



**Deputy County Commissioner, Wajir South Sub-County & 4 others v Mohamed & another
(Civil Appeal (Application) E451 of 2022) [2023] KECA 746 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KECA 746 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E451 OF 2022
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA
JUNE 22, 2023**

BETWEEN

**DEPUTY COUNTY COMMISSIONER, WAJIR SOUTH SUB-COUNTY 1ST APPLICANT
WAJIR SOUTH SUB-COUNTY 2ND APPLICANT
MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT 3RD APPLICANT
PUBLIC SERVICE COMMISSION 4TH APPLICANT
ATTORNEY GENERAL 5TH APPLICANT**

AND

**MUHAMUD BARE MOHAMED 1ST RESPONDENT
AYAN SALAN BAGAY 2ND RESPONDENT**

(Being an application brought under Article 164(3)(a) of the Constitution, Sections 3 3A and 3B of the Appellate Jurisdiction Act, and rule 5(2)(b) of the Court of Appeal Rules (2010) seeking stay of execution of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (S. Rutto, J.) dated and delivered on 25th November 2022 in E.L.R.C Petition No. E040 of 2022)

RULING

1. The notice of motion dated December 6, 2022 seeks stay of execution of the judgment delivered by Rutto, J. on November 25, 2022 in the Employment and Labour Relations Court at Nairobi (ELRC) petition No E040 of 2022, pending hearing and determination of an appeal.



2. The background to this application is that Muhamud Bare Mohamed and Ayan Salah Bagay, the 1st and the 2nd respondents respectively, filed a petition against the applicants before the ELRC at Nairobi contending that, on October 14, 2021, the 1st applicant advertised the position of chief II, Burder Location in Diif sub-county, Wajir county. The minimum requirements for appointment to the said position were set out in the advertisement, and required the interested persons to be not less than 35 years of age and a resident of burder location, among other qualifications: 19 applicants were shortlisted and invited to attend interviews
3. The 1st respondent recommended three applicants for appointment and subsequently, Abdisalan Muktar Ali (Ali), the 5th respondent in the petition, was appointed despite the fact that he had not met some of the mandatory requirements in that he was 11 years younger than the required minimum age; and was not a resident of burder location. the applicants contended that the appointment was contrary to the requirements set out in the advertisement and therefore in violation of the Constitution and was indicative of bias, improper motives and irrationality in the recruitment exercise.
4. After a full trial, the court allowed the petition and declared the recruitment exercise unconstitutional, null and void. The trial court further issued an order of mandamus compelling the 1st to 3rd respondents to repeat the recruitment exercise in a manner in tandem with the Constitution and the relevant statutory instruments.
5. Being aggrieved by that decision, the applicants instituted an appeal before this court on which they have anchored this notice of motion. In the draft memorandum of appeal that is annexed to the affidavit sworn in support of the application by Michael Ololtuaa, the Deputy County Commissioner, Diif Sub-County, the applicants state, *inter alia*, that the learned trial judge erred in law and in fact in quashing the appointment of Ali as the Chief, Burder Location, on the requirement of age, which is neither a constitutional nor statutory requirement, thus rendering the judgment discriminatory and unconstitutional. They add that the 1st respondent had discretion to wave, as regards the 5th respondent, the stipulated qualifications. The applicants further contend that the learned judge erred in law by failing to properly and exhaustively evaluate the evidence on record; that the learned judge erred in law and in fact by failing to join all the shortlisted candidates as parties to the proceedings; and for issuing orders that had not been sought by the petitioners.
6. The applicants urged this court to find that the appeal is arguable.
7. On the nugatory aspect, the applicants contended that if the order sought is not granted, the delayed recruitment of the chief will cause a security risk in the area; that the people of Burder Location are likely to suffer as a result of lack of service delivery due to the absence of a chief, and such loss and or suffering cannot be compensated by an award of damages. This would render any order that may eventually be made by this court on appeal to be of no effect, the applicants argued.
8. During the hearing of the application, Mr Weche, learned counsel for the applicants, relied heavily on his written submissions that cover the issues as summarized herein above.
9. Mr Kinaro, learned counsel for Ali, who has also filed an application for stay of the impugned judgment in a different application, E842 of 2022, supported the application.
10. Opposing the application, Mr Aboubakar, learned counsel for the 1st and 2nd respondents, adopted his written submissions dated December 21, 2022. Counsel submitted that the trial court rightly found that the appointment of Ali violated article 73(2) (a) of the Constitution which provides for the guiding principles of leadership and integrity, and which include, inter alia, selection on the basis of personal integrity, competence and suitability.



11. Counsel further submitted that the applicants unilaterally varied some of the requirements for appointment as advertised and thereby created unfairness and lack of transparency in the recruitment process. For those reasons, among others, it was submitted that the appeal is not arguable.
12. On the nugatory aspect, counsel submitted, inter alia, that Burder Location has an Assistant Chief and there is an Assistant County Commissioner for Diff Sub-County, and therefore government services and general security in the area will not be compromised if the order sought is not granted. Counsel added that Burder Location did not have a Chief for about 9 months prior to the appointment of Ali, and that over that period, government services were effectively rendered and security was not compromised.
13. Lastly, Mr Aboubakar submitted that if the application is dismissed, the applicants will undertake a fresh recruitment exercise in tandem with the Constitution, and that Ali can still apply alongside any other interested applicant if he satisfies the set criteria.
14. The principles that guide this court in determination of an application under rule 5 (2)(b) of this Court's Rules are well settled and have been set out in a plethora of the court's decisions. They have been well summarised in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR. The twin test is that an applicant must demonstrate that the appeal or intended appeal is arguable; and that unless the orders sought are granted the appeal, if successful, shall be rendered nugatory.
15. We have considered the application, the written and oral submissions by all the parties herein. We have also perused the draft memorandum of appeal that is attached to the applicants' affidavit in support of the application.
16. Looking at the intended grounds of appeal, we are satisfied that the appeal is arguable. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal.
17. Turning to the nugatory aspect, we are not satisfied that the appeal will be rendered nugatory if the order sought is not granted. Although the applicants contended that the effect of the impugned judgment is to paralyse the operations of the Ministry of Interior and Co-ordination of National Government in Diff sub-county, which they further argue may compromise security in the area, we do not think that these allegations were proved. As rightly argued by the 1st and 2nd respondents, prior to the impugned recruitment Burder Location was without a chief for almost 9 months. The Assistant Chief and the Deputy County Commissioner, Diff sub-county, were effectively serving residents in the area. We may also add that the police and other security officers are also providing security in the area.
18. In addition, the applicants did not demonstrate what prejudice they would suffer if another recruitment of the area chief is conducted as ordered by the trial court.
19. We note that the application seeks stay of execution of the trial court's judgment so as to "allow the applicants to proceed with its operations pending the hearing and determination of the appeal." In other words, the applicants are asking the court to give a green light to the appointment of the 5th respondent as the chief of Burder Location pending hearing and determination of the appeal. If this court were to do so, and the appeal is not successful, the process of removing a serving chief may be quite cumbersome. It may be better to conduct a fresh recruitment all together.
20. As the applicants have not satisfied the second limb for grant of an order under rule 5 (2)(b) of this Court's Rules, we hereby dismiss this application with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE, 2023.

D. K. MUSINGA (P.)



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JUDGE OF APPEAL
K. M'INOTI

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JUDGE OF APPEAL
DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

