



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MURGOR & SICHALE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 230 OF 2020

BETWEEN

COUNTY SECRETARY OF KAJIADO,

FRANCIS OLE SAKUDE & 46 OTHERS.....APPLICANTS

AND

SALARIES & REMUNERATION COMMISSION...1ST RESPONDENT

COUNCIL OF GOVERNORS.....2ND RESPONDENT

(Being an application under Rule 5(2)(b) of the Court of Appeal Rules seeking an order for injunction pending an appeal against the Judgment of the Employment and Labour Relations Court at Nairobi (Abuodha, J) delivered on 14th May 2020 *in ELRC Petition No. 136 of 2016*)

RULING OF THE COURT

1. The applicants herein have moved this Court under **Rule 5(2)(b)** and **42** of this Court's Rules, vide a motion on notice dated 7th July, 2020, seeking an order of injunction restraining the 1st respondent, its representatives, employees, servants and/or agents or anybody working under or for it from implementing, directing or advising the County Governors and/or the Secretaries to the County Service Boards to vary, demote or in any way propose or re-designate the Job Group of the County Secretaries from Job Group T or its equivalent to Job Group S or its equivalent.
2. In their petition, the applicants sought to restrain the respondent from publishing the job evaluation, which was done without their input, on the argument that it was inconsistent with the Job Group as advertised for, applied for and under which they had been retained. The learned Judge in the impugned judgment, dismissed the applicants' petition wherein they sought certain declaratory, compensatory and injunctive reliefs alleging violation of particular constitutional rights. He dismissed the said petition for reasons that the same was devoid of constitutional issues to warrant orders as prayed.
3. The applicant's motion is anchored on the grounds contained on the face of the motion as well as an affidavit in support sworn by Dr. Ahmed Galgalo Guyo, the chairperson of all the 47 County Secretaries. In brief, the applicant contended that: pursuant to its constitutional mandate, the Transitional Authority made recommendations for the effective management of assets through standardization of the remuneration of selected county officers; that following such initiative, the Job Group of County secretaries was to be equivalent to a public officer in Job Group T; that it was upon such knowledge that the applicants anticipated a remuneration scale within the said Job Group.
4. However, following a job evaluation process carried out by the 1st respondent, the said Job Group was reviewed downwards to Job Group S despite the applicants' attempt to challenge the same during the preliminaries; that the 1st respondent attributed its decision to implement the standardization by purporting to re-designate the applicants; that such action by the 1st respondent was a violation of their constitutional rights and that they were aggrieved by the impugned judgment; that they stand to suffer from the impending execution of the said decision which translates to a demotion; that therefore their intended appeal is arguable; and that should the Court fail to grant the injunction order sought, the applicants' intended appeal will be rendered nugatory.
5. The applicant has also filed written submissions in support of the motion in which it refers to a draft memorandum of appeal wherein 12 grounds have been set and submits that its intended appeal is arguable. Among the grounds raised are that the trial court erred: by finding that the 1st respondent's advice on remuneration and benefits of public officers is binding; by failing to distinguish between the act of setting and

reviewing remuneration and advising on remuneration; failing to find that the respondents' actions amounted to a demotion of the applicants; holding that the petition did not raise any constitutional issues; by failing to find that the re-designation of the applicants from Job Group T to Job Group S was done without following due procedure hence illegal, null and void; failing to find that the respondent having declined to harmonize the applicants' job group with those of its equivalent at the national level amounted to discrimination.

6. The applicant also reiterated that if the orders sought are not granted, the intended appeal would be rendered nugatory and the applicants will suffer irreparable loss. It was deposed that following a letter dated 24th June, 2020, addressed to all the governors and secretaries to the County Service Boards, the 1st respondent advised that the applicants' Job Groups be immediately downgraded to the Job Group assigned to them through the job group review.

7. The respondents opposed the application vide a replying affidavit sworn on 15th December, 2020 by the 1st respondent's Commission Secretary and written submissions of even date. In sum, counsel opposed the application on arguments that the learned Judge granted negative orders not capable of being stayed, that the intended appeal did not raise arguable grounds, that the applicants failed to demonstrate that they would suffer irreparable loss not capable of being compensated in the event the intended appeal succeeds. He maintained that the Job evaluation process is already underway hence the balance of convenience tilts in favour of the respondents.

8. Outstandingly, the respondents argued that from the learned Judge's decision, there is no order capable of being stayed. It is now settled law that the issue as to whether a negative order is capable of being stayed is paramount in determining the success or otherwise of an application under Rule 5(2)(b) of this Court's rules such as the one before us. (See: _

George Ole Sangui v. Kedong Ranch Limited, Civil Application No. Nai 55 of 2015) where this Court citing the famous case of **Western College of Arts And Applied Sciences v. Oranga & Others [1976] KLR 63**, pronounced itself as follows:-

"In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted." (Emphasis ours)

9. In the motion before this Court the applicants sought a stay of execution of a decision in which the learned Judge simply dismissed their claim granting costs in favour of the respondents. This was a negative order which, as this Court has observed in past decisions, is incapable of being stayed.

10. However, in **Equity Bank Limited v. West Link MBO Limited, Civil Application No. Nai 78 of 2011** Githinji, JA stated that.

"It is trite law in dealing with 5(2) (b) applications the court exercises discretion as a Court of first instance. It is clear that rule 5(2)(b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

11. In addition, in **Daniel Lomagul Kandeji & 2 Others v. Kamanga Holdings Limited & 40 Others (2017) eKLR** this Court expressed itself as follows:-

"In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of being stayed."

Having said that, it is not lost to us that the applicants in their prayers sought an order of injunction. In NAIROBI METROPOLITAN PSV SACCOS UNION AND 25 OTHERS VS COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS (supra) this court stated as follows:

"In granting orders sought in application for stay or grant of an injunction as the case may be this court exercises original jurisdiction...." and proceeded to cite the case of **EQUITY BANK LIMITED VS WEST LINK MBO LIMITED CA NO. NAI 78 OF 2011** wherein Githinji JA stated that.

"It is trite law in dealing with 5(2)(b) applications the court exercises discretion as a Court of first instance. It is clear that rule 5 (2) (b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."

Having come to the conclusion that we are properly seized of the application seeking an injunctive relief, the next issue is to determine whether the applicants have demonstrated that they are deserving of this relief. In LAKE TANNERS LIMITED & 2 OTHERS VS ORIENTAL COMMERCIAL BANK LIMITED [2010] eKLR (CA No. 64 of 2010) it was held that the purpose of an injunction pending appeal is to preserve the status quo..."

As the applicants seek an order of injunction and not stay of execution, then the law enjoins us to consider this application on merit. Has the application met the threshold expected of applications predicated on Rule 5(2) b of the Court of Appeal rules?

12. The law on the grant of orders under Rule 5(2)(b) of the Court of Appeal Rules (including injunction) is well settled as restated by this Court in **Chris Mungga N. Bichage v. Richard Nyagaka Tongi & 2 Others [2013] eKLR** where the court succinctly set out the law as follows:-

“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

13. On the first limb, we have looked at the 12 grounds raised in the memorandum of appeal. Being cognisant of the fact that the applicants need only demonstrate one arguable ground and not a multiplicity of them, and further that an arguable appeal is not necessarily one that will succeed, we have no hesitancy in finding that the applicants have an arguable appeal. The first limb has therefore been demonstrated.

14. On the nugatory aspect, as expressed by this Court in **Reliance Bank Limited V Norlake Investments Ltd [2002] 1 E.A. 227**, *the term*

‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injunctioned, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

15. It is evident that the applicants are in employment and the bone of contention is the applicants’ terms of service according to the applicable Job Group, specifically remuneration, which is something capable of restitution in the event that the appeal is successful. Therefore, it is undisputable that the subject matter in this circumstance is not one requiring preservation and an injunctive order would therefore not serve any purpose.

16. As stated earlier an applicant needs to demonstrate both arguability and the nugatory aspect, and proving only one limb will not suffice. Having failed to demonstrate the nugatory aspect, the applicants will have to hold their horses and await the outcome of their appeal as the orders of injunction sought cannot be granted.

Accordingly, the applicants’ application is hereby dismissed with costs to the 1st respondent.

DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR