



Nyandoro & another v Wafula & 10 others (Civil Application E260 & E284 of 2024 (Consolidated)) [2024] KECA 888 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KECA 888 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E260 & E284 OF 2024 (CONSOLIDATED)
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
JULY 31, 2024**

BETWEEN

DAVID NYAMBASO NYANDORO APPLICANT

AND

AGGREY WAFULA 1ST RESPONDENT

OKIYA OMTATA OKOITI 2ND RESPONDENT

ISSA ELANYI CHEMAO 3RD RESPONDENT

PUBLIC SERVICE COMMISSION 4TH RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE ... 5TH RESPONDENT

CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE ... 6TH RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING 7TH RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING 8TH RESPONDENT

LAW SOCIETY OF KENYA 9TH RESPONDENT

MBURU PETER NG'ANG'A 10TH RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPLICATION E284 OF 2024**

BETWEEN



**HON. ATTORNEY GENERAL ON BEHALF OF PRINCIPAL SECRETARY,
MINISTRY OF LANDS & PHYSICAL PLANNING APPLICANT**

AND

AGGREY WAFULA 1ST RESPONDENT
OKIYA OMTATA OKOITI 2ND RESPONDENT
ISSA ELANYI CHEMAO 3RD RESPONDENT
PUBLIC SERVICE COMMISSION 4TH RESPONDENT
LAW SOCIETY OF KENYA 5TH RESPONDENT
MBURU PETER NG'ANG'A 6TH RESPONDENT
DAVID NYAMBASO NYANDORO 7TH RESPONDENT

(An application from the Judgment and Orders of the Employment and Labour Relations Court of Kenya at Nairobi (Ongaya, J.) dated 24th May 2024 in ELRC Petition No. E218 of 2023 Consolidated with Petition No. E217 and E226 of 2023)

RULING

1. This ruling is in respect of two consolidated applications dated 28th May 2024 and 6th June 2024, respectively, by which the applicants David Nyambaso Nyandoro (Nyandoro) and the Attorney General (on behalf of the Principal Secretary Ministry of Lands and Physical Planning) seek, in the main, orders for stay of execution of the judgment of the Employment and Labour Relations Court (Ongaya, J.) made on 24th May 2024 in a trio consolidated petitions filed severally by Aggrey Wafula, Okiya Omtata Okoiti and Issa Elanyi Chema, who are the named 1st, 2nd and 3rd respondents, respectively.
2. By that judgment, the learned judge granted the said petitions and issued nine (9) orders arising out of the various prayers in the petitions. Lengthy though they are, we consider it apposite to set them out verbatim for a proper appreciation of the matter at hand;
 1. "The declaration that the Public Service Commissions' (PSC) decisions purportedly rescinding the appointment of Dr. Peter Mburu Ng'ang'a and the decision purportedly recalling the letter conveying appointment of the said Dr. Peter Mburu Ng'ang'a and then, the purported Commissions' decision appointing Mr. David Nyamaso Nyandoro and conveying that appointment and all processes and communications flowing therefrom were all void acts and therefore, a nullity as are in any event, set aside and in particular the letter Ref. No. PSC/212/2/1/1; PSC/21/2/ (12) dated 28.09.2023 purporting to convey the Commission's appointment of the said Mr. Nyandoro as Chief Land Registrar and as well the letter purporting to convey that purported appointment Ref. No. 2006004230/(218) dated 17.11.2023 signed by Hon. Generali Nixon Korir, Principal Secretary, are both void, a nullity, and set aside.
 2. The Commission's decision appointing Dr. Peter Mburu Ng'ang'a as the Chief Land Registrar and the Commission's letter conveying the same on 28.09.2023 are hereby upheld.



3. The Principal Secretary, State Department for Lands and Physical Planning, as the Authorized Officer, to forthwith convey to Peter Mburu Ng'ang'a the Commission's decision of 28.09.2023 conveyed to the Ministry by the Commission Secretary's letter dated 28.09.2023 that, Mr. Mburu Peter Ng'ang'a P/No. 2006004272, Deputy Chief Land Registrar (CSG 6/ Job Group R) in the Ministry (State Department of Lands and Physical Planning) be appointed to fill the One (1) advertised post in the grade of Chief Land Registrar (CSG 4/ Job Group T) – Salary Scale : Kshs. 180, 160 – Kshs. 335, 450 p.m) w.e.f 28.09.2023.
 4. The declaration that upon the ruling delivered herein on 07.12.2023 and upon the principle of necessity, anything done by the said Mr. Nyandoro, apparently as Chief Land Registrar, shall be deemed validly and lawfully done, except where otherwise established in any specific case, as the case may be.
 5. The order of permanent injunction hereby issued to restrain the Principal Secretary and the Cabinet Secretary herein, by themselves or by their agents, from subjecting Dr. Mburu Peter Ng'ang'a to unfair labour practices.
 6. The declaration that the Principal Secretary's deliberate delay herein to implement the Commission's decision of the appointment of Dr. Mburu Peter Ng'ang'a as the Chief Land Registrar pursuant to the decision of the Public Service Commission made and communicated to the Principal Secretary on 28.09.2023, and the delay being without any justifiable reason, was unlawful and contravened the rights to fair labour practices and fair administrative action under Articles 41 and 47 of the Constitution of Kenya 2010, respectively.
 7. The declaration that the purported appointment of Mr. David Nyamaso Nyandoro as the Chief Lands Registrar instead of Dr. Mburu Peter Ng'ang'a as had been appointed and communicated by the Public Service Commission on 28.09.2023, undermined the functions and powers of the Commission under Article 234 and as established under Article 233 of the Constitution of Kenya.
 8. The judicial review order of Mandamus hereby issued that the Principal Secretary and the Cabinet Secretary herein to fully implement the Commission's decision made on 28.09.2023 that, Mr. Mburu Peter Ng'ang'a P/No. 2006004272, Deputy Chief Land Registrar (CSG 6/ Job Group R) in the Ministry (State Department of Lands and Physical Planning) be appointed to fill the One (1) advertised post in the grade of Chief Land Registrar (CSG 4/ Job Group T) – Salary Scale: Kshs. 180, 160 – Kshs. 335, 450 p.m) w.e.f 28.09.2023.
 9. Each party to bear own costs of the consolidated petitions.”
3. Aggrieved by those order a notice of appeal dated 24th May 2024, while the Attorney General lodged his dated 29th May 2024, on behalf of the 2nd to the 7th respondents in those proceedings. Those notices of appeal were followed by the motions now before us. The grounds upon which, Nyandoro's motion is grounded, amplified and lent evidentiary support by his supporting affidavit sworn on 28th May 2021, in summary are: that Nyandoro was legitimately appointed Chief Land Registrar vide a letter dated 17th November 2023 pursuant to section 12 of the *Land Registration Act* and sections 5 and 37 of the *Public Service Commission Act* (PSC Act); the learned judge quashed that appointment without due process under the *Employment Act* and usurped the constitutional and statutory role of the Public Service Commission (PSC) by imposing Mburu Peter Nganga (Mburu), the 10th respondent, in violation of the *Constitution* and the *PSC Act*, and that he has an arguable appeal raising the following additional grounds on which the learned judge is said to have erred;



- Issuing orders compelling the appointment of Mburu as Chief Lands Registrar when he, Nyandoro, was the legitimate appointee.
 - Holding, contrary to evidence, that there were no adverse reports against Mburu from the National Intelligence Service (NIS) the import of which he belittled without jurisdiction.
 - Ignoring that Nyandoro was and is substantively qualified for the position by which he was appointed on 17th November 2023 and is removable only by recognized processes.
 - Holding that Mburu’s fair administration action rights were violated yet he had not been served with a letter of appointment.
 - Arrogating jurisdiction to compel the permanent secretary to appoint Mburu.
 - Departing from the adversarial system by requiring Nyandoro to provide evidence to contradict the petitioners’ assertions.
 - Holding that parties declined to attend court for cross- examination in the absence of evidence to show service of summons for their attendance.
 - Relying on documentary hearsay to determine contested factual issue
 - Violating the tenets of judicial review limited to process examination to question the PSC’s consideration of adverse reports, claiming that there were none, and substituting its decision with his own to appoint Mburu.
4. Nyandoro asserted that as he was duly appointed Chief Land Registrar on 17th November 2023, he would lose his employment unless a stay is given thus rendering his appeal nugatory. Further, it is in the public interest for a stay to issue so that a person of questionable character or integrity is not appointed in violation of the PSC’s mandate.
5. For the Attorney General, the grounds on the face of the motion and on the affidavit of Hon. Generali Korir Nixon sworn on 6th June 2024 are to the same effect as those of Nyandoro’s. In addition thereto;
- a) The applicant is in imminent risk of being cited for contempt of the ELRC orders yet there is no valid letter communicating the PSC’s decision in relation to Mburu.
 - b) Mburu has written a letter dated 4th June 2024 addressed to the Chief Executive Officer of the PSC stating that “after careful consideration” he no longer wished to take up the position of Chief Land Registrar.
 - c) Without a stay Mburu would be imposed and forced to occupy the position of Chief Land Registrar thus rendering the appeal nugatory
 - d) The applicants have an arguable appeal as the judge erred in;
 - Holding that there was no valid reason for PSC’s decision to rescind Mburu’s appointment.
 - Holding contrary to evidence that the adverse communication by NIS or Mburu was unverified.
 - Holding that PSC’s power to appoint were exhausted once it decided on Mburu without appreciating the powers and jurisdiction of the PSC.
 - Holding without evidence that the rescission and recall of Mburu’s letter of appointment violated his right to fair administrative action.



- Issuing an order of mandamus for Mburu’s appointment thereby ignoring the PSC’s role of upholding integrity and maintaining public trust and great public interest.
 - Holding against evidence that the rescission of Mburu’s appointment and appointment of Nyandoro, lawfully done, were void.
 - Compelling Mburu’s appointment without appreciating the role of the employer.
6. The Attorney General posited that the grounds of appeal together with Mburu’s unwillingness to take up the position of Chief Land Registrar do raise a non-frivolous bona fide issue worthy of consideration on appeal, which would be rendered nugatory by having an irreversible, uncompensable situation unless a stay is granted.
 7. In opposition to the applications, the 1st, 3rd, 9th, and 10th respondents filed affidavits which were all to the effect that the application is not merited. The affidavits filed were sworn as follows, on 27th June 2024 by Aggrey Wafula, the 1st respondent; on 2nd July 2024 by Issa Elanyi Chemao, the 3rd respondent; on 28th June 2023 by Florence W. Muturi, the Secretary/Chief Executive Officer of the Law Society of Kenya; on 4th July 2024 and 8th July 2024 by Mburu, the 10th respondent. The 1st respondent agreed with the findings of the learned judge of the Employment and Labour Relations Court and contended that the intended appeal was not arguable in view of the finding that the Nyandoro’s appointment was unlawful, unconstitutional, null and void. He averred that should the intended appeal succeed, Nyandoro could be reinstated and compensated for any salaries that he may have been entitled to. In his opinion, public interest militated against a stay of the judgment of the trial court at an interlocutory stage. The 3rd respondent equally asserted that the applicants will not suffer any irreparable harm or prejudice if a stay is not granted, the decision can always be reversed upon hearing and determination of the main appeal. He argued that it was in the public interest that the recruitment and appointment of a person to the crucial position of the Chief Land Registrar must be conducted with utmost transparency and in a fair manner, in line with the principles of good governance as enshrined in Article 10 of the Constitution. For the 9th respondent, it was deposed that the grant of the reliefs sought by the applicants would have the effect of being determinative of the substantive appeal.
 8. Mburu explained that following interviews for the position of Chief Land Registrar, he emerged as the top candidate and the PSC appointed him to that position. However, in unclear circumstances, it revoked his appointment on account of an alleged adverse report from the NIS, which action the trial court found unconstitutional and invalid. The 10th respondent claimed that he had not been served with the notice of appeal pursuant to Rule 79(1) of this Court’s Rules. He contended that due to that failure, the application for a stay of execution was fatally defective. Further, it was urged that in view of the fact that the principal actor herein, the PSC, had not contested the trial court’s judgment, the intended appeal was not arguable. Mburu deposed that the PSC was given an opportunity to produce the alleged adverse report that informed its decision to revoke his appointment but it failed to do so, leading to the finding by the trial court that there were never adverse discoveries against him. He asserted that the intended appeal shall not be rendered nugatory if the orders sought are not granted as his occupation of the challenged position would be lawful pursuant to the decision of the court.
 9. On behalf of the 4th, 5th, 6th, and 7th respondents, Janerose Karanja, the Director, Human Resource Management and Development at the State Department for Lands and Physical Planning swore an affidavit on 5th November 2023. She explained the events culminating in this dispute indicating that Mburu’s appointment as the Chief Land Registrar was withdrawn and instead, the 1st applicant was appointed. Consequently, it was argued that the application herein has been overtaken by events.



10. In preparation for the hearing of the application, respective parties filed written submissions together with their case digests which were orally highlighted before us by counsel.
11. At the hearing, learned counsel Prof. Tom Ojienda, SC with Ms. Misiati appeared for Nyandoro, Mr. Felix Keaton appeared for the 1st respondent, Mr. Okiya Omtata appeared in person as the 2nd respondent, learned counsel Ms. Sitati holding brief for Mr. Peter Wanyama appeared for the 3rd respondent, Ms. Jackline Manani appeared for the 4th respondent, Mr. Oscar Eredi Chief State Counsel appeared for the 5th, 6th, 7th and 8th respondents, Mr. Paul Muite, SC together with Mr. Brian Onyango and Ms. Christine Mumbi appeared for the 9th respondent, while Mr. Orange holding brief for Ms. Judith Guserwa and Mr. Ng'ang'a Mbugua appeared for Mburu.
12. Submitting that the intended appeal was arguable, Prof. Ojienda, SC cited this Court's decision in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, where the Court stated that, 'whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised... (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.' On reliance of this Court's decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, counsel contended that the intended appeal is arguable because the trial court exceeded its mandate in its judgment. In that decision, the Court determined that in reviewing appointments to state or public offices, courts should not appear to be sitting on appeal over the decision of the appointing body. It was argued that the learned judge sat on appeal over the decision of the PSC, by faulting the legitimate appointment of the applicant on the basis that there was no justification for rescinding the recommendation of Mburu for appointment. To counsel, the learned judge usurped the constitutional role of the PSC as envisaged under Article 234(2) of the *Constitution* together with sections 5(d) and 37 of the *Public Service Commission Act*, by invalidating an appointment that was procedurally compliant and appointing the 10th respondent as the Chief Land Registrar.
13. On the nugatory aspect, Prof. Ojienda, SC drew our attention to pages 148 and 149 of the supplementary further affidavit where there is a letter written by Mburu declining his appointment as the Chief Land Registrar and indicating that he is not ready to take up the position. He submitted that in view of that letter, there was a possibility of an interregnum occurring if the Court did not stay the trial court's judgment. Lastly, counsel urged that the office of the Chief Land Registrar being an important one in the land, it was in the public interest for a stay to be granted, pending the decision of this Court, upon the hearing and disposal of the appeal, which has already been filed.
14. Next, Mr. Eredi adopted the submissions by Prof. Ojienda, SC. He reiterated that the intended appeal was arguable and posed some of the questions that this Court would need to address in the intended appeal as follows; whether the PSC can rely on background checks by state agencies like NIS and EACC; whether the PSC can recall its decision especially when that decision has not been formalized; whether such recalling of its decision amounts to unfair administrative action, and whether a person with adverse reports should be allowed to assume a state office. On the nugatory aspect, counsel contended that if the judgment of the trial court is executed, Mburu will assume office and the intended appeal will serve no purpose other than being an academic exercise. On reliance of the Supreme Court's decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, where the Court enumerated one of the principles to be considered by courts in evaluating an application for stay of execution as whether it is in the public interest to grant the stay, counsel asserted that on account of the adverse reports that were made against Mburu by the NIS and the EACC, it was in the public interest that a stay of execution be granted pending the definitive determination of this Court on who should occupy the disputed office.



15. In reply to the foregoing submissions, Mr. Keaton first addressed us on the preliminary objection. He contended that due to the failure of the applicant to serve the 1st respondent with the notice of appeal, no appeal was in place. To buttress this point, counsel cited the dissenting ruling of Kiage JA in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR, where the learned judge was emphatic that the Rules of this Court must be respected and that the notice of appeal occupies a central foundation place without which there can be no appeal. On the arguability element, counsel reiterated the 1st respondent's averments in his replying affidavit and urged that the initial decision by the PSC to appoint Mburu as the Chief Land Registrar was binding. Further, the trial court rightly found that Mburu was duly appointed. On the nugatory aspect, Mr. Keaton rejected the submission that the 1st applicant's intended appeal would be rendered nugatory. He submitted that should this Court find that the appeal is merited, it can order the 1st applicant to be reinstated to the position he held before his appointment was quashed. Moreover, granting an order of stay at this stage was tantamount to reinstating him at an interlocutory stage, contrary to rule 17 of *Employment and Labour Relations Court Rules*.
16. Mr. Omtata associated himself with the submissions of the 1st respondent. He urged that the intended appeal was not arguable and that should the appeal succeed, the applicant could be compensated. Ms. Sitati equally associated herself with the submissions of the 1st and 2nd respondents while submitting that the applications were not merited. She added that they were also not served with the notice of appeal. In response to 1st applicants' submission that the trial court usurped the constitutional and statutory role of the PSC, counsel contended that the court merely addressed the irregularities in the appointment process. Like the rest of the respondents, she urged that the letter from the NIS failed to detail any adverse report against the 10th respondent.
17. Ms. Manani indicated that PSC was not taking any position in the matter. For the 9th respondent, it was submitted that the grant of stay of execution is an exercise of discretion by this Court which is exercised on the basis of settled principles namely, the existence of an arguable appeal, the likelihood of an appeal being rendered nugatory and the public interest in the matter. For this assertion, counsel cited this Court's decision in *County Secretary, Nairobi City County & Another v Tom Ojienda & Associates* (Civil Application E052 of 2024) [2024] KECA 767 (KLR). Mr. Muite, SC stated that the LSK's interest in the matter was to assist the Court in the promotion of the rule of law, constitutionalism, and constitutional principles. Counsel similarly submitted that the appeal did not raise any triable issues and neither would it be rendered nugatory should the stay not be granted. He continued that Mburu's constitutional right to be accorded fair administrative action was violated by the PSC. He asserted that the report by NIS had no particulars and thus it was a violation of Article 47 of the *Constitution*. Counsel urged us to shy away from the invitation to grant the application on the grounds of public interest. On the strength of this Court's decision in *National Assembly & 47 Others v Okioti & 169 Others* (Civil Application E577, E581, E585 & E596 of 2023 (Consolidated)) [2024] KECA 39 (KLR), it was submitted that it would not be in the public interest to grant a stay whose effect would be to allow an action that has been found to be constitutionally infirm to continue being applicable in the glare of the public, pending the hearing of the appeal.
18. Regarding the Nigerian Supreme Court decision in *Chief R.A Okoya and others v S. Santilli and Others* (S.C.200/1989) [1990] NGSC 84 (23 March 1990), Mr. Muite, SC, submitted that declaratory reliefs are incapable of being stayed, and that an order of reinstatement is not amenable to an order of stay of execution pending appeal, as held in the minority decision of Mwilu JA (as she then was) in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR.
19. We inquired from counsel whether in his view the weighty matters that had been raised could be disposed of in the 5(2)(b) applications or whether it was appropriate that they be addressed fully on



- appeal. Mr. Muite, SC maintained that it was beyond argument that Article 47 was violated and that in any event there would be no loss that cannot be compensated by an award of damages.
20. Next, Mr. Orange also contended that Mburu had not been served with the notice of appeal which, to him, meant that this Court is divested of the jurisdiction to consider the applications. Counsel highlighted Kiage JA's dissenting opinion in *Nicholas Kiptoo Arap Korir Salat* (*supra*), which was upheld in *zacharia okoth obado v Edward Akong'o Oyugi & 2 Others* [2014] eKLR. As indicated above, the learned judge was of the view that where there is no notice of appeal, there can be no appeal, and that failure to serve such notice was a grave default.
 21. On arguability, counsel submitted that when the interviews for the contested office were on-going, the adverse report from NIS was non-existent. Moreover, the said report was not brought to Mburu's attention for him to address it. Concerning Mburu's letter expressing disinterest in the position of the Chief Land Registrar, Mr. Orange indicated that the same was authored under duress so it could not possibly be relied on. On the nugatory aspect, counsel expressed similar sentiments as the 1st, 2nd, 3rd, and 9th respondents that granting the orders sought would amount to overturning the trial court's finding and reinstating Nyandoro to the position of Chief Land Registrar at an interlocutory stage. For this contention, the dictum in *Rift Valley Water Services Board & 3 Others v Geoffrey Asanyo & 2 Others* [2014] eKLR was cited.
 22. In reply to those respondents' submissions, Prof. Ojienda, SC asserted that the filed affidavit of service of Kyalo Kamina, a process server, showed that each party was served with the notice of appeal. Counsel added that, even if service was not effected strictly in accordance with Rule 79, it was curable and it does not go to the foundation of the appeal. He reiterated that the intended appeal raised triable issues and if the stay was not granted, the appeal would be rendered nugatory. Mr. Eredi also responded briefly, submitting that the contention about what the NIS should have done or not done, and the nature and extent of the alleged adverse reports, all pointed to the arguability of the issue which the Court should determine. He reiterated that Mburu had not been formally appointed when the PSC recalled its decision.
 23. We have given the motion, the supporting and replying affidavits as well as the rival submissions made and authorities cited before us. Before expressing ourselves on the motion proper, we shall dispose of the objections raised by learned counsel Messrs Keaton and Messrs Orange to the effect that the motion by Nyandoro is incompetent and for striking out on account of non-service on them of the notice of appeal. Contrary to that assertion, Prof. Ojienda is categorical that the notice of appeal was served on all parties electronically and he refers to an affidavit of service in proof thereof.
 24. It is trite that the jurisdiction of this Court to entertain an application under Rule 5(2) (b) such as is before us is premised on the existence of a notice of appeal. It is enough that such notice of appeal be lodged in our registry for us to assume jurisdiction. Our understanding of the matter is that the operative event is the filing of the notice of appeal and not its service. Thus, it is perfectly permissible for an applicant to file and serve a notice of motion under Rule 5(2) (b) together with the notice of appeal so long as he is within time for the service of the latter. Why, he may even serve the motion before serving the notice of appeal!
 25. Now, if it turns out that a notice of appeal, though filed, was not served, then the proper action for a respondent to take would be, not to raise a preliminary objection as the two respondents have attempted to do, and on contested facts at that, which unfits the tter for preliminary objection in line with Mukisa Biscuits, case, but to apply for striking out of the notice of appeal. Thus, whereas we would endorse the opinion Kiage, JA expressed in Nick Salat and cited by Mr. Keaton, though it was a minority opinion, we find the same to be inappropriate for the reason that there, unlike here, the



- respondent had done the right thing of applying to strike out a non-served notice of appeal. There being no application for striking out, we would not accede to those respondents' plea that we strike out the motion. The preliminary objection is thus unmeritorious and we reject it.
26. Equally for rejection is the argument raised that, as the law firm of Prof Tom Ojienda & Co. Advocates not having been on record in the court below they cannot lawfully represent Nyandoro in this Court without leave having been granted on application before that court. This erroneous argument presupposes that appeal proceedings are a continuation of the proceedings before the first instance court to which Order 9 Rule 9 applies. We have no doubt that appeal proceedings are independent, and an advocate therein requires neither the consent of the previous advocates nor leave of the court below to come on record. We have decided this point in many cases including quite recently in *County Government Of Kakamega & Anor v Sila Munyao & Anor*, Kisumu Civil Appeal (Application) No. 33 of 2021 and *South Nyanza Sugar Co. v Prof. Riewa Onyango Genga*, Kisumu Civil Appeal No. 67 of 2017, and we consider the matter to be now settled.
 27. The principles upon which this Court considers applications for stay of execution or injunction pending appeal are old hat. They are essentially that; first the applicant must show that he has an arguable appeal. This means no more than that he has at least one bona fide point to raise on appeal. It need not be one that must necessarily succeed. It is enough that it calls for a response from the respondent and is worthy of investigation or consideration by the Court. The second consideration is that the appeal would be rendered nugatory which means illusory, useless, or of no effect by reason of some harm or prejudice having been suffered that is irreversible, not merely inconvenient. The term nugatory has to be given its full effect and meaning. We set out these principles and considerations quite exhaustively in the oft-cited *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013]eKLR.
 28. Following the epochal promulgation of the 2010 Constitution and the healthy proliferation of public interest litigation in its wake, a new consideration, best articulated by the Supreme Court in *Gatirau Peter Munya* (*supra*) is the question whether it is in the public interest to grant the stay sought. Thus, it is proper to now state that in Rule 5(2) (b) applications, this Court considers, not just the long-established twin principles, but in appropriate cases triple principles where the third is the public interest test, in a sequential manner.
 29. Regarding arguability, it is Nyandoro's contention, and that of the Attorney General as well, that the learned judge committed various errors of fact and law in arriving at his judgment, which grounds they have captured in their respective memoranda of appeal. Those errors are alleged to include exceeding mandate; usurping the role of the PSC in what amounts to "taking of powers that are vested elsewhere" as was stated in the *Mumo Matemu case* (*supra*), and arriving at inaccurate adverse factual conclusions contrary to the evidence. All the authorities cited are well-nigh unanimous that the threshold for arguability of an appeal is a decidedly low one. An applicant needs to raise but a single genuine point that is worthy of the Court's interrogation at the hearing of the appeal. The point need not be a strong one, and it definitely is not one that must necessarily succeed.
 30. Having perused, in a prima facie manner the grounds contained in the memoranda of appeal by the two applicants and considered the spirited arguments made by the rival parties, we are unable to say that the appeals are frivolous, flimsy, shadowy, or hopelessly raising no matter worthy of answer by the respondents and consideration by the bench that will eventually hear the appeals. A pragmatic approach of this Court is that at a consideration of Rule 5(2) (b) application, we are decidedly slow to conclude, without the benefit of a full argument, that an appeal is unarguable. We would do so only in the plainest, most obvious case where it is obvious that nothing can be said for the appeal or intended appeal. The Court at the interlocutory stage is slow to take any decided positions that denigrate an



appeal as that has the potential of embarrassing the bench that eventually hears the appeal. Bearing those considerations in mind, we think that the issues raised in the two applications are arguable.

31. On the nugatory aspect, we note that Nyandoro has been Chief Land Registrar, previously in an acting capacity, and substantially from 17th November 2023 on the basis of appointment thereto. During the period the suit was pending before the court below, he was in office. His argument, as we understand it, is that being qualified and holding that office pursuant to a valid appointment, his removal before the determination of his appeal against the learned judge's declaration that his appointment was unlawful would cause him great loss and prejudice. The attorney General on his part asserts that if a stay of execution is not granted, then the Principal Secretary in the Ministry of Lands, Public Works Housing and Urban Development may be held in contempt for not complying with the order of mandamus to appoint Mburu yet there is no valid letter from the PSC for such appointment and, Mburu, has expressly indicated that he is no longer interested in the position. Such being held in contempt would render the appeal nugatory.
32. The respondents on the other hand insist that the appeal would not be rendered nugatory as there will be no irreparable harm that would befall them were Nyandoro to vacate office as ordered by the learned judge and the said office be assumed by Mburu. They take the view that Nyandoro's salary and benefits as would be affected by the judgment impugned herein are capable of being ascertained, computed, and paid, so that whatever he may suffer is capable of being both reversed and remedied by an award of damages. It is argued that since Nyandoro's appointment was nullified by the court, his continued occupation of the office would be an illegality while that of Mburu, by the same token, would be lawful. In the same way, Nyandoro continued to occupy the office while the petition was pending at the court below, Mburu should occupy the said office pending the determination of the appeals herein which he is willing to do as he wrote the letter indicating lack of interest in the office of Chief Land Registrar under extreme duress.
33. Having given this aspect of the matter the most careful consideration, we first observe that in *Fred Matiangi Cabinet Secretary Ministry of Interior & Cordination of National Government v Miguna Miguna & 4 Others* is distinguishable from the present case because here, no party has been found to be in contempt unlike there where the applicant had been found to be in contempt of multiple court orders. At any rate, the sentiments expressed therein could not apply to Nyandoro against whom there has not been any suggestion of disobedience.
34. As we understand the Attorney General, the Principal Secretary who is apprehensive of being proceeded against in contempt has taken the position that the learned judge made orders that usurped the role of the PSC and so he is legitimately pursuing his undoubted right of the appeal to right the error. And he pleads for this Court's protection in the interim. The fate of such a plea would lie at the discretion of the Court but a peculiar aspect of this present case is that Mburu did write a letter that expressly and categorically indicated his lack of interest in taking up the position in contention. We think that this aspect introduces a degree of uncertainty as to the wisdom of compulsion to appoint him in those circumstances. Given that Nyandoro has been in that office since 17th November 2023 and Mburu, on his part has never occupied the position, we think it is in the interest of good order that a ping-pong situation of revolving office holders is avoided pending a decision on the question of who the proper holder of the office of Chief Land Registrar is, upon a merit hearing on determination of the appeals. The foregoing conclusion also answers in part the public interest limb of the applications before us. We think it conduces to the proper of functioning of the office of Chief Land Registrar, no doubt a pivotal office in land law administration in Kenya, that changes should be effected therein, if at all, only once the appeals filed herein by the holder and by the Attorney General, are determined. We think that if Nyandoro was able to remain in office while the petition was pending, there is no clear and



present danger of any apocalyptic harm to the public interest was that status quo ante to be maintained until the question is determined with finality by this Court.

35. We are persuaded that it would be in the interest of justice to maintain that status and thereby protect the public interest which is likely to suffer were it to be the case, and we cannot make a decision on it one way or the other, that the suitability of Mburu is properly questioned on account of the NIS report. We so hold while fully cognizant that the content, weight, propriety, and bona fides of the alleged reports are due for interrogation and decision at the hearing of the appeal.
36. The conclusion we arrive at then is that on all three limbs the applicants have made a case for the grant of the orders of stay of execution as prayed in the two applications, with the costs thereof being in the appeals.
37. Given the patent urgency of this matter and in the public interest, we order that the two appeals be and are hereby consolidated. They shall be processed and heard on a priority basis in the next Court term immediately after the expiry of the timelines hereunder.
38. To obviate delay in the hearing, we direct as follows:
 1. The appellants shall serve the records of appeal on any party not yet served within Seven (7) days of this order.
 2. The appellants shall file and serve their written submissions, lists and bundle of authorities on the respondents within Twenty-one (21) days of this order.
 3. The respondents shall file and serve their written submissions, lists, and bundles of authorities within Twenty-one (21) days of being served with the appellant's submissions.
 4. The appellants are at liberty to file further or supplementary affidavits in reply within Seven (7) days of being served with the respondents' submissions.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

