



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 4 OF 2020

IN THE MATTER OF

ABUSE OF ADMINISTRATIVE ACTION CONTRARY TO ARTICLE 47

OF THE COSTITUTION OF KENYA,

AND

IN THE MATTER OF

CONTRAVENTION OF THE NATIONAL VALUES AND PRINCIPLES OF

GOVERNANCE AS PROVIDED UNDER ARTICLE 10 OF

THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

ARTICLES 2, 3,19,20,21,22,23,24,165 AND 258 OF

THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

CONTRAVENTION OF THE TWO-THIRD GENDER RULE AS PROVIDED

UNDER ARTICLE 27 (8) OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

CONTRAVENTION OF THE OBJECTS OF DEVOLUTION AS PROVIDED UNDER

ARTICLE 174 OF THE OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

CONTRAVENTION OF LEADERSHIP AND INTERGRITY PRINCIPLES AS PROVIDED

UNDER ARTICLE 73 OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

CONTRAVENTION OF PUBLIC PARTICIPATION IN THE COUNTY ASSEMBLY

AFFAIRS AS PROVIDED UNDER ARTICLE 196(1) OF

THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

CONTRAVENTION OF VALUES AND PRINCIPLES OF PUBLIC SERVICES AS PROVIDED

UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF

THE FAIR ADMINISTRATIVE ACTION ACT,

AND

IN THE MATTER OF

CONTRAVENTION PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVALS) ACT

AND

IN THE MATTER OF

CONTRAVENTION MERU COUNTY ASSEMBLY SERVICES ACT,

BETWEEN

KENNETH MURIUKI.....PETITIONER

AND

MERU COUNTY ASSEMBLY SERVICE BOARD...1ST RESPONDENT

MERU COUNTY ASSEMBLY.....2ND RESPONDENT

AND

JACOB KARARI.....1ST INTERESTED PARTY

EARNEST KIMAITA..... 2ND INTERESTED PARTY

RULING

1. Feeling aggrieved by the decision of the court delivered on the 22nd October 2021, the two respondents and 1st interested party have filed Notices of Appeal together with Notices of Motion both dated 27/10/2021 seeking stay of execution of the judgment pending an appeal to the court of appeal.

2. The application filed by the counsel of the 1st respondent and 1st interested party seeks that the two be granted stay pending the determination of the appeal and sets the ground of the application to be that the appeal is highly meritorious for raising cogent points of law which needs to be preserved and that a denial of stay will not only precipitate crisis at the 2nd respondent but will also compel the discharge of the 1st interested party from office and lead to his loss of job and only source of livelihood and have the 1st respondent disbanded. To the applicants the position of the 1st interested party is all important for the orderly operations of the 2nd interested party and by extension the entire county thus visit substantial and irreparable loss to the three applicants. It was then added that the application had been brought

timeously and with bona fides and that the applicants are willing to adhere to any conditions imposed by the court for grant of stay.

3. The other application by the 1st respondent sought similar orders but on additional grounds that the dissolution of the 1st respondent in terms of the judgment would incapacitate the functions of the assembly and lead to its closure as it is the 1st respondent that is statutorily mandated to run the affairs of the assembly and enable it execute its constitutional mandate. To the applicants, such a closure would not only affect the members of the assembly whose duties would be curtailed but also the entire citizenry of the county who would have their right to legislation, oversight and representation denied. The application then set out four grounds it considers demonstrate an arguable appeal among them that the Advisory Opinion No 2 of 2012 was binding upon the court and therefore that the decision cannot stand on appeal and that section 12(3) of the County Assembly Service Act prescribe how the board must be constituted. Rule 32(2) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules was cited to grant jurisdiction to the court to grant stay of its judgment it being underscored that if stay is not granted, the Board will stand dissolved on due date a development which will result in grave disruption of the operations of the assembly which is an injury incapable of compensation in damages hence an irreparable loss.

4. The two applications were opposed by the petitioner and the 2nd interested party by the respective Replying Affidavits sworn on the 3rd and 4th November, 2021. For the petitioner, the position taken is that the application does not lie for having been brought under the wrong provisions of the law and that with the judgment in place, grant of stay is tantamount to validating and abetting the wrongs declared in the judgment. In addition, it was contended that the Notice of appeal without a memorandum of appeal reveal no cogent ground of appeal; that there is no valid reason advanced to ground the assertion that the Deputy Clerk cannot act in the absence of the clerk; that the judgment of the court did not hamstring the 2nd respondent but declared the position of the law; that there had not been an offer for security for the due performance of the decree in terms of order 42 Rule 6 and lastly that what had been demonstrated by the 1st respondent is a personal loss of income which ought not override public interest.

5. For the 2nd interested party the position taken was that there being a judgment that the recruitment of the 1st interested party was not lawful, to grant stay is to sanitize the wrongful conduct hence the application was untenable because the law provides for handling of a vacancy in the office of county assembly thus leaving no room for a lacuna.

6. Parties urged the two application by way of written submissions then highlighted same orally before the court. The submissions by the 1st respondent and the 1st interested party where filed on the 15th November 2021, those by the 2nd respondent were filed on the 16th November 2021, those by the 2nd interested party were filed on the 15th November 2021 while those by the petitioner were filed on the 17th November 2021.

7. I have read the pleadings filed as well as the submissions and the cited decisions. Being an application for stay of execution pending appeal, the law is settled that it is a discretionary matter for exercise by the court and the goal every time the court grants an order for stay is that when parties litigate, there ought to be maintained and preserved the substratum of the dispute and the level playing ground so that at the end of the appeal, if it turns out successful, the judgment thereof has a value to the litigants and not merely academic [1]. That is the reason, the court of appeal as repeatedly said that the prospects of substantial loss and resulting appeal and its outcome becoming nugatory is the cornerstone consideration for stay pending appeal. [2]

8. Of course there is the consideration whether the appeal presents arguable point(s), not necessarily points that must succeed, which I consider problematic when an application is presented to the court whose judgment is the subject of appeal, like in the present matter. I consider it problematic in that this court has made a decision and to ask it to find that its conclusions are wrong presents a personal conflict. However, I find guidance from the court of appeal that that a trial court, however strongly believing in the correctness of its decision must always give an allowance and a possibility of being reversed by the appellate court. In **Base Titanium Ltd v Kenya Ports Authority [2018] eKLR**, the court was seized of same situation and it did deliver itself as follows: -

“The court must do everything to balance the scales of justice to remain even without weighing unevenly heavy on one side. For me in this matter, while I note that I have made my determination that there is a genuine dispute to go to arbitration, I am equally aware that, that is the very decision the Defendant/Applicant has sought to challenge on appeal. There are two real options and fate of my decision once the Court of Appeal get its time to consider it. It may be upheld or just reverse altogether. Either way parties shall have had their rights investigated and determined. It is that determination that my determination here must seek to secure.

9. For the jurisdiction to grant stay to be properly invoked, one needs to have an appeal initiated by filling a notice of appeal. That threshold I find well met because there are filed two Notices of Appeal as said before. It is not to this court necessary to elaborately demonstrate how wrong the judgment to be challenged is. It is enough that the court appreciates that the court of appeal may differ with the decision and reverse it or just tinker with it. If that were to happen when the board shall have been dissolves and the 1st interested party relieved from employment, then I see that such decision by the court of appeal shall have been rendered academic for I consider and appreciate the life of the Board to be time bound. Having found that the cornerstone has been erected, I chose not to interrogate the strength or merit of the appeal to the court above but determine that to decline stay may render the substratum of the appeal nugatory.

10. Having come to that conclusion and weighed the scales between the right of the applicants to approach the court of appeal and to reap what the court of appeal has for them on conclusion against the right of the petitioner, as a successful litigant, to reap the benefits of litigation I find that the scales of justice settles in favour of an order for stay pending appeal. I do grant stay, not an open one but conditional and limited in time. The conditions I impose, taking into account that the decree is non-pecuniary and the fact that there are timelines that may be prejudiced by delay in concluding the appeal, are that the record of appeal be filed within 14 days from today and the appeal be pursued and heard within 120 days from the date of this ruling. On failure to comply with any of the two conditions, the stay hereby granted shall stand discharged. In imposing such timelines, I have read the file and established that the proceedings have been certified and decree drawn and issued.

11. On costs, I direct that the same abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ON 29TH NOVEMBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Miss Kihara for Njenga for applicant (1st respondent)

Mr. Waruya for 2nd respondent and 1st interested party)

Mr Maheli for the 2nd interested party

Miss Kaunyangi for petitioner

PATRICK J.O OTIENO

JUDGE

[\[1\]](#) RWW v EKW [2019]

[\[2\]](#) Kenya shell kenya ltd vs kibiru and Another (1986) klr 410