



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 361 OF 2018

BETWEEN

FAITH SYOKAU WATHOME KITHU (MBS).....1ST APPLICANT
RUTH NDUKU MUTUA.....2ND APPLICANT
NAOMI MUTIE KAMALA.....3RD APPLICANT
ALI MAALIM MOHAMUD.....4TH APPLICANT
KIMEU MBITHI KIMEU.....5TH APPLICANT

AND

MACHAKOS COUNTY ASSEMBLY.....1ST RESPONDENT
THE SPEAKER, COUNTY ASSEMBLY OF MACHAKOS.....2ND RESPONDENT
THE CLERK, COUNTY ASSEMBLY OF MACHAKOS.....3RD RESPONDENT
THE GOVERNOR, MACHAKOS COUNTY GOVERNMENT.....4TH RESPONDENT

(An application for injunction pending hearing and determination of an intended appeal from the

Ruling of the High Court of Kenya at Machakos (Odunga, J.) dated 5th November, 2018

in

Petition No. 12 of 2017)

RULING OF THE COURT

The five applicants, Faith Syokau Wathome Kithu, Ruth Nduku Mutua, Naomi Mutie Kamala, Ali Maalim Mohamud and Kimeu Mbithi Kimeu have by a Notice of Motion brought under **rules 5 (2) (b), 42, 43, 47 and 49** of the **Court of Appeal Rules**, amongst other provisions of law applied:

“2. THAT pending the hearing and determination of the Application – herein an order for injunction be and is hereby ordered restraining the 4th respondent herein from removing of (sic) the Appellants from office.

3. THAT pending the hearing and determination of the appeal herein an order for injunction be and is hereby ordered restraining the 4th Respondent herein from removing of the Appellants from office...”

The Machakos County Assembly, The Speaker, County Assembly of Machakos, The Clerk, County Assembly of Machakos and the

Governor, Machakos County Government are named as respondents.

In grounds in support of the Motion and in an affidavit of one of the applicants (**Naomi Mutie Kamala**) it is said amongst other things that the 3rd appellant's name was presented to the County Assembly of Machakos as nominee for County Executive Committee Member, Department of Education, Youth, Sports and Social Welfare; that the Governor, Machakos County had also nominated the other applicants to various positions in the County Government and referred their names to the County Assembly for approval; that the Speaker of the County Government had referred the nominees' names to the committee of appointments; the applicants appeared before the relevant Committee for vetting after which a report was tabled before the county assembly which found the applicants not suitable for the positions to which they had been nominated. Further, that the applicants had filed various petitions at the High Court of Kenya, Machakos citing violations of law and praying for various orders. The consolidated petitions were dismissed by Odunga, J., in a judgment delivered on 5th November, 2018 and, according to the applicants, the import of the Judgment is that the court nullified their appointments. The applicants say that they had been serving as County Executive Committee Members since 2013 and, unless an injunction was granted, the 4th respondent (Governor) would be compelled to remove them from office and appoint others to replace them.

There is a replying affidavit of **Dr. Alfred Nganga Mutua** (the 4th respondent) who depones that it is he who has the mandate to constitute the County Executive of Machakos; that he was aware that the 1st respondent had passed a resolution requiring the applicants to vacate office; at paragraphs 6-9 (inclusive) the Governor says:

“6. THAT nomination and appointment of County Executive Committee members is a legal process with many political dynamics. In the present matter, I verily believe the political party differences between myself and the majority side MCA’s influenced the resolution.

7. THAT the mere fact that the said Applicants remain in office is not a bar to their removal from office in future if this court so decides. It also does not prejudice any party.

8. THAT the reason why I am not opposed to the application is to ensure success of devolution through certainty, consistency and stability in service delivery to the people of Machakos County pending determination of the Appeal.

9. THAT as the Governor of Machakos County, I am under Constitutional and Statutory duty to protect devolution and ensure the success of its objectives.”

He also says that he supports the Motion brought by the applicants and that it is in the interest of justice to preserve the subject matter and allow due process to take place.

In written submissions by the applicants a background of the case before the Assembly and before the High Court is given. The applicant cites the case of *Nelson Andayi Havi v Law Society of Kenya & 3 Others [2018] eKLR* amongst other cases in support of their case that the intended appeal is arguable as shown in 13 grounds of appeal set out in draft Memorandum of Appeal annexed to the application.

On the nugatory aspect the applicants cite the case of *Equity Bank Limited v West Link Mbo Limited Civil Application No. 78 of 2011 (ur)* amongst other cases, and submit that the 4th respondent will proceed to replace them in the positions as County Executive Committee Members.

The 1st to 3rd respondents (together) filed written submissions as did the 4th respondent, separately. The 1st to 3rd respondents submit that the applicants have not satisfied the principles in a **rule 5 (2) (b)** application submitting that the applicants have not shown how the learned Judge misinterpreted the law. They cite *Charter House Bank Limited v Central Bank of Kenya & Another [2015] eKLR* where the applicant questioned the lawfulness of the decision of *Central Bank of Kenya* to place the applicant under statutory management. This Court held:

“Considering the limited jurisdiction of this Court in dealing with appeals arising from the exercise of discretion by a Judge, we do not find it necessary to deal with issues raised by the counsel for the applicant Bank which challenge the legality or lawfulness of the decision of the CBK to place the applicant Bank under statutory management. Those issues cannot be conclusively decided either in the present application or in the intended Appeal.”

The Court went on to hold:

“The applicant Bank can only show that the intended appeal is arguable, if it demonstrates that Azangalala J did not, prima facie, exercise his discretion judicially because either he acted on the wrong principles or that he took into account irrelevant matters or failed to consider relevant matters Rather, the counsel for the applicant Bank adopted the wrong approach by attempting to show that the decision of the superior court is wrong on the merits. Thus, in our respectful view, the applicant Bank has failed to show that the intended appeal is arguable.”

On the nugatory aspect the 1st to 3rd respondents state that the 4th respondent reinstated the applicants to office.

The 4th respondent's written submissions are in support of the Motion.

We have considered the record, submissions made by all the parties and the list of authorities filed by the 1st to 3rd respondents.

The applicants have applied for orders to stay execution of the Judgment of the High Court where the consolidated petitions were dismissed. They also apply for injunction pending appeal.

The principles that apply in an application under **rule 5(2) (b)** of the **rules of this Court** are fairly well settled. For an applicant to succeed he must, firstly, demonstrate that the appeal is arguable which is the same as saying that the same is not frivolous. Such an applicant must, in addition, demonstrate that the appeal will be rendered nugatory absent stay – See the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR** where those principles are well summarized.

One of the grounds of appeal raised in the Memorandum of Appeal is whether the Judge erred in law by violating the rule of harmony in interpreting constitutional and legal provisions by elevating the provisions of **Section 8 (a)** of the **Public Appointments (County Assemblies Approval) Act** and **Section 35 (d)** of the **County Government Act** over **Article 179 (2) (b)** as read with **Articles 179 (3), 183** of the **Constitution of Kenya, 2010** and **Section 36** of the **County Government Act**. This point is arguable in the appeal and an applicant is not required to show a multiplicity of arguable points. One point will suffice – See the case of **Dennis Mogambi Mongare v Attorney General & 3 Others Civil Application No. NAI. 265 of 2011**.

What about the second limb that must also be satisfied for an applicant to be accorded the protection of **rule 5 (2) (b)** of the **Court of Appeal Rules**?

The 1st to 3rd respondents on the one hand, and the 4th respondent in support, say that the applicants are in office after the 4th respondent re-gazetted their appointments. We cannot, in the premises, see what would be rendered nugatory if we do not grant a stay of execution of the Judgment of the High Court, considering that the applicants have been in the office all along.

Finally, if this be necessary, we note that the effect of granting the prayers sought would effectively be granting a mandatory injunction, something this Court rarely does in an application of this nature.

The result of our findings is that the applicants have not satisfied the second limb of this application. The Motion fails and is dismissed with costs to the 1st to 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

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