

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. 33 OF 2018

— BETWEEN —

OKIYA OMTATAH OKOITI.....APPLICANT

— AND —

- 1. CENTRAL BANK OF KENYA**
- 2. DE LA RUE INTERNATIONAL LIMITED**
- 3. DE LA RUE CURRENCY & SECURITY PRINT LIMITED**
- 4. DE LA RUE KENYA EPZ LIMITED**
- 5. PUBLIC PROCUREMENT REVIEW AUTHORITY**
- 6. THE HON. ATTORNEY GENERAL**
- 7. THE DIRETOR OF PUBLIC PROSECUTIONS**
- 8. THE ETHICS AND ANTI-CORRUPTION COMMISSION**

RESPONDENTS

*(Being an application for stay of the Judgment and decree of the Court of Appeal in **Civil Appeal No. 116 of 2018** consolidated with **Civil Appeal No. 119 of 2018**)*

RULING OF THE COURT

A. INTRODUCTION

[1] Before this Court is an application dated 15th November 2018 of Okiya Omtatah Okioti, the Applicant. The Application is seeking the following orders:

(a) ...

(b) *That the Honourable Court be pleased to order a stay to the Judgment and decree/orders granted on 12th October, 2018 by the Court of Appeal in Civil Appeal No.116 of 2018 consolidated with Civil Appeal No. 119 of 2018.*

(c) *The costs of the application be provided.*

[2] The Application was triggered by a Judgment of the Court of Appeal in Civil Appeal No.116 of 2018 dated 12th October, 2018 (*Githinji, Asike-Makhandia, and Sankale ole Kantai*) that set aside the Judgment of the High Court regarding the printing of new bank notes for use in Kenya. The background and the facts of this Application have been set out in Application No. 32 of 2018 where the Applicant herein was seeking the leave of this Court to file his Petition of appeal out of time. We find it unnecessary to restate those facts here.

(i) *The Application at the Supreme Court*

[3] The Application to stay the execution of the Judgment of the Court of Appeal has been brought under Articles 1,2,3(1), 4(2), 10, 22,27, 47, 50(1), 73, 75, 159, 163(4)(a), 201(a)&(d), 227(1) & (2), and 259 (1) of the Constitution of Kenya, 2010; Section 19 of the Supreme Court Act, 2011; Rule 17 and 23 of the Supreme Court Rules, 2012; and all enabling provisions of the law.

(ii) *Notice of Preliminary objection (PO)*

[4] The 2nd Respondent, De la Rue International Limited, has filed a Notice of Preliminary Objection dated 11th December, 2018, alleging that the Orders sought by the Applicant are not available in law in the absence of the certification process

stipulated in Article 163(4)(b) of the Constitution. We shall deal with the objection as we determine the Application before us.

B. SUBMISSIONS

(i) *The Applicant's*

[5] The Applicant has filed written submissions dated 11th March 2019 in support of his Application and has listed the issues for determination as follows:

- (i) *Whether the subject matter of the intended appeal is still alive and justiciable;*
- (ii) *Whether the intended appeal required certification under Article 163(4)(b) of the Constitution;*
- (iii) *Whether the computation of time under Rule 33(1) of the Supreme Court Rules violates the Constitution and the principles of natural justice;*
- (iv) *Whether there was inordinate delay in making this Application;*
- (v) *Whether the Judgment of the Court of Appeal should be stayed;*
- (vi) *Whether costs are payable.*

[6] Save for submissions on the issues of whether the Judgment of the Court of Appeal should be stayed and the delay in filing the Application, the submissions are a replica of the Applicant's submissions in ***Application No.32 of 2018*** where the Applicant is seeking leave of this Court to file his Petition of appeal out of time.

[7] On the first issue, the Applicant submits that since the dispute is about the issue of banknotes and not coins, the Respondents' claim that the subject matter is moot is not backed by any material evidence. He has produced as exhibit "ooo-

2” Legal Notice No. 235 of 7th December, 2018, for supply of coins. It is thus his submission that the subject matter is still live and justiciable.

[8] On the second issue, the Applicant has submitted that he wishes to appeal under Article 163(4) (a) of the Constitution, as the intended appeal raises issues of the interpretation and application of the Constitution as well as statute. He thus contends that his intended appeal revolves around the application and interpretation of Article 227 of the Constitution as read with the Public Procurement and Asset Act, 2015 as well as the repealed Public Procurement and Disposal Act, 2005 which he believes the Court of Appeal misapplied. He has in the same breathe alleged misapplication of Article 50(4) of the Constitution. He thus submits that in such a situation certification was not required.

[9] On whether the computation of time under Rule 33(1) violates the Constitution and the principles of natural justice, the Applicant submits that Rule 33(1) violates Articles 25(c), 47,48, 50(1), 73, 159(2) (d), and 163(4)(a) & (b) of the Constitution. He is in that regard of the view that the 30 – day period under Rule 33(1) should start at the expiry of the 14 days period under Rule 31(1) allowed to file the Notice of Appeal, irrespective of whether or not the Notice of Appeal is filed on the first or the last day of the 14 – day period allowed under Rule 31(1). He thus argues that the Rule should never be offensive to the filing of an appeal at the earliest opportunity.

[10] The Applicant has further submitted that the Rule aforesaid does not exclude such time as may be certified by the Registrar of the Court of Appeal as having been required to prepare certified record of proceedings, and does not provide a cure where delay is occasioned by inaction on the part of the Registrar of the Court of Appeal. He is of the view therefore that time should start running only after the provision of the record of proceedings to litigants by the Court of Appeal registry.

[11] On the fourth issue, it is submitted that there was no delay in making this Application having it been filed on the 46th day after the Judgment had been delivered. He thus submits that the Notice of Appeal was rightfully filed and served in time. The Applicant however adds that, since he was acting in person, it took time for him to study and understand the Judgment, put together the Petition of Appeal which was rejected for having been filed out of time and so he has filed Application No. 32 of 2018 where he is seeking for an extension of time to file his appeal. We shall deliver a separate Ruling on that Application.

[12] The Applicant furthermore submits that the delay is not unreasonable and refers this Court to the High Court decision in ***Florence Hare Mkaha v. Pwani Tawakal Mini Coach & another*** [2014] eKLR where the Court allowed an application though it was filed almost a year after delivery of Judgment by the trial Court.

[13] On whether the Judgment of the Court of Appeal should be stayed, the Applicant submits that his intended appeal is arguable and will be rendered nugatory if this Court does not grant an interim injunction pending its hearing and determination. In addition, he argues that the public interest favors the grant of stay orders and that the Respondents will suffer no prejudice if it is so granted. He has cited the Court of Appeal case in ***Butt v. Rent Restriction Tribunal*** [1982] KLR 417 giving guidance on how a court should exercise discretion in granting an order of stay.

[14] The Applicant in addition submits that his application for stay meets the legal criterion as stated in the cases of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji and 2 others*** [2014] eKLR, and ***Nathif Jama Adam v. Abdikhalim Osman Mohamed and 3 others*** [2014] eKLR. He also argues that his intended appeal is arguable as it raises legitimate and bonafide issues that

this Court should have an opportunity to interrogate in full and render a judgment on merit. He has cited the decision **of Stanely Kang'ethe Kinyanjui v. Tony Keter & 5 others** [2013] eKLR in support of that submission where the Court of Appeal held that even a single bona fide arguable point, which may not succeed on appeal, is adequate to constitute an arguable appeal. He makes reference to his draft petition of appeal annexed to his replying affidavit dated 11th March 2019 in that regard.

[15] The Applicant is also apprehensive that his intended appeal will be rendered nugatory if it succeeds without stay orders being issued because the bank notes in question may be printed and supplied and the printer would allegedly be paid the Kshs. 7.1 billion higher than what the competition was offering. He also believes that the public interest favors the grant of a stay order because the dispute herein involves a colossal amount of Kshs. 7.1 billion that Kenyans are bound to lose if the Court of Appeal Judgment stands. He submits that the circumstances of this case thus favours the grant of stay. In support, he has cited the decisions of **Kenya Airports Authority v. Mitu-Bell Welfare Society & another**, CA No. 114 of 2013; and **Stanley Kangethe Kinyanjui** (supra).

[16] Concerning costs, he is urging the Court to allow the Application with costs because in his belief, costs should follow the event. He has cited the ratio decidendi in **Eric Okeyo v. County Government of Kisumu & 2 others** [2014] eKLR in that regard. However, he submits, in the event that the Court should disallow the Application, the Court should not award costs to the Respondents since this is a public interest litigation between a private citizen and the State. He cites the **Biowatch case** cited as CCT 80/2008 or 2009 ZA CC 14 at paragraph 21 in support of that proposition.

(ii) The 1st Respondent's

[17] The 1st Respondent filed its written submissions dated 6th March, 2019 in opposing the application. The same submissions were also filed in opposition to **Application No. 32 of 2018**. It is also relying on the Replying affidavit of Kennedy K. Abuga dated 19th December 2018 and has listed the following two issues for determination:

- a) *Whether the Applicant's prayer for extension of time to file the appeal should be allowed by this Court;*
- b) *Whether this Court can properly order for stay of the Judgment of the Court of Appeal.*

[18] The first issue was dealt with in **Application No. 32 of 2018** seeking extension of time to file a petition of appeal out of time and a separate Ruling will be delivered in that regard. The second issue by the 1st Respondent is whether this Court can properly order a stay of execution of the Judgment of the Court of Appeal. Citing the decisions of this Court in **Chris Munga N. Bichage** (Supra) and **Gatirau Peter Munya v. Dickson Mwenda Kithinji** [2014] eKLR, it submitted that the Applicant has not demonstrated that his appeal is arguable and not frivolous; and that unless the order of stay is granted, the intended appeal, were it to succeed, would be rendered nugatory. It is further argued that the subject matter of appeal has been overtaken by events and there is nothing to be rendered nugatory by decline of this Court to grant the stay. It is submitted in that context that the 1st Respondent has published Legal Notice No. 235 of 2018 confirming the new issue of one, five, ten and twenty- shilling coins and that the President on 11th December 2018 launched the issue of the new currencies thereby making them operational as legal tender across the country. As such, they argue, there is no

subject matter to stay, and the Applicant has not shown and demonstrated any prejudice to be suffered if the currencies continue in circulation.

(iii) 2nd Respondent's

[19] The 2nd Respondent filed submissions dated 19th February 2019 which is stated to be in support of its Preliminary Objection dated 11th December 2018. There is also another set of written submissions dated 26th February 2019 filed in response to the Application for Stay Orders. There is a third set of submissions filed in response to this Application as well as ***Application No. 32 of 2018***. In all three sets of submissions it has argued that this Court lacks jurisdiction to hear the Application by the Applicant. We have already analyzed the 2nd Respondent's submissions on jurisdiction in ***Application No. 32 of 2018*** and a separate ruling shall be delivered therein. In a nutshell it has prayed that this Court ought to dismiss the prayer of stay for want of jurisdiction.

(iv) The 3rd and 4th Respondents'

[20] The 3rd and 4th Respondents have filed joint submissions dated 7th March 2019 in opposition to the Applicant's Notice of Motion in ***Application No. 33 of 2018*** dated 15th November 2018 and in support of the 2nd Respondent's Notice of Preliminary Objection dated 11th December 2018. The submissions have raised the following issues for determination:

- a) *Whether stay of execution should be granted where leave to this court and /or certification of the intended appeal as a matter of public interest has not been sought; and*
- b) *Whether the Applicant has met the threshold for granting stay of execution as sought in the Application;*

[21] The submissions on the first issue reiterates the submission by the 2nd Respondent as analyzed in **Application No. 32 of 2018** that certification of the intended appeal as a matter of public importance is imperative because the Application did not involve application or interpretation of the Constitution. They have in that regard made reference to paragraph 2 of the Judgment of the Court of Appeal where the Court summarized the issues for determination none of which, they submitted, related to the application or interpretation of the Constitution.

[22] On the second issue concerning stay of execution of the Judgment of the Court of Appeal, the 3rd and 4th Respondents submit that the Applicant has not met the principles laid down in the case of **Gatirau Peter Munya** (supra). It is thus submitted that the Appeal is not arguable but is frivolous as the Applicant has not addressed himself to the issues, if any, which this Court would be tasked with considering in any intended appeal. They argue further that the Applicant has only made a vague allusion on the alleged breach of the Constitution in the findings of the Court of Appeal. They have cited the cases of **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union**, Civil Application Nai. No. 72 of 2001; **Aviation & Allied Workers Union of Kenya v. Kenya Airways Limited & 3 others** [2017] eKLR; and **Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscone** [2013] eKLR in support of this proposition.

[23] On the nugatory aspect, it is submitted that the stay order would serve no meaningful purpose as the printing of currency process has already commenced. They have cited the case of **Reliance Bank Limited v. Norlake Investments Limited** [2002] 11 E.A.227 where it was held that what may render the success of an appeal nugatory must be considered within the circumstance of each particular case. They thus urge the Court to disallow the application for stay of execution of the Court of Appeal Judgment, jurisdiction having been improperly invoked, and

the Application having failed to meet the threshold for grant of orders of stay of execution.

The 5th and 6th Respondents'

[24] The Attorney General (AG), on 4th March 2019 filed written submissions on its behalf and on behalf of the 5th Respondent (the Public Procurement Review Authority) in opposition to the Application. It has framed the issues for determination as follows:

- a) *Whether or not there is any positive order capable of being stayed;*
- b) *Whether the Court's jurisdiction has been properly invoked and whether there is an appeal capable of being rendered nugatory.*

[25] According to the AG, the order by the Court of Appeal contained in its impugned Judgment is a negative order and there is nothing to be executed capable of being stayed. In addition, it is argued, there is no appeal on which the Application is predicated as the Applicant has failed to file his Petition of appeal and record of appeal without proceedings within the timelines provided by the Supreme Court Rules, 2012.

[26] The submissions on the second issue mirror the submissions by the 2nd Respondent as analyzed in ***Application No. 32 of 2018*** – that the Applicant has not demonstrated that he sought certification that the said matter is of general public importance, hence this Court lacks jurisdiction to determine the intended appeal. It concludes by stating that there is no appeal capable of being rendered nugatory as there is no proper and competent appeal before the Court for determination. It thus urges the Court to dismiss the Application with costs.

C. ANALYSIS AND DETERMINATION

[27] In *Application No. 32 of 2018*, we declined the prayer by the Applicant herein to extend time to file his Petition of Appeal out of time for want of jurisdiction. It follows therefore that we have no jurisdiction to determine this application for stay of execution of Judgment of the Court of Appeal. In addition, there is no substantive appeal before us to enable us make a determination on this application for stay of execution one way or the other. Orders cannot be granted in a vacuum or on a whim. It is the Petition of Appeal that indicates the substratum of a party's case and whether interim orders should be granted or not. Without it, no orders can ordinarily issue.

[28] On costs, the Applicant shall pay costs to all the Respondents as costs follow the event, a submission he forcefully made in his favour but which we hereby apply as against him. We have done so because this is not a matter of general public importance, but an issue regarding the award of a tender for print of currency, involving private as well as public entities. The Applicant ought to be aware of the consequences of his actions including on costs, hence this order.

D. FINAL ORDERS

(i) *The Application dated 15th November 2018 is hereby dismissed.*

(ii) *Costs are awarded to all the Respondents as against the Applicant.*

[29] It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of July, 2019.

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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

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

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA