



**Governor, County Government of Laikipia & another v Laikipia & another (Civil Application E052 of 2021) [2021] KECA 196 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 196 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E052 OF 2021  
MSA MAKHANDIA, S OLE KANTAI & P NYAMWEYA, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**GOVERNOR, COUNTY GOVERNMENT OF LAIKIPIA ..... 1<sup>ST</sup> APPLICANT**

**THE COUNTY GOVERNMENT OF LAIKIPIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**COUNTY ASSEMBLY OF LAIKIPIA ..... 1<sup>ST</sup> RESPONDENT**

**TABITHA MUTHONI MWANGI ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution and further Orders of the Employment and Labour Court at Nyeri (Marete, J.) dated 16th June 2021 in Petition No. E002 of 2020)*

**RULING**

1. Before us is a motion on notice filed under certificate of urgency. The motion seeks to stay execution of the orders of the court dated 16<sup>th</sup> June 2021 and stay of further proceedings including the sentencing of the 1<sup>st</sup> applicant scheduled for 12<sup>th</sup> July 2021. It was placed before us for hearing on the 13<sup>th</sup> July 2021. Miss. Kithinji appeared alongside Mr. Muchemi for the applicants whereas Mr. Abwour appeared for the 1<sup>st</sup> respondent. We heard all counsels by way of written and oral submissions. At the end of it all and on account of urgency we were persuaded that this was a fit and proper case for grant of interim stay of proceedings as well as stay of execution of the ruling by Marete, J. aforesaid. We reserved our reasons for so acting which we now give in this ruling. We must observe from the onset that the 1<sup>st</sup> applicant had been convicted of contempt of court and his sentencing was scheduled for 12<sup>th</sup> July 2021. Had we not acted as aforesaid there was every possibility that the trial court would have proceeded to sentence the 1<sup>st</sup> applicant to either a fine or imprisonment term as prayed for by the 1<sup>st</sup> respondent thereby rendering the intended appeal academic.



2. The facts leading to the application are that, the 1<sup>st</sup> respondent filed a petition in the Employment and Labour Relations Court “ELRC” praying for an order of injunction against the 1<sup>st</sup> and 2<sup>nd</sup> applicants restraining them from replacing or sacking or removing her from office, and the 2<sup>nd</sup> respondent be barred from approving, vetting, recommending any person to replace her. Simultaneously with the filing of the petition the 1<sup>st</sup> respondent took out a notice of motion against the applicants and the 2<sup>nd</sup> respondent seeking same orders as above albeit on the interim basis pending the hearing and determination of the petition. Upon hearing the application ex-parte the trial court granted orders on 12<sup>th</sup> November 2020 in terms that: an interim conservatory order of injunction is issued restraining the applicants from filling, firing, replacing, sacking, removing and or dismissing the 1<sup>st</sup> respondent from her office of County Executive Committee Member for education, Youth, Gender, Sports and Culture and from forwarding any name for appointment into the office and in the event such person is appointed in the office, the same be declared invalid, null and void. Upon service of this order on the applicants they filed an application dated 16<sup>th</sup> November 2020 to set aside the ex-parte orders for the reasons that there was material non-disclosure of facts by the 1<sup>st</sup> respondent in relation to her termination of employment and that the ex-parte orders implied that she had to be reinstated to office.
3. The main motion and the motion to set aside the ex-parte orders were scheduled to be heard on 25<sup>th</sup> November 2020. However the 1<sup>st</sup> respondent filed an application citing 1<sup>st</sup> applicant for contempt dated 22<sup>nd</sup> November 2020. On the 25<sup>th</sup> November 2020, when the two applications were to be heard, the court directed that the motion on contempt be dispensed with first. It was the 1<sup>st</sup> respondent’s contention that the applicants were in contempt of the said order by willfully and deliberately refusing to obey and comply with the orders of the court and thus they should be compelled to appear before trial court to show cause why they should not be punished and upon conviction pay a fine of not exceeding Ksh.1,000,000/= or for an imprisonment term not exceeding 2 years. The motion was supported by an affidavit sworn by the 1<sup>st</sup> respondent who reiterated and expounded on the above grounds.
4. In opposing the motion, the 1<sup>st</sup> applicant swore a replying affidavit and a further affidavit dated 1<sup>st</sup> December 2020 and 19<sup>th</sup> December 2020 respectively. It was his deposition that: the 2<sup>nd</sup> respondent’s employment had been terminated due to her incompetency; that he was not in breach of any court order since by the time the order was served on him, he had already terminated the 1<sup>st</sup> respondent’s employment and had even processed her dues for payment. The 2<sup>nd</sup> respondent could not vet the 1<sup>st</sup> respondent since he could not forward her name for nomination as the order of the court had barred that action as well and he lastly deposed that he had not willfully and unlawfully disobeyed the court order.
5. However by the ruling of the court dated 16<sup>th</sup> June 2021, the 1<sup>st</sup> applicant was convicted of being in contempt of a court order and his sentencing was reserved for 12<sup>th</sup> July 2021. Aggrieved by this decision the applicants filed a notice of appeal and subsequently filed the instant application seeking stay of execution of the aforesaid court order and stay of proceedings including sentencing scheduled for 12<sup>th</sup> July 2021 pending the hearing and determination of the intended appeal pursuant to Rule 5(2)(b) of this court’s rules.
6. The grounds in support of the application are that: the 1<sup>st</sup> applicant was likely to be deprived of his personal liberty once he is sentenced; the intended appeal had over-whelming chances of success since the order of the court had been overtaken by events; no person had been appointed to fill the position of the 1<sup>st</sup> respondent; the intended appeal may be rendered nugatory for the reason that the 1<sup>st</sup> applicant shall have suffered wrongful imprisonment which may not be reversed in the event the intended appeal



succeeds and lastly we were urged that in the interest of justice we should exercise our discretion in favour of the applicants and grant the order.

7. In support of the motion is an affidavit sworn by the 1<sup>st</sup> applicant who largely reiterates and expounds on the grounds aforesaid, suffice to add that by the time of service of the order on him, he had already delivered a termination letter by hand to the 1<sup>st</sup> respondent and was processing her terminal dues.
8. In their written submissions, the applicants maintained that they had an arguable appeal. The grounds raised were substantial and weighty as the trial court erred in finding the 1<sup>st</sup> applicant to be in contempt of court yet the termination of the employment of the 1<sup>st</sup> respondent had already been effected. That the 1<sup>st</sup> respondent had failed to meet the threshold on the standard of proof for contempt of court which was higher than in normal civil case but lower than in criminal cases. We were referred to the case of case of *R. vs Ahmad Abolfathi Mohammed & Another* [2018] eKLR in which the Supreme Court explained the standard of proof in contempt proceedings as aforesaid.
9. On whether the intended appeal shall be rendered nugatory it was submitted that the 1<sup>st</sup> applicant would have suffered wrongful imprisonment if stay is not granted which action is irreversible.
10. In opposing the application, the 1<sup>st</sup> respondent filed a replying affidavit dated 12<sup>th</sup> July 2021. She deposed that the motion was premature because the 1<sup>st</sup> applicant had only been ordered to show cause why he should not be punished for contempt of court and that the intended appeal would not be rendered nugatory since the applicants' contention was that they could not comply with the court order as they had already been overtaken by events.
11. The 1<sup>st</sup> respondent in her submissions posited that the intended appeal may not be arguable for the reason that the 1<sup>st</sup> applicant had deliberately disobeyed the court order and unless he purges the same he did not deserve to be heard by this court.
12. We have considered the application, the rival affidavits, the submissions by all parties and the authorities cited. The notice of appeal dated 16<sup>th</sup> June 2021 was filed pursuant to Rule 75 of this court's rules, which grants us jurisdiction to entertain this motion. (See *Safaricom Ltd. vs Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR).
13. The application is premised on Rule 5(2)(b) of this court's rules. 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 the case of *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR.
14. The applicants have indicated that the intended appeal will be pegged on the grounds that; the impugned orders had been overtaken by events, that the 1<sup>st</sup> applicant was convicted over matters that were beyond his control, that the respondent had been paid her terminal dues and had not refunded the same at the time the orders were made, he had complied with the court's orders to the extent possible by not nominating and or appointing a replacement in the office previously held by the 1<sup>st</sup> respondent following the court's orders, he was convicted over matters that occurred before the court orders were issued and finally, the learned judge erred in law and in fact in the exercise of discretion.
15. To establish an arguable appeal, the applicant is not obliged to establish a plethora of grounds, it will suffice even if only one ground is raised as was held in *Silverstein vs Chesoni* [2002] I KLR 867 . This one ground does not even need to succeed but one which ought to be fully ventilated before the court as was held in *University of Nairobi vs Ricatti Business of East Africa* [2020] eKLR. We are certain that the above proposed grounds of appeal are not idle. They make the intended appeal arguable.



16. On the nugatory aspect, the applicant must demonstrate that in the absence of stay and the order is executed the same will not be reversible. The 1<sup>st</sup> applicant has maintained that in the event that he is imprisoned and serves the term, his personal liberty would have been curtailed which act cannot be reversed even if the appeal was to succeed. It may also impact on his future political endeavours and career. This will obviously render the intended appeal nugatory, otiose and a mere academic exercise.
17. From the above it is clear that the applicants have satisfied both limbs on the arguability of the intended appeal and the nugatory aspect. Accordingly we reiterate and reinforce the order we made on the 13<sup>th</sup> July 2021, that is; there shall be stay of execution of the order issued on 12<sup>th</sup> November 2020 and stay further proceedings including the sentencing which had been scheduled for 12<sup>th</sup> July 2021 awaiting the hearing and determination of the intended appeal. The costs of this application shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

