



REPUBLIC OF KENYA



KENYA LAW
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**Cabinet Secretary Ministry of Water, Sanitation & Irrigation & another
v Omondi & another; Okello & 2 others (Interested Parties) (Civil
Application E052 of 2021) [2022] KECA 852 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KECA 852 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E052 OF 2021
PO KIAGE, M NGUGI & F TUIYOTT, JJA
APRIL 28, 2022**

BETWEEN

**CABINET SECRETARY MINISTRY OF WATER, SANITATION &
IRRIGATION 1ST APPLICANT
ATTORNEY GENERAL 2ND APPLICANT**

AND

**GEORGE OMONDI 1ST RESPONDENT
BOARD OF LAKE VICTORIA SOUTH WATER WORKS DEVELOPMENT
AGENCY 2ND RESPONDENT**

AND

**BOAZ OKELLO INTERESTED PARTY
GEORGE ODEDE INTERESTED PARTY
LAKE VICTORIA SOUTH WATER WORKS DEVELOPMENT
AGENCY INTERESTED PARTY**

*(Being an application for stay of execution and/or conservatory orders pending
the lodging, hearing & determination of the intended appeal against the
judgment & decree of the Employment & Labour Relations Court of Kenya
at Kisumu (Stephen Radido, MCLArb, J) in Petition No. E012 of 2020)*

RULING

- [1] In a judgment delivered on 26th May, 2021 in Petition No. E012 of 2020, Radido Stephen, J made three important findings: the [Water Act](#), 2016, does not clothe the Cabinet Secretary with power to appoint



the chief executive officers of Water Works Development Agencies; under the State Corporations Act, the power to appoint a chief executive of a state corporation reposes on the board of the state corporation, and; for diversity to justify fair competition and merit in the appointment to positions of state corporations, there must be demonstrable facts.

[2] Drawing from these findings, the judge ordered as follows: -

- “(i) A declaration be and is hereby issued that the involvement of the Cabinet Secretary & her decision recommending & directing the Board of the Lake Victoria South Water Works Development Agency to appoint Eng. Boaz Okoth Akello, as the Chief Executive Officer of the Lake Victoria South Water Works Development Agency, is ultra vires the Water Act, the State Corporations Act & the Mwongozo Code.
- ii. A declaration be and is hereby issued that the power to appoint the Executive Officer of the Lake Victoria South Water Works Development Agency is the mandate of the Board of Lake Victoria South Water Works Development Agency.
- ii. A declaration be and is hereby issued that the appointment of Eng. Boaz Okoth Akello, as the Chief Executive Officer of Lake Victoria South Water Works Development Agency, is contrary to the law & is hereby invalidated.”

[3] The Attorney General (AG) is aggrieved by that decision, intends to challenge it, and has filed a Notice of Appeal in accordance with Rule 75 (1) of the Court of Appeal Rules. In the meantime, by a Notice of Motion dated 7th June, 2021, the AG seeks the following orders: -

- “(i) spent
- (ii) spent
- (iii) That this Honourable Court be pleased to grant a stay of execution of the judgment delivered on 26th May, 2021 by Hon. Justice Radido Stephen, MCI Arb pending the hearing and determination of the intended appeal.
- (iv) That this Honourable court be pleased to grant of any further proceedings pursuant to the judgment delivered on 26th May, 2021 by Hon. Radido Stephen, MCI Arb pending the hearing and determination of the intended appeal or on such terms as he court may deem just.
- (v) That this Court be pleased to grant any such orders as may deem fit and just to grant; and
- (vi) That costs of this application be in the cause.”

[4] The AG urges us to find that the appeal is arguable. The AG further argues that execution of the orders issued by the trial court will create a state of affairs that will irreparably affect or negate the very essence of the AG's case if the appeal were to succeed. In a word, that the applicants' appeal will be rendered nugatory if stay is not granted.

[5] The principles upon which this Court grants or refuses stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules is a well-beaten path. In Githinji



v. Amrit & Another [2004], for example, this Court noted;

“The principles applicable in an application under Rule 5

(2) (b) of the Court of Appeal Rules are now well settled.

The applicant must [first] demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would be rendered nugatory if the application for stay was refused.”

[6] The threshold to be achieved in demonstrating that an appeal is arguable is low. It is that the appeal, although not a trifle, must not necessarily succeed. Looking at the draft memorandum of appeal, one is able to identify at least one arguable matter: Can it be said that the recommendation of the Board of Lake Victoria South Water Works Development Agency forwarding three names to the Cabinet Secretary to appoint a chief executive officer from one of the three is an abdication of the Board’s power to appoint a chief executive officer?

[7] As to the nugatory limb, the applicant makes three arguments: that failure to stay the order will cause the Cabinet Secretary to lose his/her statutory power to appoint or take part in the appointment of the chief executive officer in the water agency; the implementation of the orders will have a wider bearing in the appointment of chief executive officers in state agents in other ministries; the decision creates a misleading precedent which shall potentially affect existing appointments and in the end a lot of public funds will be used in the recruitment and appointment processes of the chief executive officers in all state agencies in the country.

[8] We have given this matter due consideration.

[9] We start by observing that the orders issued by the trial court, which we have set out elsewhere in this ruling, were specific to the appointment process of the chief executive officer of the Lake Victoria South Water Works Development Agency and invalidated the appointment of Eng. Boaz Okoth Akello. We are therefore unable to follow the argument that the implementation of the orders will affect or cause confusion in respect to the role or lack thereof of Cabinet Secretaries in the appointment of state corporations falling under their respective ministries. The order is not a general order and another court of concurrent jurisdiction confronted with a similar question could either choose to be persuaded or not by the rationale of the decision.

[10] As regards whether to implement an order whose effect is to bar the Cabinet Secretary from making the said appointment will render the intended appeal nugatory, we were not told that prior to the specific attempt to appoint the 1st interested party, the Cabinet Secretary was always involved in past appointments. In the absence of that information, we are unable to say that the appeal will be rendered nugatory if stay is not granted. In the end it seems to us that public interest is better served by not allowing an appointment which a competent court has found to be unlawful from taking effect. In doing so, we take comfort in the information made available to us at plenary hearing by counsel for the applicant that the position of chief executive officer currently has an occupant in an acting capacity. Technically, the state corporation is not without a head.

[11] The Notice of Motion of 7th June 2021 is without merit and is hereby dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

P. O. KIAGE

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**JUDGE OF APPEAL
MUMBI NGUGI**

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**JUDGE OF APPEAL
F. TUIYOTT**

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

