



Dande & 3 others v Director of Public Prosecutions & 2 others (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KESC 23 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 4 (E005) OF 2022
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
MAY 19, 2022**

BETWEEN

**EDWIN HAROLD DAYAN DANDE 1ST APPLICANT
ELIZABETH NAILANTEI NKUKUU 2ND APPLICANT
PATRICIA NJERI WANJAMA 3RD APPLICANT
SHIV ANOOP ARORA 4TH APPLICANT**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
CHIEF MAGISTRATES COURT AT NAIROBI 2ND RESPONDENT
BRITISH AMERICAN ASSET MANAGERS LIMITED 3RD RESPONDENT**

(Being an application for conservatory orders of injunction pending an appeal against the Judgment and Decree of the Court of Appeal at Nairobi (Asike Makhandia, Mumbi Ngugi & P. Nyamweya, JJ.A) dated 4th February, 2022 in Civil Appeal No. 378 of 2022)

The Supreme Court cannot grant an order of stay of proceedings pending a hearing in the Magistrate’s Court.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the Supreme Court vis-a-vis Court of Appeal - jurisdiction to grant interlocutory orders of stay in criminal proceedings - what was the distinction between the Supreme Court’s and the Court of Appeal’s jurisdiction to grant interlocutory orders of stay in criminal proceedings - whether the Supreme Court could grant an order of stay of proceedings pending hearing in the Magistrate’s Court - Supreme Court Act, 2011, section 21(2); Court of Appeal Rules, rule 5(2)(a).

Civil Practice and Procedure – orders - stay orders - circumstances in which an order for stay could be issued - arguable appeal - what was the nature of an arguable appeal.



Civil Practice and Procedure – pleadings – timelines for filing responses – claim that parties file their responses after the time provided by the Deputy Registrar during pre-trial - what was the effect of failure to file responses to an application within timelines issued by a deputy registrar.

Brief facts

The applicants filed the instant application praying that pending the hearing and determination of Petition No. 4 of 2022, a conservatory order be granted staying the criminal proceedings in Nairobi Chief Magistrates Criminal Case No. 1735 of 2016 *Republic v Edwin Harold Dayan Dande & 3 Others*. The applicants submitted that; the court had jurisdiction to grant interlocutory reliefs pending the hearing and determination of the appeal; they had an arguable case with a high probability of success; the 1st respondent, in abuse of his prosecutorial powers had instituted charges against them contrary to article 157 of the Constitution of Kenya, 2010 (Constitution); and that unless the criminal proceedings before the subordinate court were stayed, the intended appeal would be rendered nugatory.

Issues

- i. Whether the Supreme Court could grant an order of stay of proceedings pending hearing in the Magistrate’s Court.
- ii. What was the distinction between the Supreme Court’s and the Court of Appeal’s jurisdiction to grant interlocutory orders of stay in criminal proceedings?
- iii. What were the circumstances in which an order for stay could be issued?
- iv. What was the nature of an arguable appeal?
- v. What was the effect of failure to file responses to an application within timelines issued by a deputy registrar during pre-trial?

Held

1. At the Court of Appeal, the applicants only challenged the exercise of prosecutorial powers of the 1st respondent under article 157 of the Constitution. Being that the appeal before the Court of Appeal and its determination dealt squarely with the interpretation of article 157, the appeal was properly before the court in terms of article 163(4)(a) of the Constitution.
2. The court’s jurisdiction to grant interlocutory orders of stay of proceedings was derived from section 21(2) of the Supreme Court Act which provided that in any proceedings, the Supreme Court could make any ancillary or interlocutory orders, including any orders as to costs that it thought fit to award. Rule 5(2)(a) of the Court of Appeal Rules provided that the consideration was that the applicant could only apply for stay of criminal proceedings upon conviction and sentence either by the subordinate court, or by the High Court.
3. 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 the most exceptional of circumstances.
4. An order of stay would be granted in the following instances;
 1. the appeal or intended appeal was arguable and not frivolous;
 2. unless the order of stay sought was granted, the appeal or intended appeal, were it eventually to succeed, would be rendered nugatory; and
 3. it was in the public interest that the order of stay be granted.
5. An arguable appeal was not one that had to necessarily succeed, but was simply one that was deserving of the court’s consideration; what had to be avoided was to render the appeal, if successful, nugatory or an academic exercise. The court, in exercising its discretion, balanced between the lower and the higher risks of injustice and no definitive conclusions ought to be made as that could only be in the appeal and not in an application for stay.
6. Under article 163(4) of the Constitution and sections 15, 16 and 17 of the Supreme Court Act, only an appeal from the Court of Appeal could be entertained by the Supreme Court, as of right, if it involved the interpretation or application of the Constitution or where it was certified that a matter of general public importance was involved.



7. It was fairly elementary that the court could 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 the instant application. Reference to any other court or tribunal as prescribed by national legislation in article 163(3)(b)(ii) was definitely not reference to the Magistrate's Court.

8. The petition filed by the applicants on March 11, 2022 only challenged the decision of the Court of Appeal and not that of the Magistrate's Court. As a matter of fact, no decision was made by the latter to warrant any challenge in the High Court.

9. Pre-trial directions in the instant matter were issued by the Deputy Registrar on March 11, 2022, therein, the respondent was to be served with the application and was in turn to file a response within 7 days. Unfortunately, parties in defiance of the directions, and after being issued with the ruling notice on May 4, 2022, continued to file responses up to the eleventh hour including as late as May 11, 2022. That practice was irregular and unacceptable. The court did not take into consideration in the instant ruling, submissions irregularly filed.

Application dismissed.

Orders

1st and 3rd respondents to have costs of the application.

Citations

Cases

1. Ambetsa, Wycliffe Oparanya v Director of Public Prosecutions (Constitutional Petition 561 of 2015; Judicial Review 335 & 418 of 2016; [2017] eKLR (Consolidated)) — Followed
2. Board of Governors, Moi High School, Kabarak & another v Malcolm Bell (Petition Nos 6 & 7 of 2013; Civil Application Nos 12 & 13 of 2012; [2013] eKLR (Consolidated)) — Explained
3. Jirongo, Cyrus Shakhhalanga Khwa v Soy Developers Ltd & 9 others (Petition 38 of 2019 [2021] eKLR) — Explained
4. Mong'are v Attorney General & 3 others [2014] 1 KLR 283 — Explained
5. Omenda, Peter Ayodo & 6 Others v. Ethics & Anti-Corruption Commission & 2 others (Application 31 of 2019; [2020] eKLR) — Explained
6. Reliance Bank Ltd v Norlake Investments Ltd ([2002] EA 227) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 25(c); 47; 48; 49; 157; 163(4)(a)(b) — Interpreted
2. Court of Appeal Rules (cap 9 Sub Leg) — Rule 5(2)(a) — Interpreted
3. Supreme Court Act, 2011 (Act No 7 of 2011) — section 15, 16, 17, 21(1)(a)(2); 24(1) — Interpreted

Advocates

None mentioned

RULING

[1] We have perused and carefully examined the notice of motion taken out by the applicants on March 9, 2022, which is expressed to be brought under the provisions of article 163(4)(a) of *the Constitution*, sections 21(1)(a) and 24(1) of the *Supreme Court Act* (No. 7 of 2011) and rules 3(5), 31 and 32 of the Supreme Court Rules, 2020 in which the applicants pray that pending the hearing and determination of Petition No. 4 of 2022, a conservatory order be granted staying the criminal proceedings in Nairobi Chief Magistrates Criminal Case No 1735 of 2016 *Republic v Edwin Harold Dayan Dande & 3 others*; and

[2] Upon reading the affidavit by the 1st applicant, Mr Edwin Harold Dayan Dande, sworn on March 9, 2022 in support of the motion; and



- [3] Upon considering the written submissions by the applicants dated March 9, 2022 wherein the applicants contend, among other things, that the court has jurisdiction to grant interlocutory reliefs pending the hearing and determination of the appeal in the terms enunciated in the case of *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell*, SC Civil Applications No 12 & 13 of 2012; [2013] eKLR; that they have an arguable case with a high probability of success; that their intended appeal raises complex issues of constitutional interpretation, touching on the violation of their rights to fair hearing under article 25(c); that the 1st respondent, in abuse of his prosecutorial powers has instituted charges against them contrary to article 157 of *the Constitution*; that unless the criminal proceedings before the subordinate court are stayed, the intended appeal will be rendered nugatory as the character and subject matter of the intended appeal will dissipate and; further, that unless the criminal proceedings are stayed by the time their intended appeal is determined, they will have already gone through an unlawful and expensive trial that has been pre-determined by the Court of Appeal in violation of their rights under articles 50, 25(c), 47, 48, and 49 of *the Constitution*; and
- [4] Upon considering the 1st respondent's submissions dated March 25, 2022, opposing the appeal and arguing that the appeal is not arguable for the reason that the Court of Appeal did not violate any of the rights mentioned by the applicants in this application and therefore both the appeal and the attendant notice of motion ought to be dismissed; and
- [5] Upon considering the 3rd respondent's notice of preliminary objection, replying affidavit and submissions dated March 18, 2022 in opposition to the motion wherein it contends that no issues relating to the interpretation or application of *the Constitution* were raised before both superior courts below; that in the result, the appeal does not meet the jurisdictional threshold envisioned in article 163(4)(a) of *the Constitution*; and further, that the applicants having failed to meet the threshold for admission under article 163(4)(a) and having also failed to invoke the only other option, article 163(4)(b), the Petition of Appeal dated March 9, 2022 and the notice of motion dated March 9, 2022 are both incompetent and are for striking out for want of jurisdiction; and

In the above context, we now therefore opine as follows:

- [6] Having considered the 3rd respondent's objection to the jurisdiction of this court, we note that before the Court of Appeal, the applicants only challenged the exercise of prosecutorial powers of the 1st respondent under article 157, and the appellate court specifically posed the questions;
- “...whether the trial court failed in its duty to protect the appellants from skewed and malicious prosecution; did the 1st respondent act independently in instituting the criminal case against the appellants or was it orchestrated by ulterior motives?”;
- and
- [7] Being of the view that the appeal before the Court of Appeal and its determination dealt squarely with the interpretation of article 157 of *the Constitution*, this appeal, we declare, is properly before the court in terms of article 163(4)(a) of *the Constitution*; and
- [8] Bearing in mind also that the court's jurisdiction to grant interlocutory orders of stay of proceedings is derived from section 21(2) of the *Supreme Court Act* in the following terms:
- “In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award.”; and



- [9] Acknowledging the contrast between this rule and rule 5 (2)(a) of the *Court of Appeal Rules* where the consideration is that the applicant can only apply for stay of criminal proceedings upon conviction and sentence either by the subordinate court, or by the High Court; and
- [10] Cognisant of the fact 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 the most exceptional of circumstances; and
- [11] Upon considering this court’s own decision in the case of the *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell* (*supra*) on the inherent powers of the court, where it has jurisdiction, to grant ancillary and interlocutory reliefs pending the resolution of the contested issues; and
- [12] Upon being guided by the provisions of section 21(2) aforesaid and the decision of the court in the case of *Wycliffe Oparanya Ambetsa v Director of Public Prosecutions*, SC Petition 14 of 2016; [2017] eKLR, an order of stay will be granted in the following instances;
- “i. the appeal or intended appeal is arguable and not frivolous;
 - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it eventually to succeed, would be rendered nugatory;
 - ii. it is in the public interest that the Order of stay be granted.”;
- and
- [13] Remembering that an arguable appeal is not one that must necessarily succeed, but is simply one that is deserving of the court’s consideration; that what must be avoided is to render the success of the appeal, if successful, nugatory or an academic exercise; that the court, in exercising its discretion, balances between the lower and the higher risks of injustice; and that no definitive conclusions ought to be made as that can only be in the appeal and not in an application for stay, as noted in the persuasive decisions in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] E A 227 and *Dennis Mogambi Mang’are v Attorney General & 3 others* Civil Application No Nai 265 of 2011 (UR 175/2011) [2012] eKLR; and
- [14] Further, remembering that under article 163(4) of *the Constitution* and sections 15, 16 and 17 of the *Supreme Court Act*, only an appeal from the Court of Appeal can be entertained by the Supreme Court, as of right if it involves the interpretation or application of *the Constitution* or where it is certified that a matter of general public importance is involved; and
- [15] Applying these strictures to this application, 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; and that this court has, in the cases of *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others*, SC Application 22 of 2019; [2019] eKLR and *Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others*, SC Application 31 of 2019; [2020] eKLR, granted orders to stay the respective decisions of the Court of Appeal and not the proceedings that were pending before the Magistrate’s Courts; and
- [16] Noting that indeed the petition filed by the applicants on March 11, 2022 only challenges the decision of the Court of Appeal and not that of the Magistrate’s Court; and that as a matter of fact, no decision was made by the latter to warrant any challenge in the High Court; and



[17] For These Reasons, therefore, it is our view that the application lacks merit and is for dismissal; and

[18] However, before we conclude, it is important at this juncture to note that pre-trial directions in this matter were issued by the Deputy Registrar on March 11, 2022, therein, the respondent was to be served with the application forthwith and was in turn to file a response within 7 days therein. Unfortunately, we observe that parties in defiance of the said directions, and after being issued with the ruling notice on May 4, 2022, continued to file responses up to the eleventh hour including as late as May 11, 2022. This practice is irregular and unacceptable. We have, in this respect, not taken into consideration in this ruling, submissions irregularly filed; and

[19] Accordingly, we make the following orders:

- i) The applicants' notice of motion dated March 9, 2022 fails and is hereby dismissed.
- ii) The 1st and 3rd respondents shall have costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

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P.M. MWILU

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT**

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

