



REPUBLIC OF KENYA



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Principal Secretary Ministry of Interior & Co-ordination Of National Government & 6 others v Wako & 6 others (Civil Application 069 of 2021) [2022] KECA 856 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KECA 856 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 069 OF 2021
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
JULY 22, 2022**

BETWEEN

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT 1ST APPLICANT
REGIONAL COMMISSIONER EASTERN REGION 2ND APPLICANT
COUNTY COMMISSIONER, MARSABIT 3RD APPLICANT
DEPUTY COUNTY COMMISSIONER, MOYALE SUB-COUNTY 4TH APPLICANT
MOHAMUD MOHAMED GODANA 5TH APPLICANT
ATTORNEY GENERAL 6TH APPLICANT
PUBLIC SERVICE COMMISSION 7TH APPLICANT**

AND

**ALI JARSO WAKO 1ST RESPONDENT
BORANA ELDERS FROM HEILU LOCATION 2ND RESPONDENT
MOHAMED HAPICHA 3RD RESPONDENT
HASSAN ADAN 4TH RESPONDENT
HON. KHADIJA IBRAHIM 5TH RESPONDENT
ISSACKO GALGALLO 6TH RESPONDENT
EDDIN GABABO 7TH RESPONDENT**

(An application from the Judgment and Decree of the Employment & Labour Relations Court at Nyeri (D. K. Njagi Marete, J) dated the 26th day of July, 2021 in Page 2 of 7 Constitutional Petition No. 22 of 2021)



RULING

1. By a notice of motion dated 20th August 2021, brought under certificate of urgency, the applicants have moved this Court for an order of stay of execution of the Judgment and Decree of the Employment and Labour Relations Court (ELRC) (Marete, J) delivered in Nyeri ELRC Constitution Petition No. 22 of 2020 on 26th July, 2021 pending the hearing and determination of an intended appeal.
2. The Judgment arose from a constitutional petition which was filed by Ali Jarso Wako and Borana Elders from Heilu location. The two petitioners were aggrieved by the recommendation made for appointment of Mohamud Mohamed Godana as chief of Heilu location instead of Ali Jarso Wako whom they contend had performed better in the interview, and hailed from the Borana community which is the dominant community, but which is underrepresented. The petitioners accused the applicants of acting in violation of Articles 19, 27, 28 and 47 of *the Constitution*.
3. The learned Judge ruled in favour of the petitioners and issued a declaration that the recruitment of Mohamud Mohamed as chief of Heilu location is illegal, procedurally unfair and unconstitutional; and secondly, that it was in the interest of good governance and entrenchment of peace that the recruitment exercise of the Chief of Heilu location be repeated with the view to taking into account the law, *the Constitution*, the involvement of all stakeholders and effective public participation.
4. Being aggrieved, the applicants have filed a notice of appeal indicating their intention to appeal against the judgment, and have brought the motion seeking an order for stay of execution. The applicants contend that their intended appeal raises substantive issues of law and fact, and has overwhelming chances of success. They have exhibited a draft memorandum of appeal in which they have raised sixteen (16) grounds faulting the findings of the learned Judge and accusing him of disregarding the evidence, shifting the burden of proof to the applicants, delivering a contradictory judgment and failing to appreciate that the recruitment process was not tainted by any illegality, irrationality or unreasonableness such as to justify the court's intervention.
5. The applicants further contend that the learned Judge has directed that the recruitment process be repeated in a manner that is contrary to the provisions of the Public Service Commissions Act, Public Service Regulations & Human Resource Policies and Procedure Manual for the Public Service, and that if a stay is not granted, an improper procedure will be adopted. In addition, the results of the fresh interviews may result in a person other than Mohamud Mohamed being appointed, thereby creating confusion that will negatively impact government operations.
6. The applicants have also filed written submissions in which they urge the Court that they have complied with the principles for granting a stay of execution pending appeal as enumerated in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR. The applicants further argue that the petitioners did not pray for repetition of the recruitment exercise, and the trial Judge had no basis for issuing such order.
7. On the nugatory aspect, the applicants argue that Mohamud Mohamed has already been confirmed as a permanent and pensionable employee, and execution of the orders of the ELRC will result in his constructive dismissal without due process. The appointment of another person in the repeat exercise will further defeat the purpose of their intended appeal. In addition, unless the orders of the ELRC are stayed, the residents of Heilu location will remain without a chief, and this will subject them to unnecessary inconveniences. Further, the judgment is likely to exacerbate the tribal tension and hostility between the Gabra and Borana communities.



8. The respondents did not file any reply to the motion or any written submissions. During the hearing of the motion, Mr. Onyiso appeared for the applicants, while Mr. Alfred Nyandieka appeared for the 3rd to 7th respondents. The 1st and 2nd respondents were not represented.
9. Mr. Onyiso relied on the written submissions and authorities that had been filed on behalf of the applicants and argued that the applicants had an arguable appeal as the learned Judge erred by, amongst other things, issuing an order that had not been prayed for. He reiterated their submissions that the intended appeal would be rendered nugatory unless the orders sought were granted.
10. Mr. Nyandieka supported the applicants' motion. He urged that a Judge has no power to grant a relief not prayed for; and that the learned Judge shifted the burden of proof, and ignored the evidence which was available. He urged that it was necessary to preserve the subject matter of the suit by issuing the stay orders.
11. The application before us being one under Rule 5(2)(b) of the *Court of Appeal Rules*, the principles upon which such an application is determined are now quite clear, having been restated in many decisions. In *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* (supra), the Court revisited several of its decisions, laying down the principles upon which such an application can be determined and summarized them as follows:

- “i) In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.
- ii) The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
- (iii) The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
- iv. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
- iv. An applicant must satisfy the Court on both the twin principles.
- iv. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
- iv. 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.
- v. 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.
- iv. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
- iv. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.



iv. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim"

12. We have considered the applicants' motion, the written submissions, the authorities cited, and the oral submissions made before us. The applicants have exhibited a draft memorandum of appeal in which various issues have been raised. One of the issues raised is whether the reliefs granted by the learned Judge were sought by the petitioners. As stated in the Stanley Kang'ethe decision, a single arguable ground is sufficient to meet the requirement of arguability. The ground we have cited is sufficient in that regard.

13. As regards the nugatory aspect, there is already someone occupying the position of chief of Heilu location. If the orders issued by the learned Judge are not stayed, execution would result in recruitment, which may result in someone else being appointed, and this may pose difficulties should the applicants succeed in their appeal. It will also create unnecessary confusion and uncertainty, which would be contrary to public interest. In addition, there is danger of exacerbated tension and insecurity that may arise from the animosity between the communities.

14. In the circumstances, it is appropriate that the order of stay of execution do issue, pending the hearing of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

