

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ & P; Mwilu DCJ & V.P; Ibrahim, Wanjala & Njoki, SCJJ)

APPLICATION NO 8 OF 2018

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPLICANT

AND

CHRYSANTHUS BARNABUS OKEMO 1ST RESPONDENT

SAMUEL KIMUNCHU GICHURU 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

CHIEF MAGISTRATE COURT 4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION 5TH RESPONDENT

(Being and application for stay of execution and/or enforcement of the Judgment of the Court of Appeal (E.M. Githinji, H.M. Okwengu and J Mohammed, JJA) dated 2nd March 2018 in Civil Appeal No. 5 of 2016 consolidated with No. 23 of 2016)

RULING

I. THE APPLICATION

[1] This Notice of Motion application is dated 24th April 2018 and was filed on 26th April, 2018. The Director of Public Prosecution (DPP)/Applicant sought orders, *inter alia*: that this Honourable Court be pleased to issue an order of stay of execution, enforcement or any other steps or actions intended to implement the pronouncements and or/orders of the judgement of the Court of Appeal in the manner of the institution and

conduct of extradition cases and proceedings in Kenya pending the hearing and final determination of the appeal by the Applicant against the Judgement of the Court of Appeal in Civil Appeal No. 5 of 2016 consolidated with Civil Appeal No. 23 of 2016 by Chrysanthus Barnabas Okemo and Samuel Gichuru respectively. Another order sought was that “the status quo currently prevailing in respect of the institution and conduct of extradition cases and proceedings be maintained pending the hearing and final determination of the appeal by the Applicant against the Judgement of the Court of Appeal in Civil Appeal No. 5 of 2016 consolidated with Civil Appeal No. 23 of 2016 by Chrysanthus Barnabas Okemo and Samuel Gichuru respectively.”

[2] *The summarized grounds in support of the application were that: being dissatisfied with the Court of Appeal Judgment delivered on 2nd March, 2018, the Applicant duly filed a Notice of Appeal; that the Judgement of the Court of Appeal is wrong, erroneous and against the law under the relevant Statutes and Constitution of Kenya 2010 as relates to the law, the nature and the conduct of extradition proceedings; that there are extradition cases currently pending before the court and at various stages of proceedings which have been instituted by the DPP, and as such, the decision of the Court of Appeal shall have serious ramifications on the administration of Justice throughout the Republic of Kenya owing to the extradition proceedings pending in various courts; that there is an urgent and founded need that the intended appeal by the applicant herein be heard and determined before the judgement of the Court of Appeal may be enforced, hence the urgency in the application herein to avoid the intended appeal being rendered nugatory or a mere academic exercise; and that the decision of the Court of Appeal if executed/enforced shall have serious ramifications and adverse effects on the administration of criminal justice as many other cases pending before court may be decided on the basis of the Court of Appeal decision appealed against. Further, that the judgement of the court of Appeal is manifestly wrong, illegal and erroneous and if allowed to stand shall render the intended appeal nugatory or reduce the same to an academic exercise.*

[3] The application was supported by the affidavit of Victor Mule, a Senior Assistant Director of Public Prosecutions with the Applicant.

[4] Having been filed under a certificate of urgency, the matter was placed before a single Judge of the Court (*Ojwang, SCJ*) on 8th May 2018. Upon perusal of the pleadings before him, the learned Judge certified the matter urgent and granted an order of *stay of execution, enforcement or any other steps or actions intended to implement the pronouncement and/or orders of the of Judgment of the Court of Appeal pending the hearing and determination of the appeal.*

II. PARTIES' SUBMISSIONS

[5] The **Applicant** filed its written submissions on 3rd May 2018 urging the Court that the appeal is arguable. It set out the various findings in the Court of Appeal judgement, for instance that “*extradition is part of Kenya’s criminal justice system*” and proceeded to elaborately set out the various Statutes that provide for and govern extradition matters in Kenya, thus making the case that extradition is part of Kenya’s criminal justice system.

[6] The **1st Respondent** filed a Replying Affidavit and submissions on 14th June 2018. He urged that the stay sought should not be granted as it will reverse the invalidation of extradition proceedings which invalidation was done by the Court of Appeal Judgment. That this will amount to allowing an appeal at an interlocutory stage. Further that if the stay is not granted, it will affect diverse persons in other court processes in various courts yet this Court does not have power to extend conservatory orders to all extradition proceedings pending in other cases and relating to other parties. The case of **Attorney General vs Law Society of Kenya & Another** [2009] eKLR, was cited in support of this submission.

[7] The **2nd Respondent** filed a Replying Affidavit dated 10th July 2018 in which he echoes the averments in the 1st Respondent's affidavit and submissions in opposition to the application.

III. ANALYSIS

[8] The application before us is in the nature of an interlocutory application that seeks interim orders. The import of an order of stay was clearly stated by this Court in the case of **Board of Governors, Moi High School, Kabarak & another v Malcolm Bell** [2013] eKLR as being to preserve the subject-matter of an appeal. In determining an application seeking stay orders therefore, in focus is the substantive appeal. It is this appeal that the Court skims through in determining whether the various components for grant of stay as stated in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR have been met. That is, whether the appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal, were it to eventually succeed, would be rendered nugatory; and whether it is in the public interest that the order of stay be granted.

[9] Consequently, in making an application for stay orders, the primary pleading is the petition of appeal which originates the matter and invokes this Court's jurisdiction. This Court aptly stated this in the case of **Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others** [2019] eKLR, in which it referred to an earlier decision thus:

*“... we have stated in the past that an interlocutory application cannot originate proceedings before the Court. (See the case of **Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 Others** SC Petition No. 27 of 2014; [2014] eKLR.) Such a stand-alone application will not generally be considered as it is not predicated upon a substantive matter before the Court and remains unknown in law.”*

[10] While previously this legal position was only stated in case law, it is now provided for in the Rules of the Court. Rule 31(2) of the Supreme Court, 2020 provides:

“An interlocutory application shall not be originated before a petition of appeal or a reference is filed with the Court.”

[11] With the foregoing background, this Court takes note that in a related application before this Court, being: *Supreme Court Application No. 28 of 2019*, the Applicant herein sought leave to file its appeal out of time. This is a clear manifestation and admission that there is no appeal that was filed in this matter. We have confirmed with the Court registry that indeed this application for stay was filed without first filing an appeal.

[12] The upshot is that without a petition of appeal having been first filed in this Court, this application was predicated on nothing. It had no foundation upon which to stand and it was a nullity *ab initio*. The same should not have been accepted for filing. While Rule 31(2) of the Supreme Court, 2020 has been recently introduced in the new Rules, that is no panacea in this matter, for at the time of filing this application, there was jurisprudence on the need for first filing an appeal before such an application. As the application was a nullity, the proceedings therein were also a nullity and we so declare them.

[13] Consequently, we make the following orders:

- (a) The Notice of Motion dated 24th April 2018 is hereby declared null and void, and struck out.***
- (b) The order of stay granted by the Court on 8th May 2018, being predicated on proceedings that were founded on a null and void application, is declared null and void. For the avoidance of doubt, the said order is hereby discharged.***
- (c) There shall be no order as to costs.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of JULY, 2020.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT

OF THE SUPREME COURT

SUPREME

.....

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE

PRESIDENT

OF

THE

COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

N. NJOKI

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

**REGISTRAR
SUPREME COURT OF KENYA**

