



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KARANJA & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. E097 OF 2021**

**BETWEEN**

**THE NATIONAL ASSEMBLY..... 1ST APPLICANT**

**THE SENATE.....2ND APPLICANT**

**AND**

**CHIEF JUSTICE OF THE REPUBLIC OF KENYA.....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**DEPUTY CHIEF JUSTICE..... INTERESTED PARTY**

*(Being an application under Sections 3, 3A and 3B of the Appellate Jurisdiction Act, Rule 5(2) (b) of the*

*Court of Appeal Rules, 2010, seeking stay of proceedings pending hearing and determination of the*

*application as well as pending hearing and determination of the intended appeal against the*

*Ruling/Order of the High Court of Kenya at Nairobi (L. Achode, P. Nyamweya,*

*G.V. Odunga, J.A. Makau & A.K. Ndung'u, JJ.) dated 18th February, 2021*

**in**

**Petition No. E291 OF 2020)**

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**LEINA KONCHELLAH..... 1ST PETITIONER**

**MOHSEN ABDUL MUNASAR.....2ND PETITIONER**

**AND**

**THE CHIEF JUSTICE & PRESIDENT OF THE**

**SUPREME COURT OF KENYA.....1ST RESPONDENT**

**THE ATTORNEY GENERAL.....2ND RESPONDENT**

**AND**

**THE SPEAKER OF THE NATIONAL ASSEMBLY.....1ST INTERESTED PARTY**

THE SPEAKER OF THE SENATE.....	2ND INTERESTED PARTY
MARGARET TOILI.....	3RD INTERESTED PARTY
FREDRICK GICHANGA MBUGUA .....	4TH INTERESTED PARTY
STEPHEN OWOKO.....	5TH INTERESTED PARTY
JOHN WANGAI.....	6TH INTERESTED PARTY
AOKO BERNARD.....	7TH INTERESTED PARTY
HON. DAVID SUDI.....	8TH INTERESTED PARTY
LAW SOCIETY OF KENYA.....	9TH INTERESTED PARTY
THE KENYA HUMAN RIGHTS COMMISSION.....	10TH INTERESTED PARTY
FEDERATION OF WOMEN LAWYERS.....	11TH INTERESTED PARTY
OKIYA OMTATAH OKOITIL.....	12TH INTERESTED PARTY

#### RULING OF THE COURT

We are asked in the Motion brought under various provisions of law including **rule 5(2) (b)** of the **Court of Appeal Rules** to issue an order staying further proceedings before the High Court at Nairobi in **Petition No. E291 of 2020 (consolidated) Leina Konchellah & Others versus Chief Justice & Others** pending hearing and determination of the Motion and of an intended appeal. In grounds in support of the Motion and in supporting affidavits of Hon. Justin Muturi and Hon. Kenneth M. Lusaka it is said amongst other things that The National Assembly (1st applicant) and The Senate (2nd applicant) instituted a petition at the High Court challenging the constitutionality of the 1st respondent’s (the Chief Justice and President of the Supreme Court of Kenya) advisory opinion dated 21st September, 2020 addressed to His Excellency the President advising him to dissolve both houses of Parliament on account of failure to enact the legislation giving effect to the principle in **Article 81(b)** of the **Constitution** that not more than two thirds of members of elective public bodies be of the same gender; that the advisory is premised on the 1st respondent’s wrong reading of **Article 261(7)** of the **Constitution** which led to the conclusion that the 12th Parliament had failed to enact legislation as required under **Article 100** of the **Fifth Schedule** that issues timelines for enactment of such legislation. It is further stated that the applicant filed an application in **Petition No. E300 of 2020** seeking orders to set aside or suspend the appointment of the 5 Judge bench appointed by the Interested Party (Deputy Chief Justice) on 14th October, 2020 which appointment the applicants contend is contrary to **Article 165(4)** of the **Constitution**; that the petitioner in **Petition No. E291 of 2020** filed a preliminary objection raising similar grounds as the applicants; the application and preliminary objection were dismissed on 18th February, 2021 and the 5 Judge bench gave directions on the hearing of the substantive petition. According to the applicants **Article 165(4)** of the **Constitution** does not envisage a scenario where the duty to empanel a bench of the High Court in such a matter can be performed by anyone save the Chief Justice and the applicants are appealing that decision for this Court to interpret **Article 165(4)** of the **Constitution**.

The supporting affidavits repeat what we have already set out, with the affidavit of **Hon. Justin Muturi** deponing at paragraphs 31 and 32:

*“31. THAT the above demonstrates that the Applicants have an arguable Appeal with a high chance of success and if the orders sought in this Application are not granted, the Appeal will be rendered an exercise in futility as the subject matter will have been dissipated.*

*32. THAT the Application, and the intended Appeal, bears great national importance and it raises serious issues of constitutional interpretation and it is therefore urgent that the same be heard urgently.”*

In a replying affidavit **Hon. Lady Justice Philemona Mbete Mwilu** (the acting **Chief Justice and President of the Supreme Court of the Republic of Kenya**) who is the Interested Party in the consolidated petitions in the High Court and the 6th respondent herein depones that she knows that the retired Chief Justice issued

the impugned opinion to dissolve the houses of Parliament; that certain decisions had been made by the High Court, the Court of Appeal and the Supreme Court dealing with the issue of gender representation in public office; that Parliament had failed to enact necessary legislation as required; that petitions were filed to challenge that advisory opinion where the retired Chief Justice was sued as a party; in those circumstances she, as Deputy Chief Justice constituted the impugned bench to hear and determine the consolidated petitions. Further, that the High Court had determined that powers donated by **Article 165(4)** of the **Constitution** were administrative in nature and could be exercised by the Deputy Chief Justice and, in any event, the intended appeal was not arguable for various reasons deposed to in the affidavit.

The applicants and the 1st respondent filed written submissions and digests of authorities which we have perused and we are grateful to learned counsel for the able argument made in support or in opposition to the Motion.

The principles that apply in an application to this Court for stay of execution or stay of proceedings are well known. An applicant must, firstly, demonstrate that there is an arguable appeal – that there is a *bona fide* point of law or fact that calls for a response from the adverse party, a point that merits consideration and decision by the Court. That point must be a *bona fide* one, not a frivolous one but it need not be one that must necessarily succeed. A single arguable point will suffice as an applicant is not required to establish a multiplicity of arguable points. See *Damji Pragji Mandaria v Sara Lee Household and Body Care (K) Limited, Civil Application No. NAI 345 of 2004*.

Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay. A full discussion of these principles that guide the court in applications under **rule 5(2) (b)** of the **rules of this Court** will be found in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*.

The Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR* identified a third principle to be borne in mind in applications for relief pending appeal – the public interest. That Court identified this as a consideration for orderly facilitation in the public sector and to uphold the function of the Court as an adjudicator in disputes involving agencies. It was held in that case that conservatory orders should be granted:

*“... on the inherent merit of the case bearing in mind the public interest, the constitutional value, and the proportionate magnitudes and priority levels attributable to the relevant cases.”*

Coming to the matter at hand it is intended to be argued on appeal that the powers donated by **Article 165(4)** of the **Constitution** cannot be delegated and that they are not administrative.

The said Article provides:

*“165(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”*

As we have observed an arguable point on appeal is not one that will ultimately succeed. The point intended to be argued – whether the Deputy Chief Justice was empowered by the said Article to empanel a bench of the High Court, is not an idle one. It is an arguable point.

On the nugatory aspect it appears to us that if it was to be held on appeal that the Deputy Chief Justice had no power to empanel the bench the appeal would be a victory with no practical effect, an academic exercise.

We find, also, that this is a matter in the public interest domain and it is proper that the appellants exhaust their appellate rights.

The Motion succeeds and is granted. Let costs be in the appeal.

In view of the public interest involved in the petitions at the High Court let the appeal be filed within 30 days of today and be prioritized for hearing. In default of filing as ordered the order for stay will lapse.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MAY, 2021.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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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.*

**DEPUTY REGISTRAR**