Attorney-General & another v Katiba Institute & 7 others (Civil Application E365 & E368 of 2021 (Consolidated)) [2021] KECA 166 (KLR) (19 November 2021) (Ruling)

Neutral citation: [2021] KECA 166 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E365 & E368 OF 2021 (CONSOLIDATED)

RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA

NOVEMBER 19, 2021

BETWEEN

ATTORNEY-GENERAL ..... 1ST APPLICANT

PRESIDENT OF THE REPUBLIC OF KENYA ..... 2ND APPLICANT

AND

KATIBA INSTITUTE ..... 1ST RESPONDENT

CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT ..... 2ND RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 3RD RESPONDENT

KENYA HUMAN RIGHTS COMMISSION ..... 4TH RESPONDENT

KENYA JUDGES AND MAGISTRATES' ASSOCIATION ..... 5TH RESPONDENT

KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) KENYA ..... 6TH RESPONDENT

ATTORNEY- GENERAL ..... 7TH RESPONDENT

PRESIDENT OF THE REPUBLIC OF KENYA ..... 8TH RESPONDENT

(An application for stay of execution of the Judgment and orders of the High Court of Kenya (Dulu, Musyoka and Wakiaga JJ.) dated 21st October, 2021 in Constitutional Petition No. 206 of 2020)

RULING

1. The Notice of Motion in Civil Application No. E365 of 2021 dated 25th October, 2021 came before us for hearing on the 1st day of November, 2021. It is brought under Article 164(3) of the Constitution

of Kenya, sections 3, 3A and 3B of the *Appellate Jurisdiction Act* and Rule 5(2)(b) of the *Court of Appeal Rules*. It substantively seeks orders as follows:

> "c) That pending filing, hearing and determination of the intended appeal, this Honourable court be pleased to grant a conservatory order staying the execution of the judgment and orders of High Court in Nairobi Petition No. 206 of 2020 Katiba Institute vs. Attorney General & others.
>
> d) That costs of the application be in the cause."

2. It is supported by grounds on its body, a supporting affidavit sworn by Kennedy Kihara, Principal Administrative Secretary in the Executive Office of the President together with annexures thereto and written submissions and legal authorities in support thereof dated 28th October, 2021. It has been opposed by a replying affidavit of Christine Nkonge, the Executive Director, Katiba Institute, the 1st respondent herein sworn on 28th October, 2021 together with annexures thereto and written submissions dated 31st October, 2021. Likewise, the Notice of Motion dated 26th October, 2021 in E368 of 2021 was also simultaneously placed before us for hearing on the same date. It is brought under Rule 5(2)(b) of the Court of Appeal Rules. It also substantively seeks orders that:

> "c) This Honourable Court be pleased to grant an order of stay of the execution against the judgment and orders of the High Court in Nairobi Petition 206 of 2020 Katiba Institute vs. The President of the Republic of Kenya & 2 Others; Judicial Service Commission and 3 Others ((Hon. Mr. Justice Dulu, Hon. Mr. Justice Musyoka and Hon. Mr. Justice Wakiaga) dated and delivered on 21st October, 2021 pending the hearing and determination of the intended appeal.
>
> d) The costs of the petition be provided for."

3. It is similarly supported by grounds on its body, a supporting affidavit of Kennedy Kihara Principal Administrative Secretary in the Executive Office of the President together with annexures thereto, written submissions and legal authorities in support thereof dated 28th October, 2021. It has similarly been opposed by a replying affidavit by Christine Nkonge, Executive Director Katiba Institute, the 1st respondent, sworn on 28th October, 2021 together with annexures thereto.

4. Due to the nature of their similarity since they stem from the same intended impugned judgment of the High Court of Kenya at Nairobi dated 21st October, 2021 in Constitutional and Human Rights Division Petition No. 206 of 2020 and with the consent of all learned counsel for the respective parties in both applications, the two applications were consolidated and heard together.

5. Both applications were canvassed through rival pleadings, written submissions and legal authorities of the respective parties in support of their opposing positions herein, in the presence of advocates for the respective parties with oral highlighting. In Civil Application No. E365 of 2021, Senior Counsel Mr. Waweru Gatonye with Paul Wanga were in attendance for the 7th respondent, learned counsels, Emmanuel Bita appeared for the applicant, Ochiel Dudley with Miss Nkonge, I. Kinama and Mr. Lempaa jointly appeared for the 1st respondent, Mr. Isaac Wamasaa appeared for the 2nd and 3rd respondent, Mr. Mungai appeared for the 4th respondent, and Ms. Purity Makori h/b for Mr. Kelvin Mogeni appeared for the 6th respondent. In Civil Application No. E368 of 2021, Senior Counsel Mr. Waweru Gatonye with Paul Wanga appeared for the applicant herein, learned counsel, Mr. Ochiel Dudley with Miss Nkonge, I. Kinama and Mr. Lempaa jointly appeared for the 1st respondent, Mr. Isaac Wamasaa appeared for the 2nd and 3rd respondents, Mr. Mungai appeared for the 4th respondent, Ms. Purity Makori h/b for Mr. Kelvin Mogeni appeared for the 6th respondent while Mr.

Emmanuel Bita appeared for the 7th respondent. There was no appearance for the 5th respondent in both sets of the applications. The Court being satisfied that the 5th respondent had due notice of the hearing date for the hearing of the two applications having been served electronically with a hearing notice by the Deputy Registrar of the Court on Thursday, October 28, 2021 at 8.36am allowed learned counsel present for their respective parties in the consolidated applications to prosecute the said applications.

6. Upon due consideration of the respective parties' pleadings, written submissions and legal authorities relied upon by the respective parties in support of their rival positions, we gave a ruling on 1st November, 2021 granting interim orders as follows:

    1. A temporary order of stay in terms of prayer (c) in E365 of 2021 is granted pending delivery of the Ruling on 19th November, 2021.

    2. Today's costs in the application in E365 of 2021 to abide the outcome of the Ruling on 19th November, 2021.

    3. A temporary order of stay in terms of prayer (c) in E368 of 2021 is granted pending delivery of the Ruling on 19th November, 2021.

    4. Costs of the application in E368 of 2021 to abide the outcome of the Ruling on 19th November, 2021.

We now proceed to give reasons for the ruling.

7. As we have already stated above, both motions were consolidated and heard together. Starting with the motion in Civil Application No. E365 of 2021, it is supported by the grounds appearing on the face of the motion and a supporting affidavit sworn by Kennedy Kihara (Mr. Kihara), the Principal Administrative Secretary in the Executive Office of the President. Likewise, the application in E368 of 2021 is similarly supported by a supporting affidavit of Mr. Kihara. It is Mr. Kihara's averments in both sets of supporting affidavits inter alia that; vide a judgment delivered on 6th February, 2020 the High Court in Nairobi Constitutional Petition No. 369 of 2019 declared that the President is constitutionally bound by the recommendations made by the Judicial Service Commission in accordance with Article 166(1) as read with Article 172(1)(a) of the constitution on the persons to be appointed as Judges. The Attorney General was aggrieved by that judgment and orders resulting therefrom and filed and served a notice of appeal intending to appeal against the whole of that decision.

8. Pursuant to the filling of the aforesaid notices of appeal, the Attorney General lodged the substantive appeal before this Court in Nairobi Civil Appeal No.286 of 2020; Attorney-General vs. Adrian Kamotho Njenga and Others. It is Mr. Kihara's position that the above-mentioned appeal has already gone through case management, pursuant to which parties have in compliance with directions given therein by the Deputy Registrar of this Court during case management filed written submissions and legal authorities in readiness for the hearing and disposal of the said appeal.

    All that parties are waiting for is a hearing date.

9. Mr. Kihara continues to depose that during the pendency of the aforesaid Appeal No. 286 of 2020, the Supreme Court of Kenya in Petition No. 42 of 2019; Kenya Vision 2030 Delivery Board vs. The Commission on Administrative Justice and Others delivered a judgment in which the Supreme Court held that recommendations from a commission do not necessarily bind either the person to whom, or the entity to which it is addressed. Second, that such recommendations are only binding upon a public entity where it has been specifically provided for either in the constitution or a statute. It is therefore Mr. Kihara's position that the same issue that the Supreme Court was confronted with

in the mentioned completed Supreme Court case is what this Court will be confronted with in the intended appeal, namely, whether his Excellency the President of the Republic of Kenya is bound by the recommendations of the Judicial Service Commission as directed by the High Court in the intended impugned judgment. It is therefore, their position that this is a very important constitutional question that merits consideration and determination by this Court before execution of the intended impugned judgment can be allowed to proceed to its logical conclusion. Mr. Kihara asserts further that the applicant's apprehension that due to the rigid constitutional protections afforded to Judges once appointed to office, it is only prudent that the current status quo prevailing as at the time the Court's intervention was sought be maintained to preserve the substratum of the intended appeal by issuance of a conservatory order staying the execution of the judgment and orders of the Court pending the hearing and determination, firstly, of Nairobi Civil Appeal No. 286 of 2020 in the first instance and the intended appeal herein in the second instance.

According to Mr. Kihara, the outcome of NRB Civil Appeal No.286 of 2020 will impact on the outcome of the intended appeal herein.

10. It is also Mr. Kihara's position that, during the pendency of the hearing and determination of Civil Appeal No. 286 of 2020 before this Court, several other offshoot cases were variously instituted by various entities before the High Court seeking to enforce the decision and orders of the High Court of Kenya in Nairobi High Court Petition 369 OF 2019. The cases include Nairobi High Court, Constitutional Petition No. E206 OF 2020; Katiba Institute vs. President of the Republic of Kenya and others, Nairobi Constitutional Petition No. 246 of 2020; Adrian Kamotho Njenga vs Attorney-General and others; Nairobi Constitutional Petition No.E196 of 2021 Dr. Magare Gikenyi vs Attorney General & others, Nairobi Constitutional Petition No.E199 of 2021; Bernard Odero Okelo vs Attorney-General & others, Nakuru High Court JR Miscellaneous Application No.11 of 2021; Peter Okiro & John Ochola vs Attorney-General, in all of which orders werevariously made against the Attorney General.

11. The Office of the Attorney General was aggrieved with all the judgments in all of the above-mentioned offshoot matters, and variously filed and served notices of appeal and also sought to be supplied with copies of proceedings with the intention of variously filing appeals in this Court against those intended impugned judgments, inclusive of the judgment and orders forming the substratum of the intended appeal herein.

12. On the totality of the above averments, Mr. Kihara asserts that in the circumstances the Attorney General's intended appeal herein is not frivolous but arguable. He relies on the draft memorandum of appeal in support of this deposition. Mr. Kihara further, asserts that unless a conservatory order is issued by this Court staying the execution of the intended impugned judgment as prayed for in both applications, and orders of 21st October, 2021 stayed, the intended appeals will be rendered nugatory as the six nominees would have been deemed appointed thereby obliterating the substratum of both intended appeals. Mr. Kihara reiterates the position taken above that once the six nominees are appointed as Judges, the constitutional provisions insulating their positions as Judges against removal without following the constitutional prerequisites explicitly set in the Constitution will set in. These prerequisites require that once appointed to their respective offices as Judges, they may only be removed in accordance with the prerequisites set out in Article 168 of the Constitution, which if fruitioned, will have the effect of irreparably altering the substratum of the intended appeal.

13. It is also Mr. Kihara's fears that if the six nominees will proceed to preside over matters and discharge their constitutional mandates with regard to legal proceedings during the pendency of the intended appeals, the same would occasion uncertainty over the legality of such proceedings and would therefore expose the consumers of justice to unmitigated harm and anguish should it turn out that the six

nominees ought not to have been deemed appointed by the President upon lapse of the timelines given by the trial court. Mr. Kihara therefore, strenuously asserts that the peculiar circumstances surrendering the consolidated applications under consideration herein, merit issuance of conservatory orders as variously sought separately in the respective applications to preserve the substratum of the intended appeals pending the hearing and determination of the intended appeals.

14. Turning to the submissions filed by the Office of the Attorney General in support of the application in E365 of 2021 dated 28th October, 2021, learned counsel, Mr. Emannuel Bita submits that they have an arguable appeal with a high probability of success. They rely on their proposed grounds in their draft memorandum of appeal annexed to the application. They intend to argue on appeal, inter alia, that the learned Judges erred in law by: issuing orders that are patently illegal and unconstitutional with no perceptible origin in the words or design of the Constitution; seeking to address a perceived constitutional transgression with another constitutional transgression; failing to find that where there is a proven constitutional transgression by the President, the Constitution provides sufficient remedies and that the orders granted by the Superior Court were not available for consideration and grant by the court; failing to appreciate that it does not have unlimited prerogative to fashion remedies that go outside its constitutional judicial remit; issuing orders whose effect if implemented is to amend the provisions of Articles 132 and 166 of the Constitution of Kenya contrary to the procedure and principles envisaged under chapter sixteen of the Constitution; the superior court's decision constitutes judicial overreach and the learned Judges over-stepped their judicial function and encroached on the functions of political organs of State.

15. Further that the Judges erred in law by: issuing orders with a corrosive effect on the Constitution of Kenya's cardinal principle of separation of powers; issuing an order of mandamus compelling a public officer to act outside the scope of their constitutional and statutory duties; issuing orders that are diametrically against the express provisions of Article 2(2) of the Constitution; issuing orders whose effect is to set a precedent that allows the Constitution of an arm of government otherwise than in compliance with the constitution; making findings and orders on issues that the very same court admits were not specifically pleaded by the petitioner (paragraph 30 of the judgment of the court); making findings and issuing orders whose effect was to sit on appeal over the court's ruling at the interlocutory stage of proceedings; purporting to exercise concurrent jurisdiction with the High Court in Petition No. 369 of 2019; Adrian Kamotho Njenga vs Attorney General and others over the same subjectmatter; failing to appreciate the fundamental difference between injunctive orders and declaratory orders.

16. It is also the applicant's position that the Judges also misdirected themselves in law thereby wrongly exercising their discretion unjudiciously by issuing orders whose effect if implemented would be to irreversibly alter the substratum of an appeal before the Court of Appeal in Nairobi Civil Appeal No. 286 of 2020 between the Attorney General vs Adrian Kamotho Njenga & 3 Others whose pendency the High Court was made aware of but ignored; erred in law by disregarding and willfully misinterpreting clear guidance of the Supreme Court, in the Supreme Court decision in Kenya Vision 2030 Delivery Board vs. The Commission on Administrative Justice and Others [supra] thereby contravening the provisions of Article 163(7) of Constitution; and erred in law by failing to appreciate the purport and meaning of the provisions of Article 156(7) of the Constitution.

17. To buttress the above submission, Mr. Emmanuel Bita relies on the case of *Miriam Muthoni Mahihu (sued on her own behalf and as the Executor of the Estate of Eliud Muchoki Mahihu (deceased) & 5 others vs. African Safari Club Limited* [2013] eKLR and *Okiya Omtatah Okoiti & Another vs. Anne Waiguru, the cabinet secretary, Devolution and Planning & 3 others* [2015] eKLR all on the threshold for granting the relief sought in an application of this nature. Counsel therefore reiterates

in a summary at the risk of repetition that the High Court orders were patently unconstitutional for among other reasons, being contrary to the express provisions of the Constitution, going outside the High Court's constitutional judicial remit, disregarding binding guidance from the Supreme Court and having the effect of amending the constitution by judicial craft, the intended appeal raises fundamental constitutional questions for consideration and determination, the President has exclusive constitutional power to appoint Judges as underscored by Article 134(2)(a) of the Constitution which provides that the power cannot be exercised by any other person even during temporary incumbency, the High Court had no mandate to arrogate to itself powers constitutionally preserved for the President and purport to exercise those powers of appointment of the six nominees which in counsel's opinion amounted to an unprocedural backdoor amendment to the Constitution which should not be countenanced by this Court.

18. In further support of the position taken above on this issue, counsel relies on the case of *Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others* [2014] eKLR for the proposition that "the jurisdiction of a court is not a fluid phenomenon, as it is regulated by the Constitution and cannot, therefore, be extended through judicial craft or innovation" in reiteration of the position taken above that the Judges overstepped their constitutional mandate in arriving at the intended impugned decision.

19. Turning to the issue as to whether the intended appeal will be rendered nugatory if the stay order sought is not granted, counsel has urged the Court to adopt the position taken by the Court in the case of the *Chief Justice and President of Supreme Court of Kenya & Judicial Service Commission vs. Bryan Mandila Khaemba* 2019 [eKLR] and refrain from granting orders in vain.

20. Turning to public interest, counsel relies on the case of *Attorney General vs. Okiya Omtatah Okoiti vs Another* [2019] eKLR and *Energy Regulatory Commission vs. John Sigura Otido* [2019] eKLR for thepropositions that public interest is a proper consideration in an application for stay. This is in support of their submission that if the intended impugned orders were to take effect and thereafter the appointment by the High Court of the six nominees is found to have been unconstitutional, it is not only the applicants who would suffer prejudice but also the litigants who would have had their matters presided over by the subject six Judges in their new appointment who in counsel's opinion would suffer irreparable harm especially when it is undisputed that this Court is yet to pronounce itself in Civil Appeal No. 286 of 2020 in which the core issue for determination as in the intended appeal herein will be as to whether the president is bound by the recommendations of the 3rd Respondent which in counsel's opinion is a fundamental constitutional question for determination by this Court on appeal.

21. Finally, the applicant relies on the case of *Equity Bank vs. West Link Mbo Ltd* [2013] eKLR and *Sicpa Securities Sol. Sa vs. Okiya Omtatah Okoiti & 2 Others* [2018] eKLR and submits that in addition to theCourt's mandate to grant interim orders for stay under Rule 5(2)(b) of the Court of Appeal Rules, it also has power under the exercise of its inherent powers to also grant the relief sought.

22. Turning to the applicant's case in Civil Application No. E368 of 2021, we reiterate that the motion is supported by the grounds on the face of the motion and a supporting affidavit similarly sworn by Kennedy Kihara Administrative Secretary in the Executive Office of the President. Being cognizance of the similarity of the averments deposed by Mr. Kihara in support of the earlier application and those in support of this application, we find it prudent not to replicate this but only set out the background of the events that triggered the litigation resulting in the intended impugned decision as captured in the said application.

23. In summary, it is Mr. Kihara's averments herein that vide a Petition dated 19th June, 2019 Katiba Institute, the 1st Respondent sued the applicant and the 3rd to 8th respondents alleging continued

failure, neglect, and/or refusal by the President of the Republic of Kenya to Gazette and appoint 41 Superior Court "Judges-in-waiting" recommended by the Judicial Service Commission was in violation of the Constitution. The applicant filed a Notice of preliminary objection dated 16th July, 2020 objecting to the proceedings against the President of the Republic of Kenya on grounds that the Petition was fatally incompetent for misjoinder of the applicant contrary to the express provisions of Article 143(2) of the Constitution of Kenya which prima facie grants the President immunity from civil proceedings. The superior court delivered a ruling on 17th December, 2020 making a finding that there was indeed misjoinder of the applicant in the Petition, but declined to strike out the name of the applicant. The applicant herein being aggrieved filed a notice of appeal and an application for stay of proceedings in the Petition in the High Court on 22nd February, 2021 and in the alternative stay of proceedings pending hearing and determination of Civil Appeal No.286 of 2020; The Honourable Attorney General vs. Adrian Kamotho Njenga & 3 others being an appeal against the judgment in Petition No.369 of 2019; Adrian Kamotho Njenga vs. The Attorney General & others since the petition largely sought to enforce the judgment and orders of the same petition.

24. It is this applicant's contention that the High Court declined to hear the application for stay of proceedings on priority and in orders made on the 24th May, 2021 and 9th June, 2021, the High Court directed that both the petition and the application be heard simultaneously. The applicant being aggrieved with those orders filed an application for stay of proceedings in the Court of Appeal in Civil Application 221 of 2021; The President of the Republic of Kenya vs. Katiba Institute and others seeking stay of proceedings in the HC Petition 206 of 2020; Katiba Institute vs. The President of the Republic of Kenya & 2 others; Judicial Service Commission & 3 others pending the hearing and determination of the application and the intended appeals herein.

25. This Court directed the filing of written submissions in the said application vide its notice of 1st July, 2021. The High Court was duly notified of that position vide a letter dated 22nd July, 2021 but the above notification notwithstanding, the High Court proceeded on with the hearing of the applications and petition simultaneously on 26th July, 2021. Judgment was delivered on 21st October, 2021, dismissing the applicant's application on the grounds, inter alia, that after the delivery of the ruling of 17th December, 2020, the applicant was left with an option to choose whether to leave or continue participating in the proceedings. The holding of the above position notwithstanding, the High Court went further and made adverse orders against the applicant. The applicant is therefore genuinely aggrieved with the above intended impugned orders and intends to file an appeal against the decision of 21st October, 2021 and has applied for typed proceedings.

26. Turning to the submissions in support of Civil Application No. E368, senior counsel, Mr. Waweru Gatonye submits that they have an arguable appeal with a high probability of success. They rely on their draft memorandum of appeal which according to senior counsel, raises arguable grounds, inter alia, that the learned Judges erred in law and fact by: making a contradictory finding that whereas there was a misjoinder of the applicant the applicant's presence in the petition did not prejudice him yet there were clearly adverse orders sought against him by the petitioners; finding that the applicant ought, to be sued through the 2nd respondent's office yet they went ahead to hold that his participation in the proceedings was not fatal, in clear breach of the law and the court's own precedent; failing to give due consideration to the appeals that had been lodged against the ruling delivered on 17th December,2020 in Petition No. 206 of 2020; Katiba Institute vs The President of the Republic of Kenya & 2 others & 4 others interested parties and the Judgement in Petition No. 369 of 2019; Adrian Kamotho Njenga vs. Attorney General, Judicial Service Commission & 2 others interested parties [2020]eKLR by the 1st and 2nd Respondent's respectively, in disposing the appellant's application for stay of proceedings; wrongly exercising their discretion in issuing orders whose effect if implemented would not only render superfluous the proceedings but also undermine the jurisdiction of the Court of

Appeal in Nairobi Civil Appeal No. 286 of 2020 between the Attorney General vs. Adrian Kamotho Njenga & 3 others which the superior court was made aware of; holding that the appellant was in continued disobedience of the declaratory orders made by court yet a substantive appeal had been filed by the office of the Attorney General in Nairobi Civil Appeal No. 286 of 2020 between the Attorney General vs. Adrian Kamotho Njenga & 3 others against the same orders; relying in foreign precedents to arrive at a conclusion that powers of the applicant to appoint the six nominees lapsed after 14 days after receiving names from the Judicial Service Commission yet there is no express provisions in the Constitution or the Judicial Service Commission Act for such times expect in the case of appointment of the Chief Justice and Deputy chief justice; holding the powers of the appellant to appoint the six nominees could lapse and his office becomes fuctus officio a position that is not provided for in the constitution or the enabling legislation amongst other grounds.

27. It is senior counsel's position herein that on the basis of the above highlighted grounds forming the applicant's draft memorandum of appeal, the applicant herein has satisfied to the Court to the required threshold that the intended appeal is arguable and will be rendered nugatory if an injunction/stay order sought is not granted.

28. Senior counsel relies on the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & others* [2013] eKLR on the threshold for granting reliefunder Rule 5(2)(b) of the Court of Appeal Rules.

29. Senior counsel submits that the High Court orders were patently unconstitutional and have the potential effect of creating a conflict between the Office of the Chief Justice and the Office of the President of the Republic of Kenya. In counsel's opinion, the Judges have rendered a decision whose effect is to rewrite the constitution in so far as the appointment of Judges is concerned which should not be counternanced.

30. On whether the intended appeal will be rendered nugatory if a stay order sought is not granted, it is senior counsel's submission that the impugned judgment had given a time limit of 14 days within which the six nominee Judges ought to be appointed by the applicant in default of which the subject Judges would be deemed duly appointed. The Office of the Chief Justice and the Judicial Service Commission have also been directed to swear in the Judges to office at the expiration of the said timeline.

    It is submitted that if the stay order sought is not granted and the Judges are sworn in this Court cannot issue an automatic order removing them from office upon success of the intended appeal. This is because in senior counsel's opinion, the correct constitutional procedure on removal of Judges which requires that the Judges can only be removed from office in accordance with the provisions of Articles 168 of the Constitution and the Judicial Service Commission Act will set in.

31. Senior counsel relies on the case of *National Police Service Commission, Inspector General & 3 others vs. Henry Nyakoe Obuba* [2016] eKLR in support of their submission that in the absence of the stay order sought herein after the lapse of 14 days as ordered by the High Court, the applicant herein who is a symbol of national unity under Article 131(1) (e) of the Constitution shall be deemed to have lost a constitutional power to appoint Judges. In counsel's opinion, the apprehension which is not any real but is also justified if not halted is likely to result in a public embarrassment that will be irreversible even after the success of the intended appeals.

32. On public interest, senior counsel relies on the case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014]eKLR, Hon. *Mike Mbuvi Sonko vs. the Clerk, County Assembly of Nairobi City & 11 Others* Civil Application No. E228 of 2021(unreported) and submits that public interest is also an element for consideration in an application for relief under Rule 5(2) (b) of this Court's Rules hence senior counsel's argument that it is in the public interest that the orders for stay of execution

sought herein be granted not only to conserve the substratum of the intended appeal but also to ensure that the consumers of justice are not exposed to unmitigated harm and anguish in the event the intended impugned orders of the High Court are found to be unconstitutional and are set aside by this Court in the intended appeal.

33. In rebuttal of both consolidated applications, Mr. Ochiel on behalf of the 1st respondent in both applications submits that the 1st respondent filed a replying affidavit dated 28th October, 2021 sworn by Christine Nkonge, the Executive Director of the 1st respondent. It is Mr. Ochiel's position that the 1st respondent concedes that it is alive to the legal position in an application of this nature that granting of a relief of the nature sought by the applicants in the consolidated applications is discretionary, their position is that both applicants are undeserving of this Court's exercise of its judicial discretion in their favour. Justification for the above submission according to Mr. Ochiel is found in Article 166(1)(b) which according to counsel, commands the President of the Republic of Kenya to appoint Judges, in accordance with the recommendations of the Judicial Service Commission. Despite the clarity of the above constitutional provision, counsel laments that since 2016, the President of the Republic of Kenya prefers what counsel has termed as to "cherry-pick" and appoint Judges according to whim, which appointments according to counsel depends on which Judges the President prefers based on a criterion known only to the President and the Attorney General.

34. Counsel submits that the Attorney General actively participated in the interviews for the affected Judges conducted in June and July 2019, but never raised any issues against any of them concerning their integrity. The 1st respondent is therefore surprised at the Attorney General's change of mind with regard to appointment of the six Judges.

35. It is also the Mr. Ochiel's position that to the 1st respondent's knowledge, only one, Macharia Njeru, the Law Society of Kenya representative to the Judicial Service Commission who dissented from the recommendations of the subject Judges claiming that not enough judges had been appointed from the private practitioners. Counsel laments that one nominee passed on while waiting to be appointed. They also have knowledge that it was the above set of circumstances that prompted one, Adriano Kamotho Njenga to file suit against the Attorney General in February, 2020 namely, Adrian Kamotho Njenga vs. Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR seeking to enforce the appointments. The said suit was heard on its merits at the conclusion of which the High Court found that the President's omission to swear the six nominees was unconstitutional and issued orders therein which orders have neither been stayed nor obeyed by the President.

36. Counsel continues to urge further that the President's refusal to obey the Court orders has resulted in an untold damage to the justice sector system and to judicial independence forcing the Court of Appeal to close down its registries in Kisumu, Mombasa, Nakuru, Nyeri and Malindi which in counsel's opinion, has also contributed largely to causing a backlog of cases not only in the Court of Appeal but also in the other courts intended to be served by the affected Judges, the applicants jointly refused, ignored and or neglected to swear into office.

37. It is therefore counsel's position that in light of what has been alluded to above, it will be a waste of judicial authority and a vain exercise of judicial discretion in issuing stay in these two consolidated applications considering that it is now trite that court orders should not issue in vain.

38. It is also counsel's position that while the Adrian Njenga case [supra] litigation was pending determination, the President appointed some 34 of the appointees who were the substratum of the Adriano case but rejected the 6 forming the proceedings resulting in the intended impugned judgment without giving any plausible reasons as to why he excluded them from the list of those who were to be sworn in.

39. Counsel also contends that the applicants herein should be denied audience before this Court because of their habitual blatant contempt of court orders which in the counsel's opinion are deliberately calculated to impede the cause of justice. Counsel also laments that the President and the Attorney General both have on numerous occasions showed blatant disobedience to court orders which should not be countenanced by this Court, hence counsel's assertion that both are undeserving of this Court's exercise of its discretion in their favour as both have approached the seat of justice with dirty hands arising from their conduct of displaying extreme impunity and contempt of court orders. It is counsel's position that both applicants have only sought stay of execution of the intended impugned orders to escape compliance with the High Court orders in at least three other matters in which courts of competent jurisdiction have made findings that the President has no mandate to review, reconsider or decline to appoint persons recommended as Judges by the Judicial Service Commission.

40. It is further counsel's position that public interest in the peculiar circumstances of this application cannot tilt in favour of the applicants as in doing so will be tantamount to the Court condoning the President's unjustified delay and obstinate refusal to appoint the affected Judges. Counsel therefore urges this Court not to make a mistake of providing succor to the President's open contempt for the Courts' validly issued orders in the LSK and Adrian Njenga cases.

41. Turning to the applicant's arguments that the intended appeal will be rendered nugatory if the stay orders sought in both applications are not granted, counsel argues that denying stay orders sought in both applications will not render the intended appeals nugatory as the Constitution of Kenya provides a process the applicants can invoke for the removal of the subject Judges.

42. Lastly, it is also the counsel's position that the applications under consideration are also subjudice as a similar application in Civil Application No. E221 of 2021; President of the Republic of Kenya vs Katiba Institute & Others seeking to stay orders in the Adrian KamothoNjenga case is still pending before this Court.

43. Turning to the 1st respondent's submissions dated 31st October, 2021, Mr. Ochiel reiterates the averments in the replying affidavit filed in rebuttal of both consolidated applications and submits, inter alia, that the Court should decline to exercise its discretionary and equitable relief of stay in favour of both applicants in the consolidated applications not only in the interest of justice but also in the interest of preservation of the dignity of the Court, especially when it is explicit from the record that the applicants herein have come to this Court with dirty hands by seeking equity from the Court without being prepared to do equity to the subject Judges contrary to Article 166(1)(b) of the Constitution which requires the president to appoint Judges.

44. It is therefore Mr. Ochiel's position that granting the applicant's stay would be tantamount to condoning their wrongful conduct of refusing to appoint the subject Judges which in counsel's opinion if sanctioned by this Court will be tantamount to rendering the wrong committed against the subject Judges remediless contrary to the prerequisites of equity which forbids a wrong to be rendered remediless. Mr. Ochiel reiterates that since the President and the Attorney General have shown a brazen disregard for the rule of law by displaying contempt for orders issued by court's competent jurisdiction and made a mockery of the administration of justice granting them the relief sought would be tantamount to rewarding them for their conduct of disobeying court orders with impunity.

45. To buttress the above submissions, counsel relies on the case of *Fred Matiangi the cabinet Secretary, Ministry of Interior and Co-ordination of National Government vs. Miguna Miguna & 4 others* [2018] eKLR; *Rose Detho vs. Ratilal Automobiles Ltd* [2007] eKLR; *AB vs. RB* [2016] eKLR; *FBSM vs. SBHM* [1977] eKLR; *Ontario Attorney General vs. Paul Magder Furs Ltd* 10 0.R.(3d) 46; *Hadkinson vs. Hadkinson* [1952]2 All ER 567; all in support of the 1st respondent's submission that since the

applicants in the consolidated application are guilty of contemptuous disobedience of court orders issued by courts of competent jurisdiction both in the LSK and Adrian Njenga cases they should not be granted the relief sought.

46. Instead, counsel has invited this Court to adopt the position taken by the Court in the case of *B vs. Attorney General* [2014]1 KLR 431; *Eric vs. J. Makokha & 4 others vs. Lawrence Sagini & 2 others* [1994] eKLR and Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Coordination of National Government vs. Miguna & 4 others [2018]eKLR and decline to issue orders sought, as in doing, it would be vindicating the Courts that granted the disobeyed orders and preserving the dignity of the Court.

47. Learned counsel, Mr. Isaac Wamaasa on record for the 2nd and 3rd respondents left the matter to court in both applications. Learned counsel, M/s Purity Makori associated herself with the submissions of the 1st respondent in opposition to both applicants. Likewise, learned counsel, Mr. Mungai on record for the 4th respondent also associates himself fully with submissions of the 1st respondent in opposition to both applications.

48. In reply to the cumulative submissions of the respondents variously opposing the consolidated applications, learned counsel, Mr. Emmanuel Bita on behalf of the applicant in Civil Application No. E365 of 2021 replies that neither the High Court nor Judicial Service Commission have the last say when it comes to appointment of Judges as that mandate is constitutionally vested in the President, the applicants cannot be sent away empty handed from the seat of Justice herein as there are no specific orders finding them guilty of contempt of any court order, issues raised in the consolidated applications being subjudice does not arise as there is clear demonstration that what the applicants are aggrieved of resulting in their presentation of the consolidated applications are the intended impugned orders granted on 21st October, 2021. Lastly, Mr. Bita reiterates that the Supreme Court has already expressed itself on the issue and it would only be fair and just that this Court be accorded an opportunity to pronounce itself on the issue complained of before execution can issue.

49. Likewise, senior counsel, Mr. Waweru Gatonye reiterated the position taken by learned counsel, Mr. Bita and termed as misleading the 1st respondent's submission and prayers to the Court. It is senior counsel's position that issues intended to be raised on appeal are weighty constitutional matters which will go a long way in crystallizing the law on the issues intended to be raised on appeal. It is only fair and in the interest of justice that the status quo prevailing as at the time of the filing of the consolidated applications be maintained pending hearing and determination of the intended appeal.

50. Our mandate under Rule 5(2)(b) is original, independent and discretionary. See *Githunguri vs. Jimba Credit Corporation Ltd No. (2)* [1988] KLR 88. It is a procedural innovation designed to empower this court to entertain interlocutory applications for the preservation of the subject matter of the appeal where one has been filed or is intended. See *Equity Bank Ltd vs. West Link NBO* Civil Application No.78 of 2011 (UR). The jurisdiction under Rule 5(2)(b) only arises where the applicant has lodged a notice of appeal. See the *Safaricom Ltd vs. Ocean View Beach Hotel Ltd & 2 others*, Civil Application No. 327 of 2009 (UR).

51. The conditions to be met before a party can obtain relief under Rule 5(2)(b) have been numerously crystallized by case law. These are, namely, that the applicant has to demonstrate, firstly, that the appeal or intended appeal is arguable. By arguable, it does not mean an appeal or intended appeal which must succeed, but one which raises a bona fide issue worthy of consideration by this Court. Second, one that

warrants a response from the opposite party. See *Northwood Development Company Limited vs. Husein Alibhai Pirbhai & 2 Others* [2015] eKLR for the holding, inter alia, that:

> " The principles which guide the Court in considering applications made under that rule are now well settled and we need only restate them from Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus: -
>
> " Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-
>
> 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
>
> 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."

52. Second, that the intended appeal will be rendered nugatory if the stay order is not granted. On the nugatory aspect, 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 irreversible. Or if it is not reversible, whether damages will reasonably compensate the party aggrieved.

53. It is also trite too that demonstration of the existence of even one arguable point will suffice. See *Kenya Railways Corporation vs. Edermann Properties Ltd*, Civil Appeal No. NAI 176 of 2012 and *Ahmed Musa Ismael vs. Kumba Ole Ntamorua & 4 others*, Civil Appeal No.NAI.256 of 2013. Lastly, both limbs must be demonstrated to exist before one can obtain relief under Rule 5(2)(b).

See *Emirates Airline Limited vs. Stephen Chase Kisaka* [2015] eKLR, for the holding, inter alia, that:

> " The first is that the appeal is arguable, and the second is that if the orders sought are not granted, then the appeal would be rendered nugatory. It falls upon the applicant to satisfy the twin principles. See Republic vs. Kenya Anti-Corruption Commission & 2 others (supra) where the Court rendered itself thus:
>
> > " The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb."

54. The above principles were aptly restated by the Court in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR, wherein the guiding principles were summarized as hereunder;

> " (i) in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Reuben & 9 Others v Nderitu & Another (1989) KLR 459;
>
> (ii) the discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;

(iii) the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See Halai & Another vs. Thornton & Turpin (1963) Ltd. (1990) KLR 365;

(iv) in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See David Morton Silverstein vs. Atsango Chesoni, Civil Application No. Nai 189 of 2001;

(v) an applicant must satisfy the Court on both of the twin principles;

(vi) in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004;

(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. See Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008;

(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. See Damji Pragji (supra);

(ix) the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232;

(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 alleged impunity, the onus shifts to the latter to rebut by evidence the claim. See International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403."

55. We have applied the above principles to the rival arguments before us herein. We are satisfied that our jurisdiction has been properly invoked under the applicable rule as there are notices of appeal in place on the basis of which the consolidated applications under consideration have been anchored. See the case of Githunguri vs. Jumba Credit Corporation Ltd (Supra).

56. Our next simple task is to determine whether both applicants on the facts as laid before us highlighted above have brought themselves within the ambit of the twin principles for granting of a relief under Rule 5(2) (b) of this Court's Rules. The first prerequisite to be established is the demonstration of the existence of an arguable appeal. Both applicants have displayed before us draft memorandum of appeals whose contents have been summarized in the body of the ruling.

57. We have reconsidered them and are in agreement with both applicants that the issues intended to be raised on appeal which we find no need to rehash warrant the Court's interrogation as well as the respondents' response thereto. In the result, we are satisfied that both applicants intended appeals are

therefore not frivolous, but arguable. We find no harm in us reiterating that one arguable point will suffice. See the case of *Kenya Railways Corporation vs. Edermann Properties Ltd* (supra).

58. On the nugatory aspect, we find this ingredient also satisfied in view of the undisputed contention by the applicants that the Supreme Court has already expressed itself on the issue in the Supreme Court case of Kenya Vision 2030 Delivery Board vs. The Commission on Administrative Justice and Others [supra]. There is also brought to our attention that Civil Appeal No. 286 of 2020; Attorney-General vs. Adrian Kamotho Njenga and Others [supra] is pending determination over the same issues.

59. Lastly, there is requirement that both prerequisites are satisfied before relief can be granted under Rule 5(2)(b). Herein, we are satisfied as demonstrated above that both limbs have been satisfied by the applicants in the consolidated applications. We therefore, find basis for granting the relief sought in both applications as the applicants have met the threshold for granting relief under Rule 5(2)(b) of the Court of Appeal Rules.

60. In the result, we grant orders as follows:

    1. In Civil Application No. 365 of 2021, a conservatory order staying the execution of the judgment and orders of the High Court in Nairobi Petition No. 206 of 2020 Katiba Institute vs. Attorney General & Others, made on 21st October, 2021 be and is hereby granted pending filing, hearing and determination of the intended appeal.

    2. In Civil Application No. 368 of 2021, a conservatory order staying the execution of the judgment and orders of the High Court in Nairobi Petition No. 206 of 2020 Katiba Institute vs. Attorney General & Others, made on 21st October, 2021 be and is herebygranted pending filing, hearing and determination of the intended appeal.

    3. In view of the nature of the litigation herein and the urgency involved, we direct that the matter be mentioned before the President of the Court within fourteen (14) days of the delivery of this ruling, for the President of the Court to give directions on the expeditious disposal of the intended appeals.

    4. Costs of both applications to abide the outcome of the intended appeals.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR