



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, GATEMBU & MURGOR J.J.A.)**

**CIVIL APPLICATION NO. NAI 247 OF 2019**

**BETWEEN**

- MONICA MUTHAMI.....1<sup>ST</sup> APPLICANT
- PAULINE SARAH AKUKU..... 2<sup>ND</sup> APPLICANT
- SAMMY KIPLIMO KIPTOO.....3<sup>RD</sup> APPLICANT
- ROBERT OTIENO.....4<sup>TH</sup> APPLICANT
- JENNIFER KORIO.....5<sup>TH</sup> APPLICANT
- SHIRLEY GABRIELLA ACHIENG.....6<sup>TH</sup> APPLICANT
- ASMAN JOHN.....7<sup>TH</sup> APPLICANT

**AND**

- NAIROBI CITY COUNCIL ASSEMBLY BOARD.....1<sup>ST</sup> RESPONDENT
- THE AG. CLERK NAIROBI CITY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT

*(Being an application for an injunction pending the hearing and determination of an intended appeal against the judgment and orders of the High Court at Milimani (M. Onyango, J) delivered 26<sup>th</sup> July 2019 in JUDICIAL REVIEW APPLICATION No. 35 of 2018)*

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**RULING OF THE COURT**

By a Notice of motion dated 30<sup>th</sup> July, 2019, brought under **Article 159** of the **Constitution** and **rule 5 (2) (b)** the **Court of Appeal rules, the applicants**, sought orders for an injunction to restrain the respondents, their officers, servants or agents from seconding them to the liaison office in the County Executive pending the hearing and determination of the intended appeal.

The motion that was supported by a sworn affidavit of **the 1<sup>st</sup> applicant, Monica Muthami** of the same date, t was brought on grounds that the applicants had filed a Judicial Review application in the Employment and Labour Relations Court wherein they sought orders of certiorari to prohibit the respondents from seconding them to the liaison office in the County Executive or any other office of the County Executive; that by a judgment dated 29<sup>th</sup> July 2019, the trial judge (**M. Onyango, J**) dismissed the application. The applicants were aggrieved by that decision and intend to file an appeal in this Court. They contend that the appeal is arguable as the learned judge erroneously found that the applicants were not entitled to the judicial review orders sought, and further failed to address the question of whether the secondment to the liaison office was proper in the absence of a County Assembly Service Scheme. That furthermore the learned judge failed to appreciate that the secondment was being utilized as a weapon to victimize and punish the applicants.

Despite having been served with the hearing notice on 9<sup>th</sup> March 2021 no reply to the application was received from the respondents.

Be that as it may, 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 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 have faulted the learned judge for dismissing the judicial review application, without addressing the question of whether the secondment was procedural in the absence of a County Assembly Service Scheme and for failing to appreciate that the secondment was being utilized as a weapon to victimize and punish the applicants. Our high level view is that, the circumstances of the case do not point to the grounds as being arguable, particularly since no correlation could be drawn between the secondment process and the yet to be enacted County Assembly Service Scheme, or in other words, that because the scheme had yet to be enacted, this rendered the secondment process as unprocedural.

That said, a failure to satisfy the first limb does not necessitate a consideration of whether the second limb was met. Needless to say, this too fails. The applicants have not indicated whether the impending secondment is due to take effect or has taken effect. They have provided no indication as to what would be rendered nugatory in the event they were seconded and the appeal were to succeed. There is nothing evidencing loss of their employment, or indicating that there would be a change in the employer/employee relationship following the secondment. All that has happened is that they will be gainfully employed in a different department of the same entity. They can always return to their original positions were the appeal to succeed. And with that, we find that the second limb also fails.

As such the Notice of motion dated 30<sup>th</sup> July 2019 is unmerited, and is dismissed with costs to the respondents.

***It is so ordered***

***Dated and delivered at Nairobi this 4<sup>th</sup> day of June, 2021.***

**H. OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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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**