



Waititu Babayao v County Assembly of Kiambu & 6 others (Civil Application E096 of 2023) [2023] KECA 1427 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1427 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E096 OF 2023
K M'INOTI, HA OMONDI & GWN MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

FERDINARD NDUNG'U WAITITU BABAYAO APPLICANT

AND

COUNTY ASSEMBLY OF KIAMBU 1ST RESPONDENT

KIAMBU COUNTY ASSEMBLY 2ND RESPONDENT

THE SENATE 3RD RESPONDENT

SPEAKER, THE SENATE 4TH RESPONDENT

JAMES KARANJA NYORO 5TH RESPONDENT

KIAMBU COUNTY EXECUTIVE COMMITTEE 6TH RESPONDENT

ANTHONY IKONYA MWANIKI 7TH RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the High Court at Nairobi (Dulu, Nzioka and Okwany, JJ.) dated 24th February 2022 in HC. Const. Pet. No. 29 of 2020 Consolidated with Pet. No. 87 of 2020)

RULING

1. At all material times, the applicant, Ferdinard Ndungu Waititu Babayao was the Governor of Kiambu County, one of the 47 Counties of Kenya. On 3rd December 2019 and pursuant to Article 181 of *Constitution of Kenya*, a motion was presented before the County Assembly of Kiambu for his impeachment and removal from the office of Governor. The grounds upon which the motion was based were:
 - i. gross violation of Articles 6, 10, 176, 185, 201 and 227 of *Constitution of Kenya*;



- ii. violation of sections 87, 91 and 115 of the [County Government Act](#);
 - iii. violation of sections 5, 107 92) (e), 123 and 130 (1) (b) (i) of the [Public Finance Management Act](#);
 - iv. violation of Article 40 of [Constitution](#);
 - v. abuse of office and gross misconduct; and
 - vi. contravention of regulation 25(1)(b) of the [Public Financial Management \(County Regulations\) 2015](#).
2. On 19th December 2019, the County Assembly passed the motion to impeach the applicant and the next day, the Speaker of the County Assembly informed the Speaker of the Senate of Kenya of the resolution. The Senate resolved, pursuant to section 33 of the [County Governments Act, 2012](#), to investigate the removal by impeachment of the applicant as Governor of Kiambu County. After conducting a hearing, on 29th January 2020, the Senate resolved to remove the applicant by impeachment as Governor for gross violation of [Constitution of Kenya](#), the [County Governments Act](#), the [Public Finance Management Act](#), and the [Public Procurement and Disposal Act](#); commission of crimes under national law; and abuse of office and or gross misconduct. Upon removal of the applicant from office, the 5th respondent, James Karanja Nyoro, who had been elected in 2017 as the applicant's Deputy Governor, was sworn in and assumed office as the Governor, Kiambu County, and served the rest of the applicant's term. It is apt to point out that the applicant's impeachment notwithstanding, his term of office as Governor came to an end in 2022 and presently, the substantive Governor in office in Kiambu County was elected in the general elections held in August 2022.
 3. The applicant was aggrieved by his impeachment and on 30th January 2020 he lodged Petition no 29 of 2020 in the High Court of Kenya at Nairobi challenging his impeachment. That petition was consolidated with Petition no 87 of 2020 filed by the 7th Respondent, Anthony Ikonya Mwaniki, and by a judgment dated 24th February 2022, the High Court (Dulu, Nzioka and Okwany, JJ.) found no merit in the consolidated petition and dismissed the same. On 28th February 2022, the applicant lodged a notice of appeal, evincing intention to appeal the judgment of the High Court and subsequently filed Civil Appeal no E096 of 2023.
 4. On 2nd March 2023, more than one year after the judgment of the High Court, the applicant filed the application now before us in which he seeks stay of execution of the decision of the Senate as well as the said judgment. What appears to have triggered the application for stay of execution was the applicant's contentious appointment on 2nd December 2022 by His Excellency the President as a member of the Commission on the Rehabilitation of the Nairobi River (the Commission). Immediately upon his appointment, some public-spirited petitioners lodged in the High Court Petition no E549 of 2022 and Petition no E022 of 2023 challenging the applicant's appointment as a violation of Constitution, given his impeachment and removal from office for violation of Constitution, laws of Kenya, abuse of office and gross misconduct. On 10th February 2023, the High Court granted conservatory orders which effectively barred the applicant from being sworn in and assuming office in the Commission.
 5. In his application now before us, the applicant prays for a substantive prayer worded as follows:

" Pending the hearing and determination of the appeal, this Honourable Court be pleased to stay the resolutions of the Senate of Kenya made on 29th January 2020 and published in the Kenya Gazette no 672 and the judgment of the High Court in Nairobi delivered on 24th



February 2022 by Hon. Justice George Dulu, Hon. Justice Roseline (sic) Nzioka and Hon. Justice Wilfrida Okwany on 24th February 2022 (sic).”

6. It is important to note at this stage that although some of the grounds upon which the application for stay of execution is based relate to the conservatory orders granted by the High Court on 10th February 2023 barring the applicant from assuming office in the Commission, the application before us is based on the notice and record of appeal lodged by the applicant against the judgment of the High Court dated 24th February 2022. To that extent, therefore, the applicant’s anxiety that due to the conservatory orders his term at the Commission will expire before his appeal is heard and determined, is not an issue properly before us.
7. In support of his application, the applicant, through his learned counsel Mr. Nyamu, submitted that his intended appeal is arguable. Most interesting, the grounds of appeal which the appellant relies on attack directly the decisions of the Kiambu County Assembly and the Senate of Kenya and rather indirectly the judgment of the High Court, which the applicant is appealing. Among the issues he intends to canvass before this Court include that he was denied the right to a fair hearing at the time of impeachment when he was denied an opportunity to table his evidence; lack of quorum at the time of impeachment; lack of public participation in the impeachment process; and failure to furnish him with the Senate Committee’s report on his impeachment. On public participation in the impeachment proceedings, the applicant relied on the decision of this Court in [Martin Nyagah Wambora v County Assembly of Embu](#) [2015] eKLR.
8. On whether the intended appeal will be rendered nugatory, the applicant submitted that he stands to suffer irreparable loss and damage because he has been prohibited from taking up his office in the Commission and his term of office is likely to expire before the appeal is heard and determined, thus denying him the opportunity to serve. The applicant added that he was erroneously barred from office whilst he had not exhausted his right of appeal against his impeachment. He relied on Article 27 of [Constitution](#) and submitted that he is entitled to the protection of the law and that under Article 50(2) (a) of [Constitution](#), he is presumed innocent until he is proven guilty after exhausting all avenues of appeal. The applicant used the analogy of Article 99(3) of [Constitution](#) which provides that a person who is subject to a sentence of six months imprisonment or is found to have violated Chapter Six of [Constitution](#) is disqualified from election as a Member of Parliament. However, he contended, such disqualification does not take effect until the concerned person has exhausted the possibility of appeal or review. He added that to treat him differently was discriminatory and in breach of Constitution.
9. The 1st and 2nd respondents, represented by Mr. Karugu, learned counsel, did not file any affidavit or submissions. They merely informed the Court that they did not oppose the application. Similarly, Ms. Wairimu, learned counsel holding brief for Mr. Mungai for the 5th respondent did not file any response to the application or submissions and indicated that the 5th respondent was not taking any position on the application. The 6th and 7th respondents did not attend Court though they were duly served with the hearing notice.
10. The 3rd and 4th respondents, who were represented by Ms. Thanji opposed the application vide written submissions dated 6th April 2023. They submitted that in [Mike Mbuvi Sonko v Clerk, County Assembly of Nairobi & Others](#), pet. no 11 (E008) of 2022, [Martin Nyagah Wambora & 3 others v Speaker of the Senate & 6 Others](#), [2014] eKLR and [Martin Nyagah Wambora v County Assembly of Embu & 37 Others](#) [2014] eKLR, the relevant superior courts all the way to the Supreme Court settled the legal issues raised by the applicant on impeachment of a Governor under Article 181 of [Constitution](#) and section 33 of the [County Governments Act](#) and therefore the appeal is not arguable.



11. On whether the appeal risked being rendered nugatory, these respondents submitted that the applicant had failed to demonstrate how the appeal would be rendered nugatory. They also contended that the High Court, having merely dismissed the applicant’s petition, did not make any positive order capable of being stayed by this Court. These respondents added that the applicant’s impeachment and removal from office of Governor was upheld by the High Court after which he left office and a general election was subsequently held resulting in the election of a new Governor. As far as they were concerned, the application had been overtaken by events and there was nothing to preserve through an order of stay of execution. It was also contended that public interest lay in refusing to grant the orders sought by the applicant.
12. We have anxiously considered this application, the submissions by the parties and the authorities they cited. It cannot be gainsaid that under rule 5(2) (b), this Court has jurisdiction to issue three kinds of orders pending the hearing and determination of an appeal or intended appeal, to preserve their substratum. Those orders are for stay of execution, injunction or stay of proceedings. In his application the applicant seeks stay of execution of the decision of the Senate and the judgment of the High Court dated 24th February 2022. The decision which is the subject of appeal, according to the notice of appeal, is the judgment of the High Court dated 24th February, 2022 and not the decision of the Senate. The applicant had the option of applying for an injunction but deliberately opted for stay of execution of the judgment of the High Court.
13. The first hurdle that the applicant has to jump to entitle him to an order of stay of execution is to show the existence of a judgment or a ruling the subject of a notice of appeal, which is capable of being stayed. We agree with the 3rd and 4th respondents that the judgement of the High Court was in the nature of a negative order. The court merely dismissed the applicant’s petition. This explains the anomaly we have already noted, whereby the applicant’s complaint as framed is against the decisions of the County Assembly of Kiambu and the Senate rather than directly against the judgment of the High Court. In *Hon. Peter Anyang Nyong'o & Two Others v The Minister for Finance & Another*, CA. no Nai. 273 of 2007 this Court reiterated that:

“This Court has consistently construed Rule 5 (2) (b) to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Two principles emerge from a consideration of Rule 5 (2) (b) and the two authorities to wit, that, the jurisdiction of the Court under Rule 5 (2) (b) is restricted to decisions made in Civil Proceedings and that the reliefs sought must relate to the decision of the superior court in its original or appellate jurisdiction.”
14. Decisions of this Court abound to the effect that the Court will not issue an order of stay of execution where the decision appealed against merely resulted in the dismissal of an action. In *Exclusive Estates Ltd v Kenya Posts & Telecommunications Corporation & Another* [2005] 1 EA 53, the Court held as follows:

“The stay of execution envisaged by rule 5(2) (b) of the rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the *Civil Procedure Act*... The order which dismissed the suit was a negative order which is not capable of being executed.”
15. Similarly, in *George ole Sangui v Kedong Ranch Ltd* [2015] eKLR the Court stated:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the



doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

16. For the above reason, the applicant has failed to jump the first hurdle and it is not necessary for us to delve into whether his appeal is arguable or whether it will be rendered nugatory. The Notice of Motion dated 2nd March 2023 is accordingly, dismissed.

17. Costs of the application will abide the outcome of Civil Appeal no E096 of 2023. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2023.

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

