Leader of Majority Party, National Assembly v Okoiti & 5 others (Civil Application E086, E092, E093 & E094 of 2023 (Consolidated)) [2023] KECA 856 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 856 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E086, E092, E093 & E094 OF 2023 (CONSOLIDATED)

HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA

JULY 7, 2023

BETWEEN

LEADER OF MAJORITY PARTY, NATIONAL ASSEMBLY ..... APPLICANT

AND

OKIYA OMTATAH OKOITI ..... 1ST RESPONDENT

NATIONAL ASSEMBLY ..... 2ND RESPONDENT

PARLIAMENTARY SERVICE COMMISSION ..... 3RD RESPONDENT

THE DIRECTOR GENERAL PARLIAMENTARY JOINT SERVICES .... 4TH RESPONDENT

THE HON THE ATTORNEY GENERAL ..... 5TH RESPONDENT

THE SENATE ..... 6TH RESPONDENT

(Being an application for stay of proceedings pending the determination of an appeal from the ruling and orders of the High Court of Kenya at Nairobi (Ongudi, J.) dated 13th February 2023 in Nairobi Constitutional Petition No. E 469 of 2022)

RULING

1. Nairobi Civil Application No E086 was listed before us with regard to a notice of motion seeking to stay proceedings in Nairobi High Court Constitutional Petition No E469 of 2022 pending hearing and determination of an appeal from the ruling and orders of Ongudi J, given on February 13, 2023. Also listed before us were Civil Application Nos E092 of 2023, No E093 of 2023 and No E094 of 2023. Basically, all the applications before us were made pursuant to rule 5(2) (b) of the *Court of Appeal Rules* seeking stay of further proceedings in Milimani Constitutional Petition No E469 of 2022 pending the hearing and determination of this appeal from the ruling and orders of Ongudi, J dated February 13, 2023. It was thus agreed by all parties that the matters be consolidated and heard together, resulting

in File No E086 of 2023 being the lead file. The parties were thus assigned appearances in the matter in the following manner:

Leader of the Majority National Assembly - 1st Applicant

The Chairperson of Liason Committee National Assembly - 2nd Applicant Hon Samuel Chepkonga, MP - 3rd Applicant

Leader of the Minority Party - 4th Applicant

v

Okiya Omtatah Okoiti - 1st Respondent National Assembly - 2nd Respondent

Public Service Commission - 3rd Respondent

Director General Parliamentary Joint Services - 4th Respondent Hon The Attorney General - 5th Respondent

The Senate - 6th Respondent

2. The genesis of this matter stems from the petition filed by the 1st respondent, Okiya Omtatah Okoiti before the High Court at Milimani, Constitutional Petition No E469 of 2022 - *Okiya Omtatah v the National Assembly & others* (the Petition) dated October 6, 2022 seeking a declaration that the *Parliamentary Service Commission Act* No 22 of 2019 and section 2(1) (c) of the *Public Finance Management Act* No 18 of 2021, as amended by the *Public Finance Management Act* (Amendment) Act No 6 of 2014, and the *Statute Law Miscellaneous Amendment) Act* No 12 of 2019 be declared unconstitutional. The main ground for challenging the Parliamentary Service Act is that it was enacted without the Senate's participation and, yet, it affects the functions of the Senate.

3. The 1st respondent was also aggrieved by section 2(1) (d) of the *Public Finance Management Act* and the amendments of the said section vide the Public Finance Management (Amendment) Act No 6 of 2014 and the *Statute Law (Miscellaneous Amendment) Act* No 12 of 2019 on the grounds that the said amendments usurp the role of the Clerk of the Senate, who, under the *Constitution*, is the Accounting Officer for the entire Parliamentary Service, including the National Assembly. The petition also sought an order of certiorari to quash the impugned provisions in the aforesaid legislation.

4. The 6th respondent supported the petition whilst the 2nd - 5th respondents were opposed to the same.

5. The applicants filed separate applications in the Constitutional Petition No E469 of 2022 seeking to be joined as interested parties to the Petition, contending that they had an identifiable stake in the outcome of the petition. By a ruling delivered on February 13, 2023, the trial court dismissed the said application with no order as to costs pointing out that:

> "...What is being challenged is a statute that was enacted (*Parliamentary Service Act*-No 22 of 2019), and various sections of statutes which were allegedly enacted without the participation of the Senate. The National Assembly which comprises of all the members of Parliament is the body that enacts legislation. Any special role that may have been performed by the applicants in the enactment of the law that is being challenged will be well highlighted through the 1st respondent. No individual Member of Parliament will be personally affected by the outcome of these proceedings, to make them participate in the suit, as parties.
>
> Will this Court be able to reach a definitive determination in the petition without the intended interested parties? The answer is yes, the reason being that the 1st respondent will bring on board all the material that the applicants have. This will avoid unnecessary

repetition of facts.... I conclude that the applications for joinder ... have not satisfied the set principles. They are dismissed with no order for costs."

6. The applicants, aggrieved by the said ruling, filed applications seeking orders to stay the proceedings arguing that the High Court's decision denied them the right to be heard in the Petition, whose determination affects their respective mandate and operations, and hence the appeal against the impugned ruling in its entirety. The applicants describe the pending appeal as arguable, drawing from the case of *George Mike Wanjohi v Stephen Kariuki & 5 others*, SC Civil Application No 6 of 2014 which defines an arguable appeal as

> "one that elicits recognizable controversies that purely bear constitutional dimension and effect"

and the case of *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR where it was held that an arguable appeal need not necessarily succeed, but is not frivolous, the appeal is described as arguable. Among the grounds raised is that:

> the learned Judge failed to appreciate the fact that inclusion of the applicants in the matter will afford the Court an opportunity to hear the various perspectives of the concerned parties which will in turn enable it to conclusively determine the matter; their respective personal interests in the matter are different from that of the 2nd respondent and will remain unarticulated unless enjoined in the matter, thus each of their presence will enable the Court to appreciate all the issues in dispute; the National Assembly was sued in the proceedings before its passing the legislation without Senate's participation, and each intends to demonstrate that the impugned provisions were necessary not only for his functions but also the functions of all offices in the National Assembly. Consequently, there is no likelihood that the National Assembly will highlight their respective grievances.

7. To demonstrate that the appeal is arguable with regard to the question of joinder, the 1st applicant, by the supporting affidavit sworn by Hon Kimani Ichung'wah, the Leader of Majority Party in the National Assembly, maintains that, as a member of the National Assembly, he will be personally and directly affected by the outcome of the proceedings to warrant his participation. He explained that, as Leader of the Majority Party tasked with the responsibility of advancing the goals of the National Assembly and general supervision of legislative business in the National Assembly, he is best placed to adduce evidence to demonstrate that the impugned provisions are necessary for the PSC to facilitate the office the 1st applicant holds; that, as Leader of the Majority Party, he is best placed to adduce evidence to demonstrate that the impugned provisions are necessary for the Parliamentary Service Commission to facilitate the office he holds to perform its Constitutional duties and mandate pursuant to Articles 94, 95, 108 and 109 of the *Constitution*. It is his contention that it is an erroneous perception to impute that the application was by individual members who will not be affected personally by the proceedings before the Superior Court.

8. He further states that the facts that the National Assembly will present are not the same as what the 3rd respondent offers; that what he intends to offer will help the Court to understand the 1st applicant's functions; that his office was crucial in passing the impugned law; and that he indents to submit on how that law came into being. He maintains that there will be no repetition of facts and evidence.

9. In support of the limb on arguability of the appeal, Miss Nganyi, learned Counsel for the Office of the Liason Committee, the 2nd applicant, pointed out to the composition of the Committee, which is established to ensure that the committees of the National Assembly perform their constitutional mandate, Counsel drew our attention to the supporting affidavit dated March 13, 2023 sworn by

Hon Boss Gladys Jepkosgei, the Deputy Speaker of the National Assembly and Chairperson, Liaison Committee of the National Assembly. She submitted that the appeal raises 5 arguable grounds, key among them being the unique role that the 2nd applicant has, being in charge of all committees in Parliament, deliberating and operating the annual budget, and to address the two legislations without including it would be grossly unjust. Further, that although membership of the committee is drawn from the house, the applicant undertakes its functions independently from the National Assembly; and that the application having been made on behalf of all committees of the National Assembly who depend on the impugned provisions to ensure that they are well facilitated, there was no way that the trial court can reach a definite determination without its participation.

10. Further, that the effect of the order sought in the petition would mean that the duties of the accounting officer would be vested on the Clerk of the Senate, and the committees would need to be facilitated by a Clerk of another House contrary to Article 128 of the *Constitution*; so to that extent any decision by the High Court would affect the applicant and all committees directly. The 2nd applicant also intends to demonstrate that that the impugned statutes were necessary for its functions as well as the function of all the committees of the National Assembly, and there is no likelihood that the National Assembly will highlight the applicant's grievances; and it will be driven from the seat of justice by being denied the right to be heard in a matter in which it has an identifiable stake.

11. The 3rd applicant, Samuel Chepkonga, MP explains in his affidavit dated March 7, 2023, through learned Counsel Mr. Emacar, that the 3rd applicant is well versed with the events leading to the legislations as he is a Member of Parliament who was also in office when the impugned amendments were passed (2013-2017); that there would not be any unnecessary repetition of facts during the determination of the petition, as the material the 3rd applicant intends to rely on are facts relating to the period when he was Commissioner to the Parliamentary Service Commission (2018-2022) and also matters within his knowledge during his tenure as a member of Parliament (2013-2017) when the impugned amendments were passed; that the National Assembly is not capable of representing the unique interests of the applicant in an individual capacity when the impugned amendments were passed and as such he is the only one that can represent his interest; that being a member of the National Assembly, he requires facilitation to perform his constitutional and National mandate, and as such the outcome of the petition which seeks to challenge the constitutionality and legality of the impugned statutes as relates to the appointment of the Clerk of the National Assembly as an accounting officer will largely impact his operations, and to that extent any decision by the High Court will affect the applicant directly.

12. The 4th applicant is the Leader of the Minority, and through the affidavit dated 8th March sworn by Hon Opiyo Wandayi, Member of Parliament, explains that unlike an ordinary MP with no leadership role, as the Leader of the Minority Party his role is to guide legislation through the House, policy formulation and policy decisions, assisting in planning of the House business, determining legislative priorities and facilitating the orderly conduct of House business; so he will be directly affected by the outcome of the petition. It is his contention that he is best placed to adduce evidence to demonstrate that the statutes sought to be declared unconstitutional facilitate the office of the Leader of the Minority in the National Assembly to perform its constitutional mandate and responsibilities; that any decision by the trial court in relation to the petition will undermine the independence of the operation of the office of the applicant as the petition seeks to have a situation where the Clerk of the Senate is the only accounting officer of the PSC.

13. All the applicants are also apprehensive that unless stay of all further proceedings in Milimani High Court Constitutional Petition No E469 of 2022 *Okiya Omtatah v The National Assembly & others* is granted, hearing of the matter will proceed at the High Court, and this poses a threat to their right

to a fair hearing as enshrined in Article 50 of the *Constitution*, as they will be condemned unheard in a matter in which they have demonstrable identifiable stake. Each laments that the orders which will be made by the trial court are likely to paralyze or greatly affect operations of the 1st applicant which is funded by public funds. In support of this limb, reference is made to the decision in *Reliance Bank Ltd v Norlake Investments* to submit that if what is sought to be stayed is allowed to happen, then damages may not be adequate compensation, as the matter will proceed to full determination without their participation, and the appeal will be rendered moot.

14. We are also urged to take into account public interest, with the argument being that in this instance, public interest dictates that a smooth running of Parliament is in the public interest as it ensures proper oversight of public resources, adequate representation of the people, and legislation, thus staying implementation of the impugned provisions will hamper the smooth running of parliament. Secondly, that failure to stay the proceedings would mean they will not be heard, and the shared refrain is that it is in the public interest to uphold the Bill of Rights on the right to be heard, and save on judicial time, because should the appeal succeed, then the matter would have to be heard de novo, which would not make economic sense of judicial time management.

15. The 1st and 6th respondents in opposing the application submit there is nothing arguable in the appeal as the applicant has failed to demonstrate that he has an identifiable and proximate stake in the proceedings, nor has there been a demonstration of the prejudice that will be suffered in the event of non-joinder. They reiterate that the applicants as members of the National Assembly are not separate and distinct and independent from the 2nd respondent, as such there is no identifiable stake separate from the 2nd and 3rd respondent.

16. That the National Assembly representing the people of the constituency as well as special interests and the Public Service Commission are very well able to canvass the issues addressed by the applicant; the mere fact that the 2nd applicant served as a Commissioner in the 3rd respondent between 2018 and 2022, is not enough to demonstrate sufficient stake in the matter the joinder of the applicant(s) in the constitutional petition has the potential to open flood gates for similar applications by members of the 2nd respondent leading to unnecessary delays in the determination of this matter and that it is not in the public interest that the petition does proceed expeditiously.

17. That in any event, the applicant has failed to show how the proceedings in the trial court would be rendered nugatory should stay of execution be denied.

18. We refer to *Halsbury's Laws of England*, 4th Edition Vol 37 at p 330 and p 332 which makes the following observation:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases .... It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case".

19. We are alive to the fact that stay of proceedings is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. Indeed the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR spells out clearly that:

> " The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of Rule 5(2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts...."

20. We note with approval the observation made by the High Court in *Kenya Wildlife Service v James Mutembei* [2019] eKLR, where Gikonyo J, pointed out that:

> " Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent."

21. We shall bear the above in mind even as we consider the question on whether the applicants have demonstrated an arguable case. We have considered the application, the grounds in support thereof, the affidavits, the submissions, the authorities cited and the law. The jurisdiction of this Court under rule 5(2) (b) of this Court's *Rules* is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.

22. The principles for granting a stay of execution, injunction or stay of proceedings under rule 5(2) (b) of this Court's *Rules* are well settled. This Court in the case of *Trust Bank Limited and another v Investech Bank Limited and 3 others* [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

> " 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..."

23. In considering the twin principles set out above, we are cognizant that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court's satisfaction.

As to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR where this Court described an arguable appeal in the following terms:

> " 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.

viii) In considering an application brought under Rule 5(2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

24. We also bear in mind that an arguable point as is trite law is not necessarily one that must succeed but merely one that is deserving of consideration by the court. Our careful consideration of the grounds set out in the motion and the memorandum of appeal, in view raises the arguable issue of whether the trial court erred in disallowing the application for joinder of the applicant.

25. On the appeal being rendered nugatory, this Court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002]1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

26. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai Civil App. 53 of 2010 this court held:

> "...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

27. We take note that the High Court dismissed the applicant's application for joinder. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is no positive and enforceable order made which can be the subject matter of the application for stay of proceedings.

28. Nonetheless, even if it was to be argued that the nature of the negative order results in an undesired event taking place, then the question that arises is whether the result would be that the applicants will have been denied the right to be heard in the proceedings. This is the limb that teeters on a rather unstable footing, as all the applicants herein either fall under the National Assembly and the Parliamentary Service Commission. This would mean that should they desire to have their perceived special roles or interests articulated, nothing would hinder them from instructing the 1st and 2nd respondents on any evidence that the may wish to adduce by way of supporting affidavits. The result is that the complaint about being denied a right to be heard is a situation that can easily be salvaged or remedied and the applicants have not demonstrated that the appeal will be rendered nugatory if the proceedings before the lower court are not stayed.

29. Although ideally we would stop at the point of considering the twin principles, and the fact that one twin has been rendered still-born, we have been asked to consider another aspect identified by the Supreme Court in *Gitirau Peter Munya v Dickosn Mwenda Kithinji & 2 Others* [2014] eKLR, which added a third consideration to grant stay under Rule 5 (2)(b), this being whether it is in the public interest that stay be granted. We have anxiously sieved through each respective argument raised with regard to public interest alluding to the smooth running of Parliament so as it ensures proper oversight of public resources, adequate representation of the people, and legislation, as weighed against the scales for stopping the proceedings versus allowing them to proceed. In our considered view, the aspiration of Kenyans, their confidence in institutions assigned the role of dispute resolution; and their affirmation in the *Constitution* that disputes in courts and tribunals be resolved expeditiously, the only credible outcome is that it cannot be in the public interest to stay the proceedings, yet their representatives have

avenues readily available, through which they can easily use to articulate whatever concerns they may have. Ultimately, the pendulum on public interest does not swing in favour of the applicants prayers.

30. In view of the foregoing, we find that the applicant has failed to satisfy the principles for grant of the orders sought pursuant to rule 5(2) (b) of this Court's *Rules*, and accordingly, the Notice of Motion dated April 4, 2023 fails and is hereby dismissed. The costs shall abide the outcome of the appeal.

31. As the applicant is required to establish both limbs, the applicant has failed to satisfy the requirements under Rule 5(2) (b) of this Court's *Rules*. Accordingly the Notice of Motion is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR