



REPUBLIC OF KENYA



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**Itumbi v Law Society of Kenya & 55 others (Civil Application
E126 of 2023) [2023] KECA 593 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 593 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E126 OF 2023
HA OMONDI, KI LAIBUTA & GWN MACHARIA, JJA
MAY 26, 2023**

BETWEEN

DENIS NJUE ITUMBI APPLICANT

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT
KATIBA INSTITUTE 2ND RESPONDENT
PRESIDENT OF THE REPUBLIC OF KENYA 3RD RESPONDENT
PUBLIC SERVICE COMMISSION 4TH RESPONDENT
ANNE WANJIKU MWANGI 5TH RESPONDENT
NICHOLAS NGABIYA RIOBA 6TH RESPONDENT
EDWIN SUDI WANDABUSI 7TH RESPONDENT
SHARIF ATHMAN ALI 8TH RESPONDENT
ISAAC MAIGUA MWAURA 9TH RESPONDENT
REHEMA HASSAN 10TH RESPONDENT
SAMUEL KUNTAI TUNAI 11TH RESPONDENT
MILLICENT NYABOKE OMANGA 12TH RESPONDENT
MOHAMUD ALI SALEH 13TH RESPONDENT
ALFRED AGOI MASADIA 14TH RESPONDENT
KIRUI JOSEPH LIMO 15TH RESPONDENT
BEATRICE NKATHA NYAGA 16TH RESPONDENT
ARTHUR MAANGI GONGERA 17TH RESPONDENT



CATHERINE WANJIKU WARUGURU	18 TH RESPONDENT
HUSSEIN TUNEYA DADO	19 TH RESPONDENT
NANCY CHARITY NANYAMA KIBABA	20 TH RESPONDENT
WAJONYA BENJAMIN JOMO WASHALI	21 ST RESPONDENT
ENG. NICOLAS GUMBO	22 ND RESPONDENT
ONESMAS KIMANI NGUNJIRI	23 RD RESPONDENT
VICTOR KIOKO MUNYAKA	24 TH RESPONDENT
DENIS NJUE ITUMBI	25 TH RESPONDENT
SIMON MWANGI KAMAU GIKURU	26 TH RESPONDENT
JAMES KIMANTHI MBALUKA	27 TH RESPONDENT
KHATIB ABDALLAH MWASHETANI	28 TH RESPONDENT
ELLY STEPHEN LOLDEPE	29 TH RESPONDENT
MARK LOMUNOKOL	30 TH RESPONDENT
ANAB MOHAMED GURE	31 ST RESPONDENT
JACKSON KIPTANUI	32 ND RESPONDENT
DANIEL WAMAHIU KIONGO	33 RD RESPONDENT
EVANS ODHIAMBO KIDERO	34 TH RESPONDENT
VINCENT KEMOSI MOGAKA PAUL	35 TH RESPONDENT
LELEI LILIAN CHEPTOO TOMITOM	36 TH RESPONDENT
BISHOP MARGARET WANJIRU	37 TH RESPONDENT
AMOS CHEGE MUGO	38 TH RESPONDENT
WESLEY KORIR	39 TH RESPONDENT
CHARLES NJAGUA KANYI	40 TH RESPONDENT
JACKLINE MWENESI LUKALO	41 ST RESPONDENT
NYAGA JOHN MUCHIRI	42 ND RESPONDENT
WILSON SOSSION	43 RD RESPONDENT
REHEMA DIDA JALDESA	44 TH RESPONDENT
CHRISANTUS WAMALWA WAKHUNGU	45 TH RESPONDENT
SUNYA ORRE	46 TH RESPONDENT
MARY YAINA SENETA	47 TH RESPONDENT
JOHN LODEPE NAKARA	48 TH RESPONDENT
PROF. ELIJAH GITONGA RINTAUGU	49 TH RESPONDENT



MWANAMAKA AMANI MABRUKI	50 TH RESPONDENT
KERICH RAEI CHEBICHII	51 ST RESPONDENT
DAVID KIPKORIR KIPLAGAT	52 ND RESPONDENT
FREDRICK OTIENO OUTA	53 RD RESPONDENT
ALLAN KIBET KOSGEY	54 TH RESPONDENT
ELIUD KARANJA MATINDI	55 TH RESPONDENT
HON. ATTORNEY GENERAL	56 TH RESPONDENT

(Being an application for stay of execution and further proceedings pending appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (H. Ong’udi, J.) delivered on 31st March 2023 in Petition No. E084 of 2023)

RULING

1. By a Gazette Notice No. 12432 published on October 12, 2022, the 4th respondent, the Public Service Commission (the Commission), invited applications to the position of Chief Administrative Secretary (CAS).
2. Upon publication of the Notice, the 1st respondent, the Law Society of Kenya (the LSK), lodged petition No. E174 of 2022 in the High Court of Kenya at Nairobi challenging the legality of the appointment of persons to the office of CAS, which petition was dismissed in February 2023.
3. On March 22, 2023, the 3rd respondent, the President, appointed the 5th to the 54th respondents as CASs whereupon the 1st and 2nd respondents filed a petition dated 23rd March 2023 in the High Court of Kenya at Nairobi, HC Pet. No. E084 of 2023 seeking a declaration that the President was bound by the recommendation of the 4th respondent on creation of an office in the Public Service; a declaration that the process of recruitment of the 5th to the 54th respondents was in violation of the Constitution and the Public Service Act; a declaration that the appointments did not meet the mandatory constitutional and statutory requirements; an order quashing the decision of the 3rd respondent to unilaterally create an additional twenty-seven (27) positions in the office of CAS; costs of the petition; and any other relief that the Honourable court may deem fit to grant.
4. The 1st and 2nd respondents’ petition was supported by the affidavit of Florence Wairimu Muturi, the Chief Executive Officer of the 1st respondent sworn on March 23, 2023, and was anchored on various constitutional and legal basis and alleged violation of the Constitution as more particularly set out on the face of the petition, but to which we need not address ourselves presently. Suffice it to observe that, though not necessary for our determination of the Motion before us, the record does not contain any reply to the petition.
5. The 1st and 2nd respondents’ petition was accompanied by a Notice of Motion dated 23rd March 2023 made under rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 essentially seeking conservatory orders restraining and barring the 5th to the 54th respondents from assuming or continuing to act as CAS, and from earning any salary, remuneration and benefits. They prayed that costs of the application be in the cause.



6. The Motion was supported by the affidavit of Florence Wairimu Muturi, the Chief Executive Officer of the 1st respondent sworn on March 23, 2023, and was made on seven (7) grounds into which we need not go. As already observed, the record does not contain any reply to the Motion.
7. The Motion, having been filed under a certificate of urgency, was placed before Ong’udi, J. on March 24, 2023 whereupon the learned Judge certified it as urgent with orders that the petition and the Motion be served on all the parties immediately; and that any responses be filed and served by close of business on March 27, 2023. The learned Judge also granted “interim conservatory orders” pending hearing and determination of the Motion and set a mention date for further directions on March 28, 2023.
8. When the Motion came up for mention on March 28, 2023, learned counsel for Dennis Njue Itumbi (the applicant), raised a preliminary objection on matters relating to various procedural concerns, including the question of the court’s jurisdiction, issues of service and the overall competence of the petition. It is noteworthy that the record as put to us does not contain a transcript of the proceedings to enable us ascertain the content of the preliminary issues and the rival submissions made by the respective counsel.
9. By orders and directions given on March 31, 2023, Ong’udi, J. directed that:
 - (a) petition Nos. 80 and 84 of 2023 be consolidated as requested by the parties;
 - (b) the 1st, 2nd and 55th respondents re-serve the respondents who had not entered appearance by placing an advert in one of the popular newspapers within five (5) days next following;
 - (c) the 1st and 2nd respondents be granted leave to amend their petition, and that the amended petition be filed and served within three (3) working days;
 - (d) the parties who had filed applications and preliminary objection do have the same served on all the parties within three (3) working days;
 - (e) upon service of the various applications, the respondents do file and serve their responses within five (5) working days;
 - (f) the applications and the preliminary objection be canvassed by way of brief written submissions limited to six (6) pages within six (6) working days of service of the responses;
 - (g) in view of the fact that the matter is of great public interest, the same be referred to the Chief Justice to empanel a multi-judge bench;
 - (h) all pending applications and preliminary objection be dealt with by the expanded bench, and that the interim conservatory orders be extended until then; and that the matter be mentioned on April 21, 2023 before the expanded bench for further directions.
10. Dissatisfied by the orders and directions of the learned Judge, the applicant moved to this court on appeal on a whopping 16 grounds set out in his memorandum of appeal dated April 3, 2023 faulting the learned Judge for, inter alia:

certifying the consolidated petitions as raising substantial questions of law while the jurisdiction of the High Court was still pending determination; consolidating the petitions prior to service; issuing substantive orders and directions before satisfaction of proper service; exercising her discretion to refer the matter to the Chief Justice for empanelment of an expanded bench; failing to find that the dispute at hand was a preserve of the Employment and Labour Relations Court; failing to find that the issues



raised in the consolidated petitions had been conclusively addressed by the ELRC in petition No. E174 of 2022; extending *ex parte* interim orders; issuing conflicting, contradictory and unenforceable orders; and for issuing orders that offended the doctrine of presumption of legality, and which are adverse to public policy in so far as they sought to suspend the operation of gazette notices which have not been quashed or invalidated by a competent court.

11. By a Notice of Motion dated April 3, 2023 and amended on April 14, 2023, the applicant prays for: stay of execution of the orders and directions of Ong’udi, J. given on March 31, 2023 pending the intended appeal; and stay of proceedings in petition No. E084 as consolidated with No. E080 pending hearing and determination of the intended appeal; and that costs be in the cause.
12. The applicant’s Motion is supported by the applicant’s affidavit sworn on April 3, 2023, the affidavit of Engineer Nicholas Gumbo, the 22nd respondent, sworn on 11th April 2023, and of Alan Kibet Kosgey, the 54th respondent, sworn on April 18, 2023 on his own behalf and on behalf of the 5th to the 24th respondents, the 26th to the 33rd respondents, and the 36th to the 53rd respondents. The supporting affidavits essentially narrate the factual background relating to the proceedings in the court below and to the proceedings herein, and highlighting the grounds on which the applicant’s Motion is made, and the grounds on which the intended appeal is preferred.
13. The applicant’s Motion is also made on sixteen (16) grounds, which essentially replicate the aforementioned grounds of appeal. The applicant contends that, unless restrained by this Court, the Chief Justice shall proceed to empanel a bench of Judges to handle a matter for which their jurisdiction is expressly ousted by the Constitution; that, unless stay is granted, the applicant will suffer substantial loss in that he will remain in a state of “career purgatory” since the appointees can neither serve in the office to which they were recruited nor seek other gainful employment; that the balance of convenience tilts in favour of sustaining the appointment of the CASs to facilitate seamless service delivery within the Public Service; that he has an arguable appeal with outstanding chances of success; and that, if the orders sought are not granted, the substratum of the intended appeal will have been lost.
14. Learned counsel for the applicant, M/s. Adrian Kamotho Njenga & Company, filed written submissions dated April 24, 2023 citing 7 judicial authorities, including the cases of Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR highlighting the principles that apply for grant of orders under rule 5(2) (b) of the Court of Appeal Rules; and Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 in which the court defined the term “nugatory” as “worthless, futile or invalid” or “trifling”.
15. Supporting the Motion, learned counsel M/s. Garane & Somane for the 5th to the 24th, the 26th to the 33rd and the 36th to the 54th respondents filed written submissions dated April 28, 2023 citing 7 authorities, including the cases of Banking Insurance and Finance Union v Hon. Justus Aloo Ogeka & 9 others [2015] eKLR on the twin principles that must be satisfied for grant of orders under rule 5(2) (b) of this Court’s Rules; and Katangi Developers Limited v Prafula Enterprises Limited & another [2018] eKLR in which the court also defined the term “nugatory”.
16. Learned counsel Mr. Peter Wanyama for the 11th to the 34th respondents made oral submissions in support of the Motion for stay of the conservatory orders, but not of the proceedings. So did Miss. Manani for the 4th respondent. Likewise, Miss. Mutindi for the 56th respondent made oral submissions in support of the Motion as prayed.
17. In opposition to the applicant’s Motion, the 55th respondent, Eliud Karanja Matindi, filed his replying affidavit notarised on April 11, 2023 setting out the factual background leading to the proceedings herein. In addition, he contends that the application before us and the intended appeal are premature,



- as the matters to which they relate are yet to be heard and determined by the High Court; that the applicant's notice of preliminary objection challenging the interim conservatory orders and the jurisdiction of the High Court is yet to be heard and determined; that scheduled to be heard alongside the applicant's preliminary objection is the 56th respondent's preliminary objection, which also challenges the court's jurisdiction and joinder of some of the parties; that the applicant has yet to exhaust the constitutionally mandated process before attempting to invoke this Court's jurisdiction; and that the application and the intended appeal herein lack merit and should be dismissed with costs.
18. In the same vein, learned counsel Mr. Ochiel Dudley for the 2nd respondent filed written submissions dated May 1, 2023 citing 4 authorities, including the cases of *Attorney General & another v CORD & 7 others* [2015] eKLR contending that the applicant has not demonstrated that the High Court orders have occasioned a lacuna in the State's operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace; and *Kenya Wildlife Services v James Mutembei* [2019] eKLR for the proposition that the test for stay of proceedings is high and stringent, and that it has not been satisfied. According to the 2nd respondent, they are amenable to stay of proceedings on condition that the conservatory orders remain in force.
 19. In addition to the learned counsel aforesaid, Miss. Kiunga, holding brief for Mr. Eric Theuri for the 1st respondent, made oral submissions opposing the Motion. According to Miss. Kiunga, the intended appeal and the Motion before us were premature in view of the fact that the preliminary objections on the jurisdiction of the High Court were yet to be heard and determined.
 20. As this Court has pronounced itself time and again, for an applicant to merit stay orders pursuant to rule 5(2) (b) of the *Court of Appeal Rules* pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal, as the case may be), if successful, would be rendered nugatory absent stay. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v A A Kawir Transporters & 4 others* [2014] eKLR).
 21. An arguable appeal is simply one that raises a bona fide arguable point that deserves to be considered and determined by the court. In other words, an arguable appeal is one that is not frivolous (see *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union*, Civil Application No. Nai. 72 of 2001). To establish an arguable appeal, the applicant does not have to present a multiplicity of grounds. Even a single bona fide ground will suffice (see *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR).
 22. A cursory look at the record as put to us clearly shows that the applicant's Motion heralding the intended appeal comes way ahead of its time. Put differently, it is premature as no substantive decision capable of being challenged on appeal was made by the learned Judge. We take to mind the fact that the orders and directions given on 31st April 2023 were merely procedural and suitably designed to prepare the platform for the parties to litigate their rights and interest in the consolidated petitions. Those orders and directions were in the nature of pretrial directions that do not in any way touch on the substantive issues in contention. Faulting the learned Judge for preserving the substratum of the petitions, and for setting timelines for filing and serving rival pleadings and submissions to expediate hearing and determination of the two petitions borders on mischief and stand in the way of the intended determination of the real issues in contention.



23. As the High Court at Nairobi in *Okoti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties)* [2022] KEHC 3209 (KLR) aptly held:
- “Courts exist to resolve actual disputes. They are not in the business of engaging in academic or abstract discourse that is not anchored in disputed facts.”
24. In the same vein, the High Court at Nairobi in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR correctly observed:
- “The court is prevented from determining an issue when it is too early or simply out of apprehension...
- There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.”
25. That said, it is noteworthy that the learned Judge did not pronounce herself on any substantive issue falling to be determined by the already-empanelled 3-Judge bench including: matters relating to the jurisdiction of the court; the contention that the matters raised in the consolidated petitions were res judicata; and other preliminary issues touching on the pre-trial orders and directions. The question as to whether the conservatory orders made to maintain the status quo pending determination of the preliminary objections and other interlocutory applications will stand the test of time when the parties appear before the expanded bench to ventilate their respective cases is not for us to say. Suffice it to observe that those are matters awaiting adjudication by the expanded bench where the applicant will have the right and opportunity to address those issues, which are yet to be determined by the High Court, but which are not ripe for escalation on appeal to this court. To hold otherwise would be to enter into the arena of litigation in anticipation.
26. In our considered view, the grounds advanced for the intended appeal do not call for the court’s inquiry. They constitute an invitation to engage in litigation over premature matters. Indeed, we do not find a single ground that would suffice to satisfy the first limb of the twin principle as was contemplated in the case of *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR. Simply put, the applicant has no arguable appeal.
27. Having so concluded, we hasten to observe that no useful purpose would be served by pronouncing ourselves on the second limb of the twin principle for grant of orders under rule 5(2) (b). Neither would it be necessary to examine the principles applicable for grant of orders staying proceedings in the trial court (which the applicants and those supporting his Motion appeared not eager to pursue) pending appeal or intended appeal.
28. Having carefully examined the record before us, the impugned pre-trial orders and directions, the applicant’s Motion dated April 3, 2023 and amended on April 14, 2023, the grounds on which it is anchored, the affidavits in support and in reply thereto, the written and oral submissions of learned counsel for the parties, and the cited authorities, we form the view that the applicants’ Motion fails and is hereby dismissed. In view of the public nature of this case, we direct that each party shall bear its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

H.A. OMONDI



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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

