



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR J.J.A.)

CIVIL APPLICATION NO. 91 OF 2017

BETWEEN

COUNTY GOVERNMENT OF KIAMBU.....APPLICANT

AND

JAMES GACHERU KARIUKI.....1ST RESPONDENT

JAMES NGUGI MUNGAI.....2ND RESPONDENT

RICHARD MUNGAI KAGIRI.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

(Being an application for stay of execution or stay of further proceedings pending the lodging hearing and determination of an intended appeal against the judgment and orders of the Constitutional & Human Rights Division at Nairobi (Lenaola, J) dated 23rd February 2017 and delivered on 24th February 2017

in

Constitutional & Human Rights Petition No. 52 of 2016 as consolidated with No. 308 of 2015 and No. 7 of 2016)

RULING OF THE COURT

By a Notice of Motion dated 21st April 2017, brought under *rule 5 (2) (b) the Court of Appeal rules, the applicant, County Government of Kiambu* sought orders for stay of execution of the judgment of the High Court dated 23rd February 2017 (*Lenaola, J*) pending the hearing and determination of the intended appeal.

In the judgment, the High Court directed that the applicant was to ensure that all Kiambu County legislation that was not published in the Kenya Gazette within a period of 3 months be so published failing which such legislation would be invalidated. In so doing, the court issued the following orders;

“i) it is hereby declared that Section 25(2) of the County government Act is inconsistent with Article 199 (1) of the Constitution to the extent that it uses the phrase “whichever comes earlier” and is invalid to that extent only.

ii) It is hereby declared that a County Legislation does not take effect unless it is published as such in the Kenya Gazette in line with Article 199 (1) of the Constitution and thereafter in the County Gazette, if need be.

iii) The Kiambu County Government shall regularize the publication of all its County Legislations in the Kenya Gazette within 3 months’ failure to which such legislation shall lapse and be invalid. For avoidance of doubt, until such an eventuality, the legislations such(sic) continue to be in operation.

iv) As for costs let each party bear its own costs...”

The applicant was aggrieved by the decision and intends to lodge an appeal against it in this Court. In the meantime, it has brought this motion supported by a sworn affidavit of **Fredrick M. Kitema** the applicant's County Secretary of the same date on grounds on its face and its written submissions. It is asserted that the intended appeal has overwhelming chances of success for reasons in the main that, the High Court failed to appreciate that after the applicant debated the County legislation, it was published by the Government Printer, through a supplement of the Kenya Gazette entitled '*Kiambu County Gazette*'; that as a consequence, the legislation met the requirements of the provisions of **Articles 199 (1)** and **260** of the **Constitution**; that the learned judge failed to appreciate that there is no difference in substance between a publication in the Kenya Gazette and the Kiambu County Gazette; that the judge was wrong to find that the Kiambu County Gazette was not a supplement of the Kenya Gazette; that the learned judge also failed to appreciate that the Government Printer adopts the title '*Kiambu County Gazette*' in the Kenya Gazette to distinguish between National Government Gazette notices and County Government Gazette notices; that by entitling the County publication as '*Kiambu County Gazette*' in the Kenya Gazette did not make it a County Gazette.

It was contended that if the judgment were to be executed, the legislation of the County Government would be rendered invalid, which would undermine the independence of the county assembly; that further, invalidating the County legislation would expose the County Government to numerous legal suits as without county laws it will be handicapped, and unable to carry out its operations laws once the compliance period of 3 months' lapses.

By a replying affidavit filed by the 1st respondent, it was deposed that the intended appeal is not arguable because **Article 199 (1)** of the **Constitution** makes reference to a Gazette which is defined by **Article 260** as the Kenya Gazette or a supplement of the Kenya Gazette published under the authority of the National Government; that in respect of the publications of county legislation, reference is made in **Article 199 (2)**, to the County Gazette which is defined and prescribed by the County Government Act No. 17 of 2012; that the learned judge was right in finding that a gazette, that is, the Kenya Gazette or a supplement to the Kenya Gazette was substantially the Kenya Gazette under the National Government, and not a County Gazette.

It was further deposed that the apprehension that the operations of the county government would be incapacitated as a consequence of the judgment was farfetched, and misleading and should therefore be disregarded.

Also filed was a replying affidavit of the 3rd respondent where it was averred that the High Court had granted the applicant 3 months to regularize all the County legislation in the County Gazette, and that the applicant was not at any risk of failing to carry out its ongoing and existing operations.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, are that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

As to whether the intended appeal is arguable, the applicants contend that the trial judge was wrong in finding that the County legislation ought to have been published in a County Gazette instead of in the Kenya Gazette, and in creating a distinction between the Kenya Gazette and the County Gazette. Whether or not the publication of County legislation in the Kenya Gazette amounted to a County publication is in our view a matter that is arguable.

And in considering whether the intended appeal would be rendered nugatory, we begin by observing that this judgment was rendered on 23rd February 2017. And one of the orders of the court was that, “...*The Kiambu County Government shall regularize the publication of all its County Legislations in the Kenya Gazette within 3 months' failure to which such legislation shall lapse and be invalid. For avoidance of doubt, until such an eventuality, the legislations such (sic) continue to be in operation*”. Considering that more than 3 months has lapsed since the judgment, it becomes apparent that the orders sought herein may have already been overtaken by events meaning that the concerned County legislation has been rendered invalid.

But having said that, it is also observed that the applicant has not in any way demonstrated how the intended appeal would be rendered nugatory in the event it were to succeed, with the result that the applicant has failed to satisfy the 2nd limb.

As a consequence, the Notice of Motion dated 21st April 2017 is unmeritorious, and is hereby dismissed. Costs will abide the outcome of the intended appeal.

It is so ordered

Dated and delivered at Nairobi this 21st day of May, 2021.

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR