



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**PETITION NO. 3 OF 2015**  
**(Formerly Milimani Nairobi Petition No. 387 of 2015)**

**IN THE MATTER OF: ARTICLES 2, 3(1), 10, 19, 20, 21, 22, 23 (1) & (3), 27 (1) (4) AND (5), 47 (1) (4) & (5), 47 (1) & (2), 50 (1), 79, 157, 159 (2), 165, 249 & 250 OF**

**THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: INVESTIGATION AND RECOMMENDATIONS BY THE CRIMINAL INVESTIGATION DEPARTMENT, NAIVASHA**

**AND**

**IN THE MATTER OF: VIOLATION OF THE CONSTITUTIO RIGHTS OF JEAN FRANCOIS LOUIS RAYMOND DAMON**

**BETWEEN**

**JEAN FRANCOIS LOUIS RAYMOND DAMON .....PETITIONER**

**-VERSUS-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT NAIVASHA.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. Following this court's dismissal of the Petitioner's application for conservatory orders to prohibit the Respondents from arresting, detaining and/or charging the Petitioner with the offence of Sodomy against a complainant identified as J.L.L. (abbreviated) the Petitioner has brought a further Notice of Motion dated 15<sup>th</sup> March 2016.

2. The said Motion seeks an order to stay execution of the **“Ruling/Order issued by the Honourable court.....on 11<sup>th</sup> March, 2016 pending the hearing and determination of the Appeal.”** The grounds stated on the face of the Motion are that:-

**“(a) The Petitioner being dissatisfied with the Ruling delivered on the 11<sup>th</sup> March, 2016 has lodged an Appeal against the same.**

**(b) The Petitioner has an Arguable Appeal with a high chance of success.**

**(c) The Petitioner will suffer irreparable harm if the orders sought are not granted.**

**d. If the orders sought are not granted, the instant Application will be rendered nugatory.**

**e. The interests of Public Policy are in favour of the orders being granted.**

3. The Motion is supported by the affidavit sworn by the Petitioner. The gist of the supporting affidavit was restated in the arguments made by Mr. Wena for the Petitioner, at the hearing of the application, and can be stated briefly.

4. It is the Petitioner’s contention that he has an arguable appeal with a high chance of success and that he will suffer irreparable loss if the stay sought is denied. Restating earlier arguments, Mr. Wena stated that although the DPP has wide prosecutorial discretion the same is not unfettered, and must be exercised properly.

In that regard, Mr. Wena submitted that the intended prosecution cannot be a proper exercise of the said discretion as there is no credible evidence, especially medical evidence, to support the intended charges.

5. It is contended that if the Petitioner is charged his reputation will suffer permanent damage that no amount of damages would compensate him, that even the success of the appeal would not repair the loss.

Mr. Wena further stated that it would secure the interests of the fair and proper administration of justice to grant the orders and that the balance of convenience lies in favor of granting the orders. Regarding prejudice, the Petitioner contends that while his appeal will be rendered nugatory even if it succeeds, the Respondents will not suffer any prejudice if the court grants the orders sought.

6. Responding to the Motion, the DPP filed grounds of opposition on behalf of the Respondents. Citing **section 7 and 8 of the Law Reform Act**, he contends that the present applicant does not lie as the court in rejecting the earlier application gave a negative order, which cannot be converted into a positive one that is amenable to stay. Equally, that the true nature of orders sought are prohibitory and not available in the circumstances of this case.

7. Miss Kithiki for Respondents called to her aid the decision of the court in **R -vs- the Attorney General & 4 Others** exparte **Diamond Hashim Lalji and others (2014)eKLR**. She argued that under Article 157 of the Constitution the DPP is empowered to prosecute and particularly, to enforce right of victims of crime, which are not inferior to those of the suspect.

She pointed out that no new material had been placed before the court to demonstrate an arguable case, and that the institution of criminal charges notwithstanding, the publicity they may attract cannot warrant the stay of prosecution. She was skeptical, based on the manner in which Notice of appeal was drafted, whether it constituted a proper appeal to warrant the granting of stay orders.

8. I have considered all the material canvassed in respect of the Petitioner’s application. A Motion for stay pending appeal is provided for under **Rule 32** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013 (the Mutunga Rules). However, the question that has taxed my mind in considering the present motion is whether indeed, there is any order capable of execution arising from the ruling of this court dated 11<sup>th</sup> March, 2016.

9. Secondly, it is apparent that in entertaining the Motion the court is being asked to sit on appeal on its decision. This is because the grounds argued in demonstrating that the applicant has arguable appeal and will suffer nugatory loss, are exactly the same matters upon which the earlier application was premised and subsequently argued. It would embarrass the court to sit in appeal over its own decision on the application for conservatory orders.

Besides an order to stay a dismissal order/ruling would not be efficacious as the parties would effectively revert to the *status quo ante*.

10. In my own view Section 7 and 8 of the Law Reform Act may not apply to the instant case as the same is a Petition. At any rate the application of Section 7 & 9 of the Law Reform Act has been qualified through several decisions of the Court of Appeal (See **Nakumatt Holdings Ltd -vs- Commissioner of Value Added Tax (2011) eKLR**). However some of the principles that attach to applications for stay pending appeal where an application for Judicial review has been dismissed do cut across and apply to Petitions too.

11. In the **exparte Diamond Hashim Lalji & Ahmed Hasham Lalji** case cited by the Respondents, Odunga J had dismissed such an application. In considering an application brought to stay execution pending appeal, he stated:

**“There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for Judicial review, the superior court does not grant any positive order in favor of the Respondents which is capable of execution”**

12. I fully associate myself with this view. I also agree with **Odunga J’s** further observation that what determines the true nature of a matter is not the pleading, whether Judicial review or constitutional Petition but rather the substance. Here, as in the above case, the applicant contends that his right to fair trial is likely to be violated.

13. In the case of **Attorney General -vs Law Society of Kenya & Another Court of Appeal Civil Appeal No. Nairobi 144 of 2009** the court adopted with approval the observation made by Law VP in **Western College of Arts and Applied Sciences v Orange (1976) KLR 63** as follows:

**“In the instant case the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court, in an application for a stay, to enforce or restrain by an injunction. Similarly, the order of the superior court which is the subject matter of the stay application is not capable of execution as it did not order any party to do anything or to refrain from doing anything or to pay any sum. The application for stay of execution is to that extent misconceived.”**

See also **Kwench Ltd. -Vs- Nairobi City County & 2 others Civil Application Nairobi 106/2014**.

14. I need not go into the merits of the application before me therefore, as neither the dismissal order nor the ruling of this court is capable of execution. In view of the foregoing I find that the motion filed on 15<sup>th</sup> March 2016 is misconceived and will dismiss it with costs.

Delivered and issued this 14<sup>th</sup> day of April 2016.

**C. Meoli**

**JUDGE**

In the presence of:

For the Petitioner/Applicant: Mr. Wena

For the Respondents: M/s Waweru Holding Brief for M/s Kithiki

Court Clerk: Mr. Barasa