



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPLICATION NO. E015 OF 2021

BETWEEN

DANIEL ODHIAMBO KAUDO.....1ST APPLICANT

BRIAN ODHIAMBO.....2ND APPLICANT

AND

THE SPEAKER, COUNTY ASSEMBLY OF HOMABAY.....1ST RESPONDENT

HOMABAY COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

HOMABAY COUNTY ASSEMBLY.....3RD RESPONDENT

HON. MICHAEL NYANGI.....4TH RESPONDENT

HON. PETER JUMA OWUOR.....5TH RESPONDENT

COMMISSIONER LILLIAN OGONO.....6TH RESPONDENT

HON. JOSEPH OKOTO.....7TH RESPONDENT

(Being an Application for an injunction pending an Appeal against the judgment and decree of the Employment and Labour Relations Court of Kenya at Kisumu (S. Radido, J.) dated 17th December 2020

in

ELCR Petition No. 27 of 2020 As consolidated with ELCR Petition No. 32 of 2020)

RULING OF THE COURT

1. Before the Court is an application brought under **Rule 5(2)(b)** of this Court's Rules seeking, *inter alia*, an injunction restraining the respondents either by themselves, employees, servants and/or agents or any anybody working under them from illegally suspending, terminating and/or otherwise removing the 1st applicant from the office of the Clerk of the 3rd respondent and/or recruiting a Clerk for the said position pending the hearing and determination of the intended appeal.
2. The impugned judgment emanates from two consolidated petitions, **Kisumu ELRC Petitions No. 27 and 32 of 2020**. The 1st applicant, who was the 3rd respondent's Clerk, was the petitioner in petition No. 27 while the 2nd applicant was the petitioner in petition No. 32.
3. The crux of the matter is that by a memorandum dated 24th July, 2019 the 1st respondent herein, Speaker of the County Assembly of Homabay, suspended the 1st applicant from office for reasons that his gazettelement as the Clerk of the County Assembly by an Acting Speaker on or about 29th March, 2019 was unlawful, null and void. Further, that such appointment was unlawful as it was not preceded by a recruitment process contrary to the County Government Act and the County Assembly Services Act. Aggrieved, the applicant, vide a motion on notice dated 27th July, 2019, instituted Judicial Review proceedings seeking to quash the 1st respondent's decision on arguments that due procedure was not followed in reaching the decision to suspend him; he cited an infringement of his fundamental rights as envisaged in the

Constitution.

4. Following numerous and diverse interlocutory litigation processes, which appeared to irk the learned Judge, the Judge dismissed the consolidated petitions after making a finding to the effect that the acting County Speaker who had purported to gazette the applicant as the County clerk had done so in clear contravention of Court orders that had reinstated the Speaker. According to the learned Judge, the Acting Speaker's act of gazetting the applicant was bereft of any legal authority and was an imposter in the office of the Speaker and the person he purported to gazette was therefore a trespasser in the office of the Clerk of the County, and the violation of the applicant's constitutional rights could not therefore arise.

5. That is the decision the appellant is challenging on appeal. The instant application, dated 8th February, 2021 is predicated on, among other grounds: that the applicant is aggrieved by the impugned judgment; that the intended appeal is arguable that the intended appeal would be rendered nugatory if the injunction is not granted, and that it is in the interest of justice that the injunction is granted. It is supported by the applicant's affidavit sworn on even date and has several annexures.

6. The gist of the said affidavit and submissions filed by counsel for the applicant is that the intended appeal is arguable as the applicant intends to challenge the impugned decision on grounds, as appear on the face of its draft memorandum on record, *inter alia*, that the learned Judge erred by failing to find that gazette was not a requirement for the appointment of a Clerk of the County Assembly; erroneously finding that the applicant's appointment was invalid by virtue of him being gazetted by the deputy speaker who was at the time the Acting Speaker, considering expunged evidence which was not properly before the Court; disregarding the applicant's evidence hence failing to find that the pertinent issue was the validity of the 2nd respondent's decision making process and not the validity the decision itself, by failing to find that the 2nd respondent's decision to suspend the applicant was biased and unreasonable hence illegal, null and void, and by improperly exercising his discretion hence exhibiting elements of bias and reaching a decision that was apparently wrong in law

7. On the nugatory aspect, counsel submitted that the respondents are in the process of recruiting a new Clerk at any time now as they have already advertised the position as vacant. Therefore, that unless an order for an injunction is granted, the intended appeal shall be rendered nugatory.

8. The 2nd applicant has not filed any submissions in support of this application.

9. The interested parties in the petition who are identified as the 4th to 7th respondents for purposes of the appeal this application have filed written submissions. Despite the fact that the arguments in counsel's submissions seem to go into the merits of the intended appeal as opposed to setting out whether or not the instant application has merit, it is clear from a close reading of the same that they are in support of the application on grounds that the intended appeal raises arguable issues.

10. The 2nd respondent did not file a replying affidavit in opposition of the application. However, in its written submissions, guided by the principles under which a **Rule 5(2)(b)** application would be successful as set out in **Multimedia University & Another v. Professor Gitile N. Naituli (2014) eKLR**, counsel for the 2nd respondent submitted that the applicant's application did not meet the threshold. He maintained that the applicant's intended appeal did not raise any arguable issues and that since the applicant had already vacated office an Acting Clerk had already been appointed, the applicant had failed to demonstrate that he would suffer irreparable loss, if an injunction is not granted, in the event that his intended appeal is successful. He maintained that in any event, if the applicant's intended appeal was successful, he would simply be reinstated. Therefore, that the intended appeal would not be rendered nugatory if an injunction is not granted.

11. The 1st and 3rd respondents' have neither filed replying affidavits nor filed written submissions.

12. Before delving into the merits of the application, the 2nd respondent has raised a procedural issue that the application is incompetent as it is brought against a negative order and therefore, there is nothing to stay.

13. Under **Rule 5(2)(b)** of this Court's Rules, the Court has jurisdiction to grant three orders; stay of execution, stay of further proceedings and an order of injunction. The said provision provides as follows:-

5. Suspension of sentence, injunction and stay of execution and stay of further proceedings

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may —

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just. (Emphasis supplied)

14. It is clear, from the face of the applicant's application that the applicant seeks an injunction restraining the 3rd respondent from proceeding with a recruitment and appointment process pending his intended appeal and not a stay of execution of the impugned orders, which are negative in nature as rightfully observed by the 2nd respondent. Having clarified that, it is clear that the orders sought are capable of being granted in the event that the applicant succeeds in demonstrating that he is deserving of such orders of an injunction.

15. It is trite that to demonstrate arguability of the intended appeal, the applicant must show that the intended appeal is not frivolous. The grounds of appeal as aforementioned, appear on the face of the draft memorandum, the main issue being that the learned Judge erred by interrogating the merits of the 3rd appellant's decision as opposed to the validity and or lawfulness of the decision-making process hence reaching an erroneous decision to dismiss the applicants' petition or that the learned Judge erred by not finding that the 3rd respondent did not follow due process in suspending the applicant hence issuing orders quashing the said decision. This is undoubtedly an arguable issue and as such satisfies the first limb on the arguability of the intended appeal.

16. On the second limb, the applicant has to demonstrate that the appeal will be rendered nugatory if the injunction sought is not granted as the substratum of the appeal shall be lost and he will suffer irreparable loss in the event that his intended appeal succeeds.

17. According to the applicant, if the 3rd respondent continues with the process of recruiting and appointing a Clerk, then his appeal shall be rendered nugatory. In opposition, the 2nd respondent argued that since the applicant was already not in office and that an Acting Clerk had already been appointed, an injunction would serve no purpose. Further, that it was disputable that the applicant stood to suffer irreparable loss since in any event he had already been removed from office.

18. This court has on several occasions stated that an injunction sought under **Rule 5(2)(b)** is designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals. (See: **Equity Bank Limited v. West Link Mbo Limited, Civil Application 78 of 2011**).

19. It goes without saying that what the applicant fears has technically already occurred, it is undisputed that he is already out of office. This fact would not change whether or not the recruitment and appointment process of filling the position is carried out by the 3rd respondent. Therefore, an order for an injunction would not serve any purpose in the circumstances.

20. As this Court has expressed before, the Court will not stay or injunct that which has already happened. In this case the horse has already bolted and there is nothing to stop. See **Jaribu Holdings Ltd v Kenya Commercial Bank Ltd [2008] eKLR** where this Court expressed itself succinctly on this issue as follows:-

“It will not be within reason for us to grant an order of stay of a decree which we know and the applicant itself concedes has been executed. The general policy of the law is that courts should not act in futility. As we stated earlier if we were to order a stay, the applicant might use the order to seek possession. An order of stay is supposed to prevent execution from taking place...”

21. We are also not persuaded that the applicant’s appeal will be rendered nugatory if the orders sought are not granted in the event the appeal succeeds. This is so because if the Court hearing the appeal ultimately determines that the applicant was wrongfully removed from office, he can always seek compensation. The second limb has therefore not been demonstrated. This application fails and is dismissed. Costs in the appeal.

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

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR