



**County Assembly of Tana River & 4 others v Nkaduda (Civil Application
E065 of 2021) [2022] KECA 781 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KECA 781 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E065 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JUNE 24, 2022**

BETWEEN

**COUNTY ASSEMBLY OF TANA RIVER 1ST APPLICANT
CLERK, THE COUNTY ASSEMBLY OF TANA RIVER 2ND APPLICANT
MOHAMMED BUYA YUSA 3RD APPLICANT
GALOLE SADDAM HUSSEIN 4TH APPLICANT
ABDI ERGAMISO GOBU 5TH APPLICANT**

AND

MICHAEL JUSTIN NKADUDA RESPONDENT

*(An application for stay of proceedings and of execution of the ruling of
the Employment and Labour Relations Court at Malindi (B. Ongaya
J.) delivered on 29th October 2021 in Malindi ELRC Petition 6 of 2021)*

RULING

1. The Applicants, in an application brought by way of a Notice of Motion dated 21st December 2021, seek orders of stay of execution of the judgment dated 29th October 2021 and consequential orders delivered in Malindi ELRC Petition No. 6 of 2021, and a stay of further proceedings therein, pending the hearing and determination of their appeal therefrom, being Malindi Civil Appeal No. E61 of 2021. The Applicants also seek an injunction restraining the Respondent from assuming office as Speaker of the County Assembly of Tana River pending the hearing and determination of the petition in ELRC and their appeal in Malindi Civil Appeal No. E61 of 2021.
2. The application is principally brought pursuant to rule 5 (2) (b) of the *Court of Appeal Rules*, 2010, and is supported by an affidavit sworn on 21st December 2021 by Abdullahi Hussein, the Clerk of the



County Assembly of Tana River and 2nd Applicant herein. The Applicants' case is that the ELRC, in the impugned ruling dated 29th October 2021, only allowed an application by the Respondent and issued conservatory orders in the impugned ruling dated 29th October 2021 restraining the Applicants from implementing or enforcing its resolution of 4th May 2021 to gazette or declare a vacancy or fill the position of the Speaker of the County Assembly of Tana River.

3. Further, that the Respondent never sought any prayer for reinstatement to the office of Speaker of the County Assembly of Tana River in his application in the ELRC, even though he attempted to introduce a prayer for mandamus in his Amended Petition, and given that the Respondent had already been impeached, the only remaining part of the impeachment that could be arrested at the time of delivering of the impugned ruling was that of advertising and filling of the position of Speaker. However, that the Respondent on 10th November 2021 "stormed" the 1st Applicants office with "hired goons" with a view of accessing the office of the Speaker, leading to chaos. The Applicants are therefore apprehensive that unless the orders sought are granted they and the public will suffer irreparable loss as the Respondent is likely to cause more chaos and disrupt the normal operations of the Applicants. Further, that the Respondent will not be prejudiced as he can be adequately compensated by damages, and the Applicants are willing to abide by any conditions and terms as to security this Court may deem fit to impose. The Applicants annexed the pleadings filed in the ELRC and the impugned ruling dated and delivered on 29th October 2021 by Ongaya J. and an undated Memorandum of Appeal.
4. In response, the Respondent filed a replying affidavit he swore on 8th March 2022, wherein he detailed the pleadings filed in the ELRC and his claim therein, and averred that the effect of the impugned ruling by Ongaya J. was that he remained the Speaker of the County Assembly of Tana River and as such needed no order to be reinstated to a position he already occupies, and that the status quo order for 45 days issued by the Odongo Manani J. on the 8th December, 2021 has since lapsed. Further, that the matter at the ELRC being a constitutional petition, the trial Judge had jurisdiction to frame an appropriate remedy to give effect to the rights and fundamental freedoms breached under Article 23 of the *Constitution*.
5. The Respondent denied that he had "stormed" the 1st Applicant's office with "hired goons" and that he had promised to go back with more powerful and armed "goons", and averred that save for being stopped by the Applicants from attending the 1st Applicant's Chambers, he had continued to perform the functions of the Speaker of the 1st Applicant. In addition, that his retention as Speaker will not cause any prejudice to the 1st Applicant which employed him, and retains the prerogative of hiring and firing him as legally mandated as long as they follow due process and the law. Lastly, the Respondent contended that there is no positive order issued by the Ongaya J. on 29th October, 2021 against the Applicants that is capable of being stayed, and no substantial loss shall result to the Applicants if the orders sought are not granted. On the contrary, that he stands to suffer prejudice and loss if the orders sought by the Applicants were to be granted.
6. When the instant application came up for hearing on 23rd February 2022, learned counsel Ms. Macrine Juaje holding brief for Mr. Kilonzo appeared for the Applicants, while learned counsel Mr. Binyenya, for the Respondent was also present. Ms. Juaje orally highlighted written submissions dated 17th February 2022, wherein the facts of the application were reiterated and it was submitted that the intended appeal was arguable as the trial Court dwelt on the merits of the constitutional Petition at an interlocutory stage, and made definitive findings the Respondent's impeachment proceedings were in breach of the relevant statutory provisions, its appeal will be rendered nugatory as the trial Court has made up its mind and will be biased. Further that it is the public interest that the injunction sought is granted issue and no order of reinstatement was given, and the Respondent has already been impeached by the 1st Applicant.



7. Mr. Binyenya on his part, while also highlighting written submissions dated 8th March 2022, reiterated that the effect of the impugned ruling was to restore the status ante, and the Respondent to position of Speaker. Further that the Applicants have not met the twin principles in an application for stay and have no arguable appeal, as the impeachment process undertaken by the 1st Applicant was unprocedural, in breach of the law and was conducted unfairly, and none of the instances provided for in section 11 (1) of the *County Governments Act* 2012 for removal of a Speaker has been met or shown to exist by the Applicants to warrant issuance of stay orders. In addition, that the Respondent shall be prejudiced by losing a state office unlawfully and being subjected to an unfair process which are flagrant breaches of the law which cannot be compensated in damages.
8. The Applicants, having lodged and served a Notice of Appeal within 14 days of the impugned ruling on 10th November 2021, which position was confirmed by the Applicants' counsel and the Court after perusal of the Record of Appeal, this court is properly seized of the application, as prescribed by Rule 5 (2)(b) and held in *Halai & Another vs Thornton & Turpin (1963) Ltd.* (1990) KLR 365. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are also well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, the applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
9. On the limb of arguability, we have perused the Memorandum of Appeal and note that the Applicants allege that the conservatory orders were erroneous as the Respondent had already been impeached, and the trial Judge made final and definitive conclusions on the impeachment process and determined the entire Petition at an interlocutory stage. It was pointed out by the Respondent that these are not arguable grounds of appeal, as the impeachment process was unlawful and unfair. However, whether these grounds are merited or not is a matter that will have to be determined at a later stage, and it is sufficient at this stage that they are not frivolous grounds.
10. This Court in this regard held as follows in *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”
11. It is our view that the questions of the proper application of the conditions for grant of a conservatory orders by the trial and whether the orders it granted were final in nature at an interlocutory stage are arguable grounds. The Applicants have therefore established the existence of the first limb.
12. On the second limb of the appeal being rendered nugatory, it is notable in this regard that the trial Court in its ruling granted a conservatory order restraining the 1st, 2nd, 3rd, 4th and 5th Respondents (the Applicants herein) from “effecting, implementing or enforcing the decision or resolution on the motion passed by the 1st respondent (1st Applicant herein) on Tuesday, the 4th day of May, 2021, including not to gazette or declare the resultant vacancy or fill it with another person”. The said resolution passed on 4th May 2021 was of impeachment of the Respondent. The interpretation and effect of the said orders in our view is a matter for determination during the hearing of the substantive appeal, and in light of the grounds of appeal raised by the Applicants.



13. At this stage it is sufficient for this Court that the orders in the impugned ruling required the Applicants not to take certain positive steps, and in our view a stay of execution of the said orders or stay of proceedings in the trial Court will result in a situation where not only the appeal, but the Petition in the ELRC is rendered otiose, and will therefore unduly prejudice the Respondent. On the other hand, we also note that there was no explicit order made by the ELRC in the impugned ruling reinstating the Respondent that can be the basis for the Respondent's insistence that the said orders put him back in office.
14. In the circumstances it is our view that while the stay orders are not merited, an injunction is merited to address the prejudice the Applicants may suffer by any continued interference by the Respondent of their operations. The Applicants have thereby met the threshold for the second limb.
15. We accordingly order as follows:
 1. An order of injunction be and is hereby granted restraining the Respondent from assuming office as Speaker of the County Assembly of Tana River, pending the hearing and determination of the Applicants' appeal in Malindi Civil Appeal No. E61 of 2021.
 2. The costs of the Notice of Motion dated 21st December 2021 shall abide the outcome of the appeal in Malindi Civil Appeal No. E61 of 2021.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

