Sonko v Clerk County Assembly of Nairobi City & 11 others (Civil Application E228 of 2021) [2021] KECA 83 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 83 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E228 OF 2021

W KARANJA, J MOHAMMED & JW LESSIT, JJA

OCTOBER 22, 2021

BETWEEN

MIKE MBUVI SONKO ..... APPELLANT

AND

CLERK COUNTY ASSEMBLY OF NAIROBI CITY ..... 1ST RESPONDENT

SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY ..... 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY ..... 3RD RESPONDENT

CLERK OF THE SENATE ..... 4TH RESPONDENT

SPEAKER OF THE SENATE OF KENYA ..... 5TH RESPONDENT

SENATE OF KENYA ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) ..... 8TH RESPONDENT

ASSUMPTION OF THE OFFICE OF THE COUNTY GOVERNOR COMMITTEE ..... 9TH RESPONDENT

BENSON MUTURA THE ACTING GOVERNOR, NAIROBI .... 10TH RESPONDENT

ANN KANANU THE DEPUTY GOVERNOR ..... 11TH RESPONDENT

OKIYA OKOITI OMTATAH ..... 12TH RESPONDENT

(An application for stay and injunction pending the hearing and determination of an intended Appeal from the judgment of the High Court of Kenya at Nairobi (Chitembwe, Korir & Okwany, JJ) dated 24th June 2021 in Petition No. 425 of 2020 As consolidated with Petition No. E014 Of 2021)

RULING

Background

1. Before us is a notice of motion dated 29th June, 2021 in which Hon. Mike Mbuvi Sonko (the applicant) seeks orders in the main:

    a. That pending the hearing and determination of the intended appeal herein, an injunction or conservatory order do issue restraining anybody or any state organ or authority from swearing in Ms Ann Kananu Mwenda (the 11th respondent) as Governor of Nairobi City County;

    b. That pending the hearing and determination of the intended appeal herein, an order do issue restraining the 11th respondent from assuming substantive office of Governor for Nairobi City County or in any way performing any roles reserved for a substantive Governor; and

    c. That this Court makes such orders as may be appropriate to preserve the subject matter of the intended appeal herein and for the expeditious hearing and determination of the intended appeal.

2. The Clerk County Assembly of Nairobi City, The Speaker of Nairobi City County Assembly, The Nairobi City County Assembly, The Clerk of The Senate, The Speaker of the Senate of Kenya, The Senate of Kenya, Hon. Attorney General, The Independent Electoral and Boundaries Commission (IEBC), The Assumption of the Office of The County, Governor Committee, Hon. Benson Mutura, The Acting Governor, Nairobi, Ann Kananu Mwenda, The Deputy Governor, Okiya Okoiti Omtatah are the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th respondents respectively.

3. The application is brought under Rule 5(2)(b) of the *Court of Appeal Rules* (this Court's Rules). A brief background will place the instant application in context. The applicant was elected Governor of Nairobi City County in the General Elections held on 8th August, 2017. On 26th November, 2020 a notice of motion for the removal of the applicant was lodged with the Clerk of the Nairobi City County Assembly by one Michael Ogada, the member of County Assembly for Embakasi Ward. By a letter dated 26th November, 2020, the 1st respondent invited the applicant to appear before the Committee of the whole Assembly of the Nairobi City County Assembly on 3rd December, 2020. On 30th November, 2020, the applicant filed a constitutional petition before the Employment and Labour Relations Court and obtained conservatory orders. On 3rd December, 2020, the 1st respondent proceeded to convene the County Assembly for purposes of the motion for impeachment of the applicant. Subsequently, on the same date, the County Assembly of Nairobi City County passed a resolution under Article 181 of the Constitution as read with Section 33 of the *County Governments Act*; and that the Senate in its resolution passed on 17th December, 2020, voted to remove the applicant from office.

4. The applicant filed a Constitutional Petition challenging the impeachment process being Constitutional Petition No. E425 of 2020. Another Petition was filed by Okiya Okoiti Omtatah (the 12th respondent) being Constitutional Petition No. E014 of 2021. The two petitions were consolidated and heard together. The Speaker of the County Assembly of Nairobi City County (the 2nd respondent) was sworn in as Acting Governor. The 11th respondent was vetted and sworn in as Deputy Governor and the 2nd respondent subsequently resigned. The High Court (Chitembwe,

Korir & Okwany, JJ.) dismissed the consolidated petitions and in a lengthy judgment delivered on 24th June, 2021 the court found that the process of impeachment of the applicant fully complied with the constitutional and statutory requirements. It is this finding that has aggrieved the applicant and which he intends to appeal against. In the meantime, he seeks orders to prevent the 11th respondent, whom he appointed to the office of Deputy Governor and has since taken up this position, from ascending to the position of governor of Nairobi County.

5. A Preliminary objection was filed by the 1st respondent and supported by the 3rd respondent in which it was contended that this Court does not have jurisdiction to entertain the applicant's motion as there was no order made by the High Court that is capable of being stayed, that the order sought herein does not relate to the proceedings before the High Court and that the instant application has been brought contrary to the principle in *John N. Liboyi v Board of Governors St John College [2009] eKLR*. We shall consider this Preliminary Objection first as it challenges our jurisdiction to consider the applicant's motion.

6. We understand the application before us as seeking to preserve the status quo – in effect, ensure that the 11th respondent does not assume the office of governor of Nairobi county until his appeal is heard and determined. In our view, that is a question that this Court can properly consider in line with the jurisdiction conferred upon it under Rule 5(2)(b) of this Court's Rules. In *Njuguna S. Ndung'u v Ethics & Anti Corruption Commission & 3 others [2015] eKLR*, this Court affirmed its jurisdiction to grant conservatory orders by stating that:

> "It appears to us that the implication of the incorporation of "conservatory orders" into this Court's understanding of its Rule 5(2) (b) jurisdiction is a logical and inevitable consequence of fidelity to the Constitution and the overriding principle. If it in effect leads to a slight if nuanced, expansion of the traditional Rule 5(2) (b)considerations it would be a natural consequence to be embraced bearing in mind that the applicable principles are not in statute but have been developed by the Court over time. The object always must be the doing of substantial justice."

7. The purpose of conservatory orders in matters touching on the public interest were discussed by the Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]* eKLR where itstated that:

> "(86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

8. In the instant motion, the applicant has argued that his intended appeal bears a public interest element, and has raised various constitutional issues which in our view warrant our consideration and a determination on whether or not we should grant the orders sought herein. In the circumstances, we are satisfied that we have jurisdiction under Rule 5(2)(b) of this Courts Rules to consider the issues raised in the motion. In addition, we have considered the case of John N. Liboyi v Board of Governors

St John College (supra) which has been cited by the 1st respondent and find that the circumstances therein can be distinguished from those of the applicant. In that case, this Court stated that it had no jurisdiction as no notice of appeal had been filed through which the Court could have been clothed with jurisdiction to consider the application for stay. That is not the case here. We therefore find that this Court has the requisite jurisdiction to determine the instant application.

9. We turn now to consider the substantive orders in the motion. All the parties who made submissions before us agreed that the principles upon which this Court exercises its Rule 5(2)(b) of the Rules of this Court,jurisdiction to grant orders of injunction are settled. These were discussed by this Court in *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others [2000] eKLR* where in the Court delineated the jurisdiction of the Court in such an application. It stated that:

> i."The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case..."

10. These principles were reiterated by this Court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR* where it affirmed this Court's original and discretionary discretion in granting such orders. In that application, it was held, inter alia that this Court while exercising discretion under Rule 5(2)(b) of this Court's Rules has wide and unfettered discretion and that:

> " iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.
>
> v). An applicant must satisfy the court on both of the twin principles.
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> vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
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> vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
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> viii). In considering an application brought under Rule 5 (2)(b)the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
>
> ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
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> x). Whether or not an appeal will be rendered nugatory 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.
>
> xi). Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's impecunity, the onus shifts to the latter to rebut the allegation."

11. These are the principles we must apply to the application that is now before us.

12. In considering whether the appeal is arguable we remind ourselves that an arguable appeal is not necessarily one that must succeed, but merely one that is deserving of full ventilation before this Court.

13. In arguing that his intended appeal would be rendered nugatory, the applicant has claimed that he has an arguable appeal. He has annexed a memorandum of appeal to his affidavit and has urged us to consider it. In addition, he relies on *Martin Nyaga Wambora V County Assembly of Embu & 6 Others (2015) eKLR* where this Court was satisfied that the applicant had an arguable appeal as his appeal hinged on issues on interpretation of the Constitution.

14. In his submissions, the applicant, joined by the 12th respondent have made various allegations touching on the conduct of the 1st – 6th respondents and the various roles that they played during the impeachment process. In sum, they contend that the High Court reached an erroneous conclusion as it: did not properly interpret the Constitution in relation to the correct processes of impeachment conducted by the 3rd and 6th respondent; failed to abide by the doctrine of stare decisis by departing from the holdings of this Court in Martin Nyaga Wambora v Embu County Assembly & Others [2014] eKLR and Martin Nyaga Wambora v County Assembly of Embu & 37 Others [2015] eKLR; failed to properly addressthe constitutional violations particularised in the petitions; being openly biased against the applicant; failed to exercise its jurisdiction under Article 165(6) of the *Constitution* in failing to consider the question of lawful participation of members of the County Assembly in the process of impeachment. The applicant argues that all these issues which he intends to raise in the appeal evince an arguable appeal.

15. On his part, Mr. Omtatah argued that as a party interested in the substratum of the appeal, he was an interested and relevant party under Rule 77 of this Court's Rules. He argued that the application is merited and arguable, and identified as an arguable issue the question of public participation and the procedure for impeaching a Governor.

16. The 8th respondent has not taken a position in this application, save for asking us to make a decision in the interest of justice.

17. All the other respondents, have submitted that the applicant's intended appeal is not arguable. The 1st respondent submits that there is nothing to conserve, and that the High Court made the correct orders after considering the manner in which the applicant was impeached. It further urged that the orders sought were extraneous to the subject of the petition since the question of swearing in the 11th respondent was not an issue for determination. The 2nd respondent has argued that in the intended appeal, there would be no question requiring interpretation of the Constitution, while the 3rd respondent argues that there is no substratum in this appeal that can be conserved.

18. The 4th, 5th and 6th, and 9th and 10th respondents on their part have submitted that the issues that the applicant intends to raise in his appeal have already been settled in Martin Nyaga Wambora & 3 Others V Speaker Of The Senate & 6 Others (supra) and therefore the applicant will not be raising any new issues that require ventilation in this Court. The 7th respondent was of the view that there was no nexus between the orders sought in the application and the intended appeal, since the question of ascension of the 11th respondent to the office of Governor had not been an issue in Petition 425 of 2020.

19. We have set out each of the parties' submissions on this aspect of the application to demonstrate the vastly different points of view that have been taken. It is true, as shown in the memorandum of appeal, that one of the issues for consideration in the intended appeal is the question of the participation of members of the 3rd respondent in the process of impeachment of the applicant. In our considered view, the fact that the question of swearing in of the 11th respondent was not an issue raised in Petition

425 of 2020 would not mean that it ought not be raised in this appeal due to the fact that the orders he seeks are to vindicate his perceived rights to remain the Governor of Nairobi County.

20. This single issue is arguable, and we are of the view that it is sufficient for us to find that the applicant has satisfied the first limb for the grant of the orders he seeks.

21. Rejecting this assertion, the 1st and 3rd respondents argued that there will be no prejudice to the applicant if the orders sought are not granted, and even in the unlikely event that the 11th respondent is sworn in as a Governor, this Court has the power to redress and provide recourse to the applicant, including reinstating the applicant, if it is determined that his removal from office was improper.

22. The 1st and 3rd respondents asserted that there is no positive and enforceable order other than the order for costs which is capable of execution by the respondents arising from the impugned judgment; that there is therefore nothing for this Court to stay, enforce or restrain by way of injunction; that the High Court did not order the parties to do anything or refrain from doing anything , to pay any sum or swear in the 11th respondent; that the disposition made by the High Court dismissing the 2 petitions is not capable of execution by the respondents against the applicant herein. Counsel for the 3rd respondent cited the decision of *National Cereals & Produce Board versus Erad Suppliers & General Contractors Limited, Nairobi Civil Application No. Nai 48 of 2012* for the proposition that no stay order is capable of being issued by a Court of law against a negative order.

23. The 1st and 3rd respondents further submitted that the orders sought by the applicant in the instant application do not relate to the orders made in the impugned judgment; that the issue of the swearing in of the 11th respondent was neither an issue nor was it determined by the High Court in the impugned judgment. The 3rd respondent further submitted that the issue of the swearing in of the 11th respondent is not one of the grounds of appeal raised in the Draft Memorandum of Appeal and this Court therefore lacks the jurisdiction to grant the orders sought.

24. The 4th, 5th and 6th as well as the 7th and 10th respondents agreed with those submissions, stating that even were the 11th respondent to be sworn into office, this Court, after hearing the appeal, could nullify that appointment and reinstate the applicant. In addition, the 7th respondent submitted that since the applicant has not occupied the office of Governor since 17th December, 2020, there would be no prejudice should the orders sought herein not be granted. The 7th respondent further submitted that the appeal will not be rendered nugatory, absent stay as there are sufficient safeguards in the Constitution to ensure a reversal of any actions undertaken should the appeal succeed.

25. The applicant is apprehensive that should the 11th respondent become Governor of Nairobi County, then his appeal would be rendered nugatory; and that even if he was to succeed and the Court was to find that his impeachment was improper, then it would mean that he would not be able to return to his former position. He further asserts that this would mean a violation of his rights under Article 38 of the Constitution, which include to vie for political office. The applicant cited the decision of Martin Nyaga Wambora v County Assembly of Embu & 6 others [2015] eKLR, but inour view, this case does not come to his aid. In that application, the Court gave a conservative order for a limited time of four months as the applicant was still in office. That is not the case here. In this case, the applicant has already been removed from the office of Governor.

26. As pointed out by the 7th respondent, the applicant has not been in office for at least ten months; he is effectively no longer the Governor of the County, and if the court hearing the substantive appeal find that there has been a violation of his political rights, then those violations, since they will be personal to him, can be vindicated by way of an order of damages, or such other order that the court may deem fit. In this, that we agree with this Court in *Stephen Mring'a Masomo v County Government, Taita-Taveta & 2 others [2016] eKLR* where the Court found, in the context of an application of a county

official to his position pending the hearing of his appeal, that an award of damages would adequately recompense him should he be successful.

27. On the limb of public interest, in *Law Society of Kenya v Bloggers Association of Kenya & 6 others [2020] eKLR* this Court noted that the question of public interest was to be considered in applications for orders under Rule 5(2)(b) of this Court's Rules by holding that:

> " the Supreme Court in the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji [2014] eKLR added a 3rd principle of "public interest" which should be considered when giving conservatory orders. We hold the view that this consideration did not displace the nugatory aspect and a party still needs to conjunctively establish the arguability aspect and the nugatory aspect before you can consider the public interest point."

28. The applicant argues that the intended appeal is one that is in the public interest since he was elected by voters in Nairobi County, and as it is of utmost public interest that the objects of devolution as outlined in Chapter Eleven of the Constitution are respected, and that leadership of the County is attained through constitutional means.

29. On the other hand, the respondents who oppose the application have argued that due to the reasons that the applicant was removed from office, the public interest would demand that he not be allowed to interfere with the running of Nairobi County. We do not want to make substantive findings on the merits of the removal of the applicant from office as it is not our role to do so at this stage.

30. Finally, it has been asserted by the 1st, 3rd and 7th respondents that there was no nexus between the orders sought in the instant application and the substratum of the Petition giving rise to the impugned judgment. We find that the issue of the swearing in of the 11th respondent was not raised in the High Court and the impugned judgment did not address or determine that issue. We note that issue of the swearing in of the 11th respondent was not a ground of appeal in the applicant's draft memorandum of appeal. In the draft memorandum of appeal, the applicant impugns the decision of the High Court which failed and/or refused to overturn the impeachment process and the impeachment of the applicant herein. We therefore find that there is no nexus between the orders granted by the High Court and the orders sought in the instant application.

31. Ultimately, for the foregoing reasons, our finding is that this application does not meet the threshold set for applications under Rule 5(2)(b) of the Court of Appeal Rules.

32. The upshot is that the application dated 29th June, 2021 is without merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

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

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR