



REPUBLIC OF KENYA



**Kithinji v Director of Public Prosecutions & another (Petition (Application)
29 (E033) of 2022) [2023] KESC 18 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KESC 18 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

PETITION (APPLICATION) 29 (E033) OF 2022

PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ

FEBRUARY 24, 2023

BETWEEN

JAMES NTHUKU KITHINJI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATES COURT AT NAIROBI KIBERA LAW

COURTS 2ND RESPONDENT

(Being an application for stay of proceedings in the Magistrate's Court pending the hearing and final determination of an Appeal from the Ruling of the court of appeal)

Supreme Court does not have the jurisdiction to issue an order of stay of proceedings before the Magistrate's Court.

An order for stay of criminal proceedings would not be granted as a matter of course but upon the sparing exercise of judicial discretion and only in exceptional circumstances.

Reported by John Wainaina

Civil Practice and Procedure – interlocutory orders – application for stay of proceedings – application for stay at the Supreme Court - conditions precedent - what were the circumstances in which the Supreme Court acting as an appellate court could grant ancillary or interlocutory orders - Supreme Court Act (Act No. 7 of 2011) section 21(2); Supreme Court Rules 2020, rule 3(5)

Criminal Procedure – appeals – application for stay orders at the appellate court - what were the circumstances in which an appellate court could grant an order for stay in criminal proceedings

Brief facts

The applicant contended that he was aggrieved by the decision of the Court of Appeal which declined to grant stay of proceedings at the Magistrates Court (where the appellant was facing criminal charges); that his appeal



pending before the Court of Appeal was arguable and raised triable issues involving a clear misapplication of the law.

The appellant sought an interim order staying all further proceedings in Kibera Criminal Case No. 743 of 2018 (Magistrates Court) pending the hearing and/or determination of the instant application; an order setting aside the ruling of the Court of Appeal; and an order staying all further proceedings in Kibera Criminal Case No. 743 of 2018 pending the hearing and final determination of the applicant's pending appeal at the Court of Appeal.

Issues

- i. What were the circumstances in which the Supreme Court acting as an appellate court could grant ancillary or interlocutory orders?
- ii. What were the circumstances in which an appellate court could grant an order for stay in criminal proceedings?
- iii. Whether the Supreme Court had the jurisdiction to issue an order of stay for proceedings before the the Magistrate's Court.

Held

1. under section 21(2) of the *Supreme Court Act*, and rule 3(5) of the *Supreme Court Rules 2020*, the Supreme Court had inherent power to grant any ancillary or interlocutory orders as could be necessary for the ends of justice or to prevent abuse of the process of the court. The criteria for grant of interlocutory relief to wit that the appeal had to be arguable and not frivolous; that if stay was not granted the appeal would be rendered nugatory; and if it was in the public interest that the order of stay was granted.
2. An order for stay of criminal proceedings was not granted as a matter of course but upon the sparing exercise of judicial discretion and only in exceptional circumstances.
3. The notice of motion lacked merit as it not only sought to set aside a ruling of the Court of Appeal at the interlocutory stage but also sought to stay proceedings before the Magistrate's Court contrary to the limited jurisdiction granted to the Supreme Court under article 163(3)(b) and (4) of the *Constitution*.

Application dismissed.

Orders

Costs of the application would abide the outcome of the appeal.

Citations

Cases

1. Attorney General v Kenya Ports Authority & 7 others (Civil Application 15 of 2020; [2020] eKLR) — Explained
2. Board of Governors, Moi High School, Kabarak & another v Malcolm Bell (Petition 6 & 7 of 2013; [2013] KESC 12 (KLR)) — Explained
3. Dande & 3 others v Director of Public Prosecutions & 2 others (Petition 4 (E005) of 2022; [2022] KESC 23 (KLR)) — Explained
4. Munya, Peter v Dickson Mwenda Kithinji & 2 others (Application 5 of 2014; [2014] eKLR) — Explained
5. Muriithi, Deynes & 4 others v Law Society of Kenya & another (Civil Application 12 of 2015; [2016] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 (Const2010) — Article 25(c); 50(1)(2)(4); 159; 163(3)(b)(4)(a); 259 — Interpreted
2. Magistrate Courts Act, 2015 (Act No 26 of 2015) — Section 8(2) — Interpreted



3. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 3, 3A, 15A, 21(1)(2); 23A(1)(a); 24(1) — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 3(5); 31; 32 — Interpreted

Advocates

None mentioned

RULING

1. Upon perusing the notice of motion dated December 2, 2022 and filed on even date, pursuant to articles 159, 163(4)(a) and 259 of the Constitution, sections 3, 3A, 15A, 21(1), 23A(1)(a) and 24(1) of the Supreme Court Act and rules 31 and 32 of the Supreme Court Rules, 2020 seeking: an interim order staying all further proceedings in Kibera Criminal Case No 743 of 2018 pending the hearing and/or determination of this application; an order setting aside the ruling of the Court of Appeal delivered on October 7, 2022; and an order staying all further proceedings in Kibera Criminal Case No 743 of 2018 pending the hearing and final determination of the Applicant's pending appeal at the Court of Appeal; and
2. Upon perusing the grounds on the face of the application; the supporting affidavit of the applicant sworn on December 2, 2022; submissions dated December 2, 2022; and supplementary submissions dated December 28, 2022, we note that the applicant contends that he is aggrieved by the decision of the appellate court which declined to grant stay of proceedings at the Magistrates Court; that his appeal pending before the Court of Appeal is arguable and raises triable issues involving a clear misapplication of the law apparent on the face of the ruling of the Court of Appeal as it failed to appreciate section 8(2) of the Magistrate Courts Act which ousts jurisdiction of the criminal trial court to determine redress of violation of the right to a fair trial; disregarding binding precedent from the Supreme Court and Court of Appeal consequently denying him the ability to challenge admissibility of the P3 Medical Report evidence pursuant to article 50(4) of the Constitution; and
3. Upon considering the applicant's further argument that unless the orders of stay are granted, the defence proceedings will commence, fatally defeating his rights under articles 25(c), 50(1), 50(2) and 50(4) of the Constitution rendering the appeal nugatory as he has been found to have a case to answer on the basis of disputed evidence obtained pursuant to his disputed unlawful arrest; that he satisfies the test of exceptional circumstances for this court to exercise its jurisdiction arising from an interlocutory ruling by the Court of Appeal as per this court's decisions in Attorney General v Kenya Ports Authority & 7 others Civil Application No 15 of 2020 [2020]eKLR, and Deynes Muriithi & 4 others v Law Society of Kenya & another Civil Application No 12 of 2015 [2016]eKLR;
4. Noting that the 1st and 2nd respondents did not file any responses to the application despite service and further noting the 1st respondent's court attendance on 16th January, 2023 wherein its counsel indicated that he had filed responses to the application; and
5. Furthermore noting that the 1st respondent in opposition to the application only filed submissions dated December 21, 2022 urging that, allowing the application is tantamount to determining the petition which is frivolous, has no probability of success and is neither arguable nor raises questions of constitutional application or interpretation; and that the applicant at the trial court did not demonstrate the manner in which the proceedings were in violation of his rights under articles 25(c) and 50 of the Constitution to warrant the granting of stay of proceedings;



6. Taking into account the 1st respondent’s submission that this court lacks jurisdiction to grant the orders sought as there is no substantive subject matter of appeal before this court for determination that needs to be safeguarded. The 1st respondent cites this court’s decisions in *Peter Munya v Dickson Mwenda Kithinji & 2 others* SC Application No 5 of 2014 [2014] eKLR and *Board of Governors, Moi High School Kabarak & another v Malcolm Bell* [2013] eKLR in support of that submission; and
7. Bearing in mind this court’s inherent power to grant any ancillary or interlocutory orders as may be necessary for the ends of justice or prevent abuse of the process of the court under section 21(2) of the *Supreme Court Act*, rule 3(5) of the *Supreme Court Rules 2020* and this court’s decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (*supra*) which set out the criteria for grant of interlocutory relief to wit that the appeal must be arguable and not frivolous; that if stay is not granted the appeal will be rendered nugatory; and if it is in the public interest that the order of stay is granted; and
8. Cognisant that an order for stay of criminal proceedings is not granted as a matter of course but upon the sparing exercise of judicial discretion and only in exceptional circumstances as enunciated in *Dande & 3 others v Director of Public Prosecutions & 2 others* Petition 4 of 2022 [2022] KESC 23 (KLR) where we held that:

“ [15]..it is fairly elementary that this court can only grant an order of stay of a decree or order of the Court of Appeal or stay of further proceedings in the Court of Appeal but not of proceedings pending hearing in the Magistrate’s Court, as sought in this application; and that reference to “any other court or tribunal as prescribed by national legislation” in article 163(3)(b)(ii) is definitely not reference to the Magistrate’s Court.”
9. We now opine that the notice of motion lacks merit as it not only seeks to set aside a ruling of the Court of Appeal at the interlocutory stage but also seeks to stay proceedings before the Magistrate’s Court contrary to the limited jurisdiction granted to the Supreme Court under article 163(3)(b) and (4) of the *Constitution* and the decision in *Dande & 3 others v Director of Public Prosecutions & 2 others* (*supra*).
10. Consequently, for reasons aforesaid, we make the following orders:
 - i. The notice of motion application dated December 2, 2022 be and is hereby dismissed; and
 - ii. Costs of the application shall abide the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED*AT NAIROBI THIS 24TH DAY OF FEBRUARY 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT



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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

