



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, J.J.A.)

CIVIL APPLICATION NO. 56 OF 2020

BETWEEN

NERRY OTIENO ACHAR.....APPLICANT

AND

COUNTY ASSEMBLY OF KISUMU..... 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KISUMU..... 2ND RESPONDENT

*(Being an application for an injunction and stay of the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu
(Mathews Nduma, J.) dated 10th March, 2020*

in

Petition No. 24 of 2019

RULING OF THE COURT

It is prayed in the Motion brought under various provisions of law that pending the hearing and determination of an appeal we be pleased to issue an injunction in the form of conservatory orders maintaining the status quo obtained prior to the Judgment delivered on 10th March, 2020 staying the implementation of the decision of the County Assembly of Kisumu made pursuant to a Motion by **Steve Ouma Owiti, MCA** and approved by the County Assembly on 30th July, 2019. We are also asked to, pending the hearing and determination of an appeal, to issue such directions as would serve to preserve the subject matter of the appeal. In grounds in support of the Motion and in an affidavit of the applicant, **Nerry Otieno Achar**, it is stated *inter alia* that the Employment and Labour Relations Court (“ELRC”) at Kisumu delivered a Judgment on 10th March, 2020 where the applicant’s petition was dismissed. The applicant had gone to that court to determine whether the impeachment process carried out against him was constitutional; whether he was entitled, under **Article 50(1)** of the **Constitution of Kenya, 2010** to be supplied with documents of the allegations made against him in the impeachment proceedings; whether the impeachment proceedings were a nullity and whether the respondent’s conduct amounted to a breach of the rules of natural justice. It was further stated that the applicant who was aggrieved by the findings of that court had filed a notice of appeal; that the applicant had been invited by the County Assembly Committee to respond to 10 substantive allegations for removal from office; that the 2 days fell on a Saturday and Sunday, days when the applicant and his counsel were days of worship; that the applicant had asked for documents in support of the allegations levelled against him and a copy of the Hansard and assembly standing orders which had not been supplied; that impeachment proceedings were conducted in his absence; that he received a report of the recommendation to remove him from office; that the appeal raises weighty issues of interpretation and application of the Constitution; that execution of the Judgment if carried out it will render the appeal nugatory; that the Judge did not consider the substance of the petition and that the Judge erred in not considering and applying various provisions of the Constitution.

There is a replying affidavit by **Owen Ojuok**, the Clerk of the 1st respondent who depones that the prayer for injunction is intended to act retrospectively by stopping events that existed prior to the Judgment of the ELRC; that the petition by the applicant was dismissed and the ELRC did not order any party to do or refrain from doing something; that the applicant did on 7th July, 2020 step aside as a County Assembly Executive and that the applicant was given an opportunity on 7th August, 2019 to appear before the County Assembly to defend himself but he instead filed a petition in ELRC on 5th August, 2019.

The principles that apply in an application of this nature are well settled. An applicant must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable and, secondly, that the appeal will be rendered nugatory absent stay – See **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR**.

This Court has also consistently held, in as far as applications for stay of execution are concerned, that a negative order cannot be executed, and that where a suit has been dismissed, the resulting order is a negative order that is not amenable to a grant of stay – See **Western College & Arts & Applied Sciences v Oranga & Others [1976] KLR 63**.

The applicant's petition was dismissed by ELRC. The resultant order was a negative order that is not capable of execution. In relation to the applicant's prayer for injunction pending appeal, we are told by the Clerk of the 1st respondent, that the applicant voluntarily stepped aside as a County Assembly Executive. In these premises an injunction is not available. The Motion fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of February, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR