IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: NAMBUYE, KARANJA & MURGOR, JJ.A.]

CIVIL APPEAL (APPLICATION) NO. E131 OF 2021

BETWEEN

THE PUBLIC SERVICE COMMISSION & 72 OTHERS .....APPLICANTS

AND

OKIYA OMTATAH & 4 OTHERS.....RESPONENTS

(An application for stay of judgment and order of the High Court of Kenya (A. C. Mrima, J.) dated 20th *April, 2021)* ***in*** **Nairobi Constitutional Petition 33 of 2018 consolidated with Petition 42 of 2018**

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RULING OF THE COURT

Before us is a Notice of Motion dated 29th April, 2021 brought under **Sections 3A** and **3B** of the **Appellate Jurisdiction Act, Rules 5(2)(b)** and **47** of the **Court of Appeal Rules**, substantively seeking a stay of the judgment and order of the High Court decision of **Hon. A. C Mrima, J.** dated and delivered on 20th April, 2021 in Nairobi High Court, Constitutional and Human Rights Division **Petition No.33 of 2018** consolidated with **Petition No. 42 of 2018** pending hearing and determination of the intended appeal of the applicants herein and an order for costs.

The motion is supported by grounds on its body and a supporting affidavit of **Paul Kihara Kariuki**, **EGH**, the 2nd applicant herein together with annexures thereto. It has been opposed by a replying affidavit of **Christine Nkonge**, described as the Executive director of the 5th respondent, sworn on 17th May, 2021 together with annexures thereto and grounds of opposition dated 17th May, 2021 filed by the 1st interested party. It was canvassed through rival pleadings, written submissions and legal authorities filed by advocates for the respective parties, without their attendance or oral highlighting at the conclusion of which we considered the pleadings, submissions and legal authorities relied upon by the parties in support of their respective opposing positions herein and made interim orders as follows:

> **1. Interim orders in terms of prayers 2 and 3 of the application are granted pending delivery of the ruling herein on 23rd July 2021.**
>
> **2. Costs of the application to abide the delivery of the Ruling.**

The background to the application albeit in summary form is that the 1st and 2nd respondents filed in the **Nairobi High Court Constitutional and Human Rights Division Petition No. 33 of 2018 and Nairobi High Court Constitutional Petition No. 42 of 2018**. The first petition mainly challenged the constitutionality of the position of the Chief Administrative Secretaries and the appointment of the holders of those offices. It also challenged the appointment of Cabinet Secretaries and Principal Secretaries on several fronts, while in the second petition, the Petitioner challenged the composition of the Cabinet on the grounds that the Cabinet did not meet the constitutional gender balance; did not contain the 5% of the persons living with disabilities as well as lacking in youth, minority and marginalized groups. The same fate visits the appointment of the Principal Secretaries and the Chief Administrative Secretaries. The petitions were consolidated and heard by way of written arguments at the conclusion of which the learned Judge, **A.C. Mrima, J.** evaluated the record considered it in light of the rival positions before the court and issued orders as follows:

> **a. Claims that this Court has no jurisdiction to deal with the consolidated Petitions, that the creation of the office of the Chief Administrative Secretary in the public service infringes Articles 152 and 153 of the Constitution, that the tenure of office of a Principal Secretary is tied to the term of office of the President who appoints the Principal Secretary and that the President has no powers to re-assign a Cabinet Secretary or a Principal Secretary without the approval of the National Assembly were not proved and are hereby dismissed.**

b. The claim that the processes towards the establishment of the Office of the Chief Administrative Secretary were in contravention of Articles 10, 47, 132(4)(a), 201(a), 232(1) and 234(2)(c) of the Constitution as well as Sections 27 and 30 of the PSC Act succeeded. The Court declares the Office of the Chief Administrative Secretary unconstitutional.

c. The claim that a Cabinet Secretary who serves in the first term of the President (which President is re-elected for a second term) must be approved by the National Assembly so as to continue to serve as a Cabinet Secretary in the second term of the President succeeded. Such contravenes Article 132(2) of the Constitution and Sections 3 and 7 of the Public Appointments (Parliamentary Approval) Act. As such, any Cabinet Secretary who served during the first term of H.E. President Kenyatta and continues to serve as a Cabinet Secretary during the second term without having been approved by the National Assembly upon the President's re-election is in office in contravention of the Constitution.

d. The claim that a Principal Secretary can only be appointed into office upon such a person being shortlisted, interviewed, recommended for nomination by the Public Service Commission to H.E The President and on approval by the National Assembly succeeded. Any contrary appointment contravenes Articles 10, 27, 41(1), 47 and 155 of the Constitution as well as Sections 3 and 7 of the Public Appointments (Parliamentary Approval) Act and Section 27 of the Public Service Commission Act. Therefore, any serving Principal Secretary who was not either shortlisted, interviewed, recommended for nomination by the Public Service Commission to H.E The President or approved by the National Assembly is in office in contravention of the Constitution and the law.

e. As a result of passage of time since the filing of the Petitions herein in 2018, and for purposes of consideration of further reliefs, if any, the Hon. Attorney General shall, within 30 days of this judgment, file in this matter an Affidavit giving, *inter alia*, the following details: -

i. The members of the Cabinet in January 2018.

ii. The current members of the Cabinet.

iii. The gender, age and ethnicity of the current Cabinet Secretaries and Principal Secretaries.

iv. The time and manner in which the current Cabinet Secretaries and Principal Secretaries were appointed.

v. Whether any serving Cabinet Secretary or Principal Secretary suffers any disability.

f. Given the potential of orders (b), (c) and (d) above to disrupt the orderly operations of the Ministries and in view of the state of the Covid-19 Pandemic in Kenya further to the processes involved in recruiting Cabinet and Principal Secretaries and the re-organization of the Ministries in the absence of the Chief Administrative Officers or the regularization thereof, the effect of orders (b), (c) and (d) above is hereby suspended for the period when the Country is battling to contain the Covid-19 Pandemic or such a period as this Court may later determine in order to afford the Respondents an opportunity to regularize the situation.

g. Once declared by the Government that the Covid-19 Pandemic curve is flattened, the Honourable Deputy Registrar of this Court shall schedule this matter for mention on the basis of priority.

h. This being a public interest litigation, each party will bear its own costs.

Those are the orders of this Court"

The applicants were aggrieved and timeously filed a notice of appeal dated 29th April, 2021 intending to appeal against the whole of the said judgment on which the application under consideration is anchored.

Supporting the application, the applicants aver and submit that they have satisfied the twin prerequisites for granting relief under **Rule 5(2)(b)** of the **Court of Appeal Rules** being demonstration that the appeal or the intended appeal is arguable and second, that the appeal/intended appeal will be rendered nugatory should it ultimately succeed if the substratum of the appeal is no more or out of reach for the successful appellant. In support of the first prerequisite, the applicants rely on the annexed draft memorandum of appeal containing ten (10) grounds of appeal. The applicants intend to fault the learned Judge for *inter alia*: finding that the Cabinet Secretaries re-appointed upon the re-election of a President ought to be vetted afresh when there is no provision of law that requires this to be done, finding that the Principal Secretaries who were not either shortlisted, interviewed and recommended for nomination by the Public Service Commission to the President are in office unconstitutionally when there is no provision of the Constitution of Kenya that provides for this process, making orders in the nature of an advisory opinion or abstract propositions of law and not directly resolving any real, earnest or vital controversy or dispute. Further complaint is that the orders granted by the Judge fail, firstly, to identify the Cabinet Secretaries who served during the first term of H.E President Uhuru Kenyatta and continue to serve as Cabinet Secretaries during the President's second term without having been approved by the National Assembly upon the President's re-election and are now in office in contravention of the Constitution of Kenya; and, secondly, the Principal Secretaries who were not either shortlisted, interviewed, recommended for nomination by the Public Service Commission to the President or approved by the National Assembly and are in office in contravention of the Constitution of Kenya when the said office was lawfully established by H.E President Uhuru Kenyatta upon recommendation of the public service in exercise of his powers under **Article 132(4)(a)** of the Constitution of Kenya. They also intend to fault the learned Judge in finding that the recommendations by the Public Service Commission creating the positions of Chief Administrative Secretary was an administrative action and subject to the fair administrative requirements in **Article 47** of the **Constitution of Kenya** and the **Fair Administrative Action Act**; in finding that the law on the recruitment of Principal Secretaries was applicable to the recruitment of Chief Administrative Secretaries; in creating, without any legal basis, a differentiation in the tenure of Cabinet Secretaries and Principal Secretaries on account of their respective appointment processes, by not

holding as he should have that all Cabinet Secretaries had been approved by the National Assembly; in shifting the burden of proof to the respondents by requiring the Attorney General to provide information, post judgment for purposes of determining whether the petitioners were entitled to some of the reliefs sought; and, lastly, in finding that the requirement of the inclusion of persons living with disabilities in the cabinet was for immediate implementation when **Article 54(2)** of the **Constitution of Kenya** is clear that the same shall be implemented progressively.

Turning to the satisfaction of the second prerequisite, the applicants assert that if the relief sought is not granted, the disruption of Government operations and the resultant effect of service delivery to the people of Kenya are neither reversible nor capable of being compensated by an award of damages.

To fortify the above intended grounds of appeal, **Mr. Charles Mutinda**, a chief state counsel submits that if the orders granted by the learned judge are not stayed, the position of Chief Administrative Secretary as currently constituted will cease to exist and all Chief Administrative Secretaries will not only lose their jobs but their actions during the time they held office may be called to question. He argues that some ten (10) cabinet secretaries and a number of Principal Secretaries may suffer a similar fate and the cabinet will not be properly constituted. The Government will also be incapable of functioning optimally. It would also be impossible or extremely difficult to comply with the judgment and order of the High court within the remainder of the current presidential term which is just about fifteen (15) months as at the time of the delivery of the intended impugned judgment; and that considering the difficulties that would be posed in the relevant public participation, recruitment and vetting/approval processes of new office bearers for the affected offices due to the Covid-19 pandemic. It is therefore imperative for the court to intervene and grant the relief sought. He also submits that it is in the public interest that the order is stayed as the judgment of the trial court will affect the government to function optimally and that the ultimate losers will be the Kenyan people who expect service delivery of the highest standard from the government and consequently rendering the applicants appeal nugatory should it ultimately succeed.

In support of their submissions, applicants have relied on the following authorities: **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others vs. Job Kilach [2003] eKLR, Dennis Mogambi Mong'are vs. Attorney General & 3 Others [2014] eKLR** and **Attorney General vs. Okiya Omtatah Okoiti & Another [2019] eKLR** all on the principles/propositions that an arguable appeal is not necessarily one which must succeed but it should be one which is not frivolous and that a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable; **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227, Hashmukhlal Virchand Shah & 2 Others vs. Investment & Mortgages Bank Limited [2014] eKLR**; **George Otieno Gache & Another vs. Judith Akinyi Bonyo & 5 Others [2017] eKLR;**

on the need for the Court to exercise its discretion in such a manner so as to prevent an appeal/intended appeal from being rendered nugatory should it ultimately succeed and on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

In rebuttal it was the 1st respondent's case that the applicant has not met the threshold for grant of stay under **Rule 5(2)(b)** of the Court's **Rules** and that the appeal is a nonstarter. He however concedes that some of the grounds raised in the applicant's draft memorandum of appeal are **'arguable'**. Further, that the application is a nonstarter as all that applicants purport to stay is premature as the trial court suspended its orders until further notice, pegged on the containment of the Covid-19 pandemic under **order** (**f)** and (**g)** of the judgment sought to be stayed and that the application is therefore an exercise in futility.

In support of their averments and submissions, the 1st respondent relies on the following authorities; **Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 others [2013] eKLR, Yusuf Mbuno (CEO) vs. Okiya Omtata & 7 Others [2021] eKLR** and **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** on the principle guiding the exercise of this Court's mandate under **Rule 5(2)(b)** of the Court's **Rules**; **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**; on the discretion of this Court to grant an injunction in view of the public interest of the matter.

The 5th respondent's case in rebuttal is that the applicants have not met the threshold for granting of a stay of the trial court's orders under **Rule 5(2)(b)** of the Court's **Rules**. Second, that they are undeserving of the relief of a stay order as there is already an inbuilt stay in the orders issued by the High Court, a position similarly taken by the 1st interested party.

In support of their averments and submissions, the 5th respondent relies on the following authorities; **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** on the principles that guide the exercise of this court's mandate under **Rule 5(2)(b)** of the Court's **Rules**; **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**; on the discretion of this court to grant an injunction in view of the public interest of the matter; and lastly, **Attorney General & Another vs. Tolphin Nafula & 5 Others; Attorney General (Interested Party) [2021] eKLR** on the proposition that an appeal will be rendered nugatory should it ultimately succeed in the circumstances where the substratum of the appeal would no more or out of reach of the successful appellant and this Court.

Our invitation to intervene on behalf of the applicants has been invoked substantively **Rule 5(2)(b)** of the Court's **Rules**. It provides:

> **"in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just."**

The principles that guide the Court in the discharge of its mandate under the above **Rule** and which we fully adopt are as crystallized by the Court in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR**. These require an applicant seeking relief premised on the above Rule to demonstrate that the appeal or the intended appeal is arguable and second, that the appeal will be rendered nugatory should it ultimately succeed after the substratum of the appeal is no more or out of reach of the successful appellant.

In satisfaction of the first prerequisite, applicants rely on the annexed memorandum of appeal whose contents are already highlighted above

and which we find no need to rehash. Our take on the same is that in law an arguable appeal is not one which must necessarily succeed, but one which is not frivolous but raises a bona fide issue that can be argued fully before the Court. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

We have considered the above threshold in light of the rival positions herein on this prerequisite and are satisfied that the intended grounds of appeal raised in the draft memorandum of appeal annexed to the application are arguable, their ultimate success or otherwise notwithstanding.

On the nugatory aspect, the position in law is that this depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. See the case of **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**.

We have considered the above threshold, in light of the rival position herein on this prerequisite. It is our finding that although there is already an inbuilt stay granted by the trial court under order **(f)** of the judgment already set out above, public interest underpinning the substratum of the intended appeal would demand that we affirm the interim orders in terms of prayer 2 and 3 of the application issued on 15th June, 2021 and which we hereby do. Costs of the application to abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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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