



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ &VP, Ibrahim, Njoki, Lenaola & Ouko SCJJ)

PETITION (APPLICATION) NO. 29 (E033) OF 2022

-BETWEEN-

JAMES NTHUKU KITHINJI PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE 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)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 2nd December, 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 7th October 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 2nd December, 2022; submissions dated 2nd December, 2022; and supplementary submissions dated 28th December, 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 21st December, 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 & Anor. 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.”

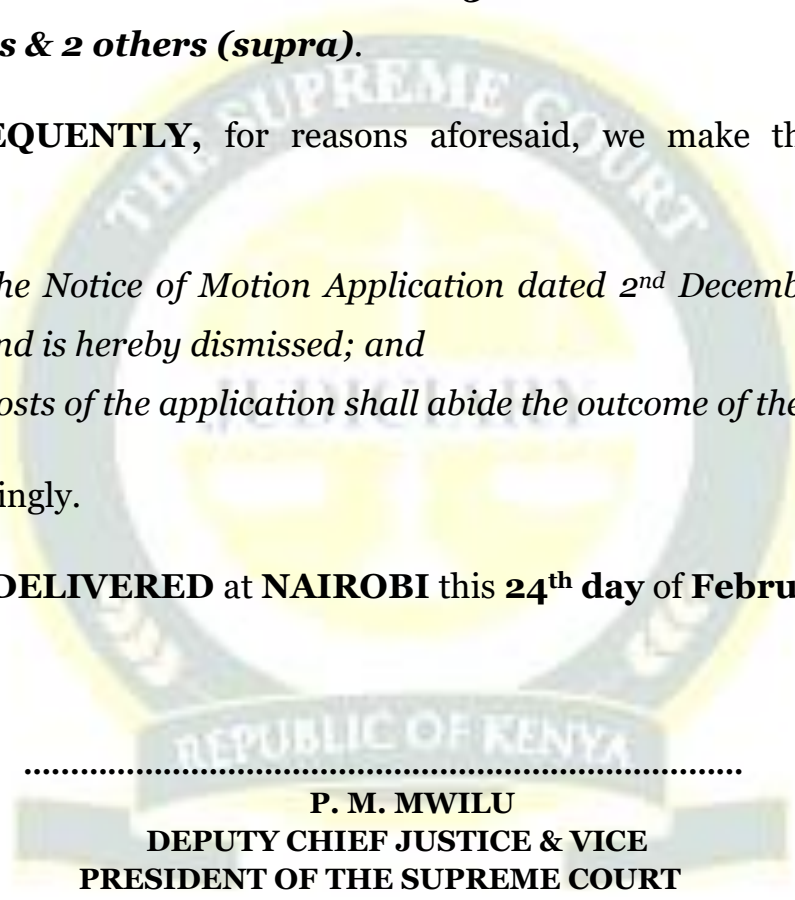
[9] WE NOW OPINE that the Notice of Motion lacks merit as it not only seeks to set aside a ruling of the Court of Appeal at the interlocutory stage but also seeks to stay proceedings before the Magistrate’s Court contrary to the limited jurisdiction granted to the Supreme Court under Article 163(3)(b) 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 2nd December, 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

.....
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

