Case Number:	Civil Application Nai 2 of 2015 (UR 2/2015)
Date Delivered:	23 Jan 2015
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Daniel Kiio Musinga, Patrick Omwenga Kiage, Agnes Kalekye Murgor
Citation:	Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Petition No. 628 of 2014 (as consolidated with Petition Number 600 of 2014)
Case Outcome:	Application Dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 2 OF 2015 (UR 2/2015)

BETWEEN

THE HON. ATTORNEY GENERAL …… 1ST APPLICANT

REPUBLIC OF KENYA ……2ND APPLICANT

VERSUS

COALITION FOR REFORM AND DEMOCRACY…….....1ST RESPONDENT

KENYA NATIONAL COMMISSION ON

HUMAN RIGHTS …… 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE JUBILEE COALITION …… 4TH RESPONDENT

KITUO CHA SHERIA ……5TH RESPONDENT

KATIBA INSTITUTE ……6TH RESPONDENT

LAW SOCIETY OF KENYA ……..7TH RESPONDENT

COMMISSION ON THE IMPLEMENTATION OF

THE CONSTITUTION …… 8TH RESPONDENT

(Being an application for Stay of the Order of the High Court of Kenya at Nairobi (G.V. Odunga, J.) dated 2nd January, 2015

in

Petition No. 628 of 2014 (as consolidated with Petition Number 600 of 2014)

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RULING OF THE COURT

On 6th January, 2015 the Attorney General filed an application under **sections 3A and 3B** of the **Appellate Jurisdiction Act** and **rules 5(2)(b), 11** and **47** of the **Court of Appeal Rules** seeking the following orders:

"1. That the application be certified as urgent and that it be heard during the current vacation.

2. That the Court do issue an order staying the orders of the High Court issued on 2nd January, 2014 (sic) in Nairobi High Court Petition 628 of 2014 – KENYA NATIONAL COMMISSION ON HUMAN RIGHTS vs. THE ATTORNEY GENERAL) pending the hearing and determination of this application inter partes.

3. That the Court do issue an order staying the orders of the High Court issued on 2nd January, 2014 (sic) in Nairobi High Court Petition 628 of 2014 (as consolidated with petition no. 630 of 2014 - KENYA NATIONAL COMMISSION ON HUMAN RIGHTS vs. THE ATTORNEY GENERAL) pending the hearing and determination of the intended appeal.

4. That the Court do make such or further orders in the interest of justice.

5. That costs be in the cause."

The motion was premised on grounds as shown on the face of the application and supported by an affidavit sworn by **Amb. (Dr.) Monica Juma**, the Principal Secretary, Ministry of Interior and Co-ordination of National Government.

The brief background to this matter is that some time in December 2014 the 1st and 2nd respondents filed two separate petitions before the High Court challenging various sections of the **Security Laws (Amendment) Act, No. 19 of 2014, (**hereinafter the **"SLAA"),** which was enacted by Parliament on 18th December, 2014 and assented to by His Excellency the President of the Republic of Kenya on 19th December, 2014.

Together with the petition, the 1st respondent filed an application pursuant to the provisions of **Articles 19, 20, 21, 22, 23 and 259 of the Constitution of Kenya, 2010**, (hereinafter **"the Constitution")** and **rules 5, 19 and 23** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.** The application sought, *inter alia*, the following:

"3. Pending the hearing and determination of the petition a conservatory order does issue staying and/or to stay/suspend the coming into force or implementation and/or operation of Security Laws (Amendment) Act, 2014 published on the website of The Presidency on the 19th of December, 2014 and in particular to STAY and/or SUSPEND the operation or coming into force of the following provisions:

(i) . Section 4, 5, 12, 16, 25, 26, 29, 34, 48, 56, 58 and 64 and 86 of the Security Laws (Amendment) Act, 2014.

(ii) Sections 8, 9 of the Public Order Act.

(iii) Section 66A(1) and (2) of the Penal Code.

(iv) Section 42A and 344 (a) of the Criminal Procedure Code.

(v) Section 18A of the Registration of Persons Act.

(vi) Sections 20A and 59(A) of the Evidence Act.

(vii) Sections 2 and 4 of the Firearms Act.

(viii) Section 16A of the Refugees Act.

(ix) Sections 12, 42 and 48 of the National Intelligence Act.

(x) Sections 10 and 34F (1) and (2) of the Prevention of Terrorism Act.

4. Costs of the application be provided for."

On its part the 2nd respondent urged the Court, pending the hearing and determination of its petition, to grant a conservatory order suspending the operationalization of the entire Act in question.

On 24th day of December, 2014 the two petitions were consolidated by Lenaola, J. who also directed that the applications be heard before a single judge on 29th December, 2014 and a ruling thereon delivered as soon as possible thereafter, together with a ruling under **Article 165(4)** of the **Constitution** as to whether the petitions raised substantial questions of law and therefore required to be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

What was the basis of the 1st and 2nd respondents' complaints to the court regarding the **SLAA"** In an affidavit sworn in support of the application, **Francis Nyenze**, the Minority Leader in the National Assembly, stated that on 8th December, 2014 the **SLAA** was published in a special issue of the **Kenya Gazette Supplement No. 163 (National Assembly Bill No. 39)** under the hand of the **Hon. Asman Kamama,** Chairman of the Administration and National Security Committee of the National Assembly. Between 8th December, 2014 and 19th December, 2014, the Bill was introduced to Parliament, went through the first and second readings, was considered by the Committee of the whole House, read for a third time, was passed and assented to by the President on 19th December, 2014.

The deponent further stated that on 9th December, 2014 the Bill was introduced for the first reading in the National Assembly and the period for its publication was reduced from 14 days to 1 day. That deprived the public of their right to public participation, which is a right enshrined under **Article 118** of the **Constitution**. He went on to state that on 10th December, 2014 the "**Daily Nation**" newspaper had published the dates for public participation in respect of the Bill to be 10th, 11th and 15th December, 2014.

Public participation was therefore inadequately carried out and manipulated to fail, the deponent added.

The 1st respondent further stated that on 11th December, 2014 the Bill was tabled for the second reading without adequate public participation, contrary to Standing Order No. 127 of the National Assembly, which places a requirement under the law that a Bill after its first reading shall be committed to a Committee who shall then conduct public participation and seek the views and recommendations of the public which would be incorporated in the report. The 1st respondent further contended that contrary to the Memorandum of Objects and Reasons of the said Bill, which was given as making minor amendments which did not merit publication of a separate Bill, the Bill contained extensive, controversial and substantial amendments affecting several Acts of Parliament, some of which infringed on some provisions of the Constitution. The 1st respondent further stated that on Wednesday 18th December, 2014 the relevant Committees that were considering the Bill held meetings at night way past 10 p.m., making it impossible for the conduct of business in an open manner or in public as required under **Article 118(1)** of the **Constitution**. The Supplementary Order Paper that was tabled on the same day to present the Bill for third reading before the House was unprocedural as the Order paper was distributed when the House had already sat contrary to Order Paper No. 38(2) that requires that it shall be made available to the members at least one hour before the House convenes.

The deponent also lamented that the sitting of the National Assembly on 18th December, 2014 was a special sitting convened by the Speaker following a request by the Leader of the Majority in the National Assembly in accordance with Standing Order No. 29. That the one day sitting limited the freedom of speech and debate in the National Assembly as required under **Article 117(1)** of the **Constitution**. It was further claimed that on 18th December, 2014 the Opposition and some members of the Jubilee Coalition drew the attention of the Speaker to several provisions of the Bill that were either unconstitutional or violative of the Bill of Rights, and advocated for consultation amongst all the members of the National Assembly but, the request was not granted. It was also alleged that the Speaker was informed that there were communities in Kenya, especially of the Islamic faith, that were concerned that some provisions of the Bill could be used against them in an unfair and oppressive manner.

The 1st and 2nd respondents stated that during the proceedings of the Committee of the whole House of 18th December 2014 the environment in the August House was quite acrimonious and voting was done in a manner that violated **Article 122(1) and (2)** of the **Constitution.** The two respondents also contended that the Speaker failed to exercise his personal independence and that of the Assembly in the passage of the Bill. They further alleged that the Speaker did not abide by the mandatory provisions of **Article 110(3) (4) and (5)** of the Constitution and he did not involve the Speaker of the Senate in resolving the question as to whether the Bill was one concerning Counties and therefore required both Houses, that is, the National Assembly and the Senate, debate it. To the contrary, the Bill was only debated in the National Assembly on 10th December, 2014 and an amendment introduced on 11th

December 2014 replacing “Parliament” with the “National Assembly”.

In their petitions, the 1st and 2nd respondents explained how the various sections of the **SLAA** were contrary to the letter and spirit of the Constitution, and in particular, the Bill of Rights. On that account, and given the manner in which the law was enacted as highlighted hereinabove, the 1st and 2nd respondents sought conservatory orders pending hearing and determination of the petition as stated.

In contesting those applications, the Attorney General relied on a replying affidavit sworn by **Asman Kamama**, the **Chairperson of the Committee on Administration and National Security.** Mr. Kamama deposed that on 26th November, 2014, the President of the Republic of Kenya formed a team comprising both the Executive and Legislative members in the security sector, to look into the issue of insecurity after 64 Kenyans were killed in Mandera on 22nd November, and 2nd December, 2014 by unknown terrorists. A report which recommended a raft of urgent reforms in the security system, including amendments to several laws, was given to the President on 4th December, 2014. That is the report that led to the drafting of the **Security Laws (Amendment) Bill, 2014.** The Bill was published on 8th December, 2014 and its period of application was procedurally shortened from 14 days to 1 day. The Bill was then presented for first reading and committed to the Committee on Administration and National Security.

On 10th December, 2014 the said Committee put out an advertisement for public participation in the local newspapers inviting members of the public to submit written memoranda with their views in respect to the Bill. The Committee received memoranda from 31 organizations and individuals, including the 2nd and 6th respondents. After consulting with most of the organizations and individuals who had submitted memoranda and several committees of the House as well as some members of the National Assembly who had proposed certain amendments to the Bill, the Committee on Administration and National Security tabled its report on 18th December, 2014 before commencement of the third reading. The second reading had been done on the morning of 11th December, 2014.

When on 18th December, 2014 the Bill was presented on the floor of the House for consideration, there was total disorder and House sitting was suspended during part of the morning session. When the House resumed its sitting in the afternoon most of the agreed amendments were moved while others were dropped in the absence of the movers. Thereafter, the Bill proceeded to the Committee of the whole House and the third reading, when Mr. Kamama moved the amendments. Mr. Kamama reiterated that there was public participation in the formulation of the final Bill. He refuted the 1st and 2nd respondents’ assertions that the Speaker was biased and lost his independence in the process of passage of the Bill.

Regarding the alleged disorder and pandemonium that was witnessed in the House on 18th December, 2014, Mr. Kamama alleged that it was caused by members of the 1st respondent. In his view, voting was conducted in accordance with **Article 122** of the **Constitution**.

Mr. Kamama further asserted that before the Bill was passed the Speaker of the National Assembly had consulted with the Speaker of the Senate and the latter agreed that the Bill did not touch on matters concerning counties.

The 4th respondent opposed the application while the 5th and 6th respondents supported the applications made by the 1st and 2nd respondents. The 7th and 8th respondents appeared as *amicus curiae*.

Having heard exhaustive submissions by a host of counsel that appeared for the parties herein, Odunga, J. delivered a considered ruling on 2nd January, 2015. The learned judge stated that it is only provisions of the **SLAA** which, *prima facie*, **disclosed "a danger to life and limb or imminent danger to the Bill of Rights at that very moment"** that could be suspended by way of conservatory orders. In paragraph 176 of his ruling the judge further stated:

"I must however make it clear that the mere fact that the court suspends certain provisions of the challenged enactment, does not amount to a determination that those provisions are unconstitutional. In other words there is no inconsistency in the court granting conservatory orders suspending certain provisions and after hearing the petition finding that the same provisions are after all not unconstitutional. Similarly, there is no inconsistency in the court invalidating provisions which at the hearing of the application for conservatory orders it did not find necessary to suspend. In other words, at this stage this court is not entitled to determine the petition in its entirety."

The learned judge then embarked on an interrogation of all the impugned clauses and sections of the SLAA and set out the implications of each. He was of the view, *prima facie*, that a number of those clauses were likely to infringe upon the stated freedoms and fundamental rights. In the last three paragraphs of the ruling, the learned Judge delivered himself thus:

"191. In the result, I grant conservatory orders suspending the following clauses in the Security Laws (Amendment) Act,

No. 19 of 2014 together with the amendments to the respective statutes pending the hearing and determination of these petitions:

1. Clause 12 which inserted section 66A of the Penal Code.

2. Clause 16 which inserted section 42A to the Criminal Procedure Code.

3. Clause 26 which inserted section 20A of the Evidence Act.

4. Clause 29 which inserted section 59A to the Evidence Act.

5. Clause 48 which inserted section 16A to the Refugees Act.

6. Clause 58 which amended section 65 of the National Intelligence Service Act by deleting

the word "Parliament" and substituting therefor the words "National Assembly".

7. Clause 64 to the extent that it introduces sections 30A and 30F to the Prevention of Terrorism Act.

192. Pursuant to Article 165(4) of the Constitution I hereby certify that these petitions raise substantial questions of law under clause 3(b) and (d) of Article 165. Accordingly, I direct that these petitions be transmitted to the Hon. the Chief Justice forthwith for purposes of empanelling an uneven bench of not less than three Judges assigned by him to hear and determine the petitions.

193. The costs of the applications shall be in the cause."

The Attorney General, being dissatisfied with the aforesaid ruling, filed a notice of appeal and a draft memorandum of appeal. The said documents were filed on 5th January, 2015. The Attorney General also filed a notice of motion seeking to stay the orders granted by Odunga, J. on 2nd January, 2015, pending hearing and determination of an appeal to this Court.

When the application came up for hearing before us on 12th January, 2015, the 3rd and 4th respondents supported the same while the 1st, 2nd, 5th and 6th respondents opposed it. The 7th and 8th respondents appeared as *amicus curiae*.

Professor Githu Muigai, the Attorney General, Senior Counsel, together with **Mwangi Njoroge** and **Kuria Thande** appeared for the applicant. Prof. Muigai submitted that the intended appeal is arguable and relied on 15 grounds that are highlighted on the face of the application which are an exact replica of the grounds in the proposed memorandum of appeal. He also made reference to a lengthy affidavit sworn by **Amb. (Dr.) Monica Juma** in support of the application. In summary, Dr. Juma's affidavit points out various issues of law and fact which she believes Odunga, J. misapprehended in granting the conservatory orders.

In an effort to demonstrate that the intended appeal is arguable, the Attorney General chose to highlight a few of the proposed grounds in the draft memorandum of appeal. He contended that the learned judge had no jurisdiction to hear and grant the conservatory orders. He submitted that the application ought to have been referred to the Hon. the Chief Justice to constitute a 3 Judge bench to hear it, since it was common ground that the application as well as the petition raised substantial questions of law. The Attorney General further submitted that a single judge of the High Court to whom a constitutional application is presented, if satisfied that it raises a substantial question of law, can only give appropriate directions then refer it to the Chief Justice to empanel a bench of uneven number of Judges, being not less than three, to hear and determine it in line with **Article 165(4)** of the **Constitution**. In his view, the learned judge put the cart before the horse by determining the interlocutory application, and thereafter certifying that the petitions raised substantial issues of law which required the Chief Justice to do as aforesaid.

The learned Attorney General postulated an alternative argument: that if the learned judge had jurisdiction, he exercised it erroneously. In that regard, he adverted to the constitutional doctrine of separation of powers between the three arms of government. He submitted that unlike the other two arms of government, the Judiciary is not elected and in matters such as the one that was before it, the court should allow the political arms of government to reach a settlement. In his view, what was before the court was largely a political contest between the two dominant political divisions of the country and the Judiciary should have exercised restraint so as to maintain its impartiality.

Notwithstanding and in sharp contrast to the above submission, the Attorney General conceded that the 1st and 2nd respondents had a right to question whether any statute is constitutional. However, that question can only be argued before a bench of three or five Judges empanelled by the Chief Justice and not before a single Judge, he added.

Lastly, the Attorney General referred to the presumption of constitutionality which presupposes that all Acts of Parliament are constitutionally compliant. That presumption can only be rebutted after a full hearing of a petition. He submitted that the 1st and 2nd respondents' applications that were before the court were not properly anchored in law as they were mainly supported by newspaper cuttings. He faulted the learned judge for disregarding the holdings in two similar High Court decisions that were cited to him, to wit, **KIZITO MARK NGAYWA vs MINISTER OF STATE FOR INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION [2011] eKLR** and **SUSAN WAMBUI KAGURU AND OTHERS vs ATTORNEY GENERAL [2012] eKLR**. The *ratio decidendi* in the aforesaid decisions was that conservatory or interim orders in petitions which seek to nullify a statute or sections of a statute for being unconstitutional are scarcely granted, and for the court to grant such orders it must be satisfied that the operation of the impugned legislation is a threat to life or limb.

In the Attorney General's application, the reasons advanced as to why the intended appeal shall be rendered nugatory are as follows:

"i. Suspension of the operation of part of the Security Laws (Amendment) Act before prior proof of its unconstitutionality at the substantive hearing of the petition in which it is impugned is (sic) may cause an unprecedented hiatus the enforcement of a law that has been urgently enacted for the purpose of meeting the exigencies of the changing tactics used in perpetuation of terrorism and general criminal activity in Kenya.

ii. If the stay is not granted the citizens" right to be protected by the Kenyan security agencies under the terms of the Security Laws (Amendment) Act, 2014 will have been irreparably compromised in that the mischief that is sought to be avoided by the law, once committed during its stay or suspension, will certainly never be brought to justice.

iii. The learned Judge of the High Court erred in law and in fact in failing to find that a proper and wholistic interpretation of Article 23 of the Constitution does not envisage conservatory orders in respect of legislation but that the only redress the court may issue is to declare if merited, the

invalidity of any law as a final determination in proceedings; therefore, the very act of issuing a stay before proof of unconstitutionality there is great prejudice to the republic in that the proper constitutional order which must be upheld at all times is breached.

iv. If the stay is not granted as a matter of urgency in the case there is likelihood that the general security situation in the country will continue to be adversely and irredeemably affected.

v. The law in question is intended to be effective in curbing crime and terrorism and public interest demands that a stay be granted pending the hearing of an appeal against the orders of the High Court."

Prof. Muigai submitted that private law remedies have so far guided this Court's determination of the question whether an intended appeal would be rendered nugatory unless the orders sought in a **rule 5(2) (b)** application are granted. This criteria, he opined, should now be expanded to cover instances where the interests of the public and justice so demand.

He urged the Court to hold that to the extent that the Government of the Republic of Kenya is enjoined to enforce a law that has been passed, the interests of the public shall be compromised unless the orders sought are granted.

Regarding balance of convenience, the Attorney General submitted that it lies in operationalization of the entire **SLAA** and in the interest of the public as opposed to what he termed **"philosophical arguments"** that had been advanced by the 1st and 2nd respondents and the other respondents who supported them.

Mr. Keriako Tobiko, the Director of Public Prosecutions, the 3rd respondent, concurred with the submissions made by the Attorney General. He added that the learned judge, having acknowledged the doctrine of presumption of constitutionality, should not have granted the conservatory orders. He cited a decision of the Supreme Court of India, **PUCL v UNION OF INDIA [2004] 2 SCC 476** where it was held that:

"A statute carries with it a presumption of constitutionality.

Such a presumption extends also in relation to a law which has been enacted for imposing reasonable restrictions in the fundamental right."

Mr. Tobiko also cited the case of **MARYLAND v ALONZO JAY KING, 133 S. Ct. 1 (2012)** where Chief Justice Roberts of the Supreme Court of the United States held that:

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."

A similar holding was also made in **PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES v ABOTT, (Case 13- 51008) 2013** by the United States Court of Appeals for the Fifth Circuit.

The DPP further buttressed his submissions by citing the decision by the Supreme Court of India in the case of **PEOPLE"S UNION FOR CIVIL LIBERTIES & ANOTHER v UNION OF INDIA**, **Writ Petition (Civil) No. 389 of 2002** . In that case, the constitutional validity of various provisions of the Prevention of Terrorism Act, 2002, were challenged. The Court held, *inter alia*:

"Once legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution……mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional."

Mr. Tobiko submitted that by granting the conservatory orders, the High Court had suspended critically important provisions of the law that are vital in the fight against terrorism and urged this Court to vacate the High Court orders.

Both **Mr. Monari** and **Mr. Musangi**, learned counsel for the 4th respondent, were in support of the submissions made by the Attorney General and the DPP. In their view, the learned judge, by granting the conservatory orders, had prejudged the **SLAA.** They urged this Court to grant the orders sought.

The 1st respondent opposed the application and filed a replying affidavit sworn by **Norman Magaya**, the Head of its Secretariat. **Mr. James Orengo, Senior Counsel, Mr. Paul Mwangi, Mr. Harun Ndubi, Mr. Anthony Oluoch and Ms. Celestine Opiyo** appeared for the 1st respondent.

Mr. Orengo submitted that this Court had no jurisdiction to entertain the application as the notice of appeal that is on record is defective and had not been served within seven days from the date of filing. The notice of appeal shows that the applicant intends to appeal to the **Supreme Court of Kenya** against a decision delivered by the High Court on **2nd January, 2014**. There was also no evidence that the notice had been lodged at the High Court registry, there being no endorsement by the Deputy Registrar as required.

Senior Counsel added that this Court has severally held that its jurisdiction to grant an order under **rule 5(2) (b)** of the **Court of Appeal Rules** can only be invoked when there is a proper notice of appeal. In that regard he cited, inter alia, **NAIROBI CITY COUNCIL v RESLEY [2002] 2 EA 487; EQUITY BANK LTD v WEST LINK MBO LTD [2013] eKLR.**

Mr. Orengo further submitted that there is no positive order of the High Court emanating from the impugned ruling that is capable of being stayed. All that the Attorney-General was required to do was to suspend application of some sections of the impugned Act. The application is therefore misconceived, he asserted. The case of **ATTORNEY-GENERAL v LAW SOCIETY OF KENYA & ANOTHER, Civil**

Application No. NAI 144 of 2009 was cited in support of that submission. In that case, this Court held:

"The orders made by Ojwang, J., merely nullified certain sections of the Act. Those orders do not require the applicant to do or refrain from doing anything. We cannot in a motion for stay of execution restore into operation the nullified sections; the effect of that would be to reverse the decisions of the trial judge on a motion for stay. That is not permissible."

Mr. Orengo further submitted that the presumption of constitutionality with regard to Acts of Parliament is a rebuttable one. He pointed out that **Article 2** of the **Constitution** spells out supremacy of the Constitution and any law that is inconsistent with the Constitution is void to the extent of the inconsistency. He added that various sections of the **SLAA** were a threat to the Bill of Rights and therefore fell within exceptional circumstances in which conservatory orders may issue to suspend their operation pending hearing and determination of the petition. He added that under the provisions of **Article 23 (3)** of the **Constitution,** the High Court has power to issue conservatory orders in any proceedings brought under **Article 22** which provides for the right to institute court proceedings where an applicant is claiming that freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

Senior Counsel added that in granting the conservatory orders, Odunga, J. exercised his discretion and the applicant has not demonstrated that the discretion was exercised injudiciously.

In countering the applicant's subnission that the intended appeal will be rendered nugatory unless the orders sought are granted, Mr. Orengo submitted that there is no vacuum in the existing laws that are intended to check crime. Such laws include the Criminal Procedure Code, the Penal Code, the Evidence Act, the National Intelligence Act and the National Cohesion and Integration Act and any other appropriate law that may be invoked to counter the threat of terrorism and other crimes. In that regard, he urged this Court not to interfere with the orders made by Odunga, J.

Mr. Victor Kamau, learned counsel for the 2nd respondent, relied on a replying affidavit sworn by **Kagwiria Mbogori**, the Chairperson of the Kenya National Commission on Human Rights. He generally concurred with the submissions made by Mr. Orengo. In his view, an order of stay of the High Court orders was not the most efficacious one in a matter of this nature. What is important is to have the pending petitions heard and disposed of as soon as possible. He reiterated that the doctrine of presumption of constitutionality cannot be used to clothe the legislature with power to enact laws that violate the Bill of Rights.

Dr. Khaminwa, Senior Counsel, who is on record for the 5th respondent, relied on his own replying affidavit that he had been authorized to swear and file. He also supported the submissions made by Mr. Orengo and urged the Court not to interfere with the orders issued by the High Court. He added that the

State had not demonstrated that it will suffer any prejudice if the conservatory orders remain in force pending hearing and determination of the appeal before this Court or the hearing and disposal of the petitions in the High Court. He further reiterated that there is no vacuum in the law of the land that would make it difficult for the State to apprehend and prosecute terror suspects.

Mr. Wanyoike and **Ms. Faith Rotich,** learned counsel, appeared for the 6th respondent. In supporting the submissions made by Mr. Orengo, Mr. Wanyoike relied on grounds of opposition and several authorities filed by the 6th respondent. Contrary to the submission by the Attorney General that the 1st respondent's application for conservatory orders ought to have been heard before a three judge bench constituted by the Chief Justice, Mr. Wanyoike submitted that it is the petitions that were to be so heard and not the interlocutory applications. He reiterated that the High Court is clothed with jurisdiction to grant conservatory orders to suspend certain sections of a statute pending determination of their constitutionality. In that regard, counsel cited several authorities, including the Supreme Court of Kenya decision in **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR.** In that case the court held:

"Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest.

Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as „the prospects of irreparable harm" occurring during the pendency of a case; or „high probability of success" in the supplicant"s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

Mr. Wanyoike further submitted that the intended appeal will not be rendered nugatory by this Court's refusal to grant the orders sought. In his view, the applicant had not demonstrated in any way, how the suspension of the provisions had prejudiced the State's ability to check or deter terrorists or other criminals. He added that, public interest leans against granting the orders sought. Counsel distinguished the case of **PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES** (supra) that were cited by the DPP, saying that the decision had been overturned by the Supreme Court of the United States, an assertion that was unsupported and has not been verified.

Mr. Nzamba Kitonga, Senior Counsel, for the Law Society of Kenya, the 7th respondent (*amicus curiae*) submitted that there was nothing wrong with the practice of going before a single judge of the High Court to seek conservatory orders before the judge determines whether a substantive petition ought to be certified as raising a substantial question of law under **Article 165(4)** of the **Constitution**. He urged this Court to determine whether the greater harm was in staying the conservatory orders issued by the High Court or maintaining them pending the hearing and determination of the intended appeals before this Court or the petitions before the High Court.

Mr. Kitonga further submitted that since the effect of the conservatory orders was to suspend application of just a few sections of the **SLAA,** there would be no considerable gap in facilitative law pertaining to apprehension and prosecution of criminal suspects in the intervening period.

Mr. Nyamodi, learned counsel for the Commission on the Implementation of the Constitution, the 8th respondent, (amicus curiae) urged the Court to consider the application before it in the wider interest of the public, taking into consideration that terrorism is an emerging threat world over. It is in the interest of justice that the State is empowered to protect Kenyans from all forms of torture, counsel submitted, saying that torture includes the infliction of pain to the body and mind that is brought about by terrorism.

In a brief rejoinder, Prof. Muigai, conceded that the notice of appeal as filed contains several typographical errors but urged this Court to desist from perpetuating its practice of yester years of dismissing or striking out matters before it on technicalities, a practice which the Appellate Jurisdiction Act, the Court of Appeal Rules and the Constitution now frown upon. He contended that the errors in the notice of appeal are not fatal and do not prejudice the respondents in any way. Regarding service of the notice, Prof. Muigai submitted that the objection was unfounded since the stipulated time of service was yet to expire.

For avoidance of doubt, Prof. Muigai reiterated that the State was not disputing the power of the court to declare sections of any law as unconstitutional, his principal submission was that a judge cannot do so in *limine* in respect of a law passed by Parliament and assented to by the President. That can only be done upon full hearing and final determination of a petition challenging the constitutionality of the impugned law or sections thereof. In suspending several sections of the **SLAA** by way of conservatory orders, the High Court had acted improperly, the Attorney General submitted.

We have endevoured to summarize the arguments that were put forward by all the parties in this matter, given the diverse views and considerable interest it evokes. That notwithstanding, we must point out that shorn of all controversy, what we are dealing with now is a common application that is primarily brought under **rule 5(2) (b)** of this **Court"s Rules.** The conditions that ought to be satisfied by an applicant in such a matter are well settled. The applicant must first demonstrate that the intended appeal is arguable and secondly, that unless the orders sought are granted the intended appeal will be rendered nugatory. See **RUBEN & 9 OTHERS v NDERITU & ANOTHER [1989] KLR 459**. An arguable appeal is not one that must ultimately succeed; it is one which raises a bona fide issue worth the consideration of the Court. A single arguable point will suffice for purposes of an order of stay. See **KENYA RAILWAYS CORPORATION v EDERMANN PROPERTIES LIMITED, Civil Application No. 176 of 2012.**

It is not enough for an applicant to satisfy one of the two limbs aforesaid, both of them must be satisfied. This Court has so held in several decisions including, **FREIGHT IN TIME LIMITED v ROSEBELL WAMBUI MUTHEE [2014] eKLR.**

Although at the time of arguing the application counsel did not tell the Court whether the Chief Justice

had constituted a bench to hear the consolidated petitions, it is now within the public domain that indeed the Chief Justice has assigned a five judge bench to hear the petitions and give a decision thereon by 13th February, 2015. The hearing dates for the consolidated petitions have also been fixed. We have also perused the High Court file and verified that position.

In **CENTRAL BANK OF KENYA v UHURU HIGHWAY DEVELOPMENT LIMITED & OTHERS, Civil Application No. 95 of 1999**, this Court held that in an application for stay of execution pending appeal, it would be wrong for it to say anything that would indicate a concluded view as to the merits or otherwise of the action, on fact or law. That may embarrass the court that will eventually hear the appeal or intended appeal, or as in this instance, the High Court bench that will eventually hear the substantive matter. In light of that caution we will now proceed to determine the application before us.

Before we consider whether the intended appeal is arguable and whether the same will be rendered nugatory if the orders sought are not granted, it is only appropriate that we first dispose of the issue of this Court's jurisdiction to hear the application, in view of the 1st respondent's contention that the notice of appeal is defective. The Attorney General readily conceded that the notice of appeal contains several typographical errors but in his view, such errors are not fatal and cannot divest this Court of its jurisdiction to consider the application and grant the orders sought.

Section 3A of the **Appellate Jurisdiction Act** stipulates that the overriding objective of the Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act. **Section 3B** of the same **Act** sets out the duty of this Court and enjoins it to handle all matters presented before it in a manner that is just and efficient in the use of its judicial and administrative resources. More importantly, **Article 159(2) (d)** of the **Constitution** requires that justice shall be administered without undue regard to procedural technicalities.

We have looked at the notice of appeal filed by the applicant on 2nd January, 2015 and confirmed that it inadvertently stated that the Attorney General intends to appeal to the **Supreme Court** against the decision of Odunga, J. delivered on **2nd January, 2014**. The notice was duly filed on 5th January, 2015 but it does not bear any endorsement by the Deputy Registrar that is required to be there at the foot of the notice. In our view, the errors in the notice are not fatal. The respondents have neither been misled nor prejudiced thereby. It would amount to a miscarriage of justice and negation of the spirit of **Article 159 (2) (d)** of the **Constitution** and **Sections 3A and 3B** of the **Appellate Jurisdiction Act** for this Court to hold otherwise. We believe that the interests of justice would be better served by excusing the aforesaid errors so as to deal with the application substantively.

As regards service of the notice, we would agree with the Attorney-General that the objection taken was premature as the stipulated period for service of the notice upon the respondents was due to expire by

the end of the day when the application was being argued before us.

We now turn to consider the issue of arguability of the intended appeal. The draft memorandum of appeal sets out 15 grounds that are intended to be raised. Among them are:

(a). Whether by granting the conservatory orders the learned judge of the High Court erred in law and in fact in his interpretation of ***Article 23*** *of the* ***Constitution****.*

(b). Whether the learned judge of the High Court had jurisdiction to suspend various sections of ***Security Laws (Amendment) Act, 2014*** *at an interlocutory stage.*

(c). Whether the learned Judge of the High Court erred in law in hearing and determining the 1st and 2nd respondents' application as a single judge.

(d). Whether the learned judge of the High Court erred in law in his interpretation of the doctrine of presumption of constitutionality.

We shall restrain ourselves from making comments on any of the above issues and others that were raised by counsel since another bench ofthis Court is required to determine these issues. Suffice it to say that we entertain no doubt that the appeal is eminently arguable.

Turning to the second limb that must be satisfied by an applicant in a **rule 5(2) (b)** application, that is, whether the intended appeal shall be rendered nugatory if the orders sought are not granted, we must confess that we have anxiously considered this issue, bearing in mind the self-evident need to fill the gaps and tighten all the loose ends that may exist in our laws that are necessary in the fight against terrorism.

We shall not repeat the arguments that were put forward by the Attorney General and the DPP in an effort to convince this Court that the orders issued by the High Court ought to be stayed pending the hearing and determination of the intended appeal. In making a decision on this limb, the Court must strike a right and fine balance between two fundamental obligations of the State: first, to protect its subjects from terrorists, criminal elements in the society that may be supporters or sympathizers of terrorists and other undesirable and often reckless practices by a few individuals in the society that tend to aggravate human suffering in times of national disasters; second, to safeguard rights and liberties of its subjects as guaranteed under the Bill of Rights, Chapter Four of the Constitution.

National Security as defined under **Article 238** of the **Constitution** is **"the protection against internal and external threats to Kenya"s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests."** However, national security is subject to the authority of the Constitution and Parliament and must be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. See **Article 238(2)** of the **Constitution**. That implies that in enacting

or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people's rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition.

Further, **Article 19(1)** of the **Constitution** states that:

"The Bill of Rights is an integral part of Kenya"s democratic

State and is the framework for social, economic and cultural policies."

It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this.

Article 20 of the **Constitution** is explicit that the Bill of Rights applies to all law and binds all State organs and all persons. The interplay between State security and citizens' enjoyment of their rights and freedoms in a suit challenging the constitutionality of a key statute such as **SLAA,** particularly in turbulent times as we are living in, calls for a very careful navigation by the Court.

We are not satisfied that the intended appeal shall be rendered nugatory. Even if the orders are not granted, this Court will still be able to consider the propriety of the impugned High Court orders, if at all the intended appeal shall not have been overtaken by events.

We agree with Prof. Muigai that in an application of this nature, which is not seeking entirely private law remedies, the Court must also consider where the public interest lies. In **PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES** case, (supra), it was held that when the State is the appealing party in an appeal where the constitutionality of a statute is the subject matter for determination, the State interest and harm merges with that of the public. There is also the doctrine of presumption of constitutionality which must be borne in mind. The impugned Act is intended to serve the public.

While the Court appreciates the contextual backdrop leading to the enactment of the **SLAA**, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by **Article 2** of the **Constitution** has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of

the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.

We do not think that the applicant has made out such a case. The Court was not told that the grant of the conservatory orders has brought about a vacuum in our laws which makes it impossible or difficult to investigate and prosecute terror suspects or such other persons who may be targeted by the **SLAA**. Apart from the eight (8) sections of the **SLAA** whose operationalisation has been temporary suspended, all other laws of Kenya are still in full operation. We entertain no doubt that as we await either the hearing of the appeal before this Court, or, the finalization of the petitions before the High Court, the country's security agents and law enforcement organs can still make full use of the existing laws to keep the country and its people safe.

For all these reasons, we decline to grant the orders sought by the applicant and dismiss the application dated 6th January, 2015. We make no order as to costs.

Dated and Delivered at Nairobi this 23rd day of January, 2015.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

……..…

JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR