



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), ASIKE-MAKHANDIA & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 85 OF 2018

BETWEEN

**THE CABINET SECRETARY FOR ENVIRONMENT, NATURAL RESOURCES AND
REGIONAL DEVELOPMENT AUTHORITIES.....1ST APPLICANT**

THE HON. ATTORNEY GENERAL.....2ND APPLICANT

AND

PETER MACITHI MUIGAI.....1ST RESPONDENT

THE BOARD OF DIRECTORS

KENYA FORESTRY RESEARCH INSTITUTE.....2ND RESPONDENT

BEN CHIKAMAI.....3RD RESPONDENT

(Being an application seeking stay of execution of the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Hellen Wasilwa, J.) dated 31st January, 2018 in ELRC Petition No. 75 of 2016)

RULING OF THE COURT

In the Motion brought under various provisions of the law including **rule 5 (2) (b)** of the **Court of Appeal Rules** it is prayed in the main that we grant an order of stay of execution of the Judgment and all consequential orders of the **Employment and Labour Relations Court (“ELRC”)** delivered on 31st January, 2018 in **Petition No. 75 of 2016** pending hearing and determination of an intended appeal. In grounds in support of the Motion and in a supporting affidavit of **Keriako Tobiko, the Cabinet Secretary, Ministry of Environment, Natural Resources and Regional Development Authorities** it is said *inter alia* that the 1st respondent (**Peter Macithi Muigai**) had filed a petition in the ELRC seeking a declaration that the 3rd respondent’s appointment for a third term as director of KEFRI (**Kenya Forestry Research Institute – 2nd respondent**) was illegal and unconstitutional and contrary to the Code of Regulations for State Corporations (**“Mwongozo”**); that the ELRC had allowed the petition and found that the 3rd respondent was illegally in office and ordered him to vacate office immediately; that the Court had found that there was no Board in office for KEFRI; that an acting Chief Executive Officer should be appointed immediately; and that the applicant had filed a Notice of Appeal. Further, that the Judge had erred in applying “Mwongozo” retrospectively; that the Judge had erred in failing to correctly interpret the Code of Regulations for State Corporations; that the Judge erred by the conclusion on who had the mandate to appoint the Chief Executive Officer (CEO) of KEFRI and other reasons set out in the grounds and in the supporting affidavit.

When we considered the Motion on 24th March, 2021 we noted from the Hearing Notice served by e-mail by our Deputy Registrar on Tuesday 9th March, 2021 at 3.49 p.m. that the parties were asked to file written submissions. Neither of the parties filed submissions in support or opposition to the Motion.

In an application of this nature an applicant must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable which is to say that the appeal is not frivolous. Secondly, such an applicant must demonstrate that the appeal would be rendered nugatory absent stay – See the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR**.

The applicant intends to argue in the intended appeal that the Judge erred in interpreting the Code of Regulations for State Corporations in

the manner she did. It is also proposed to be argued that the Judge applied “Mwongozo” retrospectively, amongst other grounds proposed on appeal. These we find to be substantial grounds; they are not idle, they deserve a hearing and as is well known, an arguable point is not one that must necessarily succeed but one that deserves a full determination by the Court – See **Dennis Mogambi Mongare v Attorney General & 3 Others Civil Application No. NAI. 265 of 2011.**

On the nugatory aspect that an applicant, as we have seen, must also satisfy to be entitled to the protection accorded by **rule 5 (2) (b)** of the **Court of Appeal Rules** we note that the petition in ELRC was allowed, the 3rd respondent was ordered to vacate office immediately (Judgment was delivered on 31st January, 2018) and as stated at paragraph (d) of the grounds in support of the Motion:

“The learned Judge failed to appreciate that the term of the 4th Respondent contract as CEO of KEFRI comes to an end on 30th April, 2018 and that the recruitment process for a new CEO was underway such that the order for the 3rd Respondent to vacate office immediately is unreasonable and capricious.”

The term of office of the 4th respondent was to end more than 2 years ago and in those circumstances the intended appeal cannot be rendered nugatory at all.

The applicant has not satisfied the 2nd limb of an application of this nature and the Motion fails and is dismissed with no order on costs.

Dated and delivered at Nairobi this 7th day of May, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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