



REPUBLIC OF KENYA



**Kihika, Governor Nakuru County Government & 2 others v Benjam  
& 2 others; Kuria & 15 others (Interested Parties) (Civil Application  
E030 of 2023) [2023] KECA 989 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 989 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E030 OF 2023  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
JULY 28, 2023**

**BETWEEN**

**HON SUSAN WAKARURA KIHKA, GOVERNOR NAKURU COUNTY  
GOVERNMENT ..... 1<sup>ST</sup> APPLICANT  
COUNTY GOVERNMENT OF NAKURU ..... 2<sup>ND</sup> APPLICANT  
HON COUNTY ATTORNEY, NAKURU COUNTY GOVERNMENT .... 3<sup>RD</sup>  
APPLICANT**

**AND**

**DR MAGARE GIKENYI J BENJAM ..... 1<sup>ST</sup> RESPONDENT  
DANIEL KIPNGETICH ARAP BETT ALIAS SELEMBU ..... 2<sup>ND</sup> RESPONDENT  
COUNTY ASSEMBLY, NAKURU COUNTY GOVERNMENT .... 3<sup>RD</sup>  
RESPONDENT**

**AND**

**STEPHEN MUIRURI KURIA ..... INTERESTED PARTY  
JOHN KARANJA KIHAGI ..... INTERESTED PARTY  
LEONARD KIPKOECH BOR ..... INTERESTED PARTY  
ROSELYN WANJIRU MUNGAI ..... INTERESTED PARTY  
JOSEPHINE ATIENO ACHIENG ..... INTERESTED PARTY  
HON NELSON TANUI MAARA ..... INTERESTED PARTY  
HON. ZIPPORAH WAMBUI ..... INTERESTED PARTY  
SAMUEL MWANGI MWAURA ..... INTERESTED PARTY  
STEPHEN IRIBE NJOGU ..... INTERESTED PARTY**



ENG MICHAEL KAMAU KARANJA ..... INTERESTED PARTY  
MICHAEL NANDELA SHIKATI ..... INTERESTED PARTY  
PARTY SAMUEL KARANJA WAHUGA ..... INTERESTED PARTY  
WAJEFF WILSON MWANGI ..... INTERESTED PARTY  
STANLEY KARANJA ..... INTERESTED PARTY  
ISABELLA MAKORI ..... INTERESTED PARTY  
JACQUELINE MONG'INA OSORO ..... INTERESTED PARTY

*(Being an application for Stay of Execution under Rule 5 (2) (b) of the Court of Appeal Rules 2022, pending the determination of an intended Appeal from the Ruling of the Employment and Labour Relations Court at Nakuru (Wasilwa J) dated 21st March 2023 IN ELRC Petition No. 013 of 2022 as Consolidated with ELRC Petition No. 014 of 2022)*

### RULING

1. Before us is a motion dated March 21, 2023, brought pursuant to the provisions of Rule 5 (2) (b) of the *Court of Appeal Rules 2022*, in which Hon Susan Wakarura Kihika, Governor Nakuru County Government, The County Government of Nakuru and The Hon County Attorney, Nakuru County Government (the applicants here) seek stay of execution in its entirety of the Ruling and Orders of Wasilwa, J dated March 21, 2023, in Nakuru ELRC Petition No 013 of 2022, Dr Magare Gikenyi J, Benjamin v Nakuru County Government and 3 Others & 10 Interested Parties, Consolidated with ELRC Petition No 014 of 2022, Daniel K Arap Bett v The Governor Nakuru County Government & 3 Others & 10 Interested Parties, pending the hearing and determination of the intended appeal.
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by Dr Samuel Mwangi Mwaura, the Acting County Secretary of the 2<sup>nd</sup> applicant who deposed *inter alia* that the applicants had advertised for the positions of County Executive Committee Members (CECs) on August 30, 2022 and subsequently the Select Committee settled on 10 names of the nominees to take up the vacant positions on September 13, 2022.
3. That subsequently thereafter, the respondents moved the trial court by way of two petitions dated October 18 and 25, 2022 respectively, seeking to stop the vetting process of the nominees of the 2<sup>nd</sup> applicant to the position of CECs on account of contravening the law on appointment. On October 19, 2022, the trial court stayed the vetting process for the CECs nominees and later nullified the whole recruitment process for CECs of the 2<sup>nd</sup> applicant on December 5, 2022.
4. He further deposed that that the 1<sup>st</sup> applicant's understanding of the judgment of December 5, 2022, was that the impugned process had to be abandoned in favour of a fresh nomination process and that this was the case when applicants published a new list of nominees to be vetted by the 3<sup>rd</sup> respondent on December 8, 2022. That, the nomination of December 8, 2022, resulted to a vetting process and eventual swearing of the new nominees in compliance with the orders of the court. That on December 13, 2022, the 1<sup>st</sup> respondent challenged the fresh nomination process by way of a contempt application alleging that the said nomination disregarded the trial court's orders of December 5, 2022.
5. It was further deposed that the intended appeal was arguable as the learned Judge equated a fresh nomination process with a fresh advertisement without any backing by the law on the appointment



of CECs and further that the learned Judge had found the 1<sup>st</sup> applicant to be in contempt of a non-existent court order as the fresh nomination process had never been challenged before any court of law. Further that the intended appeal would be rendered nugatory if the stay orders were not granted as the 1<sup>st</sup> applicant will be sentenced by the trial court on the basis of an erroneous finding on contempt, hence rendering the intended appeal an exercise in futility.

6. The motion was opposed vide a replying affidavit sworn by the 1<sup>st</sup> respondent Dr Magare Gikenyi Benjamin J on April 10, 2023, who deposed inter alia that the contention by the 1<sup>st</sup> applicant that she was on the verge of being sentenced was not true as punishment for contempt can vary from being just a mild verbal reprimand, a small fine, imprisonment or both, and that as such, the ruling on punishment was unknown. Further the issue of jurisdiction had not been raised in the High Court.
7. When the matter came before us for plenary hearing on April 17, 2023, Prof Tom Ojienda SC appeared for the applicants whereas Dr Magare Gikenyi J Benjamin (the 1<sup>st</sup> respondent) appeared in person. Mr Kemboi learned counsel appeared for the 2<sup>nd</sup> respondent whereas Mr. Nyamwange appeared for the 3<sup>rd</sup> respondent. There was no appearance for the Interested Parties. Prof Ojienda relied on his written submissions dated March 27, 2023, which he briefly orally highlighted in Court. Mr Nyamwange associated himself with the submissions by Prof Ojienda and supported the motion. Dr. Magare Gikenyi, J Benjamin equally relied on her written submissions dated April 10, 2023 which she briefly orally highlighted. Mr Kemboi on the other hand while opposing the motion did not file any submissions and associated himself with the submissions by the 1<sup>st</sup> respondent.
8. It was submitted for the applicants that they had an arguable appeal for the reasons, *inter alia*, that the issue as to whether the court acted judiciously in holding the 1<sup>st</sup> applicant in contempt for actions that were pursued in compliance with its orders dated December 5, 2022, was an arguable issue and that further the appeal seeks a determination as to whether the court was rightfully seized of jurisdiction to determine the contempt application for a fresh nomination process that had not been successfully challenged in any court of law.
9. As to whether the appeal would be rendered nugatory if the stay orders were not granted, it was submitted that if the 1<sup>st</sup> applicant was sentenced, the action will be irreversible and its effect on the 1<sup>st</sup> applicant and the governance of the 2<sup>nd</sup> applicant could not be compensated by way of damages. Consequently, we were urged to allow the motion.
10. On the other hand, it was submitted by the 1<sup>st</sup> respondent that the jurisdiction of this Court had not been properly invoked as no valid Notice of Appeal had been placed before the Court against the decision of the superior court and that further, the 1<sup>st</sup> applicant was seeking speculative orders as she was yet to be sentenced. As to whether the appeal would be rendered nugatory if stay orders were not granted, it was submitted that the applicants were abusing the Court process as they were seeking stay of execution of a yet to be known verdict on contempt ruling and that further they would not suffer “uncompensatable” injury in a verdict which was not known. Consequently, we were urged to dismiss the applicants’ motion with costs to the respondents.
11. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the 1<sup>st</sup> respondent’s replying affidavit, the rival submissions by the parties, the cited authorities and the law.
12. The applicants motion is brought inter alia under Rule (5)(2)(b) of this Court. Rule 5 (2) (b) of this Court’s Rules which guide the Court in applications of these nature provides:

“(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:



- a. ...
  - b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.” (Emphasis ours).
13. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2)(b) to grant an order of stay of execution/proceedings or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR.
  14. We have carefully perused the Draft Memorandum of Appeal that has been annexed to the motion and from a cursory perusal of the same, we are satisfied that the applicants have demonstrated that they have an arguable appeal worthy of consideration by this Court for reasons *inter alia*, the issue whether the learned judge erred in law and fact by “arrogating herself jurisdiction on a dispute that has statutory remedies” is a weighty issue that cannot be just wished away. Of course we are mindful of the fact that we can say no more at this stage regarding arguability of the intended appeal lest we embarrass the bench that may eventually be seized of the intended appeal. Be that as it may, we are satisfied that the applicants have shown to the satisfaction of this Court that they have an arguable appeal.
  15. Regarding the contention by the 1<sup>st</sup> respondent that there is no valid Notice of Appeal/, we have looked at the motion and there is indeed a Notice of Appeal dated March 22, 2023 annexed to the motion. The contention by the 1<sup>st</sup> respondent, that there is no valid Notice of Appeal is clearly therefore without any basis.
  16. On the nugatory aspect, the 1<sup>st</sup> applicant has already been found to be in contempt of court. Additionally, it has been contended that the 1<sup>st</sup> applicant was found to be in contempt of court by a court that did not have the requisite jurisdiction and if this were found to be the case (and we are not saying it is), the applicants appeal will be rendered nugatory and an exercise in futility and the substratum of the appeal will have been lost. Furthermore, in the unlikely event that the 1<sup>st</sup> applicant is sent to prison, she will have lost her right to liberty which in our view cannot be compensated by way of damages.
  17. Ultimately therefore, we are satisfied that the applicants have established and satisfied the twin principles for our consideration in exercise of our discretion to grant an order of stay of execution as laid out in the Stanley Kangethe case (*supra*).
  18. It is in view of the above that we find merit in the applicants’ motion dated March 21, 2023, which we accordingly allow in terms of prayer 3 thereof in the following terms:
    1. An order of Stay of Execution is hereby issued staying in entirety the Ruling and Orders of Hon Wasilwa J, dated March 21, 2023, in Nakuru ELRC Petition No 013 of 2022, Dr Magare Gikenyi J Benjamin V Nakuru County Government & 3 Others & 10 Interested Parties, Consolidated with ELRC Petition No 014 of 2022 Daniel K. Arap Bett V The Governor Nakuru County Government & 3 Others & 10 Interested Parties pending the hearing and determination of the intended appeal.
  19. The costs of this motion shall abide the outcome of the intended appeal.



DATED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**

