likely to be violated, counsel urged us to uphold the decision of the High Court for reasons that there are several other corruption cases that were contained in the report given to the President and if an order staying criminal prosecution is issued, that will be highly prejudicial to EACC. Counsel distinguished the facts in the **Murungaru** case (supra) which was about a Notice to Disclose Assets pursuant to **section 26** of the Act. The Commission required more information from Murungaru regarding his assets and bank accounts before the charge was preferred against him. That was different from this case where EACC had completed the investigations. Counsel was also of the view that the applicant will not suffer any prejudice, nor was the appeal likely to be rendered nugatory for the simple reasons that the applicant is before a court of law that is constitutionally constituted with set jurisdiction. Moreover if the applicant is dissatisfied with the outcome of the criminal case, or it turns out that there is no case for him to answer, he has many avenues to file an appeal or seek damages as the case may be.

[10] Mr. Okello, learned counsel for the 2nd and 3rd respondents, largely adopted the submissions by counsel for the 1st respondent. He submitted that the jurisdiction of the Court of Appeal under **Rule 5 (2) (b)** clearly with reference to civil proceedings in which the court can only make three kinds of orders to wit;- a stay of execution of the decree appealed from; an order of injunction and an order of stay of any further proceedings. There is no provision for the Court to stay criminal proceedings before a magistrate’s court. According to the instant notice of motion, the applicant seeks orders that;-

“This Honorable Court be pleased to grant a stay of proceedings in Anti-Corruption Case No. 11 of 2015 pending the hearing and determination of the intended appeal.”

Also from the Notice of Appeal which is the basis of the instant application is clear that the applicant intends to appeal against:

“Part of the said ruling declining to stay the criminal proceedings against him in Anti- Corruption Case No. 11 of 2015 pending before the Chief Magistrates Court”

[11] Counsel further submitted that there was no arguable appeal. The reasons that the judge declined to

stay the criminal proceedings are because the applicant failed to demonstrate any violation or likelihood of violation of his rights. In criminal matters, there are adequate safeguards that are provided. The Evidence Act and also the Criminal Procedure Code all replete with court-room processes that adequately safeguard the rights of an accused person. Secondly, the issue of the President directing the DPP to prosecute the applicant was never argued before the High Court. This is another issue being introduced in an interlocutory application. Also the issue of the EACC commissioners was never canvassed before the judge, although the Commission is a body corporate as provided for under **Article 253** of the Constitution, the absence of commissioners cannot invalidate any proceeding or decision. Counsel urged us to disallow the application.

[12] Mr. Mwangi, learned counsel for the 3rd respondent, adopted the submissions by counsel for the other respondents and added that under **Article 157(4)** of the Constitution, generally the DPP has the power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct. Counsel concluded that the intended appeal has no probability of success and urged us to disallow the application since allowing it would, in essence, stall any criminal prosecution of all persons who were implicated with allegations of corruption and abuse of office in the report handled to the President pursuant to the provisions of the Constitution.

[13] The principles that guide the Court in regard to an application under **rule 5(2) (b)** of the Rules are well established. The Court exercises unfettered discretion which must be exercised judicially, on the basis that, firstly, the intended appeal is not frivolous, that is to say the appeal is arguable. Secondly, the Court must also be persuaded that were it to refuse the application for stay and later the intended appeal were to succeed, the results of the success would be rendered nugatory. Under the same rule, this Court has jurisdiction to grant three kinds of orders and these are:

1. A stay of execution of the decree or order appealed from;
2. An order of injunction; and
3. An order of stay of any further proceedings.

Clearly the above orders are applicable in civil proceedings regarding orders of the High Court and there is no mention of stay of criminal proceedings pending before a magistrate's court.

[14] The first issue we have to grapple with therefore is whether this Court has jurisdiction to issue an order of stay of criminal proceedings that are pending before a magistrate's court. In a ruling by Tunoi JA., (as he then was) in the case of **Republic vs. Kenya Anti-Corruption Commission & 2 Others**, C.A No. 51 of 2008, the learned judge reviewed some decisions of this Court regarding stay orders prohibiting magistrate's courts from continuing criminal proceedings and he readily admitted that the ratio *decidendi* in each of them was somewhat conflicting as to whether the jurisdiction of this Court under rule 5 (2) (b) includes stay of criminal proceedings in a magistrate's court. This is what the learned judge posited in a pertinent part of the said ruling:-

“Stay orders prohibiting magistrate's courts from continuing with criminal proceedings were also issued by this court in Joram Mwenda Guantaivs Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (unreported) and in the cases of Yagnesh Devani & 4 Others vs Joseph Ngindari & 3 Others Civil Application No. 136 of 2004, ...and in Berkeley North Market & 3 Others vs Attorney General & 3 Others Civil Application No NAI 74/2005 (unreported) However, in Yagnesh Devani & 4 Others v Joseph Ngindari& 3 Others... the Court in an application seeking an order under rule 5 (2) (b) of the Rules;-

1. “...
2. **That this Honourable court be pleased to order an interim stay of the order, Decree of the superior court issued on 28th May, 2004 in the superior court in Misc. Civil Application No.**

Held that;-

“ By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought 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. It can only do so after hearing the appeal. It seems to us that the application for the stay of execution of the dismissal order was not brought in error. It was deliberately designed to achieve that result which regrettably is impracticable”.

“From my consideration of the above somewhat conflicting decisions I would hold therefore that whether rule 5(2) (b) of the Rules does apply to criminal proceedings and as to whether this Court can issue an order for prohibition in a criminal case against the magistrate’s court pending appeal depends on what prayers an applicant is seeking under the rule and the particular circumstances of each case. I hasten to add that the issue of jurisdiction herein was raised *suomotu* and we were not addressed by either counsel on it...”

[15] In the instant case Mr. Okello addressed us on this issue, we also invited Mr. Muite, SC to address us on the same but he only referred us to the case of Murungaru (supra) and that of Prof Njuguna Ndungu (supra) urging us to find that the Court has jurisdiction to stop criminal proceedings. Indeed those cases cannot offer a solution because as demonstrated above, the facts are different. For example in the case of;- **Mary Ngechu Vs Attorney General & KACC Civil Application No. NAI 157 of 2012**, a differently constituted bench of this Court declined an application under rule 5 (2) (b) of the Rules to stay criminal proceedings that were pending before a magistrate’s court. Mary Ngechu was charged with various criminal counts under the Anti- Corruption and Economic Crimes Act and the Penal Code before the magistrate’s court. The applicant filed a constitutional petition seeking the termination of the criminal proceedings on the grounds that the prosecution violated her fundamental rights enshrined in the Constitution. That petition was dismissed by the High Court. The applicant filed a Notice of Appeal, and an application under **Rule 5 (2) (b)** in which she sought a stay order of the criminal proceedings that were pending before the magistrates’ court in Anti-Corruption cases Nos 19 of 2010 and 20 of 2010.

[16] In the **Mary Ngechu** ruling, this Court reviewed several past decisions; the provisions of **Article 164 (3)** of the Constitution and the Appellate Jurisdiction Act and, this is what the judges stated;-

“The jurisdiction of this Court is derived first and foremost from the Constitution and the Appellate Jurisdiction Act as follows;-

The Court of Appeal has jurisdiction to hear appeals from-

- a. **The High Court**
- b. **Any other court or tribunal as prescribed by an Act of Parliament**

See Article 164 (3) of the Constitution.

The Act of Parliament alluded to above, the Appellate Jurisdiction Act, on the other hand provides;-

“3(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law”

By Rules 58, 59 and 75 dealing with both civil and criminal appeals a notice of appeal lodged under these Rules must relate to an appeal from the High Court or the Courts created under

Article 162 (2) (c) and (b) of the Constitution.

...

As a creature of the Constitution and statute, this court can only exercise the jurisdiction conferred on it by law. Its jurisdiction to grant orders of stay of execution or further proceedings or injunction or release of an appellant on bail or suspension of execution of any warrant of distress is circumscribed by Rule 5(2) (b) of the Court's Rules.

There cannot be any doubt that his Court cannot stay criminal proceedings in the magistrate's courts in the manner sought in this application because there is no jurisdiction to do so. This court will issue and has issued as demonstrated by decisions we were referred to orders prohibiting magistrate's courts from proceeding with criminal trials where it found evidence that the trial was actuated by malice and abuse of process; where such prosecution was in derogation of the applicants constitutional rights and instituted with the predominant and improper intent to harass and exert pressure on the appellant"

[17] We are in agreement with the above findings, that each case is considered on to its own merits. It is only in instances where there are trumped-up charges, or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the applicant, that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice are met and to prevent the abuse of the process of Court as, indeed, this is a country that is governed under the rule of law and not the whims of the DPP, or any other person or authority.

[18] Does this case fall within the above parameters? In answering this question we have to exercise abundant caution because we are dealing with an interlocutory application pending the hearing of the substantive petition before the High Court and the appeal to be filed. Whatever we state in this application must not prejudice the determination of the aforesaid cases and must not cause any embarrassment to the judges who will determine them. The magistrate's courts are a creature of the Constitution and the statute which spells out their respective jurisdiction that is clearly defined. In other words, the High Court or Court of Appeal for that matter has no jurisdiction to try a criminal matter under the Anti- Corruption and Economic Crimes Act. The Court structure is supposed to act in harmony, not to sabotage one another. If we may quote what the learned judges of the Supreme Court said in regard to the jurisdiction of that court, which may have a bearing on the court structures in **Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & 5 others** – **Supreme Court Petition No. 2 of 2012** – [2012] eKLR, the judges interpreted the Supreme Court appellate jurisdiction thus:

"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be 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; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."

[19] The High Court in its supervisory jurisdiction can check the excesses of power that impinge on the applicant's rights that are enshrined in the Constitution. If the applicant is dissatisfied with the decision of the High Court, he or she can appeal. The applicant in the instant motion is challenging the constitutionality of the offences he has been charged with and the learned judge framed issues for a determination by a bench of probably three judges. Those issues needed interrogation for the Court to determine whether the applicant's constitutional rights have been violated. On the other hand the respondents have put forward arguments that challenge the seriousness of the issues raised by arguing that EACC was duly constituted when the offences against the applicant were investigated; that the DPP has powers under **Article 157 (4)** of the Constitution to direct investigation on any information or allegation of any criminal nature. The facts and the law regarding these issues have not been ventilated and the learned judge did not see any prejudice that would be suffered by the applicant if the order staying the criminal proceedings was not given.

[20] The jurisdiction to stay a proceeding either of civil or criminal nature before any court is always sparingly exercised. When this Court has done so, it has always been in a very clear case, to nip in the bud any attempt to circumvent or use the law to harass an applicant. This was the gist in the case of; **Githunguri v Republic (1985) KLR page 92**, where it was held that;

“The Attorney-General is given unfettered discretion to institute and undertake criminal proceedings by section 26 of the constitution but this discretion should be exercised in a judicious way. It should not be exercised arbitrarily, oppressively or contrary to public policy.

.....

The preferment of a charge against any person nine years after the alleged commission of the offence, six years after full inquiry in respect of it and five years after the decision of the office of the Attorney-General not to prosecute and to close the file is vexatious, harassing an abuse of the process of the court and contrary to public policy unless a good and valid reason exists for doing so, such as the discovery of important and credible evidence or the return from abroad of the person concerned”

[21] In the above case, the criminal proceedings were nullified because they were an abuse of the court process, whereas in the **Murungaru case**, (supra) the proceedings were stayed because upon the EACC having reasonable suspicion that Murungaru had acquired properties corruptly, they requested him to provide information about the said properties which request was found to be tantamount to self-incrimination of a suspect. In the instant case, the twin issues touch on the *locus* of EACC to investigate matters under the Act, and whether there was interference with independent offices by the Head of State when he directed the DPP to charge the persons named in a report tabled by the 1st respondent in Parliament.

[22] These two issues are a mixed bag of matters of fact and perhaps some law.

On the face of it, it is difficult to establish a violation of the applicant’s constitutional rights and it is no wonder the learned judge recommended a full hearing by an enlarged bench. We fully agree with the learned judge that one cannot see any violation of the rights of the applicant on the face of it. The issues need to be thrashed out and as that is going on, and before their determination, the appeal which we also agree is arguable as it will interrogate the same issues, cannot be rendered nugatory because the applicant is before a court of law that is ring-fenced with systems of protection. Moreover, if the applicant were to succeed the proceedings or any consequential orders by the said court can also be set aside.

[23] It is a constitutional right for everyone to be accorded a fair trial before a court of law. The interests of the applicant must also be considered within the law and within the overarching parameters that judicial authority is exercised according to the purposes and the principles set out in the Constitution. Every court and every institution that is created by the Constitution is accorded its own mandate to promote and protect the principles and purposes of the Constitution. For the Court of Appeal to stay a proceeding before a magistrate’s court that has the statutory mandate to try criminal cases under the Anti-Corruption and Economic Crimes Act, the alleged violation of the law and the Constitution must be blatant and glaring. The Court of Appeal is supposed to settle appeals after matters have been processed in the High Court and other lower courts and tribunals as appropriate and in doing so, **Article 259 (1)** of the Constitution requires that the Constitution be interpreted in a manner that promotes, its purposes, values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the Bill of Rights and permits development of the law and contributes to good governance. In the instant case, the judge was not satisfied that, even as the issues were to be heard by an enlarged bench, the applicant had demonstrated how his rights would be violated if the conservatory orders were not issued. This is what the judge stated in a pertinent part of her ruling:-

“Admittedly, as argued by Mrs. Wambugu for the petitioner, these cases were dealing

with the question of the existence and functioning of the Ethics and Anti-Corruption Commission and the contracts of its staff in the transition between the old and the new Constitution, and the EACC it established. However, in my view, they represent the best judicial authority on this question at this point in time. They certainly far outweigh the petitioner's bare assertion that because the EACC does not have Commissioners, it did not have the legal mandate to investigate him, or to make recommendations to the DPP for his prosecution. In the present circumstances, therefore, I am satisfied that there is no violation or threat of violation of the petitioner's rights demonstrated that would justify the grant of conservatory orders in his favour."

[24] We are now being asked to stay proceedings by a court that is constitutionally mandated to try such proceedings. The learned judge was not satisfied that the applicant had demonstrated that his rights would be violated. We agree with the learned judge that going by the pleadings and submissions from both sides, there is no clear case that is shown of the applicant's rights being violated or even a threat of violation that may render the appeal nugatory. Proceedings before a court of law should not be stopped on the basis of speculation or apprehension. At this interlocutory stage, the applicant must be able to point out an outright illegality or breach, or violation which does not require protracted arguments; the violation based on the illegality must be plain and obvious. What is not plain and obvious is a matter for a full trial.

[25] In the upshot, we find no merit in this application which we order dismissed.

Dated and delivered at Nairobi this 16th day of October 2015.

M. K. KOOME

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JUDGE OF APPEAL

J. MWERA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR