



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E527 OF 2021**

HON. REUBEN GITAU KARANJA.....1<sup>ST</sup> APPELLANT

HON. SAMUEL RIMUI KAIYANI.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

HON. JOHN KIERU WAMBUI.....1<sup>ST</sup> RESPONDENT

HON. KARIUKI MUCHIRI.....2<sup>ND</sup> RESPONDENT

JUBILEE PARTY.....3<sup>RD</sup> RESPONDENT

RAPHAEL TUJU, ACTING SECRETARY GENERAL JUBILEE PARTY.....4<sup>TH</sup> RESPONDENT

THE COUNTY ASSEMBLY OF NYANDARUA.....5<sup>TH</sup> RESPONDENT

HON. SPEAKER COUNTY ASSEMBLY OF NYANDARUA.....6<sup>TH</sup> RESPONDENT

**RULING**

1. Before this court for determination are two (2) applications. The first is the Notice of Motion dated 25<sup>th</sup> August, 2021 (“the first application”) brought by the 1<sup>st</sup> and 2<sup>nd</sup> appellants supported by the grounds laid out on its face and the facts stated in the affidavits sworn by the appellants separately, seeking for the substantive order for stay of the implementation of the judgment delivered by the Political Parties Tribunal (“the Tribunal”) made on 6<sup>th</sup> August, 2021 pending the hearing and determination of the appeal lodged against the aforesaid judgment.

2. The 6<sup>th</sup> respondent opposed the first application by putting in the replying affidavit sworn by James Wahome Ndegwa.

3. The second application is the Notice of Motion dated 8<sup>th</sup> September, 2021 (“the second application”) brought by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and supported by the grounds set out on its face and the facts stated in the affidavit of the 1<sup>st</sup> respondent. The following are the orders sought therein:

**i. Spent.**

**ii. Spent.**

**iii. THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to set aside and/or vacate its orders issued on 25<sup>th</sup> August, 2021 for being in conflict with the orders in NAKURU ELRC CASE NO. E007 OF 2021- NYANDARUA COUNTY ASSEMBLY SERVICE BOARD & ANOTHER V NYANDARUA COUNTY ASSEMBLY & 7 OTHERS.**

**iv. THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to order the consolidation of the instant appeal with NAIROBI HCCA NO. E551 OF 2021-HON. JOHN KIERU WAMBUI & ANOTHER V JUBILEE PARTY & 5 OTHERS and to give directions as to the hearing of both appeals.**

**v. THAT costs of the application be provided for.**

4. The second application is opposed by way of the replying affidavit sworn by the 2<sup>nd</sup> appellant on 26<sup>th</sup> October, 2021.
5. The two (2) applications were canvassed through brief oral arguments by the respective parties' advocates.
6. I have considered the grounds set out on the face of the applications; the facts deponed in the respective affidavits supporting and opposing them; and the contending oral submissions.
7. A brief background of the matter is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents instituted a complaint against the 3<sup>rd</sup> respondent at the Tribunal namely Complaint No. E013 of 2021 and sought for various declaratory orders to the effect that the 3<sup>rd</sup> respondent had no powers to remove them from office as members of the Nyandarua County Assembly Service Board ("the Board") and that such removal is unlawful. The said respondents also challenged the swearing in and appointment of the appellants herein to the Board.
8. Upon hearing the parties, the Tribunal in its judgment delivered on 6<sup>th</sup> August, 2021 found the removal of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to be un-procedural and unlawful, and further declared their replacement to be void and inconsequential.
9. The aforementioned judgment has triggered the present appeal.
10. Returning to the matter now before this court, I will first dispense with the second application which as earlier noted seeks twin orders.
11. Concerning the order seeking to set aside the orders issued by this court on 25<sup>th</sup> August, 2021 in his supporting affidavit the 1<sup>st</sup> respondent states that the ex parte orders for a stay of execution were obtained fraudulently and through material non-disclosure and misrepresentation of the fact that the matter had been settled in NAKURU ELRC CASE NO. E007 OF 2021-NYANDARUA COUNTY ASSEMBLY SERVICE BOARD & ANOTHER V NYANDARUA COUNTY ASSEMBLY & 7 OTHERS by way of the court order issued on 3<sup>rd</sup> June, 2021 and which order is still in force.
12. The 1<sup>st</sup> respondent further states that the interim orders for a stay of execution which were granted by this court are in direct conflict with the aforementioned order of 3<sup>rd</sup> June, 2021.
13. The above assertions were reiterated in the replying affidavit of James Wahome Ndegwa on behalf of the 6<sup>th</sup> respondent.
14. In reply, the 2<sup>nd</sup> appellant states that to grant the order sought for setting aside and/or vacating the earlier orders made by this court would result in prejudice to the appellants in view of the appeal already in place.
15. Upon perusing of the record, I note that upon hearing the first application ex parte on 25<sup>th</sup> August, 2021 this court granted an order for a stay of execution of the impugned judgment delivered by the Tribunal, pending interparties hearing of the first application.
16. From the foregoing, it is clear that the aforementioned order for a stay of execution was issued in the interim and since the material applications are presently at the ruling stage, the said order is spent. Consequently, there is no interim order in place to be vacated/set aside.
17. The second order sought under the second application is that of consolidation of the present appeal with NAIROBI HCCA NO. E551 OF 2021-HON. JOHN KIERU WAMBUI & ANOTHER V JUBILEE PARTY & 5 OTHERS.
18. The 1<sup>st</sup> respondent states in his supporting affidavit that the aforesaid appeal emanated from the impugned judgment delivered by the Tribunal and hence the same ought to be consolidated with the present appeal.
19. In reply, the 2<sup>nd</sup> appellant states in his affidavit that the two (2) appeals have since been consolidated.
20. Upon my perusal of the record, I note that NAIROBI HCCA NO. E551 OF 2021-HON. JOHN KIERU WAMBUI & ANOTHER V JUBILEE PARTY & 5 OTHERS was lodged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents vide the memorandum of appeal dated 2<sup>nd</sup> September, 2021. I also note that the appeal lies against the impugned judgment, similar to the instant appeal.
21. Upon the perusal of the record, I did not come across anything to indicate that a consolidation of the appeals was done.
22. In view of the foregoing circumstances, I am satisfied that it would be proper to have the two (2) appeals consolidated and heard together.
23. This brings me to the first application which essentially seeks for an order of a stay of execution/implementation of the impugned judgment.

24. The relevant provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be met when it comes to an application seeking an order for a stay of execution, as follows:

- a. The application must be brought without unreasonable delay;**
- b. The applicant must demonstrate that substantial loss may result; and**
- c. Provision should be made for security.**

26. I will begin with the first condition. As earlier mentioned, the decision sought to be stayed was delivered on 6<sup>th</sup> August, 2021 whereas the first application was filed on 25<sup>th</sup> August, 2021. In my view, there has been no unreasonable delay in bringing the application.

26. This brings me to the second condition on substantial loss. The appellants on the one hand state and submit that unless an order for a stay of execution is granted, they stand to suffer substantial loss by virtue of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' likelihood of executing the decision of the Tribunal thereby resulting in loss of protection of their employment, which will then render the appeal nugatory.

27. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand state and submit that there are no orders capable of being executed or stayed, and their averments were echoed by Ojare, counsel for the 5<sup>th</sup> and 6<sup>th</sup> respondents.

28. It is apparent that the orders made by the Tribunal were declaratory in nature, save for the order on costs. It is also apparent that the ELRC in NAKURU ELRC CASE NO. E007 OF 2021-NYANDARUA COUNTY ASSEMBLY SERVICE BOARD & ANOTHER V NYANDARUA COUNTY ASSEMBLY & 7 OTHERS on 4<sup>th</sup> June, 2021 granted *inter alia*, a stay of execution and injunctive orders concerning the replacement of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by the 5<sup>th</sup> respondent pending the hearing and determination of the claim. I concur with the submissions of the respondents that this position was not disclosed to this court by the appellants.

29. Be that as it may, there is nothing to indicate that the aforesaid orders have been vacated/set aside or challenged on appeal.

30. It is therefore apparent that whether or not substantial loss may result to the appellants, the granting of an order for a stay of execution at this stage may turn out to be in conflict with the interlocutory orders already in place in ELRC in NAKURU ELRC CASE NO. E007 OF 2021-NYANDARUA COUNTY ASSEMBLY SERVICE BOARD & ANOTHER V NYANDARUA COUNTY ASSEMBLY & 7 OTHERS in respect to the impugned judgment.

31. Concerning the third condition on the provision of security, it is noteworthy that the impugned judgment is non-monetary in nature and hence the issue of security would not arise.

32. In view of the foregoing circumstances, I decline to grant the order sought in the first application.

33. Consequently, I hereby make the following orders:

- i. The Notice of Motion dated 25<sup>th</sup> August, 2021 is hereby dismissed with no order as to costs.**
- ii. The Notice of Motion dated 8<sup>th</sup> September, 2021 is allowed thus this appeal is consolidated with HCCA no. E551 OF 2021-HON. JOHN KIERU WAMBUI & ANOTHER V JUBILEE PARTY & 5 OTHERS to be consolidated with the instant appeal.**
- iii. In the circumstances, each party shall bear its own costs of the Notice of Motion dated 8<sup>th</sup> September, 2021.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

..... for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents

..... for the 5<sup>th</sup> and 6<sup>th</sup> Respondents