



**Ogada & 2 others v County Assembly of Homabay & 2 others (Civil Application 50 of 2021) [2021] KECA 46 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 46 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 50 OF 2021  
S OLE KANTAI, HA OMONDI & M NGUGI, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**DANIEL OMONDI OGADA ..... 1<sup>ST</sup> APPLICANT  
COLLINS ODHIAMBO AGUTU ..... 2<sup>ND</sup> APPLICANT  
TOBIAS ODUNDO (MEMBERS OF THE HOMABAY COUNTY PUBLIC  
SERVICE BOARD) ..... 3<sup>RD</sup> APPLICANT**

**AND**

**COUNTY ASSEMBLY OF HOMABAY ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF HOMABAY ..... 2<sup>ND</sup> RESPONDENT  
GOVERNOR OF HOMABAY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution of the orders of the  
Employment and Labour Relations Court of Kenya at Kisumu (Radido,  
J.) dated 11th December, 2020 in ELRC Petition No. 42 of 2020)*

**RULING**

1. There were 7 petitioners in the petition filed at the Employment & Labour Relations Court (ELRC) at Kisumu. They included the 3 applicants Daniel Omondi Ogada, Collins Odhiambo Agutu and Tobias Odundo, all members of the Homa Bay County Service Board. They prayed for various declarations following their removal from office in Homa Bay County. In a Judgment delivered on 15th October, 2020 Radido, J. found in the applicants' favour finding that their removal from office only came into operation upon presentation of a petition in accordance with Article 251(1) & (2) of the [Constitution](#) as read with Section 58(5)(b) of the [County Governments Act](#), 2012; the 2nd and 3rd respondents (County Government of Homa Bay and Governor, County of Homa Bay) had no authority under the Constitution and the law to discipline or remove the applicants from office. The Court issued



orders of judicial review in the nature of certiorari to remove into that court and quash decisions of the 1st respondent (County Assembly of Homa Bay) and the 3rd respondent and the respondents were ordered to pay to the applicants all arrears and further remuneration due to them.

2. The respondents were dissatisfied with those orders and moved ELRC with an application for stay of execution pending appeal. That application was heard inter partes and the Judge, satisfied that the respondents were entitled to an order for stay pending appeal made the following orders in the ruling delivered on 11th December, 2020:

- “(a) Stay of execution pending Appeal is granted on condition that the Petitioners are paid all outstanding remuneration and allowances up to end of December 2020 on or before 5 January 2021.
- (b) The remuneration the Petitioners would have earned up to the end of their terms of office are deposited into Court on or before 5 January 2021.
- (c) In default of compliance with (a) and (b) above, the stay order will automatically lapse without any further Court order or directions.”

We are now asked in the main in the Motion brought under rule (5) (2) (b) of the *Court of Appeal Rules* to order a temporary stay of the said orders pending the hearing of the application; that we order the Officer Commanding Station, Homa Bay Police Station to provide escort services and security to the applicants to enable them access their offices “... by breaking the padlocked (sic) placed to their premises by the 2nd and 3rd respondents...” pending the hearing and determination of the application; that the respondents be restrained from further locking, blocking and/or preventing the applicants from accessing their offices until conclusion of their term in office and that there be a temporary stay of the orders of ELRC pending hearing and determination of the appeal. In grounds in support of the Motion and in a supporting affidavit of the 3rd applicant, Tobias Odundo it is stated that Judgment had been entered by ELRC in favour of the applicants; that an application for stay of execution pending appeal had been allowed; that the applicants earn a living by working and it amounts to servitude contrary to their social and economic rights envisaged in the Constitution “... to go without salary for the unknown and uncertain period the appeal will take...”. Further, that the applicants will not be able to meet their monthly obligations of paying school fees, bank loans, house rent and medical fees; that the respondents did not fully comply with the orders of ELRC in that full salaries and allowances were not paid, amongst other things.

3. There was no replying affidavit from the respondents when the Motion came up for hearing before us on 27th July, 2021.
4. For an applicant to succeed in an application of this nature he must firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay - see a discussion of those principles in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR.
5. We have perused the draft Memorandum of Appeal. It is proposed to be argued on appeal that the Judge erred in granting stay of execution of the Judgment without affording sufficient grounds thereto; that the Judge rendered the applicants to a life of servitude by granting stay; that the Judge misdirected himself as to the issues in dispute and considered irrelevant ones that were never in contention; that the applicants’ submissions were not considered and that the ruling was against the weight of evidence.



6. We have in this ruling set out in full the orders made by the Judge in the ruling made on 11th December, 2020. It was ordered, pending appeal, that there be a stay of execution of the Judgment on condition that the applicants be paid all outstanding remuneration and allowances up to the end of December, 2020 and that the respondents do so by or before 5th January, 2021; that the remuneration the applicants should have earned upto the end of their terms of office be deposited in Court by a given date and there was a default clause where stay orders granted would automatically lapse without further orders if the respondents did not meet the conditions imposed on grant of stay of execution pending appeal.
7. The Judge in effect granted the applicants their salaries and allowances up to the end of December, 2020 and salaries and allowances up to the end of their terms of office were secured by it being ordered that the same be deposited in Court.
8. The respondents were entitled as of right to appeal against the Judgment given against them. They exercised that right and they were given a conditional order of stay pending appeal and there was even a default order if they did not comply with the conditions imposed on being given a stay order.
9. We cannot in those circumstances see any ground of appeal which would be arguable. The Judge was entitled to consider the merits of the application presented before him by the respondents. He considered it and found it merited. We cannot see how that would render the applicants to a life of servitude – their salaries and allowances were ordered paid up to December, 2020 and the rest of the salaries and allowances be secured by being deposited in court.
10. Having not found any arguable point in the intended appeal by the applicants we need not consider the second limb on whether the intended appeal would be rendered nugatory. The Motion fails and is dismissed with no order on costs, the respondents not having participated in the Motion.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR

