



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**PETITION NO. 4 OF 2020**

**BETWEEN**

HON. ABDULLAHI BASHIR SHEIKH.....1<sup>ST</sup> PETITIONER

HON. YUSUF ADAN HAJI.....2<sup>ND</sup> PETITIONER

HON. HASSAN KULLOW MAALIM.....3<sup>RD</sup> PETITIONER

HON. IBRAHIM ABDI MUDE.....4<sup>TH</sup> PETITIONER

HON. HASSAN OMAR MOHAMED MAALIM.....5<sup>TH</sup> PETITIONER

HON. ADAN HAJI ALL.....6<sup>TH</sup> PETITIONER

COUNTY GOVERNMENT OF MANDERA.....7<sup>TH</sup> PETITIONER

ALI IBRAHIM ROBA GOVERNOR MANDERA COUNTY.....8<sup>TH</sup> PETITIONER

HON. ADAN KEYNAN WEHLIYE.....9<sup>TH</sup> PETITIONER

HON. AHMED BASHANE GAAL.....10<sup>TH</sup> PETITIONER

HON. RASHID KASSIM AMIN.....11<sup>TH</sup> PETITIONER

HON. AHMED KOLOSH MOHAMED.....12<sup>TH</sup> PETITIONER

HON. AHMED ABDISALAN IBRAHIM.....13<sup>TH</sup> PETITIONER

COUNTY GOVERNMENT OF WAJIR.....14<sup>TH</sup> PETITIONER

HON. MOHAMED ABDI MOHAMEDn GOVERNOR WAJIR COUNTY.....15<sup>TH</sup> PETITIONER

HON. ABDI OMAR SHURIE.....16<sup>TH</sup> PETITIONER

HON. GARANE MOHAMED HIRE.....17<sup>TH</sup> PETITIONER

HON. DUALE MOHAMED DAHIR.....18<sup>TH</sup> PETITIONER

HON. ADAN BARE DUALE.....19<sup>TH</sup> PETITIONER

COUNTY GOVERNMENT OF GARISSA.....20<sup>TH</sup> PETITIONER

ALI BUNOW KORANE-GOVERNOR GARISSA.....	21 <sup>ST</sup> PETITIONER
ABDULLAHI MOHAMED KANYARE.....	22 <sup>ND</sup> PETITIONER
ABDIKADIR MOHAMED HASSAN.....	23 <sup>RD</sup> PETITIONER
BILLOW SALAT HASSAN.....	24 <sup>TH</sup> PETITIONER
ABDI AHMED MADEY.....	25 <sup>TH</sup> PETITIONER

**AND**

KENYA NATIONAL BUREAU OF STATISTICS.....	1 <sup>ST</sup> RESPONEDNT
THE NATIONAL TREASURY & NATIONAL PLANNING.....	2 <sup>ND</sup> RESPONDENT
COMMISSION ON REVENUE ALLOCATION.....	3 <sup>RD</sup> RESPONDENT
THE INDEPENDENT ELECTOTRAL & BOUNDARIES COMMISSION.....	4 <sup>TH</sup> RESPONDENT
THE HON. ATTORNEY GENERAL.....	5 <sup>TH</sup> RESPONDENT

**RULING**

1. The Governors, Members of Parliament and some Residence of Garissa, Wajir, and Mandera counties Petitioned this court in a Petition dated 12<sup>th</sup> May 2020 wherein they raised several grievances relating to and on the manner in which the 2019 census in the three counties of Mandera, Wajir and Garissa was carried out by the 1<sup>st</sup> Respondent.

2. On the 29<sup>th</sup> of June, 2020 following an application by the Petitioners pending hearing of the Petition, the court issued orders as follows;

**a. The prayer on conservatory orders against Respondents 2,3,4 is declined with a rider that should the 4<sup>th</sup> Respondent start the limitation of the boundaries before Petition herein is heard and determined, the Petitioners will be at liberty to seek the same relief.**

**b. On scrutiny and access to information sought from the 1<sup>st</sup> Respondent, the court at this stage makes the following orders;**

**i. The Petitioners via their appointed IT Experts and under the supervision of this court via the Deputy Registrar of the Court shall be allowed by the 1<sup>st</sup> Respondent access to central servers and the tablets and/or devices which were used to collect data during the 2019 KPNC exercise between 24/8/2019 to 31/8/2019 for the areas in issue namely; Mandera West, Barissa, Lafey, Mandera East, Mandera North Sub-counties, Garissa Township, Balambala, Lagadera, and Dadaab Sub-counties, Eldas, Tarbaj, Wajir East, Wajir West and Wajir North Sub-counties (Constituencies).**

**ii. The Petitioners will appoint the IT Experts either jointly (one for each county) in issue or as they may agree but not to exceed a maximum of 3 and will team up with the Deputy Registrar of this court in gathering the data (in figures of people enumerated) in the devices/tablets and the 1<sup>st</sup> Respondents central servers for the areas in issue (i) above in the next 30 days.**

**iii. A joint report by the Petitioners' IT Experts and this Court's Deputy Registrar on the exercise and figure gathered of people enumeration in the areas in issue as captured in tablets/devices and central servers accessed shall be filed within 30 days from the date of this ruling.**

**iv. The 1<sup>st</sup> Respondent will be at liberty to file a report on the same data within the prescribed period above.**

**v. There shall be liberty to apply**

**c. Costs in the main suit.**

**d. The Petition be heard on priority basis.**

3. Dissatisfied with the above ruling, the 1<sup>st</sup> Respondent applied for review of the above orders in a Notice of Motion dated 13<sup>th</sup> July, 2020 brought under Section 1A & 1B, 3 & 3A of the Civil Procedure Act and Order 45 Rule 1 & 2 of the Civil Procedure Rules, where the following orders were sought;

1. The application be certified urgent.

2. The Honorable Court be pleased to stay the execution of the orders issued herein on 29<sup>th</sup> June, 2020.

3. That in the alternative, the Honorable Court do determine this application prior to the execution of the orders issued herein on 29<sup>th</sup> June, 2020.

4. That this Honorable Court be pleased to review and set aside its orders made on 29<sup>th</sup> June, 2020 in respect of the 1<sup>st</sup> Respondent/Applicant herein.

5. That the costs be provided for.

4. The Court declined to grant the prayers sought above and it is against the said ruling that the 1<sup>st</sup> Respondent intends to appeal. The 1<sup>st</sup> Respondent has made an application to the Court of Appeal seeking for stay of the said orders pending determination of the intended Appeal, the application is yet to be heard.

5. It is against the above background that the 1<sup>st</sup> Respondent has now moved this court under Articles 40, 47, 159(2)(e) and 165 (3)(a) of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 Rules 1 & 4 of the Civil Procedure Rules 2010 seeking for stay of proceedings herein, pending hearing and determination of the application in the Court of Appeal.

6. The above application is predicated on grounds that should a stay of proceeding be granted no prejudice will be suffered by the Petitioners. On the other hand, the intended appeal will be rendered nugatory in the event the Petitioners will proceed with the exercise of scrutiny as allowed by the court. Further, sensitive information will be exposed.

7. The application was opposed by the Petitioners as follows;

1<sup>st</sup>, 8<sup>th</sup> & 16<sup>th</sup> – 21<sup>st</sup> Petitioners through grounds of opposition dated 20<sup>th</sup> January, 2021 to the effect that the Ruling and Order of the 28<sup>th</sup> of October, 2020 dismissing the application for review is a negative order in nature and can therefore not be a basis for any application for stay of proceedings; the 1<sup>st</sup> Respondent has not filed a Notice of appeal challenging the decision of the court as relates to scrutiny; and therefore the Court of Appeal has no jurisdiction to set aside the orders for scrutiny and this court therefore lacks jurisdiction to order for stay proceedings; the stay being sought is an abuse of court process; no prima facie arguable appeal has been demonstrated and the application is incompetent.

8. The 9<sup>th</sup> to 15<sup>th</sup> Petitioners objected to the application on grounds that it is not in the interest of justice to stay the proceedings; there has been unexplained delay in presenting the current application; the applicant is playing lottery with judicial process; & lodging of appeal is not a ground to warrant a stay.

9. After considering the rival pleadings, submissions, arguments and various authorities cited by the Parties the only issue for determination is whether or not to stay the proceedings herein pending hearing and determination of the application for stay by the 1<sup>st</sup> Respondent under Rule 5(2)(b) in the Court of Appeal.

10. The Notice of appeal on record by the 1<sup>st</sup> Respondent reads as follows; -

**“Take Notice that the 1<sup>st</sup> Respondent, Kenya National Bureau of Statistics, being dissatisfied with the decision of Honourable Mr. Justice Kariki delivered at the High at Garissa on the 28<sup>th</sup> of October 2020, intends to appeal to the Court of appeal against the whole of the said decision.”**

11. As demonstrated above in the impugned decision Kariuki J declined to review his earlier orders.

12. No doubt the court of appeal has in deserving cases, given stay orders where an intended Appeal has the effect of overturning negative orders. Nonetheless without appearing to preempt the decision to be made by the court of appeal it is important that it be demonstrated that the applicant has an arguable appeal and the appeal is likely to be rendered nugatory if the proceedings herein are not stayed.

13. The Petitioners argue that there has been no demonstration of a prima facie case in the court of appeal, further the order of Kariuki J of the 29<sup>th</sup> of June 2020 was never appealed from and therefore the court of appeal lacks jurisdiction to deal with the issue of scrutiny that will take place if the stay of proceedings will be denied.

14. Notable is that there is no intended appeal against the order for scrutiny issued on the 29<sup>th</sup> of June 2020. The question therefore to ask is if the court of Appeal will in any event deal with the issue of scrutiny. The applicant has failed to demonstrated to this court how the continuance of the proceedings herein and the carrying out of the scrutiny as ordered will render the pending application and or appeal as it is nugatory.

15. The Court of appeal in **Scispa Securities SA Versus Okiya Omutata Okoiti & 3 others as consolidated with The Commissioner KRA Versus Okiya Omutata Okaiti & 3 Others 2018 eKLR** made reference to the decision of the same court in **Githunguri v Jimba Credit Corporation (No. 2) (1988) KLR 838** and stated as follows:

“The principles governing stay of execution were succinctly captured by this Court as below;

- i. “In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji (supra)*.
- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
- xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”

16. The court is further guided by the holdings of *Nambye J* and *Musinga J* sitting as a five bench in *Nguruman Ltd Versus Shompole Group Ranch & Another* (2014) eKLR; A case which was on all fours similar to the matter before court;

*Nambye J* stated *inter alia*

“Drawing inspiration from the principles in the case of *Board of Governors Moi High School Kabarak & another versus Malcolmbell (supra)*, I find that the learned Judges having found that the orders sought by the respondent in their bid to forestall the execution of the negative orders of *G.B.M. Kariuki, J* of 19th January, 2012 were confusing in that they had intertwined the issues of stay of the orders of *G.B.M. Kariuki J.* with the stay of the orders of *Ang'awa J*; and considering that they were alive to the fact that there was no possibility of them granting a stay order to stay the negative order of *G.B.M. Kariuki J*; and the possibility of their attempt to stay the negative order of *G.B.M. Kariuki, J* in whatever language used would in effect result in them staying the orders of *Ang'awa, J* of 2nd December, 2009 without Jurisdiction, they should have downed their tools there and then.”

*Musinga J* on his part stated;

“I may add that, for myself, no matter the nature of injustice that an applicant believes will be occasioned if the Court of Appeal declines to grant a relief under rule 5 (2)(b), as long as there is no appeal on record (which includes a notice of appeal) the Court's hands are tied and it cannot, in the guise of administering substantive Justice, purport to grant any order under the aforesaid rule. If it were to do so, that would amount to violation of both Article 164 (3) of the Constitution as well as Section 3 (1) of the Appellate Jurisdiction Act.

Once the Court realizes that there is no notice of appeal it must simply strike out the rule 5 (2)(b) application, unless it is withdrawn. That is because the Court lacks Jurisdiction to hear the application. The timeless dicta of *Nyarangi, J.A.* in *THE OWNERS OF MOTOR VESSEL LILIAN “S” vs CALTEX OIL (KENYA) LTD* [1989] KLR 1 at page 14 comes to mind:”

17. The above authority demonstrates that the court of appeal cannot give a stay of execution of an earlier order based on the notice of appeal

of a latter order. The latter order of this court is a negative order that does not order for any action to be taken or gives any order capable of being executed.

18. This matter came to court under certificate of urgency, the court also directed that it be disposed expeditiously yet the court is being asked to slow the process pending an application for stay of an order declining to review the order for scrutiny. The intend of the application for stay of proceedings appears to be aimed at the exercise of scrutiny yet the order for scrutiny has not been appealed against. And as such it has not been demonstrated how the court of appeal will gain jurisdiction to deal with the said issue of scrutiny in the circumstances.

19. In my view therefore the applicant failed to demonstrate a prima facie case towards the intended appeal or how the intended appeal will be rendered negatory to warrant stay of proceedings whose effect will the earlier orders. The application is declined with costs.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 24<sup>TH</sup> DAY OF JUNE, 2021.**

**ALI-ARONI**

**JUDGE**