



REPUBLIC OF KENYA



Parliamentary Service Commission v Okioti & another (Civil Application E349 of 2021) [2021] KECA 120 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 120 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E349 OF 2021
AK MURGOR, HA OMONDI & KI LAIBUTA, JJA
OCTOBER 22, 2021**

BETWEEN

PARLIAMENTARY SERVICE COMMISSION APPELLANT

AND

OKIYA OMTATAH OKOITI 1ST RESPONDENT

MICHAEL ROTICH SIALAI 2ND RESPONDENT

(Being an application for stay of proceedings against the Ruling and Orders of the Employment and Labour Relations Court of Kenya at Nairobi (Mbaru, J) dated 8th June, 2021 in E.L.R.C Petition No E062 of 2021)

RULING

1. The Applicant, the Parliamentary Service Commission, was aggrieved by the Ruling and Order of Monica Mbaru, J given on 8th June 2021 in Employment and Labour Relations Court Petition No. E062 of 2021 by which the learned Judge dismissed the Appellant's and the 2nd Respondent's Notices of Preliminary Objection dated 8th and 10th May 2021 respectively challenging the jurisdiction of the court to hear and determine the Petition.
2. The Applicant's Notice of Motion dated 2nd July 2021 is made under Rules 5(2) (b) and 41 of the [Court of Appeal Rules](#) seeking inter alia –
 - (a) Orders that all further proceedings in Nairobi ELRC Petition No. E062 of 2021 be stayed pending the hearing and determination of the appeal; and
 - (b) that costs of the application be borne by the 1st Respondent.
3. The Applicant's Motion is made on ten grounds set out on the face of the Motion. It is supported by the affidavit of Jeremiah Nyegenye (Clerk of the Senate and Secretary to the Appellant) sworn on



2nd July 2021, and by the supplementary affidavit of Mbarak Awadh Ahmed learned counsel for the Applicant) sworn on 8th July 2021. Substantive among the grounds on which the application is made are that –

- (a) disputes on appointments of the Clerk of the National Assembly with the approval of the House under article 128(1) of the Constitution are, as is the case with disputes on appointment of members of constitutional commissions with the approval of the House, matters falling within the exclusive jurisdiction of the High Court, and not the ELRC; and
 - (b) if the orders hereby sought are not granted, hearing of the Petition and the application for conservatory orders before the ELRC will proceed before this Court has had an opportunity to determine the question as to whether the ELRC has jurisdiction to determine the matter and, consequently, the appeal shall be rendered nugatory.
4. Having carefully read the Notice of Motion and the supporting affidavit, we find that Ground (b) forms the basis of the appeal while ground (f) is the Applicant's contention that, if the orders sought in its Motion are not granted, the appeal will be rendered nugatory. On the other hand, grounds (a), (c) and (d) disclose the steps already taken by the Applicant to institute the appeal while ground (e) gives the reason for the urgency of this application.
 5. As is evident from his replying affidavit sworn on 22nd July 2021, the 2nd Respondent supports the application. On the other hand, the 1st Respondent opposes the application and, in his written submissions dated 19th July 2021, contends that the Applicant's Motion is unmerited. He asks us to dismiss it with costs.
 6. In their written submissions dated 16th July 2021 and made in support of the Applicant's application, counsel for the Applicant, Mbarak Awadh Ahmed (Advocate) address himself to the principles for grant of stay of further proceedings pending appeal and invited us to consider the decisions in *Hon. Anne Wanjiku Kibeh v Hon. Clement Kungu Waibara and IEBC [2020] eKLR*, *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others [2014] eKLR*, *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA p.227 at p.232*; *Attorney-General and another v Tolphib Nafula and 5 others [2021] eKLR* and *Attorney-General and 2 others v Okiya Omutata Okoiti and 14 others [2020] eKLR*.
 7. Counsel for the 2nd Respondent, M/s. Macharia-Mwangi and Njeru Advocates, filed written submissions dated 25th July 2021 in which they addressed the same principles for grant of stay of proceedings pending appeal. They cited *Olive Mwihaki Mugenda and another v Okiya Omutata Okoiti and 4 others [2016] eKLR* and *Energy Regulatory Commission v John Sigura Otido [2019] eKLR*.
 8. On his part, [t]he 1st Respondent filed his written submissions dated 19th July 2021 in opposition to the application. He relied on the authorities of *Stanley Kangethe Kinyanjui v Tony Keter and 5 others [2013] eKLR*, *University of Nairobi v Ricatti Business of East Africa [2020] eKLR*, *Samuel Kamau Macharia v KCB and others [2012] eKLR* and the aforesaid case of Peter Gatirau Munya v Dickson Mwenda Kithinji and 2 others(Supra). He drew our attention two three principles that guide the Court's decision in determination of applications for stay of further proceedings pending appeal: (a) whether the intended appeal is arguable with the possibility of success; (b) whether, if the orders are not granted, the intended appeal would be rendered nugatory; and (c) whether the issues raised are matters of public interest.
 9. In his Petition No. E062 of 2021 in the Employment and Labour Relations Court, the 1st Respondent challenged the constitutionality and validity of the appointment of the 2nd Respondent as the Clerk



of the National Assembly on contract after attaining 60 years mandatory retirement age in the Parliamentary Service. He sought –

- (a) a declaration that on attaining the mandatory age of 60 years on 25th May 2021, the 2nd Respondent should vacate office of Clerk of the National Assembly and proceed on retirement;
 - (b) a declaration that the appointment of the 2nd Respondent as Clerk of the National Assembly on contract with effect from 26th May 2021 to 31st July 2022 without the approval of the House is unlawful and unconstitutional and, therefore, invalid, null and void;
 - (c) an order quashing the appointment of the 2nd Respondent as Clerk of the National Assembly on contract after he attained the mandatory retirement age of 60 years;
 - (d) an order compelling the Parliamentary Service Commission to immediately commence the recruitment of the substantive clerk of the National Assembly in accordance with the law;
 - (e) an order compelling the Parliamentary Service Commission to appoint an acting Clerk from 26th May 2021 in the event that it will not have recruited a substantive Clerk; and
 - (f) a permanent injunction to prohibit the 2nd Respondent from assuming office of the Clerk of the National Assembly after his retirement on 25th May 2021.
10. The Applicant entered appearance under protest and filed a Notice of Preliminary Objection dated 8th May 2021 challenging the jurisdiction of the ELRC on the grounds inter alia that –
- (a) disputes on appointment of the Clerk of the National Assembly with the approval of the House under Article 128(1) of the Constitution are matters falling within the exclusive jurisdiction of the High Court;
 - (b) the Commission on Administrative Justice has original jurisdiction, in the first instance, to review a decision on release or denial of access to information;
 - (c) the 1st Respondent lacks locus standi to institute the Petition under Section 12(1) and (2) of the Employment and *Labour Relations Act* or otherwise; and
 - (d) by failing to join the National Assembly as party to the Petition, the ELRC lacks jurisdiction to make any adverse orders against the House.
11. The 2nd Respondent filed a Notice of Preliminary Objection on similar grounds. The two objections were heard together by way of written submissions whereupon the learned Judge dismissed the preliminary objections in her Ruling delivered on 8th June 2021.
12. Aggrieved by the Ruling and Order of the superior court, the Applicant lodged the appeal herein, and hence the application before us to stay further proceedings pending the hearing and determination of the appeal.
13. Having considered the Applicant’s Notice of Motion dated 2nd July 2021, the affidavit in support thereof, the supplementary affidavit of counsel for the Applicant, the written submissions of the Applicant, and those of the 1st and 2nd Respondents, we form the view that the Applicant’s Motion stands or falls on two main grounds:
- a) whether the appeal is arguable, which is to say, it is not frivolous; and
 - b) whether the appeal, if successful, would be rendered nugatory if stay was not granted.



14. The principles that apply in applications pursuant to Rule 5(2) (b) of the Court of Appeal Rules for stay of execution or of further proceedings pending appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles have been enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties, and to which we now turn.
15. On the first limb of this twin principle, the Applicant relies on the Court’s decision in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR where the Court held that, for stay orders to issue, the Applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory.
16. From the grounds on which the Applicant’s Motion is founded, the affidavits in support and the respective written submissions of the parties, we find that the contest revolves around (a) the jurisdiction of the ELRC; and (b) the constitutionality and validity of the 2nd Respondent’s retention in parliamentary service on contract after having allegedly attained the mandatory age of retirement.
17. On the authority of *Olive Mwibaki Mugenda & another v Okiya Omtata Okoiti & 4 others* (2016) eKLR, para 70, the 2nd Respondent submits that the superior court had no jurisdiction to scrutinize the validity or constitutionality of his extended service as Clerk of the National Assembly. In its decision, this Court held that the Employment and Labour Relations Court is not the Human Resource Department of any organisation; the court is not charged with constitutional or statutory mandate to determine and oversee recruitment of individuals to any position in employment. On the authority of [*Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* \[2020\] eKLR](#), the Applicant submitted [*that the jurisdiction*](#) of ELRC to interpret and apply the Constitution is not original or unlimited like that of the High Court.
18. In our considered view, the issues as to the jurisdiction of the ELRC raised on appeal are arguable. Whether the appeal will succeed or not is not for us to judge. That is a matter for determination at the hearing of the appeal. Neither is it material whether the appeal is preferred on only one or more grounds. This Court in *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
19. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay is not granted. The Applicant has, in its Motion, the supporting and supplementary affidavits, and in their written submissions, demonstrated to our satisfaction that it would be. In his supporting affidavit Jeremiah Nyegenye (Clerk of the Senate and Secretary to the Appellant) sworn on 2nd July 2021 states that if the orders hereby sought are not granted, hearing of the Petition and the application for conservatory orders before the ELRC will proceed before this Court has had an opportunity to determine the question as to whether the ELRC has jurisdiction to determine the matter and, consequently, the appeal shall be rendered nugatory. The same contention appears in paragraph 15 of the 2nd Respondent’s replying affidavit. Both give reasons for their assertion.
20. The term “nugatory” was defined in *Reliance Bank Ltd V Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. We are persuaded that the circumstances of the case



before us call for stay of further proceedings in the ELRC. Otherwise, the appeal, if successful, would be worthless or futile.

21. In his submissions, the 1st Respondent invited us to consider the Court's decision in *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR where it held at paragraph 9 that "on the 2nd limb of nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether 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 our view, the outcome of further proceedings in the superior court would, in the absence of stay, be irreversible. Neither would the aggrieved party be compensated by an award of damages.
22. Having considered the Applicant's Notice of Motion dated 2nd July 2021, the affidavit in support thereof, the 2nd Respondent's replying affidavit, the respective submissions of the 1st Respondent, and of counsel for the Applicant and counsel for the second Respondent, we find that the Applicant has satisfied the two limbs of the requirements in an application for stay of further proceedings in the superior court pending appeal. Accordingly, we allow the motion dated 2nd July 2021 and hereby order that all further proceedings in Nairobi ELRC Petition No. E062 of 2021 be and are hereby stayed pending hearing and determination of the appeal. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2021

A. K. MURGOR

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

