



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU, J. MOHAMMED & KANTAL, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. E368 OF 2020

BETWEEN

YUSUF MBUNO (CEO).....APPELLANT/APPLICANT

AND

OKIYA OMTATA.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF

DEVOLUTION AND PLANNING.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

ANNE THUMBI (HRM).....6TH RESPONDENT

VENAZIO GACHARA KIMENJU(HEAD FINANCE & ACCOUNTS)...7TH RESPONDENT

JACK ODHOCH (HEAD ICT).....8TH RESPONDENT

(Being an application for stay of proceedings under Rule 5(2) (b) of the Court of Appeal Rules pending the hearing and determination of the application and the appeal from the Ruling of the High Court of Kenya at Nairobi (Odunga, J.) dated 30th January, 2019 in Petition No. 474 of 2017)

RULING OF THE COURT

We are asked in the Motion dated 20th January, 2021 brought under **Rule 5(2) (b)** of the **Court of Appeal Rules; Articles 159 and 164(3)** of the **Constitution, Order 42 rule 6 and Order 41 rules 1, 3 and 10 Civil Procedure Rules, 2010; and Sections 3 and 3A Civil Procedure Act** (the Civil Procedure Act does not ordinarily apply to this Court) and all other enabling provisions of law in the main that we order ex parte stay of proceedings in **Nairobi High Court Petition No. 474 of 2017 Okiya Omtata v Yusuf Mbuno & 8 Others** pending hearing and determination of the application. We are also asked to grant prayer (ii) in the appellant's Memorandum of Appeal dated 7th October, 2020 and order a stay of proceedings in the said petition pending hearing and determination of the appeal. In grounds in support of the Motion and in a supporting affidavit of **Maroa Jackson**, an Advocate of the High Court of Kenya who says that he has the personal conduct of the matter, it is said that the appellant/applicant, being dissatisfied with the ruling of **Odunga, J.** had filed an appeal; that the appeal touches on the court's jurisdiction to hear and determine the petition as well as the petitioner's *locus standi* in the matter; that the petition was ongoing and the trial court had ordered that a hearing date be allocated; that there should be a stay of those proceedings to enable this Court determine all issues in dispute; at paragraph (e) and (f) of the grounds in support of the Motion:

“(e) THAT if the said Stay of Proceeding is not granted, the Appellant/Applicant will suffer irreparable damage as the trial court will proceed to hear and determine a matter where its jurisdiction is being challenged.

(f) THAT further, the Applicant’s appeal will be rendered nugatory if there is no order for stay of proceedings considering that the appeal mainly challenges the trial court’s jurisdiction to hear and determine the petition.”

The respondents did not respond to the Motion. We noted at the hearing of the Motion that **Okiya Omtata** was served with the record of appeal and the Motion on 5th February, 2021, while **M/S Naikuni Ngaah & Miencha Advocates** had been served on 5th March, 2021 as contained in the Affidavit of Service sworn by **Benson M. Muindi**, a Process Server of the firm of **Maanzo & Company Advocates**.

Prayer (ii) in the Memorandum of Appeal is to the following effect:

“(ii) THAT there be a stay of proceedings in the Nairobi High Court Petition No. 474 of 2017 pending the hearing of this appeal.”

This is essentially a Motion brought under **rule 5(2) (b)** of the **Court of Appeal Rules** which gives the Court inherent power to order a stay of proceedings or a stay of Judgment or orders or order an injunction where a notice of appeal has been lodged.

It has been held in a long line of cases such as the case of **Stanley Kinyanjui Kangethe v Tony Ketter & Others [2013] eKLR** that two principles apply in an application for stay of execution pending appeal. For an applicant to succeed he must, firstly, demonstrate that the appeal, or intended appeal, as the case may be is arguable, which is the same as saying that it is not frivolous. Such an applicant must, in addition, prove that the appeal would be rendered nugatory absent stay.

We note that the Motion at the High Court of Kenya at Nairobi in Petition No. 474 of 2017 was dismissed by Odunga, J, in a ruling delivered on 30th January, 2019. We have perused the Memorandum of Appeal attached to the Motion before us. It is proposed to be argued on appeal *inter alia* that the Judge misdirected himself in holding that the petitioner had *locus standi* to file the petition. It is also proposed to be argued that the Judge erred in failing to consider the issue of jurisdiction and forum which issues were raised in the applicant’s submissions. These we find not to be idle issues; they are arguable and a single arguable point will suffice as an applicant is not required to raise a multiplicity of arguable points – See the case of **Dennis Mogambi Mang’are v Attorney-General & 3 Others [2012] eKLR**.

On the nugatory aspect we have perused the whole record before us. The applicant does not state in the Motion or in the affidavit of his lawyer what would be rendered nugatory should we not order a stay pending appeal. We have not ourselves found in the matter before us what would be rendered nugatory absent stay and this being our view, the applicant has not satisfied the second limb of an application of this nature. In those circumstances the Motion fails and is dismissed with no order on costs.

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

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

J. MOHAMMED

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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