



**Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly of the Republic of Kenya & 10 others (Application 1 (E002) of 2022) [2022] KESC 18 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KESC 18 (KLR)

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

**APPLICATION 1 (E002) OF 2022**

**PM MWILU, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**MAY 19, 2022**

**BETWEEN**

**SENATE OF THE REPUBLIC OF KENYA ..... 1<sup>ST</sup> APPLICANT**  
**SPEAKER OF THE SENATE ..... 2<sup>ND</sup> APPLICANT**  
**SENATE MINORITY LEADER ..... 3<sup>RD</sup> APPLICANT**  
**SENATE MAJORITY LEADER ..... 4<sup>TH</sup> APPLICANT**

**AND**

**SPEAKER OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF  
KENYA ..... 1<sup>ST</sup> RESPONDENT**  
**NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**  
**COUNCIL OF COUNTY GOVERNORS ..... 3<sup>RD</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**  
**KENYA MEDICAL SUPPLIES AUTHORITY ..... 5<sup>TH</sup> RESPONDENT**  
**INSTITUTE FOR SOCIAL ACCOUNTABILITY ..... 6<sup>TH</sup> RESPONDENT**  
**DRUGS AND SUPPLIES ..... 7<sup>TH</sup> RESPONDENT**  
**KATIBA INSTITUTE ..... 8<sup>TH</sup> RESPONDENT**  
**PHARMACEUTICAL SOCIETY OF KENYA ..... 9<sup>TH</sup> RESPONDENT**  
**ELIAS MURUNDU ..... 10<sup>TH</sup> RESPONDENT**  
**COMMISSION ON REVENUE ALLOCATION ..... 11<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgement of the Court of Appeal (Murgor, Nyamweya and Lesiit, JJA) delivered at Nairobi on 19th November 2021, in Civil Appeal No. E084/2021)*



## **Supreme Court orders stay of the execution of orders 1, 3 and 9 of the in Civil Appeal No. E084/2021; National Assembly another & Senate of Kenya & others**

Reported by Kakai Toili

*Civil Practice and Procedure* – orders – stay orders - what were the requirements to be met for the Supreme Court to issue stay orders.

### **Brief facts**

The applicants filed the instant application seeking stay of execution of orders 1, 3 and 9 of the judgement of the Court of Appeal at Nairobi in Civil Appeal No. E084 of 2021, *National Assembly & others v the Senate of Kenya & others* pending hearing and determination of Supreme Court Petition No. 19(E027) of 2021, *Senate of Kenya & others v National Assembly & others*. The applicants submitted that unless the orders of stay were granted, the appeal would be rendered nugatory. The applicants argued that they had an arguable appeal to warrant the grant of stay orders.

### **Issues**

Whether an order of stay of execution of orders of the decision by the Court of Appeal could issue in the circumstances.

### **Held**

The SC Petition No. 19(E027) of 2021, which was already before the court was arguable and the instant application met the principles set out by the court in *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell*, Petition Nos. 6 & 7 OF 2013; [2013] eKLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Application No. 5 of 2014; [2014] eKLR.

*Application allowed.*

### **Orders**

- i. *Pending hearing and determination of Supreme Court Petition No. 19(E027) of 2021; Senate of Kenya & others v National Assembly & others, an order was issued to stay the execution of order 1, 3 and 9 Court of Appeal at Nairobi in Civil Appeal No. E084/2021; National Assembly another & Senate of Kenya & others.*
- ii. *Costs of the application to abide the court's decision in the appeal.*

### **Citations**

#### **Cases**

1. 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)) — Mentioned
2. Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others (Application No 5 OF 2014; [2014] eKLR) — Mentioned

#### **Statutes**

1. Constitution of Kenya, 2010 — article 109,110(3);114 — Cited
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3,21,24 — Cited
3. Supreme Court Rules (2020) — Rule 31, 32 — Cited

#### **Advocates**

None mentioned



## RULING

- [1] Upon perusing the notice of motion dated January 11, 2022 and filed on January 14, 2022, under sections 3, 21 and 24 of the Supreme Court Act, and rules 31 and 32 of the Supreme Court Rules, 2020 seeking stay of execution of order nos 1, 3 and 9 of the Judgement of the Court of Appeal at Nairobi in Civil Appeal No E084 of 2021, *the National Assembly & others v Senate of Kenya & others* pending hearing and determination of Supreme Court Petition No 19(E027) of 2021, *Senate of Kenya & others v National Assembly & others* and
- [2] Upon reading the affidavit in support of Hon Senator Kenneth Makelo Lusaka, the Speaker of the Senate, sworn on January 11, 2022; and
- [3] Upon considering the grounds adduced in support of the application, and the submissions made by the applicants in support of the orders for stay of execution that is, unless the orders of stay are granted, the appeal will be rendered nugatory as the pending Bills will be re-submitted without being subjected to the joint resolution process; if the appeal is successful, the current Parliament, whose term expires on August 9, 2022 will not be able to regularize the impugned laws to conform with the Constitution and remain in force; the cross-appeal which the Court of Appeal remitted to the High Court will proceed to hearing while the petition is yet to be heard and determined by this court; it is in the public interest that the orders of stay be granted to prevent infringement of article 110(3) of the Constitution; the applicants have an arguable appeal to warrant the grant of stay orders; the Court of Appeal declined to apply the decision of the Supreme Court setting out the manner in which Parliament ought to apply article 110(3) of the Constitution and in the process violated the principle of *stare decisis*; and
- [4] Upon considering Supreme Court Petition No 19 (E027) of 2021; *Senate of Kenya & others v National Assembly & others*, filed by the applicants on December 23, 2021 and dated on even date; and
- [5] Considering orders Nos 1, 3, and 9 of the Judgment of the Court of Appeal which read *inter alia*:
- “1. We set aside orders (i), (ii), (iii), (iv), (v), and (vi) of the judgment by the High Court dated 29th October 2020, delivered in Nairobi HC Petition No 284 of 2019 as consolidated with Nairobi HC Petition No 353 of 2019..
- .....
3. A Declaration be and is hereby issued that the concurrence process in article 110(3) only applies to all Bills concerning counties within the meaning of articles 109 to 114 of the Constitution, and as interpreted in this judgment.
- .....
9. We hereby remit the appellants’ Cross Petition filed in Nairobi HC Constitutional Petition No 284 of 2019 back to the High Court for consideration and determination of Prayers No 7 to 22 of the Cross Petition.”
- [6] Upon Considering orders (i) to (vi) both inclusive made by the High Court in Nairobi HC Petition No 284 of 2019 as consolidated with Nairobi HC Petition No 353 of 2019 which read *inter alia*:
- “i. A declaration be and is hereby issued that pursuant to article 110(3) of the Constitution, a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament, as to whether



a bill is one that concerns counties, and if it is, whether it is a special or an ordinary bill, before the bill can be introduced for consideration in the originating House.

- ii. A declaration be and is hereby issued that it is mandatory and a condition precedent for any bill that is published by either House to be subjected to a concurrence process to determine in terms of article 110 (3) of *the Constitution* whether the Bill is special or an ordinary bill and that such determination is not dependent on “a question arising” as to whether the Bill is one that concerns Counties;
- iii. A declaration be and is hereby issued that the provisions of article 110 (3) of *the Constitution* are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a bill;
- iv. A declaration be and is hereby issued that pursuant to article 110(3) of *the Constitution*, one Speaker cannot unilaterally make a decision as to whether the Bill does or does not concern counties or whether a question as to whether the Bill is one that concerns counties does or does not arise;
- v. An order be and is hereby issued ordering the immediate cessation of consideration of all bills that are pending before either House, and for which joint concurrence by the Speakers of both Houses as to whether the bills concern counties, has not been demonstrated to allow for such Bills to be subjected to the mandatory joint concurrence process contemplated under article 110(3) of *the Constitution*.”

[7] Further noting that no party has responded or challenged the application before us despite the pre-trial directions before the Deputy Registrar on January 14, 2022 and March 7, 2022; and

[8] Considering this court’s finding on its jurisdiction to grant orders of stay of execution of decrees issued by superior courts in the case of *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell, Petition Nos 6 & 7 of 2013*; [2013] eKLR (*Malcom Bell Case*) and noting this court’s guiding principles on grant of stay of execution orders in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, SC Application No 5 of 2014; [2014] eKLR *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others*, SC Application No 5 of 2014; [2014] eKLR ( *Gatirau Munya Case*); and

[9] Having considered the prayers sought, we find that SC Petition No 19(E027) of 2021, which is already before us is arguable and that the instant application meets the principles set out by this court in the *Malcom Bell Case* and *Gatirau Munya case*.

[10] For the reasons aforesaid, we now make the following orders:

**Orders:**

- a. Pending hearing and determination of Supreme Court Petition No 19(E027) of 2021; *Senate of Kenya & others v National Assembly & others*, an order is issued to stay the execution of order 1, 3 and 9 Court of Appeal at Nairobi in Civil Appeal No E084/2021; *National Assembly another & Senate of Kenya & others*.
- b. The costs of this application shall abide the court’s decision in the appeal.

[11] It is so, ordered.



DATED AND DELIVERED AT NAIROBI THIS 19th DAY OF May 2022.

P.M MWILU

VICE CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME

.....

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

