



**Mate & another v Wambora & another (Civil Application
37 of 2014) [2014] KESC 3 (KLR) (29 December 2014) (Ruling)**

Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR

Neutral citation: [2014] KESC 3 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 37 OF 2014
PK TUNOI & N NDUNGU, SCJJ
DECEMBER 29, 2014**

BETWEEN

JUSTUS KARIUKI MATE 1ST APPLICANT

JIM G KAUMA 2ND APPLICANT

AND

HON MARTIN NYAGA WAMBORA 1ST RESPONDENT

COUNTY GOVERNMENT OF EMBU 2ND RESPONDENT

(Being an application for stay of execution of the Judgment and Order of the Court of Appeal sitting at Nyeri (Visram, Koome & Otieno Odek JJA), delivered on 30th September, 2014 in Nyeri Civil Appeal No. 24 of 2014)

Whether orders of stay of execution can be issued where failure to do so would render an appeal nugatory and where compensation by way of costs would be impossible

The application sought among other orders; stay the judgment and orders of the Court of Appeal directing the applicants to appear before the High Court for further orders on mitigation, and for sentencing for contempt of court. The Supreme Court held that if it was to decline to maintain the status quo, the High Court would proceed to take mitigation and then sentence the applicants. There was a likelihood, in that case, that the applicants would be incarcerated and the substratum of the appeal-cause would have been spent. In the event that the Supreme Court eventually found in favour of the applicants, it would be impossible to compensate them by way of costs. In the alternative, if the court found in favour of the respondents, no harm would have been occasioned to them. The Supreme Court thus allowed the application.

Reported by Emma Kinya Mwobobia

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals certified as matters of general public importance - whether the following were matters of general public importance and/ or involved the



interpretation or application of the Constitution capable of appeal at the Supreme Court; determination of the question whether the High Court exceeded its jurisdiction by finding the applicants to be in contempt of a court order; and determination of the extent of application of the doctrine of separation of powers – Constitution of Kenya, article 63(4)(a).

Civil Practice and Procedure – execution – stay of execution – factors to consider - whether orders of stay of execution could be issued where failure to do so would lead to probability of the substratum of the appeal being spent and where compensation by way of costs would be impossible.

Brief facts

The instant application sought among other orders; stay the judgment and orders of the Court of Appeal directing the applicants to appear before the High Court for further orders on mitigation, and for sentencing for contempt of court. The applicants had since filed a petition of appeal seeking to set aside the entire judgment of the Court of Appeal. A single judge of the instant court granted stay of the judgment and orders of the Court of Appeal directing the applicants to appear before the High Court for further orders on mitigation and sentencing, for contempt of court pending an *inter partes* hearing of the instant application. The 1st respondent contended that the instant court lacked jurisdiction under article 163(4)(a) of the Constitution, to entertain the instant application and the intended appeal.

Issues

- i. Whether the following were matters of general public importance and/ or involved the interpretation or application of the Constitution capable of appeal at the Supreme Court:
 - a. Determination of the question whether the High Court exceeded its jurisdiction by finding the applicants to be in contempt of a court order.
 - b. Determination of the extent of application of the doctrine of separation of powers.
- ii. Whether orders of stay of execution could be issued where failure to do so would lead to probability of the substratum of the appeal being spent and where compensation by way of costs would be impossible.

Held

1. The determination of the question whether the High Court exceeded its jurisdiction by finding the applicants to be in contempt of a court order called for the interpretation and application of the Constitution which was the criterion of jurisdiction of the Supreme Court by the terms of article 163(4)(a) of the Constitution.
2. The issues raised were not only cognizable but also weighty constitutional questions that were, *prima facie*, arguable. As significant as the issues in contest were, it was not possible to resolve them with finality in the context of the preliminary motion.
3. If the Supreme Court was to decline to maintain the *status quo*, the High Court would proceed to take mitigation and then sentence the applicants. There was a likelihood, in that case, that the applicants would be incarcerated and the substratum of the appeal-cause would have been spent. In the event that the Supreme Court eventually found in favour of the applicants, it would be impossible to compensate them by way of costs. In the alternative, if the court found in favour of the respondents, no harm would have been occasioned to them.
4. The determination of the extent of application of the doctrine of separation of powers, which was a vital constitutional concept was a matter of public interest.
5. The respondents' case rested on fundamental constitutional questions not yet interpreted and which bore a close relation to the appellants' case and hence the need for an interpretation of the Constitution ahead of the application of the standard law of contempt.

Application allowed. Execution of the Court of Appeal orders to rest in abeyance and status quo to be maintained pending the determination of the appeal. Hearing date of the pending appeal to be issued by the Registrar on priority basis. The costs of this application shall abide the appeal.



Citations

East Africa

1. *Aramat, Lemanken v Harun Meitamei Lempaka & 2 others* Civil Application No 8 of 2014 – (Mentioned)
2. *Commercial Bank of Africa v Ndirangu*, (1990-1994) EA 64 – (Explained)
3. *Erad Suppliers & General Contractors limited v National Cereals and Produce Board* Petition No 5 of 2012 - (Mentioned)
4. *Jobo, Hassan Ali & Another v Suleiman Said Shabbal & 2 others* Petition No 10 of 2013 – (Explained)
5. *Kenya Section of the International Commission of Jurist v Attorney-General & 2 others* Criminal Appeal No 1 of 2012 – (Mentioned)
6. *Kidero, Evans Odhiambo & 5 others v Ferdinand Ndungu Waititu & 4 others* Petition No 18 of 2014 – (Followed)
7. *Macharia, SK & Another v Kenya Commercial Bank & 2 others* Application no 2 of 2011 - (Explained)
8. *Munene, Mary Wambui v Peter Gichuki Kangara & 2 others* Application No 12 of 2014 – (Explained)
9. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application No 5 of 2014 – (Followed)
10. *Mumo Matemau v Trusted Society of Human Rights Alliance*, Civil Appeal No 290 of 2012 – (Explained)
11. *Mwangi, Njenga & Another v Truth Justice and Reconciliation Commission & 4 others*, Court Petition No 286 of 2013 – (Explained)
12. *Okoiti, Okiya Omtatah & 3 others v Attorney-General & 5 others* Petition 227, 281 & 282 of 2013 (consolidated) – (Explained)
13. *Speaker of Senate & Another v Attorney General & 3 others*, Advisory Opinion No2 of 2013- (Explained)
14. *Wanjohi, George v Steven Kariuki & 2 others* Application No 6 of 2014.

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & others* (CCT 12/05), [2006] ZACC 11 - (Explained)
2. *National Coalition for Gay and Lesbian Equity & 13 others v Minister for Home Affairs and others*, (CCT10/99), [1999] ZACC 17– Petition 227, 281 & 282 of 2013 (consolidated) - (Explained)

United Kingdom

1. *Hadkinson v Hadkinson* [1952] 2 All ER 567 - (Explained)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 6, 10, 159 (2) (e); 163(4)(a); 174; 175; 177(1) (d); 178; 179; 185 (1) (2); 196 (3) - (Interpreted)
2. Supreme Court Act, 2011 (Act No 7 of 2011) sections 15, 16, 19, 24(1) - (Interpreted)
3. Supreme Court Rules, 2012 (Sub Leg Act No 7 of 2011) rules 23, 24, 26(1) - (Interpreted)

International Instruments

1. Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (1998)
2. Commonwealth Principles on the Accountability of and the Relationship between the three Arms of Government (2003)



RULING

A. Introduction

1. The application before this Court is by way of a Notice of Motion under certificate of urgency, dated 1st October, 2014 seeking Orders to:
 - (i) stay the Judgement and Orders of the Court of Appeal sitting at Nyeri in Civil Appeal No. 24 of 2014, directing the applicants to appear before the High Court in Kerugoya on 6th October, 2014 for further orders on mitigation, and for sentencing for contempt of Court;
 - (ii) stay the proceedings in Kerugoya Consolidated Petition No. 3 of 2014, together with all incidental processes pursuant to the Judgement and Orders made by the Court of Appeal at Nyeri in Appeal No. 24 of 2014 on 30th September, 2014;
 - (iii) issue directions on the filing and hearing of the petition of appeal made in this matter before this Court;
 - (iv) direct that the costs of the application do abide the appeal.
2. The applicants have since filed a petition of appeal seeking to set aside the entire Judgment of the Nyeri Court of Appeal in Civil Appeal No.24 of 2014 dated 30th September, 2014.
3. On 2nd October, 2014 this Court (Njoki Ndungu, SCJ), having heard counsel for the applicant, certified the application as urgent. The Honourable Judge granted stay of the Judgement and Orders of the Court of Appeal sitting at Nyeri in Civil Appeal No. 24 of 2014, directing the applicants to appear before the High Court in Kerugoya on 6th October, 2014 for further Orders on mitigation and sentencing, for contempt of Court pending an inter partes hearing of this application. She further directed the applicant to file and serve submissions.
4. The applicants filed their written submissions on 31st October, 2014, while the respondent filed grounds of opposition dated 22nd October, 2014 and a replying affidavit dated 24th October 2014, together with their submissions dated 3rd November, 2014. The 1st respondent contended that this Court lacked jurisdiction under Article 163(4)(a) of *the Constitution*, to entertain this application and the intended appeal.

B. Background

5. The 1st respondent herein filed a petition at the High Court in Kerugoya, Petition No. 3 of 2014 (formerly Embu Petition No. 1 of 2014) seeking, inter alia, Orders to quash the resolution by the Embu County Assembly seeking his removal from the office of the Governor of Embu County. The petition was filed together with an application seeking ex parte conservatory Orders pending the hearing of the petition.
6. On 23rd January, 2014 the High Court (Githua, J) granted conservatory Orders restraining the County Assembly of Embu from proceeding with the impeachment proceedings without first giving the 1st respondent notice of the charges against him, and without affording him an opportunity to defend himself.
7. A copy of the Order was served upon the Office of the Speaker of the County Assembly, and later published in the Daily Nation and Standard Newspapers on the 26th and 27th January 2014.



8. However, the impeachment process continued and on 28th January, 2014 the County Assembly of Embu passed the motion of impeachment. Aggrieved by the Assembly's conduct in passing the motion, the 1st respondent filed an application seeking leave to apply for committal of the applicants to civil jail for six months for contempt of Court Orders, which leave was granted.
9. The above-mentioned application was heard together with the petition (consolidated to Petition No. 3 of 2014), and a three-Judge Bench of the High Court (Ong'udi, Githua and Olao, J) in a Judgment dated 16th April, 2014 found that the applicants were aware of the Court Orders dated 23rd January, 2014 and had deliberately disobeyed the same. It found the applicants to be in contempt of Court Orders, and directed that summons be served upon them to appear in Court, for further Orders.
10. Aggrieved by the decision of the High Court, the applicants filed an appeal to the Court of Appeal. In its Judgment dated 30th September, 2014, the Appellate Court upheld the finding of the High Court, that the applicants were aware of the Court Orders dated 23rd January, 2014 but disobeyed the same. It dismissed the appeal, and ordered the applicants to appear before the High Court at Kerugoya on 6th October, 2014 for further Orders.
11. Aggrieved by the said Court of Appeal Judgment, the applicants, on 2nd October, 2014, filed a Notice of Motion at the Supreme Court – hence these proceedings.

C. THE PARTIES' RESPECTIVE CASES

i. The Applicants' Submissions

12. Learned Senior Counsel, Prof. Tom Ojienda submitted that the application dated 2nd October, 2014 sought to stay the execution of the entire Judgment and Orders of the Court of Appeal in Nyeri Civil Appeal No. 24 of 2014 delivered on 30th September, 2014, and also to stay of the proceedings in Kerugoya Consolidated Petition No. 3 of 2014, pending the hearing and determination of the applicants' appeal.
13. Counsel submitted that this appeal is properly before this Court, and that this Court has the jurisdiction to hear and determine both the interlocutory application and the appeal, under Article 163(4)(a) of *the Constitution*. Counsel stated that the first question to be determined is whether the provisions of Articles 6, 175 and 179 of *the Constitution*, which create the two levels of Government, can be so interpreted as to limit the exercise of the powers of the Assembly. He submitted further that the issues herein concern the central question of checks and balances in *the Constitution*.
14. It was counsel's submission that the appeal meets the threshold set by this Court. Counsel referred to the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal and 2 Others Sup. Ct. Petition No. 10 of 2013 [2014] eKLR in which this Court held that:

"the test that remains...is whether the appeal raises a question of constitutional interpretation and application and whether the same has been canvassed in the superior Courts and has progressed through the normal appellate mechanisms so as to reach this Court by way of an appeal as contemplated under Article 163(4)(a) of *the Constitution*."

Also cited in that context, was this Court's decision in Erad Suppliers & General Contractors limited v. National Cereals and Produce Board [2012] eKLR.

15. Counsel urged that this appeal raises weighty matters of the interpretation of *the Constitution*, namely, the doctrine of separation of powers under the devolved system of government, and the law on contempt of Court, requiring the further input and final pronouncement of this Court. Counsel



referred to this Court's decisions in *The Kenya Section of the International Commission of Jurist v. the Attorney-General & 2 Others*(2012) eKLR (to expound on the need to settle the law on uncertain jural questions, and to develop rich jurisprudence); and *Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*, Sup. Ct. Application No. 5 of 2014 – in relation to on what constitutes constitutional interpretation, to warrant a matter coming up before this Court.

16. Counsel contended that the appeal raises an arguable appeal, as it involves the application and interpretation of various provisions of *the Constitution* which were directly and materially in issue in both the High Court and the Court of appeal—matters that the Court of Appeal misinterpreted or misapplied .
17. Counsel referred to the case of *Hon. Lemanken Aramat v. Harun Meitamei Lempaka and 2 Others*, Sup. Ct. Civil Application No. 8 of 2014 which found guidance in the view expressed by this Court in *Munya*; and that of *George Wanjohi v. Steven Kariuki & 2 Others*, Sup. Ct. Application No. 6 of 2014.
18. Learned counsel urged that this Court's task entails the interpretation and application of Articles 159(2)(e), 174, 175, 177(1)(d), 178, and 196(3) of *the Constitution*, all of which were substantially in issue both at the High Court and Court of Appeal; and he sought the interpretation of the provisions of the County Government Act, and the National Assembly(Privileges and Immunities) Act.
19. Counsel invoked Section 24(1) of the *Supreme Court Act*, 2011 as read together with Rules 23 and 26(1) of the Supreme Court Rules, 2012 and urged that the appeal was arguable, and was properly conceived within the meaning of Article 163(4)(a) of *the Constitution*. Counsel submitted that the appeal elicits cognizable controversies that bear distinct constitutional dimension and effect.
20. Learned counsel submitted that the Court's intervention through the Order issued on 23rd January, 2014 was premature, and offended the provisions of Articles 159, 174 and 175 of *the Constitution*, relating to the separation of powers. Counsel argued that the High Court's supervisory jurisdiction under Article 165 of *the Constitution* "does not extend to interfering with ongoing processes"; and that only upon the conclusion of such process, could the High Court then question the constitutionality of the outcome, and whether due process of law had been adhered to.
21. In this regard counsel referred to the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence (adopted on 19th June, 1998 at a meeting of representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association), which require (Part III) that in the discharge their functions, members should be free from improper pressures.
22. To reinforce the argument for the need to preserve the independence of Parliamentarians, counsel cited the Commonwealth Principles on the Accountability of and the Relationship between the three Arms of Government (As agreed by the Law Ministers and endorsed by the Commonwealth Heads of Government Meeting Abuja Nigeria, 2003) which states (Part II) that Judiciaries and Parliaments should fulfil their respective roles in a complementary and constructive manner.
23. Counsel also relied upon the Court of Appeal decision in *Mumo Matemu v. Trusted Society of Human Rights Alliance*, Civil Appeal No. 290 of 2012, in which the Court of Appeal, on the doctrine of separation of powers, held that:

"... separation of power does not only proscribe organs of government from interfering with others function. It also entails empowering each organ of government with countervailing powers which provides checks and balances on action taken by other organs of government.



Such powers are however not a licence to take over functions vested elsewhere. There must be judicial, legislative, and executive deference to the repository of the function.”

24. To the same intent, counsel invoked persuasive decisions of the South African Constitutional Court: *Doctors for Life International v. Speaker of the National Assembly and Others* (CCT 12/05), [2006] ZACC 11; and *National Coalition for Gay and Lesbian Equity & 13 others v. Minister for Home Affairs and Others*, (CCT10/99), [1999] ZACC 17– both of which considered the importance of the doctrine of separation of powers, and the precept of the Judiciary avoiding interference with the operations of Parliament.
25. Learned counsel urged this Court to affirm the decision of the High Court in *Okiya Omtatah Okoiti & 3 Others v. Attorney-General & 5 Others*,(2014) eKLR, where a three-Judge Bench was persuaded by the decision in *Canada (House of Commons) v. Vais* (2005) 1 S.C.R and held that:
- ... the Courts should be hesitant to interfere, except in very clear circumstances, in matters that are before the two houses of Parliament and even those before the County Assembly.”
26. Counsel further submitted that the appeal will be rendered nugatory if the application for stay is not allowed. Thus, if stay is not granted, the applicants will be required to appear before the High Court in Kerugoya for sentencing for contempt of the Orders of the Court. This will render the appeal superfluous and purely academic, and in the event that the Court makes any Orders favourable to the applicants, the same would be of no effect, if stay was not granted earlier. Counsel urges the Court to preserve the status quo, as it hears the appeal.
27. Moreover, counsel further submitted, in the unlikely event that the High Court decision is upheld, the Orders will still be capable of being enforced against the applicants. Counsel cited the decision in *Mary Wambui Munene v. Peter Gichuki Kangara & 2 Others*,Sup. Ct Applic. No. 12 of 2014in which this Court observed that:
- “The purpose of an application such as this is to preserve the subject matter in the dispute so that the rights of an appellant who is exercising his/her undoubted right of appeal under Article 163(4)(a) of *the Constitution* are safeguarded and the appeal, if successful is not rendered nugatory.”
28. Counsel submitted that the balance of convenience tilts in favour of granting this application, and that the respondents will not be prejudiced in any way if stay is granted.
29. On the issue of public interest, counsel submitted that this Court cannot separate the provisions of Articles 176, 175 and 196 of *the Constitution*, the question of the privileges of a County Assembly, and doctrine of separation of powers, from considerations of public interest.

(ii) Respondents’ Submissions

30. Learned Senior Counsel, Mr. Muite for the respondents, contested the application. He filed grounds of opposition dated 22nd October, 2014, and a replying affidavit dated 24th October, 2014 together with written submissions.
31. Counsel raised a preliminary objection on grounds, inter alia,that:
- (a). this Court does not have jurisdiction to entertain the Notice of Motion as the appeal does not lie as a matter of right, in the terms of Article 163(4)(a) of *the Constitution*;



- (b). this Court does not have jurisdiction, as the matter has not been certified as a matter of general public importance in the terms of Article 163(4) (b) of *the Constitution*;
 - (c). the application is fatally defective, as no leave was sought as contemplated under Section 15, and in compliance with Section 16 of the *Supreme Court Act*, 2011; further the application does not fall under within the appellate jurisdiction of this Court as contemplated under Section 19 of the *Supreme Court Act*, 2011;
 - (d). the application is fatally defective, as it does not invoke the specific procedural clause in Rule 26 of the Supreme Court Rules, 2012; and
 - (e). the three-Judge Bench of the High Court was still seized of the matter, as it has convicted the applicants, and was only waiting to sentence them when they sought stay at the Court of Appeal, which attempt was dismissed, and directions given for a return to the High Court.
32. It was counsel's submission that this Court has no jurisdiction to entertain this application; that the appeal does not lie as a matter of right under Article 163(4)(a) of *the Constitution*; that it does not relate to any question of interpretation of *the Constitution*. He urged that this is an appeal and/or application for stay of execution on the singular question of a finding of contempt by the Kerugoya High Court, in Consolidated Petition No. 3 of 2014. Counsel referred this Court to its earlier decision in the S.K. Macharia & Another v. Kenya Commercial Bank & 2 Others, Sup Ct. Applic no. 2 of 2011, for the point that: jurisdiction emanates from *the Constitution*, or ordinary law or both– a principle restated in Speaker of Senate & Another v. AG & Others, Sup Ct. Advisory Opinion No.2 of 2013.
33. Counsel took issue with the ex parte orders already granted, and submitted that the application did not comply with the procedure as provided under Rule 26 of the Supreme Court Rules, 2012 which regulates urgent applications.
34. Counsel submitted that the applicants are seeking to stay an unfinished judicial process at the Kerugoya High Court, as the matter is awaiting sentencing subsequent to a conviction being duly entered. Counsel posed the question whether it is permissible to appeal on conviction alone, pending sentencing, and whether the applicants will have yet another right to appeal against the sentence itself, thereafter. He urged the Court to find that the applicants are abusing the Court process, and acting in contempt of Court.
35. It was counsel's submission that the applicants had not raised any constitutional questions at the Court of Appeal in Nyeri, and they cannot invoke new constitutional provisions for interpretation, merely to satisfy the jurisdictional requirement before this Court. He urged that a party may not introduce new arguments which were not raised and canvassed both at the trial Court and the first appellate Court, and thus the applicant should not be allowed to avert the inapplicability of Article 163(4)(b), by resorting to Article 163(4)(a) of *the Constitution*.
36. Counsel submitted that the statutory privileges do not extend to disobedience of Court orders properly issued. Counsel urged that the County Government Act does not grant the immunity suggested by the applicants. He urged further that, the Act is subject to the provisions of *the Constitution*, as it was enacted after the promulgation of *the Constitution*.
37. Counsel invoked Article 10 of *the Constitution*, and argued that the applicants were duty-bound to obey Court Orders. He cited the case of Commercial Bank of Africa v. Ndirangu, (1990-1994) EA 64, as a basis for the principle that it is a fundamental rule of law, that Court Orders are to be obeyed.
38. Learned counsel submitted that the Courts had a mandate to inquire into the constitutionality of any actions of the County Assembly, by the terms of Article 165(3)(d) of *the Constitution*. He relied on



case law, Njenga Mwangi & Another v. the Truth Justice and Reconciliation Commission & 4 Others, Nairobi High Court Petition No. 286 of 2013 in which the following passage appears:

"I am in agreement that under section 29 of the National Assembly (Powers and Privileges Act)..., Courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers in the National Assembly but I am certain that under Article 165(3)(d) of *the Constitution*, this Court can enquire into any unconstitutional actions on their part" [emphasis supplied].

39. Counsel submitted that the applicants were duty-bound to obey the Court Orders and, if aggrieved, to move the Court to set them aside. For emphasis, counsel cited the case of Hadkinson v. Hadkinson, which held that a person who knows of an order of the Court, whether null or valid, regular or irregular, cannot be permitted to disobey it.
40. Counsel urged the Court to dismiss the application and the appeal, with costs to the respondents, and further to order that the applicants do appear before the High Court at Kerugoya, for the accomplishment of the contempt proceedings.

D. Issues for Determination

41. From the pleadings, and the written and oral submissions of the parties, the following issues arise for determination:
 - (a). whether this Court has jurisdiction to entertain this application?
 - (b). whether the instant application raises sufficient grounds to warrant grant of stay of execution of the Court of Appeal's decision dated 30th September, 2014.

E. Analysis

(a) The Question of Jurisdiction

42. The 1st respondent submitted that this Court has no jurisdiction to entertain the Notice of Motion. This argument is founded on the following considerations:
 - (i). the appeal does not lie as a matter of right, as contemplated under Article 163(4)(a) of *the Constitution*;
 - (ii). the matter has not been certified as a matter of general public importance, as contemplated under Article 163(4) (b) of *the Constitution*;
 - (iii). the application is fatally defective, as no leave was sought as required under Section 15, and in compliance with Section 16 of the *Supreme Court Act*, 2011; further, the application does not fall under the ambit of the appellate jurisdiction of this Court, as contemplated under Section 19 of the *Supreme Court Act*, 2011;
 - (iv). the application is fatally defective, as it does not invoke the specific procedural law founded upon Rule 26 of the Supreme Court Rules, 2012; and
 - (v). the three-Judge Bench of the High Court is still seized of the matter, as it has convicted the applicants, and is waiting to sentence them, as they had appealed unsuccessfully to the Court of Appeal.
43. Rule 24 of the Supreme Court Rules deals with applications for grant of certification. Rule 26 deals with urgent applications. Upon perusal of the application before us, we find that Rule 26 was



complied with, since a certificate of urgency, and an affidavit setting out the urgency, accompanied the application.

44. The applicants' case is that when the High Court found them to be in contempt of Court Orders, they had thereafter appealed to the Court of Appeal, on questions of law that took a trajectory of a constitutional nature. Invoking Articles 175, 185(1) and (2) of *the Constitution*, learned counsel submitted that this matter concerns vital questions on the principle of separation of powers.
45. This Court has already pronounced itself on the guiding principles for the exercise of jurisdiction under Article 163(4)(a) of *the Constitution*. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* S.C. Petition No. 2B of 2014; [2014] eKLR, the Court (paragraph 244) observed that:

"In summary, the guiding principles that we have articulated under Article 163(4)(a) are:

- (i). a Court's jurisdiction is regulated by *the Constitution*, by statute law, and by the principles laid out in judicial precedent;
- (ii). the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;
- (iii). the lower Court's determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
- (iv). an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;
- (v). with regard to election petitions, the *Elections Act* and the Regulations are normative derivatives of *the Constitution* and, in interpreting them, a Court of law cannot disengage from *the Constitution*."

46. These principles were subsequently applied in *Evans Odhiambo Kidero & 5 Others v. Ferdinand Ndungu Waititu and Others*, Sup. Ct. Petition No. 18 of 2014, in the following terms (paragraph 130):

Since its inception, this Court has consistently pronounced itself on the nature, scope, extent and limits of its jurisdiction under Article 163(4)(a) of *the Constitution* (see *Re IIEC*; *Peter Oduor Ngoge*; *Lawrence Nduitu*; *Erad Suppliers*; *Hassan Ali Joho*; *Munya 1 & 2*). In each of those decisions, the Court has considered different angles of the jurisdictional question. In his concurring opinion in *Munya 2*, *Mutunga, CJ & P* analysed the various facets of the Court's pronouncements into 'guiding principles', to be taken into account by appellants who seek to predicate their appeals upon Article 163(4)(a) of *the Constitution*. Such guiding principles are hereby restated with appropriate elaboration as is consistent with the terms of this Court's other decisions:

- (i). a Court's jurisdiction is regulated by *the Constitution*, by statute law, and by the principles laid out in judicial precedent;
- (ii). the chain of courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court;
- (iii). not all categories of appeals lie from the Court of Appeal to the Supreme Court under Article 163(4)(a); under this head, only those appeals from cases involving the interpretation or application of *the Constitution* can be entertained by the Supreme Court;



- (iv). and under that same head, the lower Court’s determination of an issue which is the subject of further appeal, must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;
 - (v). an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy;
 - (vi). with regard to election matters, not every petition-decision by the Court of Appeal is appealable to the Supreme Court; only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play, lie to the Supreme Court.”
47. Looking at the issues raised in the Appellate Courts’ Judgement, the 1st respondent was seeking declaratory Orders that the County Assembly’s motion for his impeachment was contrary to *the Constitution*. The application came up for hearing before Githua J. on 23rd January, 2014. The learned Judge issued conservatory Orders restraining the appellants from proceeding with the impeachment proceedings, without first giving the 1st respondent notice of the charges levelled against him, and without according him an opportunity to defend himself. According to the 1st respondent, the said Order was served upon the 1st and 2nd applicants on 23rd and 24th January, 2014. The said orders were also published in the Daily Nation and Standard Newspaper on 26th and 27th January, 2014
 48. The 1st respondent contends that despite the applicants being served with the aforementioned Court Order, they proceeded with the impeachment process on 28th January, 2014 with the County Assembly passing the motion of impeachment. This resulted in the respondents filing Misc. Application No. 4 of 2014 for contempt of Court Orders.
 49. The applicants denied being served with the Orders dated 23rd January, 2014. They argued that they had no role in deciding the business of the County Assembly, as the 1st applicant merely facilitates the deliberations and proceedings decided upon by the members of the Assembly, while the 2nd applicant only co-ordinates and facilitates the deliberations of the said proceedings.
 50. According to the applicants the impeachment proceedings were conducted by the County Assembly, and within its Chambers. Therefore, the proceedings were privileged under the National Assembly (Powers and Privileges) Act, and did not attract civil or criminal liability. The High Court found the applicants to be in contempt of Court Orders, and directed that summons be served on them to appear in Court. The applicants were aggrieved by this finding, and appealed to the Court of Appeal.
 51. Counsel for the applicants contended that the issues raised in the petition have taken on a distinctly constitutional element; the issues no longer involve just individuals, but are issues regarding the separation of powers between the arms of government, and it devolves to this Court to define the terms of the separation of powers. He submitted that the issues involve Articles 175 and 185(1), (2) of *the Constitution*; and they bring into question the authority and processes of the County Assembly. Learned counsel urges that the applicants were acting in their capacity as Speaker, and Clerk of the House. Counsel posed the question as to why the Members of the County Assembly were not convicted for contempt, and yet they participated in the debate. On this ground alone, counsel urged, this Court should find that it has jurisdiction. To support this argument, counsel cited this Court’s decision in the Erad Supplies case, and ICJ V AG, on interpretation of *the Constitution*.
 52. In response, counsel for the respondents urged that the applicant ought to have moved the Court under Article 163(4)(b) of *the Constitution*, to seek certification that the matter is one of general



public importance. He submitted that the applicant was evading the accomplishment of the contempt proceedings at the High Court, as the matter is not one of general public importance.

53. In the light of these arguments, the question to be determined as regards jurisdiction, is whether the appeal filed raises any question involving the interpretation and application of *the Constitution*. This Court, in the Evans Kidero case (paragraph 141, 142 and 143) expounded on the phrase “interpretation and application of *the Constitution*” as follows:

(141) The operative words are ‘interpretation or application’. Do these words have the same meaning? In our perception, these terms do not mean one and the same thing. Otherwise, the drafters would have simply opted to use either of them. As it is, the Supreme Court will not infrequently be called upon either to interpret or to apply *the Constitution*. It emerges from the comparative lesson that judicial approaches in different jurisdictions, do not accord the expressions ‘constitutional interpretation’, and ‘constitutional application’ the same meaning.

“142. For our purposes, interpretation of *the Constitution* involves revealing or clarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect). The basic reference-point in constitutional interpretation is the text. Application of *the Constitution* is a more dynamic notion. It comes into play when the provision of *the Constitution* remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory. In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a simple exercise in interpretative syllogism. It takes on the character of ‘creative interpretation’ (see Jeffrey Goldsworthy, *German Law Journal*, Vol. 14 No.08, pp. 1279-1295 (August 2013)), or what some American theorists have called ‘constitutional construction’ (see Randy E. Barnett, *Interpretation and Construction*, 34 *Harv. J.L and Pub. Policy* 65 (2010)).

143. Constitutional application, therefore, entails creatively interpreting *the constitution* to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance. Quite often, this exercise involves interpreting *the Constitution* in such a manner as to adapt it to changing circumstances in the community, with the care not to usurp the role of the legislature. This is what is meant when *the Constitution* is said to be ‘a living document’. A Constitution is, thus, to be interpreted both according to its text, and creatively as well, to breath life into it (see Jakab, ‘Judicial Reasoning in Constitutional Courts’, *German Law Journal*; Vol.14, No. 08, pp. 1215-1272 (August 2013)).”

54. In the instant case, the issue that emerges is whether the High Court and Court of Appeal properly arrived at the finding that the applicants were in contempt of Court. The 1st applicant is the Speaker of the County Assembly. The Office of the Speaker of a County Assembly is established by Article 178 of *the Constitution*, which vests in the Speaker the power to preside over a sitting of the County Assembly. The 1st applicant contends that he facilitates the deliberations and proceedings decided upon by the Members of the Assembly; while the 2nd applicant only co-ordinates and facilitates the deliberations of the said proceedings. The applicants submit that the proceedings were privileged under the National Assembly (Powers and Privileges) Act (Cap. 6, Laws of Kenya), and did not attract civil or criminal liability; and hence the Courts have no jurisdiction to interfere with such operations of the County Assembly.

55. Did the Courts exceed their jurisdiction by finding the applicants to be in contempt of a Court Order? The determination of this question calls for the interpretation and application of *the Constitution*, which is the criterion of jurisdiction, by the terms of Article 163(4)(a) of *the Constitution*.



56. We would agree with the applicants' argument, that indeed, the issues have transcended the parties as individuals, and crystallized into a conflict involving the interpretation and application of *the Constitution*, thus falling within the jurisdiction of this Court.

(b) Stay of Execution of Court of Appeal Decision: Is this the Appropriate Order?

57. This Court, in *Munya 1* held that an appellant who intends to move the Court for the grant of interlocutory Orders of stay must show that:

- (i) the appeal or intended appeal is arguable and not frivolous; and that
- (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

...

- (iii) that it is in the public interest that the order of stay be granted”.

58. The applicant urged that this appeal raises weighty issues of interpretation of *the Constitution*, namely, the doctrine of separation of powers under the devolved system of government, and the law on contempt of Court– which require the further input and final pronouncement of this Court. Learned counsel invoked this Court's decision in *The Kenya Section of the International Commission of Jurist v. the Attorney-General & 2 Others*(2012) eKLR, on the need to settle the law on uncertain jural questions, and to develop relevant jurisprudence.

59. Counsel submitted that the matter raises an arguable appeal, as it involves the application and interpretation of Articles 159(2)e, 174, 175, 177, 178, and 196 of *the Constitution*, which were materially in issue in both the High Court and the Court of Appeal. These are the provisions which, as the applicants contend, the Court of Appeal misinterpreted or misapplied. Counsel referred to this Court's decision in *Hon. Lemanken Aramat v. Harun Meitamei Lempaka and 2 Others*,Sup. Ct. Application No. 8 of 2014, which took guidance from *Munya 1*, and further affirmed the definition of “arguable appeal” as expressed in *George Mike Wanjohi v. Steven Kariuki & 2 Others*,Sup. Ct. Application No. 6 of 2014.

60. Counsel invoked Section 24(1) of the *Supreme Court Act*, as read with Rules 23 and 26(1) of the Supreme Court Rules, 2012 and urged that the appeal is arguable, and properly conceived within the meaning of Article 163(4)(a) of *the Constitution*. He submitted that the appeal elicits cognizable controversies that bear clear constitutional dimension and effect.

61. The respondents, by contrast, urged that this is an application for stay of execution on the singular question of a finding of contempt by the Kerugoya High Court, in Consolidated Petition No. 3 of 2014. Counsel for the respondents contended that it is an application seeking to stay an unfinished judicial process at the Kerugoya High Court, since the matter is awaiting sentencing after a conviction of the applicants. He urged the Court to find that the applicants are blatantly abusing Court process, and are acting in contempt of Court, with a sense of impunity.

62. It is clear that the whole question is about the conduct of the applicants, with regard to the Court Order touching on their duties, respectively, as Speaker, and Clerk, of the Embu County Assembly. This contest, in our perception, has snowballed and transcended the dispute-situation between the parties; it has crystallized into a matter requiring the interpretation and application of *the Constitution*, to determine the parameters of the doctrine of separation of powers, and to ascertain the scope of privilege for discrete constitutional agencies established under the principle of devolution.



63. We are convinced that the issues raised are not only cognizable, but are weighty constitutional questions that are, prima facie, arguable. So significant as the issues in contest are, it is not possible to resolve them with finality in the context of this preliminary motion.
64. Counsel for the applicants submitted that if stay Orders are not granted, but the appeal succeeds, the matter would be rendered nugatory, as the applicants would have appeared before the High Court for pains and penalties to be served out to them. He, therefore, urged the Court to preserve the status quo, pending the hearing and determination of the appeal. Learned counsel recalled the relevant principle, as stated by this Court in *Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others*, Sup. Ct Applic. No. 12 of 2014 in the following terms:
- The purpose of an application such as this is to preserve the subject matter in the dispute so that the rights of an appellant who is exercising his/her undoubted right of appeal under Article 163(4)(a) of *the Constitution* are safeguarded and the appeal, if successful is not rendered nugatory.”
65. Counsel submitted that the balance of convenience tilts in favour of granting this application, and that the respondents will not be prejudiced in any way, if the Orders sought are granted.
66. Indeed, if this Court declined to maintain the status quo, the High Court would proceed to take mitigation, and then sentence the applicants. There is a likelihood, in that case, that the applicants would be incarcerated, and the substratum of the appeal-cause would have been spent. In the event that this Court eventually finds in favour of the applicants, it would be impossible to compensate them by way of costs. In the alternative, if the Court finds in favour of the respondents, no harm would have been occasioned to them.

(c) Considerations of Public Interest

67. On the issue of public interest, the applicants submitted that the provisions of Articles 175, 176 and 196 of *the Constitution*; the question of privileges of a County Assembly; and the principle of separation of powers – all involve the public at large. But for the respondents, it was urged that the issue at hand simply entails the determination as to whether there was contempt of Court on the part of the applicants, and this does not involve any matter of public interest.
68. For the applicants, it was urged that the High Court, in issuing the conservatory Orders of 23rd January 2014, encroached upon the oversight role and authority of the County Assembly of Embu, contrary to the principle of separation of powers. This is an issue to be raised in the intended appeal, before this Court. It is our view that the determination of the extent of application of the doctrine of separation of powers, which is a vital constitutional concept, is a matter of public interest.

F. Orders

69. We have taken into account the weighty submissions made for the respondents, regarding the essential principle of compliance with Orders issuing from a Court of law, just as we have closely adverted to the applicants’ case for a proper interpretation of the constitutional status of County Assembly privileges, operating within the scheme of the separation- of- powers doctrine. As it is clear to us that the respondents’ case rests on fundamental constitutional questions not yet interpreted, and which bear a close relation to the appellants’ case, our starting point must be an interpretation of *the Constitution*, ahead of the application of the standard law of contempt. In view, however, of the importance of faithful compliance with Court Orders, we prefer to give directions for the maintenance of the status quo, rather than for “stay” of the current Orders, in that style.
70. We will make Orders as follows:



- (a). The application dated 1st October, 2014 is hereby allowed in the terms of the Orders herein.
- (b). The execution of the Judgement and Orders of the Court of Appeal at Nyeri in Nyeri Civil Appeal No. 24 of 2014 made on 30th September, 2014, requiring the applicants to attend the High Court at Kerugoya for further Orders on mitigation and sentencing shall rest in abeyance, and the status quo shall be maintained, pending the determination of the appeal.
- (c). A hearing date for the appeal in this matter is to be issued by the Registrar, on the basis of priority.
- (d). The costs of this application shall abide the appeal.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF DECEMBER, 2014.

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P. K. TUNOI

JUSTICE OF THE SUPREME COURT

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N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court

