



REPUBLIC OF KENYA



KENYA LAW

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**Ethics and Anti-Corruption Commission v Tom Ojienda & Associates & 2 others
(Civil Application 21 of 2019) [2020] KESC 56 (KLR) (7 February 2020) (Ruling)**

*Ethics and Anti-Corruption Commission v Tom Ojienda, SC, t/a Prof. Tom
Ojienda & Associates & 2 others; Law Society of Kenya (Amicus curiae)*

Neutral citation: [2020] KESC 56 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 21 OF 2019

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

FEBRUARY 7, 2020

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION APPLICANT

AND

PROF TOM OJIENDA & ASSOCIATES 1ST RESPONDENT

CHIEF MAGISTRATE, KIBERIA LAW COURTS 2ND RESPONDENT

LAW SOCIETY OF KENYA 3RD RESPONDENT

*(An Application for stay of execution pending hearing and determination
of Intended Appeal against the Judgment of the Court of Appeal at
Nairobi (R.N. Nambuye, P.O. Kiage, & S. Ole Kantai JJA) dated 28th June,
2019) in (Civil Appeal Nos. 109 of 2016 & 103 of 2016 (Consolidated))*

RULING

A. Introduction

1. We have before us a Notice of Motion by the Ethics and Anti-Corruption Commission (EACC) dated July 18, 2019 filed under the provisions of Articles 159(2)(a) & (e) and 163(4)(a) of the Constitution, sections 21(2) and 24(1) of the Supreme Court Act as well as rules 23 and 26 of the Supreme Court Rules, 2012. It seeks stay of execution, enforcement, and/or implementation of, or reliance upon the judgment and/or decree of the Court of Appeal in Civil Appeal No. 109 of 2016 (consolidated with Civil Appeal No. 103 of 2016). The Application is supported by an affidavit sworn on July 18, 2019 by Michael Kasilon, a forensic investigator with the applicant.



B. Litigation Background

2. While investigating suspected fraudulent payments of legal fees by Mumias Sugar Company (MSC) to the 1st respondent, the Ethics and Anti-Corruption Commission (EACC) obtained an ex-parte order from the Chief Magistrate's Court at Kibera to have access to and investigate the 1st respondent's bank accounts. The 1st respondent challenged that order in the High Court arguing that contrary to articles 27(1), 27(4), 40(1), 40(2), 47(1), 47(2) and 50(1) of the Constitution, EACC had abused its public powers and violated his constitutional rights to privacy, to property, to fair administrative action and to fair hearing by obtaining warrants to investigate his firm's Clients Account without prior notice to him. He sought various declarations in that regard and an order of certiorari to quash the said Chief Magistrate's order.
3. Upon hearing the Petition, the High Court, Lenaola, J (as he then was), in a judgment delivered on February 5, 2016, besides quashing that order, issued a declaration that "the warrants to investigate an account given to the officers of the Commission breached the 1st respondent's rights and fundamental freedoms under the provisions of articles 47(1) & 47(2) and 50(1) of the Constitution and were hence void for all intents and purposes."
4. Aggrieved by that decision, the EACC and DPP filed Civil Appeal Nos. 103 and 109 respectively before the Court of Appeal. The 1st respondent cross-appealed faulting the High Court for failing to hold that his fundamental rights to privacy, to property and not to be discriminated against were violated; and for failing to award him damages for the violation of his right to fair administrative action. The Court of Appeal (Nambuye, Kiage & Ole Kantai, JJA) consolidated those appeals and in its judgment dated 28th June 2019, dismissed those appeals and the cross-appeal holding that investigations undertaken by EACC are an administrative function subject to the provisions of article 47 of the Constitution, and directed that in exercise of its mandate, EACC should always comply with the unambiguous and clear provisions of sections 26, 27 and 28 of Anti-Corruption and Economic Crimes Act by giving notice to suspects. It is that Court of Appeal decision that has provoked the present application.

C. Application Before The Supreme Court

5. As stated, this application seeks stay of execution and/or enforcement or implementation of or reliance upon the judgment or decree of the Court of Appeal in Civil Appeal No. 109 of 2016 (consolidated with Civil Appeal No. 103 of 2016). It is premised on the grounds:
 - (a) That the Court of Appeal misapprehended the law by declaring that the investigations by the Applicant are an administrative function and thus subject to the provisions of Article 47 of the Constitution;
 - (b) That the judgment of the Court of Appeal has created inconsistencies in the interpretation and applications of Section 26, 27 and 28 of ACECA vis a vis section 118 of the CPC and section 180 of the Evidence Act;
 - (c) That the judgment and directions to give notice has serious ramifications on the fight against corruption and economic crimes and goes against the very basis of searches as an investigative tool;
 - (d) That several applications have since been filed in different Courts seeking release of documents that had been obtained pursuant to warrants issued to investigators, and that unless this Court issues stay orders, the intended appeal would be rendered nugatory and active matters pending before Courts will be lost at a great loss to the country; and



- (e) That the intended appeal raises issues of general public importance and has a significant bearing on public interest with respect to corruption and economic crime matters which the Court of Appeal failed to consider.
6. In opposition to the application, the 1st respondent has, in addition to a replying affidavit, raised a preliminary objection challenging this court's jurisdiction to entertain this application. As is our practice based on the late Justice Nyarangi's rendition in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and others decisions including those of this Court, we have to determine the issue of jurisdiction before we venture into the merits of the application.

D. Analysis And Determination

7. On jurisdiction, the 1st respondent contends that this application is an abuse of the process of court as, at the time it was filed, it was not hinged on any existing petition of appeal. He also argues that this Court lacks jurisdiction to entertain the applicant's appeal subsequently filed under Article 163(4) (a) of the Constitution as the applicant seeks the interpretation of Section 23 of the *Anti-Corruption and Economic Crimes Act*, No. 3 of 2003 (ACECA) as read together with section 118 of the *Criminal Procedure Code* (CPC), Chapter 75 Laws of Kenya and not an interpretation or application of any provision of the *Constitution*.
8. On the first ground, the applicant concedes that this application was not hinged on any existing petition of appeal. While this application was filed on 18th July 2019, the applicant had in any event attached a draft petition to the application and the appeal itself, being Supreme Court Petition No. 30 of 2019, that was filed on August 2, 2019. Since the appeal was filed within the stipulated time of 30 days of filing the notice of appeal, the applicant, in effect, wants us to deem the application as having been filed along with or after the filing of the appeal. In *Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others* [2019] eKLR, this Court deemed an application for stay properly filed on the basis of the subsequent filing of the appeal within time. The Court held that by the time a bench was constituted to determine the application, a substantive appeal was already on record, and was filed within time. Equally in *Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another* [2018] eKLR, the Court found that the record was filed piece-meal but within time, hence failure to file the appeal accompanying the application for stay was not fatal. However, in *Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 others* [2019] eKLR, this Court declined to grant stay of execution because no appeal had been filed within the stipulated timelines holding that there was thus no basis upon which to grant the stay orders sought.
9. On the basis of these authorities, we consequently deem the Notice of Motion application dated 18th July, 2019 as properly on record as by the time of considering it, a substantive appeal had already been filed on August 2, 2019 within the stipulated timelines of 30 days of filing the notice of appeal.
10. We equally find no merit in the preliminary objection that this Court has no jurisdiction to entertain this application or even the appeal itself under Article 163(4)(a) of the Constitution. This is because in the High Court, the 1st respondent challenged the order to investigate his firm's Clients Account on the grounds that, contrary to articles 27(1), 27(4), 40(1), 40(2), 47(1), 47(2) and 50(1) of the *Constitution*, EACC had violated his constitutional rights to privacy; to property; to fair administrative action; and to fair hearing. In upholding the High Court, the Court of Appeal, as stated, found that, contrary to article 47 of the *Constitution*, EACC had violated the 1st respondent's constitutional right to fair administrative action. In its appeal before this Court, the applicant wants us to fault both the High Court and the Court of Appeal on, inter alia, that finding. That is clearly an issue of interpretation and/or application of the Constitution. In the circumstances, we find and hold that we have jurisdiction



under Article 163(4)(a) of the Constitution to entertain both this application and Supreme Court Petition of appeal No. 30 of 2019.

11. On the merits of the application, as stated, in its grounds upon which this application is premised, the applicant argues, inter alia, that the High Court and Court of Appeal decisions requiring notice to be given to suspects before their bank accounts are accessed, have “serious ramifications on the fight against corruption and economic crimes” in that that requirement undermines “searches as an investigative tool.”
12. The applicant also argues that “several applications have since been filed in different Courts seeking release of documents that had been obtained pursuant to warrants issued to investigators, and that unless this Court issues stay orders, the intended appeal would be rendered nugatory and active matters pending before Courts will be lost at a great loss to the country.”
13. On his part, the 1st respondent urged us to dismiss this application for being unmeritorious. He urged that it is trite law from the persuasive Court of Appeal decisions in *Mombasa Seaport Duty Free Limited v Kenya Ports Authority* [2006] eKLR and *Charles Munyendo Olingo v Salim Chetechi Makokha & another* [2019] eKLR that in a judgment with no positive order or decree, there is nothing to stay. He argued that in this matter, neither the High Court nor the Court of Appeal issued any positive order. The High Court found that the applicant’s attempt to investigate the 1st respondent’s bank accounts without prior notice to him was illegal and accordingly quashed the Chief Magistrate’s investigative order. The Court of Appeal upheld that decision.
14. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, this Court enunciated three principles for consideration in determining applications for stay of execution. They are: “whether the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted. Has the applicant met these criteria?”
15. We have considered these rival submissions. It is not in doubt that the fight against corruption and economic crimes is a matter of great public importance. In the circumstances, in the interest of justice and to provide guidance, a clear and authoritative statement of this Court on the issues raised is imperative. Consequently, we allow this application and direct that pending the hearing and final determination of the applicant’s appeal—No. 30 of 2019, the effect of the High Court and Court of Appeal decisions in this matter is hereby stayed. Neither party to this appeal, nor any other person shall use, apply or in any way rely upon them until the said appeal is heard and determined.

E. Orders

16. Flowing from the above analysis, we make the following Orders:
 - (i) The 1st respondent’s notice of preliminary objection dated August 1, 2019 is hereby overruled.
 - (ii) The notice of motion dated July 18, 2019 is hereby granted.
 - (iii) Neither party to this appeal, or any other person shall use, apply or in any way rely upon the High Court and/or the Court of Appeal decisions in this matter until the said appeal is heard and determined.
 - (iv) The costs of this application shall abide the outcome of the said appeal.Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2020.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA

