



**Law Society of Kenya & another v Waititu & 3 others (Petition E022 of 2023)  
[2023] KEHC 629 (KLR) (Constitutional and Human Rights) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 629 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**PETITION E022 OF 2023**  
**HI ONG'UDI, J**  
**FEBRUARY 10, 2023**  
**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**  
**AND**  
**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 73, 74, 75,**  
**174, 181, 258 AND 259 OF THE CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF SECTIONS 6, 8, 13, 15 AND 40 OF**  
**THE LEADERSHIP AND INTEGRITY ACT, NO. 19 OF 2012**  
**AND**  
**IN THE MATTER OF THE COUNTY GOVERNMENT ACT, NO. 17 OF 2012, SECTION 33**  
**AND**  
**IN THE MATTER OF THE REMOVAL FROM OFFICE BY IMPEACHMENT OF HON.**  
**FERDINAND NDUNGU WAITITU BABAYAO, THE GOVERNOR OF KIAMBU COUNTY**  
**AND**  
**IN THE MATTER OF THE ENVIRONMENTAL**  
**MANAGEMENT AND COORDINATION ACT, NO. 8 OF 1999**  
**AND**  
**IN THE MATTER OF THE CLIMATE CHANGE ACT, NO. 11 OF 2016**  
**AND**  
**IN THE MATTER OF GAZETTE NOTICE NO. 14891, VOLUME**  
**NO. CXXIV – NO 258 DATED, 2ND DECEMBER 2022**  
**AND**  
**IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT, 2014, SECTION 4**



AND

IN THE MATTER OF THE UNCONSTITUTIONAL APPOINTMENT OF FERDINAND  
NDUNGU WAITITU BABAYAO TO THE NAIROBI RIVERS COMMISSION

BETWEEN

LAW SOCIETY OF KENYA ..... 1<sup>ST</sup> PETITIONER

TRANSPARENCY INTERNATIONAL KENYA ..... 2<sup>ND</sup> PETITIONER

AND

FERDINAND NDUNGU WAITITU BABAYAO ..... 1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION ..... 3<sup>RD</sup> RESPONDENT

NAIROBI RIVERS COMMISSION ..... 4<sup>TH</sup> RESPONDENT

RULING

1. The petition plus supporting and verifying affidavits and Notice of Motion dated January 23, 2023 were filed on January 24, 2023 under certificate of urgency. Directions were then issued for service of the pleadings and filing of responses, within the specific timelines with a mention on February 8, 2023 for further directions.
2. When the matter was mentioned on February 8, 2023 it was noted that:
  - (i) Only the 1<sup>st</sup> respondent had filed a response. It is not clear whether the response is to both the Petition and Notice of Motion or only to the latter.
  - (ii) There is Petition No E549/2022 filed by one Peter Odhiambo Agoro against the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents herein. The said petition raises the same issues as this one. It comes for mention for directions on February 27, 2023.
3. Mr Mogeni for the petitioners urged the Court to issue conservatory orders in terms of prayers No 2 & 3 of the Notice of Motion dated January 23, 2023. The same was supported by M/s Imbosa for the interested party.
4. Mr Nyamu for the 1<sup>st</sup> respondent while relying on the 1<sup>st</sup> respondent's replying affidavit vehemently opposed the application. He submitted that the 1<sup>st</sup> respondent had filed an appeal against the High Court Judgment and so should be left to exhaust all the appeal processes.
5. I have carefully considered the submissions by counsel for the petitioners, 1<sup>st</sup> respondent and interested party. It is not disputed that the 1<sup>st</sup> respondent who is the former Governor of Kiambu County was impeached by Kiambu County Assembly. The impeachment was upheld by the Senate on January 29, 2020. The same was further upheld by a three (3) Judge bench of the High Court on February 24, 2022 vide Petition No 29 of 2020 consolidated with Petition No 87 of 2020; Hon Ferdinand Waititu Babayao & another v the County Assembly of Kiambu & 4 others; Kiambu County Executive Committee (Interested Party).



6. What prompted the filing of these two petitions is the appointment of the 1<sup>st</sup> respondent as a commissioner in the Nairobi Rivers Commission by HE President William Samoei Ruto vide Gazette Notice No 14891 of December 2, 2022.
7. When this matter was placed before me on the January 24, 2023 as the duty Judge, I noted the urgency and the great public interest in it and gave limited timelines for service and filing of responses. I did not give any ex parte conservatory orders for very good reasons. But now all the main parties are present, before the Court.
8. The 1<sup>st</sup> respondent argues that because of the Notice of Appeal filed, this Court should allow him go through the entire Appeal process before any conservatory orders are issued. The main issue here is the interpretation of chapter six (6) of the Constitution, Leadership and Integrity Act and their impact on the appointment of the 1<sup>st</sup> respondent to a public entity.
9. The purpose for grant of conservatory orders was explained by the Court in the case of Muslims For Human Rights (MUHURI) & 2 others v Attorney General & 2 others High Court Petition No 7 of 2011, as follows:

“What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject-matter or set of circumstance that exist on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory. Through a Conservatory Order the court is able to “give such directions as it may consider appropriate for the purpose of securing the provisions of the Constitution.”

10. The applicable principles for grant of conservatory orders are now well settled in law. The Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR stated thus:-

“(86) “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.”

11. While drawing from the numerous authorities the Court in the case of Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR summarized the threshold for the grant of the conservatory orders as follows:

“24. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders compromises of the following: -



- a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
- b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”

12. The jurisdiction of this Court to stay proceedings pending appeal flow from Rule 32 of the [Constitution of Kenya \(Protection of Rights and Freedoms\) Practice and Procedure Rules, 2013](#):

Stay pending appeal.

32. (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

13. What becomes clear from reading the above provision is that an appeal or intended appeal does not operate as an automatic stay of the proceedings. In fact, the Court in the case of [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR examines the serious nature of a stay of proceedings as follows:

“...Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent. ....

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”



Also see *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR which outlines the principles which ought to be considered before grant of stay of proceedings.

14. A Notice of Appeal dated February 28, 2022 has been annexed to the 1<sup>st</sup> respondent's replying affidavit. Such Notice does not operate as stay of the Judgment of the trial Court. If there was any need for stay of the Judgment delivered on February 24, 2022, there is nothing that stopped the 1<sup>st</sup> respondent from moving the Court of Appeal for such orders.
15. As stated above, this matter has been filed in public interest. Secondly the chances of the 1<sup>st</sup> respondent being sworn in following his appointment and the gazettement before this petition is heard and finalized are high. Thirdly it's in the interest and benefit of the 1<sup>st</sup> respondent that the status quo prevailing remains pending the hearing and determination of this petition. It now behoves the parties to ensure compliance with the directions given by this Court in order to fast track this matter.
16. Based on the above observations I find that:
  - (i) The interests of justice demand that this petition be fast tracked and be determined within the shortest time, possible. For that reason the Notice of Motion dated 23<sup>rd</sup> January 2023 shall be subsumed in the petition.
  - (ii) A conservatory order is hereby issued staying the appointment of the 1<sup>st</sup> respondent as a commissioner of the 4<sup>th</sup> respondent and / or appointment to any other state or public office pending the hearing and determination of this petition.
  - (iii) The 1<sup>st</sup> respondent shall not be sworn in as a commissioner of the 4<sup>th</sup> respondent and / or any other state or public office pending the hearing and determination of this petition.
  - (iv) The respondents and interested party to file their responses to the petition within 10 days.
  - (v) The petitioners are granted leave to file a further affidavit within 5 days upon service of the responses.
  - (vi) This matter to be mentioned on February 27, 2023 alongside Petition No E549/2022 before Thande J for purposes of consolidation, and further directions.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. Ong'udi**

**Judge of the High Court**

