



National Disciplinary Committee of the Jubilee Party & 2 others v Kioni & 5 others (Civil Appeal (Application) E500 of 2024) [2025] KECA 440 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 440 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E500 OF 2024
J MOHAMMED, M NGUGI & FA OCHIENG, JJA
MARCH 7, 2025**

BETWEEN

**THE NATIONAL DISCIPLINARY COMMITTEE OF THE JUBILEE PARTY 1ST APPLICANT
JOSHUA KUTUNY 2ND APPLICANT
KANINI KEGA 3RD APPLICANT**

AND

**HON JEREMIAH KIONI 1ST RESPONDENT
DAVID MURATHE 2ND RESPONDENT
KAGWE GICHOHI 3RD RESPONDENT
THE JUBILEE PARTY 4TH RESPONDENT
NELSON EFEDHA AKWAKA 5TH RESPONDENT
RICHARD MONG'ARE BARAKE 6TH RESPONDENT**

(An application for stay of the entire judgment of the High Court of Kenya at Nairobi (Mulwa, J.) delivered on 30th September 2024 pending hearing and determination of the intended appeal) in Civil Appeal No. E630 as Consolidated with E635, E736, E750 and E764 of 2023)

RULING

Background

1. The consolidated appeals before the trial court emanated from disciplinary proceedings from various decisions of the Political Parties Tribunal (PPDT). The appeals before the High Court were initiated by Hon. Jeremiah Kioni, David Murathe, Kagwe Gichohi and The Jubilee Party, (1st to 4th respondents)



while the respondents were The National Disciplinary Committee of the Jubilee Party, Joshua Kutuny and Kanini Kega (1st to 3rd applicants). The 1st, 2nd and 3rd respondents were officials of the 4th respondent holding the position of Secretary General, National Vice Chairperson and Treasurer respectively.

2. The 1st to 3rd respondents were subjected to disciplinary proceedings before the 1st applicant and subsequent changes were made in the 4th respondent (the Party) through communication in a letter dated 13th February 2023. The communication by the 4th respondent resulted from a resolution made by the 1st applicant on 10th February 2023. The resolution was that the 1st and 2nd respondents were expelled from the 4th respondent while the 3rd respondent was suspended for a period of 2 years.
3. Aggrieved, the respondents filed an appeal to the Political Parties Dispute Tribunal (PPDT) through Appeal No. E001 of 2023 seeking to quash the implementation of the 4th respondent's letter dated 13th February 2023. The PPDT agreed with the 1st to 3rd respondents and encouraged the parties to pursue Internal Dispute Resolution Mechanism (IDRM). Parties engaged in IDRM and the earlier decision made to expel the 1st and 2nd respondents and suspend the 3rd respondent was upheld.
4. The 1st to 3rd respondents moved the PPDT once again to challenge the validity of the decisions reached by the 1st appellant. The PPDT, in a majority decision, upheld the resolutions of the 1st appellant but dismissed the 1st to 3rd respondents' appeals.
5. Before the High Court, Civil Appeals No. E630 of 2023, E635 of 2023, E008 of 2023, E736 of 2023, E750 of 2023 and E764 of 2023 were filed against the majority decision of the PPDT.
6. The High Court (Mulwa, J.) after considering the consolidated appeals, allowed the appeals by setting aside the majority decision of the PPDT. In respect to appeals HCCA Nos. E736/2023, E750/2023 and E764/2023 the High Court held that having been post the impugned notice dated 2nd February 2023, the meeting dated 10th February 2023 and the resultant 1st appellant's resolutions, and the court having declared them to be a nullity, they were found to have been overtaken by events and therefore moot.
7. The 1st applicant, being aggrieved by the decision of the High Court, commenced the appeal proceedings before this Court and in the interim, through a Notice of Motion dated 3rd October 2024, it seeks: -
 - a. Stay of judgment delivered on 30th September 2024, pending hearing and determination of the intended appeal;
 - b. Conservatory orders maintaining the leadership of the Jubilee Party as per the Gazette Notice No. 9131 Vol. CXXV – No. 161 of 12th July 2023 pending hearing and determination of the intended appeal;
 - c. Conservatory orders to the effect that status quo in the leadership of the Jubilee Party be maintained as per the Gazette Notice No. 9131 Vol. CVXXV – No. 161 of 12th July 2023.
8. Ms. Wanjiku Nduati, the 1st applicant's Chairperson, swore the supporting affidavit in support of the motion. She pointed to eight grounds of appeal which the 1st applicant will argue at the hearing thereof among others, faulting the High Court for making a determination on questions which were never appealed or presented before the PPDT and the court; failing to recognise that the jurisdiction of the PPDT is both party and subject matter specific; failing to find that the court lacked jurisdiction to hear and adjudicate on the meeting held on 10th February 2023 as it was a live matter ongoing before the Party's Internal Dispute Resolution Mechanism; and determining the suit having found that the



PPDT had jurisdiction and the only recourse was for the court to send the file back to PPDT for hearing before exercising its judicial mind on the same.

9. The 1st applicant argued that the court granted the 1st and 2nd respondents' membership back to the 4th respondent without the constitutionally recognised process. The 1st applicant further stated that in determining that other issues are moot and at the same time upholding the appeal before it, the court determined the complaints before the 1st applicant unlawfully and in disregard of the provisions of the *Political Parties Act*.
10. It was deposed by Ms. Wanjiku that if the decision is not stayed, the 1st applicant will suffer substantial damage as the decision of the High Court was an affront to its process and procedures. The 1st applicant is also apprehensive that the respondents will proceed to disenfranchise the party and destabilise the Party leadership and direction countrywide.
11. The 1st to 3rd respondents opposed the application through a replying affidavit sworn by the 1st respondent on 11th October, 2024. He asserted that the 1st applicant does not have locus standi to file the instant application or any appeal against the judgement of the High Court for the reasons that it is a neutral arbiter and should not take any side in a dispute before it.
12. The 1st respondent further deposed that the conservatory orders sought are incapable of being granted as the Gazette Notice No. 9131, Vol CXXXV - No. 161 of 12th July 2023 did not set out the leadership of the Jubilee Party, there was no intention to change the officials of the Jubilee Party, the Gazette Notice was stayed on 13th July 2023 and therefore it never took effect, and the status quo of the leadership of Jubilee Party is as per the Gazette Notice No. 3195 of 2022 which has never been overridden by any later Gazette Notice.
13. It was contended that there were no positive orders by the High Court capable of being stayed; that if the order being sought is granted, there is a risk of throwing the Jubilee Party in further disarray; and it is in the best interest of justice that this Court does not interfere with the affairs of the party at this stage but instead hears the appeal on its merits.
14. The 5th and 6th respondent filed a response dated 11th October 2024 deposed by Nelson Efedha Akwaka, the 5th respondent. Opposing the application, he deposed that the applicants have not given sufficient reasons why stay should be granted. He contended that this being a second appeal, the issues should be restricted to matters of law only. The appeal before the High Court raised constitutional questions and the actions of the applicants having been found to be unconstitutional, this Court has nothing to stay or set aside. It was further deposed that the applicants were yet to demonstrate which of the Party's organs would be rendered functionless due to execution of the said judgment.
15. The 5th respondent urged that if this Court is inclined to stay the impugned judgment, then the previous leadership as per the Gazette Notice No. 3195 published on 22nd March 2022 ought to be maintained. The 5th and 6th respondents implored us to dismiss the application, as it has not met the twin principles under rule 5(2) (b) of this Court's Rules.

Submissions by Counsel

16. Learned counsel, Mr. Mansur, appeared together with Mr. Omwanza for the 1st applicant. Senior Counsel Mbuthi Gathenji, for the 1st, 2nd and 3rd respondents, Mr. Awele for the 1st, 2nd, 3rd and 4th respondents, and Mr. Derrick Odhiambo for the 5th and 6th respondents.



17. The parties filed written submissions in support of their respective positions. The applicants' submissions are dated 4th October 2024, the 1st, 2nd, 3rd and 4th respondents' submissions are dated 12th October 2024 and the 5th and 6th respondents' submissions are dated 11th October 2024.
18. On behalf of the 1st applicant, Mr. Omwanza submitted that the intended appeal is arguable as the High Court misguided itself on the two limbs of the jurisdiction of the PPDT, namely, subject matter jurisdiction and the person jurisdiction. That the PPDT has to have the two limbs of jurisdiction present in order to exercise its judicial authority over a matter. Counsel further submitted that the intended appeal would be rendered nugatory if the orders sought are not granted as the 1st respondent may take over the operations of the Party and exacerbate the current war in the Party's leadership in the National Assembly and leadership outside the National Assembly.
19. Learned Counsel, Mr. Issa submitted that should this Court reach the conclusion that the dispute has to be remitted back to the High Court for hearing on its merit, and stay is not granted, then the intended appeal would be rendered an academic exercise. Counsel cited the Supreme Court decision of Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others [2024] KESC 3 (KLR) in support of this proposition. Mr. Issa further submitted that if a stay is not granted and the members of the 1st applicant are expelled, the structures of the Party would be re-organized and the intended appeal would be an academic exercise. Counsel submitted that the High Court delved into a matter that was not before it and made a finding that a meeting that is the subject matter of a different case was invalid.
20. On those arguments, learned counsel urged us to find that the applicants have satisfied both the arguability and nugatory limbs required under rule 5(2)(b) to be deserving of stay orders.
21. On behalf of the 1st to 4th respondents, Mr. Awele submitted that the application is not competent. Counsel submitted that the 1st applicant, at whose instance the application is made, is an organ of the Jubilee Party that can only act as a collegiate body of at least three (3) members. Counsel further submitted that there is not evidence that the instant application was authorized by the minimum number of members of the said organ, which renders the instant application fatally defective.
22. Secondly, counsel submitted that it is trite law that a court cannot stay a negative order. Counsel submitted that the High Court set aside the decision of the PPDT, and thereby the status quo subsisting in the party before the decisions of the PPDT that were appealed from was maintained. It was submitted that the status quo subsisting before the disputes arose was as made in 2022 by the National Delegates Convention of the Party; and cannot be expulsion of the 1st to 3rd respondents as the applicants contend. Counsel further submitted that expulsion of the 1st to 3rd respondents would not be a just thing to do since there are live proceedings on the dispute, which can be determined either way.
23. Mr. Awele submitted that the appeal would not be rendered nugatory since the expulsions by the PPDT were stayed by the High Court and therefore the status quo before the disputes remained. We were urged to find that the applicants had failed to meet the test established for the grant of stay under rule 5(2)(b).
24. On behalf of the 1st, 2nd and 3rd respondents, Senior Counsel, Mr. Mbuthi Gathenji, submitted that the Chairperson of the Tribunal had no interest in making an application for stay; nor would the Tribunal, which does not sit regularly, suffer any loss if the orders sought are not granted. He urged the Court to dismiss the application.
25. Mr. Odhiambo, on behalf of the 5th and 6th respondents, submitted that there is nothing to be stayed. He directed us to consider ground 3 (e) in the Memorandum of Appeal, which is questioning the High



Court's jurisdiction. According to Mr. Odhiambo, the same was stayed by dint of Appeal No. E008 of 2024 filed at the High Court in Mombasa. Counsel submitted that the High Court dealt with the question of jurisdiction and therefore the instant application is not merited. It was also submitted that the decision of the High Court that the meetings of 2nd February 2023, 10th February 2023 and 10th to 15th May 2023 were a nullity and of no consequence.

Determination

26. We have considered the application, its supporting affidavit and the annexures thereto, the replying affidavits and the rival position taken by the parties through their respective Counsel on both the written and oral submissions. The only issue for determination is whether we should grant an order of stay of execution pending the hearing and determination of the intended appeal.
27. Under Rule 5 (2) (b) of this Court's Rules, an applicant is required to satisfy us on the twin principles: first, that the appeal is arguable; and secondly, that if stay is not granted, the intended appeal, if successful, will be rendered nugatory. Both principles must be considered conjunctively for a stay application to succeed.
28. An arguable appeal is not one which must necessarily succeed, but must not be frivolous. Even a single bona fide issue is enough to meet the threshold of an arguable appeal. This principle was aptly enunciated by this Court in the case of Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] KECA 378 (KLR) as follows: -

“ That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court. The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
29. Further, in Trust Bank Limited & Another vs Investech Bank Ltd & 3 Others [2000] KECA 11 (KLR) it was held that: -

“ The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”
30. We have considered the proposed eight grounds of appeal in the 1st applicant's draft Memorandum of Appeal. The 1st applicant intends to argue, among other things, that the High Court erred in assuming jurisdiction over matters which were not subject of dispute before it or before the PPDT; the High Court erred in determining issues which were still live before the Party's IDRMs; and that the High Court proceeded to decide on matters which it found that the PPDT had jurisdiction to adjudicate on instead of remitting them back to the PPDT.
31. Upon preliminary assessment of the grounds of appeal and bearing in mind that the appeal must not be one which must necessarily succeed, we find that the 1st applicant has properly demonstrated that the intended appeal is arguable.



32. Turning to the second prerequisite, this Court held in *Julius Wahinya Kang'ethe & Another vs Muhia Muchiri Ng'ang'a* [2017] KECA 569 (KLR) as follows: -

“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.”

33. The 1st applicant argued that if the decision of the trial court is not stayed, there will be disruption of the 4th respondent's activities countrywide. We did not hear from any of the 1st applicant's counsel on the particular activities they purport will be disrupted if we do not grant the stay in the interim pending determination of the intended appeal. The 1st to 3rd respondents will resume their lawful positions in the Party and as it was pointed out by Mr. Awele in his rebuttal, if the 1st to 3rd respondents were to conduct business outside what they are permitted to do in the Party's Constitution, there is recourse. In the circumstances, the applicants have failed to satisfy the second limb of rule 5(2)(b) of this Court's Rules.

34. Accordingly, we find that the notice of motion dated 3rd October 2024 is unmeritorious. We hereby dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

