



REPUBLIC OF KENYA



**Public Service Commission v Institute & 2 others (Civil Application E096 of 2021) [2021] KECA 43 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 43 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E096 OF 2021  
W KARANJA, MSA MAKHANDIA & S OLE KANTAI, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**PUBLIC SERVICE COMMISSION ..... APPLICANT**

**AND**

**KATIBA INSTITUTE ..... 1<sup>ST</sup> RESPONDENT**

**AFRICA CENTRE FOR OPEN GOVERNANCE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution of the orders of the Constitutional & Human Rights Division at Nairobi (J.W.Lesit, E.C.Mwita & L.M Njuguna, JJA) dated 4th December, 2020 in PETITION NO. 331 OF 2016)*

**RULING**

1. The dispute in the Constitutional & Human Rights Division Court was initiated by way of a petition filed by the 1st and 2nd respondents who are nongovernmental organizations working for the interest of the public. The 3rd respondent was sued as the legal advisor to the government and its legal representative whereas the applicant was sued as a constitutional body established under article 233 of the constitution with the mandate to establish and abolish offices in the public service.
2. The petition challenged the selection and appointments by the President and the members of his cabinet, persons to positions of chairpersons and members of boards of various state corporations and parastatals; it was maintained in the petition that this mandate should be exercised by the applicant herein in 2 accordance with articles 10(2)(c), 27(3) and 232(2)(g)-(i) of the *Public Service (values and principles) Act, 2015*; that various statutes that gave such powers to other bodies should be declared invalid or unconstitutional and therefore be nullified; that such appointments should be premised on principles of fair competition and merit and that the process ought to be transparent and accountable pursuant to article 232(1) to (f) and 232(2) of the Constitution and that all appointments made by



the president or cabinet secretaries on 11th March, 2016 and gazetted in gazette notice Vol.CXVII-No.23; those made on 18th March, 2016 and gazetted in gazette vol.CXVIII-No.28; those made on 10th June 2016 and gazetted in gazette no. Vol.CXVIII-No.62; 17th June, 2016 under gazette notice vol.CXVIII-No.6; those made on 24th June, 2016 under gazette notice vol. no.CXVIII.No.70 and those made on 1st July, vide gazette notice vol.CXVIII-No.72 be declared invalid.

3. The applicant opposed the petition through a replying affidavit sworn by Joseph Kinyua the chief of staff and head of public service filed on 31st January, 2017 in which he deposed that the 1st and 2nd respondents could not determine that state corporations and parastatals were not offices in the national or county government; that the orders would affect people who had been in office and were not party to the proceedings; that the executive had power over state corporations and parastatals; and that the court could only interfere with the appointments if it was shown that the code of governance for state corporations was not adhered to.
4. The High Court heard the petition and its judgment dated 4th December, 2020, held that it could not declare the impugned provisions unconstitutional, however all appointments to state corporations must comply with the principles in articles 10 and 232 of the Constitution as well as the Public Service (values and principles) Act; and further made the following orders:

“i A declaration is hereby issued that all appointments made by the president or cabinet secretaries on 11th March 2016 and gazetted in gazette notice vol.CXVIII-NO.23; 18th March 2016 and gazetted in gazette vol.CXVIII-28; 10th June 2016 and gazette in gazette NO. Vol CXVIII No.CXVIII-No.70; and 1st July 2016 vide gazette notice vol.CXVII-No.72, are unconstitutional for violating articles 10, 232 and the public service(values and principles) act and therefore invalid.

ii An order is hereby issued quashing the appointments made on 11th March 2016 gazetted in gazette notice vol.CXVIII-No.23; 18th March 2016 under gazette notice vol.CXVIII-No.66; 24th June 2016, under gazette notice vol.CXVIII-No.70; and 1st July 2016 under gazette notice vol.CXVII-No.72.”

5. Aggrieved by the decision, the applicant filed a notice of appeal and subsequently a motion on notice dated 19th March, 2021, pursuant to rule 5(2)(b) of this court’s rules and section 3,3A and 3B of the Appellate Jurisdiction Act, in which it has asked us to grant stay of execution of the above judgment and decree pending the hearing and determination of the intended appeal.
6. The grounds in support of the application are that: it has been aggrieved by the entire judgment and decree and has as a result filed an appeal, that it is apprehensive that if stay of execution is not granted it may not be able to execute its powers and functions enshrined in Article 234 of the Constitution; that it was held that state corporations and parastatals are not offices in the public service, neither are they state organs or bodies established under the Constitution and thus they do not fall in the national government or in the county governments which was a question not pleaded by either of the parties; that the orders have an effect on the mandate of other state agencies such as the Salaries and Remuneration Commission, the office of the Auditor General and the Ethics & Anti-Corruption Commission; the findings shall remove the application of the *Public Finance Management Act, 2012*, the *Public Procurement and Asset Disposal Act* and the Leadership and Integrity Act; that the holders of these offices shall be exonerated from the values enshrined in Articles 10 and 73 of the Constitution; that there shall not be any audit or investigations by the various bodies in-charge and that it was willing to comply with any such order of this court and it was in the interest of justice that the said orders be granted.



7. In support of the motion is an affidavit sworn by Simon K. Rotich, its executive officer. He reiterated and expounded on the grounds aforesaid and further deposed that the applicant is the principal institution under the Constitution responsible for hiring and dismissal of public officers; that it sets standards of qualifications of various offices within the public service and that the orders if implemented would wish away the responsibilities of the management of its Human Resources functions, in addition he deposed that Article 260 of the Constitution defined a public office to be an office in both the national and county government whose remuneration and benefits were payable directly from the consolidated fund or directly from money provided by parliament, through a budgeting process.
8. In opposing this application, Lempaa Suyianka, the litigation counsel swore an affidavit deposing that the applicant had filed a similar application before the High Court seeking similar orders; that the applicant had conceded in the trial court that state corporations and parastatals were not within the public service as held by the Court rendering the appeal unarguable; that the appeal won't be rendered nugatory for there was a similar cause pending judgment which raised similar questions of law; the orders made were not executable and the appointments had already lapsed by effluxion of time having been made in 2016 and finally in the interest of the public, stay orders would suspend articles 10 and 232 of the Constitution, and the *Public Service (values and principles) Act, 2015* thus this court should not exercise its discretion and grant the said orders.
9. In its written submissions, the applicant maintained that it had an arguable appeal. The grounds raised were substantial and weighty; one of which was that the trial court erred in making a finding that state corporations and parastatals were not offices in the public service. We were urged to be guided by the principles set out in the case of *Stanley Kange'the Kinyanjui v Tony Ketter & 5 others* [2013] eKLR with regard to what the court should consider in applications of this nature.
10. It was further submitted, that the appeal may be rendered nugatory since the order sought if not granted will have a negative effect on its powers and functions as enshrined in article 234 of the Constitution. In addition, the finding was contrary to public policy for it being inconsistent with the Constitution. The 1st and 2nd respondents on their part urged that the intended appeal was not arguable for it raised issues that had been conceded in the trial court and led the court to agree with it, further that the appeal shall not be rendered nugatory for the reason that the judgment of the court dated 4th December, 2020 was incapable of being stayed or executed; granting stay in the circumstances shall suspend articles 10 and 232 of the constitution on appointments to parastatals. Finally, it was submitted that the applicant had failed to establish the two limbs on arguability and nugatory aspects so as to benefit from the discretion of the court in granting stay of execution sought.
11. We have considered the application, the rival affidavits, the submissions by both parties and the authorities cited. The notice of appeal dated 17th December, 2020 was filed pursuant to rule 75 of the court of appeal rules, which grants this court jurisdiction to entertain this motion. (See *Safaricom Ltd. V. Ocean View Beach Hotel Ltd & 2 others* [2010] eKLR).
12. The application is premised on rule 5(2)(b) of this Court's rules which provides inter alia:
  - “(2) subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:
    - a) ....



b) 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.”

13. The purpose of this rule is to preserve the substratum of the appeal. The principles that apply to applications of this nature are well known. First the applicant has to demonstrate that the appeal or intended appeal as the case may be, is arguable and secondly, that in the absence of stay, the same shall be rendered nugatory. These principles were succinctly set out in (*supra*).
14. The applicant’s main contention is that the finding of the court that state corporations and parastatals are not offices in the public service, because they are neither offices in the national government nor in the county government as defined by the Constitution was erroneous. The applicant maintained that such a finding would have a negative effect on its powers, functions and operations. To establish an arguable appeal, the applicant is not obliged to establish a multiplicity of issues, it will suffice even if one is raised as was held in *Joseph Gitabi Gachau & another v Pioneer Holdings(A) Limited & 2 others*[2002]I KLR 867. This one issue does not have to succeed at the full hearing but one which ought to be fully argued before the court as was held in *Joseph Gitabi Gachau & another v Pioneer Holdings(A) Limited & 2 others* [2009] eKLR. We are certain that the above issue is not idle. It makes the intended appeal arguable.
15. On the nugatory aspect, the applicant must establish that in the absence of an order of stay and execution ensues it will not be reversible. The applicant urged that its functions and powers in regard to Article 234 of the Constitution has been negatively affected. We do not see how its functions have been affected by the said orders. In any case the appointments have since lapsed by effluxion of time, having been made in 2016 for 3 year terms and therefore the intended appeal cannot be rendered nugatory.
16. The position in law is that both prerequisites must be met before a party can be granted relief under Rule 5(2)(b) of the Court of Appeal Rules. Since only one prerequisite has been satisfied, the application is unsustainable. It is accordingly dismissed with no order as to costs.

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

**W. KARANJA**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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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

