



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KARANJA & WARSAME, JJA)

CIVIL APPLICATION NO. E351 OF 2021

BETWEEN

CLERK, NAIROBI COUNTY ASSEMBLY.....APPLICANT

VERSUS

SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

(An application for stay of execution under Section 3A of the Appellate Jurisdiction Act

and Rule 5(2)(b) of the Court of Appeal Rules of the Judgement and Decree of the

Employment and Labour Relations Court at Nairobi (M.Onyango, J.)

dated and 16th October, 2020

in

Nairobi ELRC Petition No. 194 of 2019)

RULING OF THE COURT

The Employment and Labour Relations Court (Onyango, J.) entered a judgment on 16th October, 2020 in which the court dismissed a petition by the Applicant. In that petition, the Applicant (Mr. Muvengei Jacob) sought remedies including, inter alia;

“(a) A finding and holding that the 1st respondent has engaged in a malicious scheme of orchestrating the unlawful and unfair suspension, termination and/or removal of the Petitioner and other senior officers and staff of the Nairobi City County Assembly from their respective offices since September, 2018;

(b) An injunction restraining the respondents...from illegally or unfairly suspending, terminating and/or otherwise removing... Muvengei Jacob Ngwele currently serving as the Clerk of the Assembly and Secretary of the 2nd Respondent...;

(c) An injunction restraining the 1st Respondent... from illegally or irregularly constituting the membership of the 2nd Respondent...;

(d) An order of certiorari quashing purported changes in the membership of the 2nd Respondent as published by the 1st Respondent in Gazette Notice No. 9978...dated 22nd October, 2019...”.

2. In dismissing the petition, the superior court vacated all interim orders made during the subsistence of the petition including the stay of Petition No. 71 of 2020 and the order suspending Gazette Notice No. 5072 of 24th July, 2020. Dissatisfied with the Judgment of the superior

Court, the applicant herein has approached this Court by way of a motion on notice under certificate of urgency dated 5th November, 2020 and brought under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders *inter alia*, that there be a stay of execution of the judgment of the superior court dated 16th October, 2020 and that an injunction be issued restraining the respondents from advertising, shortlisting, recruiting or appointing a substantive holder of the office of the Clerk, of the Nairobi County Assembly, both pending the filing, service, hearing and determination of the applicant's intended appeal. The application is supported by an affidavit sworn by Muvengei Jacob Ngwele, the ostensible Clerk of the Nairobi City County Assembly, setting out, at length, the background to the matter and the matters in controversy.

3. Counsel for the applicant has submitted that this is a proper case for this Court to exercise its discretion under **Rule 5(2)(b)** of the **Court of Appeal Rules** and grant the orders sought. He states that the case fits the well-established legal criteria for the grant of stay orders under **Rule 5(2)(b)**; that the intended appeal is arguable and would be rendered nugatory in the event the orders for stay are not granted.

4. He asserts the applicant's draft memorandum of appeal discloses an arguable appeal, that being, an appeal that is deserving of this court's consideration, it is only appropriate in the circumstances demonstrated herein that the stay order sought be granted. In addition to challenging the various findings of the superior court in its judgement, counsel for the applicant explains that the intended appeal seeks to challenge the legality and authenticity of the impugned judgment and furnishes material to illustrate this. He further states that the applicant will adduce evidence of the superior court's apparent frustration of an out of court settlement and that they intend to argue that the respondents colluded with the superior court to invalidate the applicant's employment as Clerk of the Nairobi City County Assembly.

5. On the nugatory aspect, counsel, citing this court's decision in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR*, submits that whether an appeal will be rendered nugatory is a question of fact depending on the peculiar facts and circumstances of each case, whether what is sought to be stayed, if allowed to happen, is irreversible and if it is not reversible, whether an award of damages would be sufficient remedy. He submits that the intended appeal in this matter would be rendered nugatory if the orders sought are not granted because:

“(a) The respondents will irreversibly appoint another person to the office of the Clerk of the Assembly;

(b) The applicant and his family stand irreversibly to lose their matrimonial home. The purchase/construction of the matrimonial home was done through a mortgage loan availed to the applicant as an employee to the 2nd respondent...;

(c) The perpetrators of the fraudulent scheme used to secure the impugned judgment are likely to cover their tracks...in an effort to legitimize the illicit judgment; and

(d) The residents of Nairobi City County and several suppliers of the Nairobi County Government will suffer irreversible and irreparable harm. Such harm extends to unravelling of acts and decisions made by the Applicant in his capacity as Clerk of the Assembly since 2013.”

6. In opposition to the application, counsel for the 1st respondent submitted that the order of the superior court was a “*negative order that has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum.*” Counsel thus queried whether stay could be granted in regard to a negative order. Citing this court's decision in *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others [2014] eKLR* and the decision in *Western College of Arts and Applied Sciences vs. Oranga & Others [1976] KLR 63*, counsel argued that it was clear that a negative order is not capable of being stayed. On whether the intended appeal is arguable, counsel for the 1st respondent submitted that it only raised

“*unsubstantiated, frivolous, vexatious and baseless claims of collusion, ex-post alteration, fraud, dishonesty, irregularity and bias that border (sic) conjecture and no more.*” He further submits that the issues raised touch on the integrity of parties not before the Court and the appeal is not the right forum to ventilate the same. Counsel asserted that the applicant seeks to hold the functions of the Nairobi County Assembly in abeyance and at his mercy and that the Court must carefully weigh the need to ensure the continuity of the functions of the County Assembly to the citizenry of Nairobi *vis-à-vis* the claims by the applicant to ‘*personalize a state office.*’

7. The 2nd respondent also opposed the application setting out the parameters the court must consider in considering an application under **Rule 5(2)(b)** as enumerated in *Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR*, counsel for the 2nd respondent submitted that the applicant failed to annex a memorandum of appeal and therefore it was not possible to determine whether the appeal was arguable. They submitted that the order of the superior court was a negative order hence not capable of being stayed. In regard to the nugatory aspect, counsel for the 2nd respondent addressed the applicant's contention that if stay was not granted, the respondents would appoint another person to the position of Clerk of the Assembly. They submitted that there was already a substantive holder of that office who has already been appointed and is currently serving in that office following a regular recruitment process. Counsel thus argued that the stay orders sought by the applicant were moot. They also submitted that the applicant had failed to demonstrate that the respondents would not be able to pay damages should the intended appeal ultimately succeed and such after the orders were declined.

8. We have considered the application along with the rival affidavits and written submissions by learned counsel. We have also considered the law, particularly as espoused in the authorities cited to us. We do not agree with the respondent's argument that the trial court's orders dismissing the applicant's petition is a negative order incapable of being stayed. We associate ourselves with this court's positions in *Equity Bank Limited vs. West Link MBO Limited, Civil Application No. Nai 78 of 2011* and *Daniel Lomagul Kandeï & 2 Others vs. Kamanga Holdings Limited & 40 Others (2017) eKLR* that in dealing with **Rule 5(2)(5)** applications this Court is exercising its discretion as a court of first instance and that such discretion when exercised must consider the import of the decision of the superior court, the nature of the orders sought in the intended appeal and the particular acts before the court for preservation of the subject matter of the appeal in order to ensure the just and effective determination of the appeal. We think that injunctive orders can be granted even where the judgment appealed against simply dismissed the applicant's claim.

9. It is settled that for an applicant to succeed in an application such as the one before us he/she must establish the twin principles of

arguability and nugatory aspect. These principles were well summarized in the case of Stanley Kangethe Kinyajui vs. Tony Ketter & Others [2013] eKLR (see also Reliance Bank Ltd (in liquidation) vs. Norlake Investments Ltd., Civil Application No. Nai. 93/02 (UR) as follows:

“(i) in dealing with Rule 5(2)(b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this Court.

(ii) The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just do so.

(iii) The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

(iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.

(v) An applicant must satisfy the Court on both of the twin principles.

(v) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.

(vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

(viii) In considering an application brought under Rule 5(2)(b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.

(ix) The term “nugatory “has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or it is not reversible whether damages will reasonably compensate the party aggrieved.”

10. It is also incumbent on the applicant to establish both limbs and proving only one of them will not aid its case. On the aspect of arguability, it is trite that an arguable appeal need not be one with high chances of success but one that raises issues that deserve the consideration and determination by this Court on Appeal. We note that the applicant annexed a draft memorandum of appeal to the application raising a number of grounds attacking the judgment of the superior court. We are satisfied, from the concerns and averments contained therein, that the draft memorandum of appeal contains arguable points and that the intended appeal is not frivolous.

11. The applicant has questioned or challenged the legality and authenticity of the impugned judgment, in that it is tainted with fundamental infirmities that go to the root of the administration of justice. Such infirmities include collusion, ex-post alteration, fraud, dishonesty, irregularity and bias. *Prima facie* there is allegation that the Judgment delivered in open court on 16th October, 2020 is materially different from the version released to the parties. And that even the respondents have moved the superior court to cure the said alteration through an application for review.

12. It is also contended that the superior court frustrated an out of court settlement of the petition, that the respondents colluded with the superior court to invalidate the employment of the applicant as Clerk of the Assembly. More importantly, it is submitted that the trial Court ignored a consent judgment rendered before another Judge of equal jurisdiction in ELRC No. 2108/2014, which conclusively determined that the applicant’s appointment as Clerk was lawful.

13. It is also contended by the applicant that the superior court disregarded an opinion from the Ethics and Anti-Corruption Commission, which established that the applicant’s appointment and employment had been done above board. In our view, the matters raised by the applicant are not only weighty and fundamental but also go to the root of the administration of justice that they cannot be ignored or wished away. The applicant intends to question the integrity of the whole process that made him lose his employment and which in essence resulted in his position being taken away by another person. In our view, these are not frivolous matters but matters which are of a substantial nature not only inviting the respondents to respond to the issues raised on appeal but also the court to interrogate those issues and rule either way. We are therefore satisfied that the applicant has surmounted the first hurdle.

14. On the issue as to whether the intended appeal stands to be rendered nugatory if an order for stay of execution is not granted, this Court in Ahmed Musa Ismael vs. Kumba ole Ntamorua & 4 Others (CA No. 256 of 2013) held as follows:-

“The second limb, and both must be established, is an indication that stays or injunctions are not automatic. Rather they are granted to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

A central aspect of the impugned judgment is the applicant’s ostensible position as Clerk to the Nairobi County Assembly and the respondent’s responsibilities *vis-à-vis* that position. An important matter for consideration is whether a party can be allowed to benefit from a process whose authority, jurisdiction and integrity is being questioned. As stated earlier, the question of authority and integrity of the Judgment that removed the applicant is a central thread running through the litigation before the High Court and the Court of Appeal. No doubt there is an application for review of the judgment to correct the infirmities and irregularities filed by the respondents before the High Court, clearly confirming that *prima facie* there is a real contestation on the legality of the judgment and all incidental rights and benefits accruing therefrom. It is for those reasons that we think that the applicant has established that the appeal would be rendered nugatory in the

event a stay is not granted.

15. Clearly the applicant has satisfied both limbs for the grant of the orders sought. A question that lingers in our mind is, as to the position and place of the orders sought by the applicant bearing in mind the respondents assertion that there is already someone else who has substantively been appointed to that position following a regular recruitment process according to them (respondents) and it is already discharging functions of that office. No doubt there is an important issue as to whether the applicant was lawfully removed from office. Again, another important factor is whether the person who replaced him is lawfully and legitimately in office. According to the documents and material placed before us by the parties, the process of replacing the applicant is heavily questioned. We reiterate what we have stated above that have been informed by the Advocates for the respondents that the application has been overtaken by events, since there is already a substantive holder of the Office of Clerk. However, according to the learned counsel for the applicant, the 1st respondent should not be allowed to benefit from an illegal process and that this Court should not allow parties through a process contrary to the Administration of Justice to assume office. These, in our humble are issues of fundamental importance to be determined at the hearing of the appeal. It is also a clear manifestation that the case of the applicant is inextricably connected to the 1st respondent, meaning that the office of Clerk is inseparable at this stage and taking into consideration the facts outlined hereinabove by the applicant, we think that it is in the interest of justice to preserve the substratum of the dispute. The only way to do so is:

1. To injunct both parties from acting as Clerk, Nairobi County Assembly. For clarity both Mr. Edward Gichana Ombwori and Jacob Muvengei Ngwele are hereby injuncted from exercising the powers, privileges and responsibilities of the office, Clerk, Nairobi County Assembly pending the hearing and determination of the intended appeal.

2. With this in mind and considering the application in entirety, balancing the interests of the parties and recognizing the public interest and the critical public functions played by the parties herein, the application dated 5th November, 2020 is allowed and we hereby order that there shall be a stay of execution of the judgment of the Employment and Labour Relations Court (Hon. Lady Justice M. Onyango) dated 16th October, 2020 pending the hearing and determination of the intended appeal to this Court against the said judgment.

3. Further, an order is hereby granted restraining the respondents from advertising, shortlisting, recruiting or appointing a substantive holder of the office of the Clerk of the Nairobi City County Assembly pending the determination of the intended appeal. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

R. N. NAMUBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR