

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga; CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)

APPLICATION NO. 22 OF 2019

— BETWEEN —

CYRUS SHAKHALAGA KHWA JIRONGOAPPLICANT

— AND —

SOY DEVELOPERS LIMITED & 9 OTHERSRESPONDENTS

RULING

A. THE APPLICATION

[1] The applicant’s Notice of Motion dated 24 July 2019 came up as an urgent matter before a single Judge (*Lenaola, SCJ*) on 28 July 2019, and was accorded a certificate of urgency. It is from that stage that we now come to the Ruling of the Court, arrived at after considering the application’s merits.

[2] The applicant seeks stay of execution of the Court of Appeal’s decision in *Civil Appeal No. 43 of 2017* and *Civil Appeal No. 48 of 2017*, which had been delivered on 19 July 2019

B. BEFORE THE APPELLATE COURT

[3] The Appellate Court had set aside the Judgment of the High Court in Nairobi (*JR Misc. Application No. 78 of 2016*), which had granted an Order of *Certiorari*, quashing a decision by prosecutorial agencies to institute criminal proceedings in *Criminal Case No. 207 of 2016*, against the applicant; as well as an Order of *Certiorari* quashing the charges in a charge sheet of 9 February 2016, in *Police Case No. 121/41/2016*. Also reversed by the Appellate Court was the High Court's Order of Prohibition stopping the said Police authorities from pursuing criminal proceedings in respect of the relevant subject-matter.

C. A QUESTION OF THE CONSTITUTION: APPLICANT'S CASE

[4] The applicant herein contends that the Appellate Court's decision has compromised his personal freedom; and his contention is that "*the Court of Appeal having refused to apply clear constitutional provisions ... and which violation requires redress ... to restore and preserve the appellant's constitutional and [Court-upheld] rights*", he is rightly aggrieved, and the Supreme Court should uphold his position. On the basis of the foregoing argument, the applicant urges that his substantive appeal "*has a high probability of success*", and so should be the basis of a final appeal which involves the interpretation and application of the terms of the Constitution — a matter thus falling within the jurisdiction of the Supreme Court.

[5] Specifically, the applicant contends that the Appellate Court had defaulted by not considering the prospect of violation of his constitutional rights; by disregarding his rights to fair trial under Article 50 (2) of the Constitution; by overlooking his right to equal protection and to the benefit of the law under Article 27 (1) of the Constitution; by default in purposive interpretation of the

Constitution, such as will promote its objectives and values, in the terms of Article 259 of the Constitution; by overlooking the fact that the applicant's contested action is essentially contractual, and had taken place more than two decades earlier, and the relevant official records are unavailable; by not considering the long delays in prosecution of the matter, which now worked to the applicant's prejudice.

[6] The applicant sought to support the factual element in his application with averments in his affidavit of 24 July 2019. The factual basis of the application is that, it was some 25 years ago that the applicant took a land-offer which has now become the basis of a criminal case lodged against him, without the benefit of documentation and information such as were available at the material time.

[7] It is the applicant's case that the prosecution case against him amounts to abuse of powers, guided by ulterior motives unrelated to the pursuit of justice. In the circumstances, it was urged that the application for stay of execution of the Appellate Court's Judgment is merited.

D. RESPONDENTS' CASE

[8] The 1st, 2nd and 3rd respondents, for their part, contend that the facts surrounding the property transaction in question, in 1989, disclose fraudulent acts by the applicant herein; and that, consequently, the Appellate Court had rightly reversed the High Court decision which stood in favour of the applicant. The three respondents denied that any issues of constitutional rights were entailed in the instant matter, maintaining that *"this appeal is for the private benefit of the applicant"*.

[9] For the 5th, 6th and 7th respondents, it was submitted that this matter had properly come before the Supreme Court, as the appellant is contesting the interpretation or application of certain Articles of the Constitution — notably Articles 50 and 157. The three respondents, however, urged the Court to dispose of the matter at the preliminary stage: for *“the petition does not raise ... [any] complex issues of constitutional interpretation or application which cannot ... be determined at the interlocutory stage ...”* They urged, lastly, that *“the appeal does not merit the threshold of arguability for purposes of grant of stay”*.

[10] Of interlocutory standpoints taken judicially, ***Black’s Law Dictionary***, 10th ed. (2014), p. 938 thus affirms:

“[Of an order, judgment, appeal, etc.] interim or temporary; not constituting a final resolution of the whole controversy.”

[11] The 5th, 6th and 7th respondents call for a termination of the main cause at this preliminary stage: on the ground that no case of merit has come up, as compared to the foundations of the criminal case lodged against the applicant. As for the first three respondents, hardly any question of constitutional interpretation or application had arisen — and therefore, a jurisdictional question would have been pertinent, and the Supreme Court should not disturb the Appellate Court’s determination.

E. CONSTITUTION, AND SUPREME COURT’S REMIT

[12] This Court’s jurisdiction is not sharply defined in certain cases — especially as regards claims of constitutional entitlements, the content of which stands to be ascertained individually, from one case to another. So we must consider whether the circumstances in which the criminal case against the applicant was initiated, in any way stands to compromise rights as delineated in the Constitution. Does

the applicant have certain constitutional rights, which can only be safeguarded through a proper hearing of his appeal before the Supreme Court?

[13] As the applicant notes, the Director of Public Prosecutions (5th respondent) has conceded that the matter before this Court had been premised upon constitutional grounds — the original cause before the High Court being founded upon Articles 22 (1); 23(1), (3); 159 (2) (a); 165 (3) (b), (d); and 258 of the Constitution.

[14] Trial issues, especially those involving the criminal law, have invariably to take into account the clear provisions of the Constitution — notably Article 50 which relates to “*fair hearing*”. In the instant case, it emerges that recent criminal processes rest upon old scenarios of fact, the boundaries of which may have lost clarity. Such earlier scenarios of fact, moreover, have tended to blur the boundaries between the criminal and the civil dockets. What we see is such an amalgam of civil and criminal scenarios that also touch on the processes of the Constitution, and its prescribed rights and obligations.

F. SUPREME COURT: STANDPOINT

[15] We hold, in these circumstances, that an appellate initiative before the Supreme Court, such as in the instant case, is substantially meritorious. To provide the requisite opportunity for such an inquiry of a constitutional nature, we would sustain the motions of the judicial process, and entertain the applicant’s case on the merits.

[16] Consequently, we determine the Notice of Motion of 24 July 2019 in favour of the applicant. We hereby grant stay of execution of the Appellate Court’s decision in *Civil Appeal No. 43 of 2017* and *No. 48 of 2018, of 19 July 2019*,

pending the hearing and determination of the appeal, which is to be conducted on the basis of priority.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 19th Day of September, 2019.

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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

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA