



REPUBLIC OF KENYA



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**Govenor, Mandera County & another v Maad & 4 others (Civil Appeal
(Application) E060 of 2021) [2021] KECA 180 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 180 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E060 OF 2021
RN NAMBUYE, W KARANJA & PO KIAGE, JJA
NOVEMBER 5, 2021**

BETWEEN

GOVENOR, MANDERA COUNTY 1ST APPLICANT

COUNTY GOVERNMENT OF MANDERA 2ND APPLICANT

AND

ABDIAZIZ SHEIKH MAAD 1ST RESPONDENT

SHAMSA MOHAMED HAJI 2ND RESPONDENT

JOHORA MOHAMED ABDI 3RD RESPONDENT

HASSAN MOHAMED AHMED 4TH RESPONDENT

MANDERA COUNTY PUBLIC SERVICE BOARD 5TH RESPONDENT

*(Being an application for stay of execution of the ruling and order
of Employment and Labour Relations Court (O. N. Makau, J.)
dated 25th January, 2021 in Nairobi ELRC Cause No. 21 of 2020)*

RULING

1. Before us is a notice of motion dated 24th February, 2021 brought under Rule 5(2)(b) of the [Court of Appeal Rules](#), substantively seeking orders that:
 - “2. The Honourable Court be pleased to order a stay of execution of the Ruling and Order delivered on 25th January 2021 by Hon. Justice Onesmus N. Makau in Nairobi ELRC Petition No. 21 of 2020: Abdiaziz Sheikh Maad & 3 Others vs. The County Government of Mandera & 2 Others pending the hearing of the Appeal.



3. The costs of this application be provided for.
2. It is supported by grounds on its body and a supporting affidavit sworn by Abdinur Maalim Hussein together with annexures thereto. It has been opposed by a replying affidavit of Abdiaziz Sheikh Maad sworn on 16th March, 2021 on his own behalf and that of the 2nd, 3rd and 4th respondents respectively together with annexures thereto. It was canvassed virtually via Go-To-Meeting platform due to the current prevailing Covid-19 pandemic challenges, through written submissions and legal authorities.
3. When the matter came up for hearing before the court on 22nd June, 2021, the Court upon due consideration of the record before it granted orders as follows:
 1. Interim orders in terms of prayer 1 of the application is granted pending delivery of the ruling herein on 8th October, 2021.
 2. Costs of the application to abide the delivery of the ruling on 8th October, 2021.
4. A brief background to the application is that the 1st to 4th respondents filed a suit against the applicants in Nairobi ELRC Petition No. 21 of 2020: Abdiaziz Sheikh Maad & 3 Others versus The County Government of Mandera & 2 Others seeking various reliefs. On 20th April, 2020, the trial court issued judgment in their favour directing the applicants either to reinstate the respondents to their former employment positions or compute and pay them compensation within 90 days, that is, on or before 29th July, 2020. The applicants opted to compute and pay compensation. The respondents' were dissatisfied with the sums forming the applicants' computation of what was allegedly due and payable to them. They filed an application dated 14th August, 2020 disputing the applicants' computation. In a ruling dated 25th January, 2021 the trial court ruled in their favour prompting the applicants to file a notice of appeal dated 28th January, 2021 on which both the application under consideration and Civil Appeal No. E060 of 2021 are anchored.
5. It is the applicants' position and as supported by the 5th respondent that they have satisfied the twin principles for granting relief under Rule 5(2)(b) of the Court of Appeal Rules, namely, demonstration that the intended appeal is not only arguable but will also be rendered nugatory should the stay order sought herein be declined.
6. The applicants intend to argue on appeal that the learned Judge erred both in fact and in law when he: directed appellants to pay to the respondents a consolidated gross pay which included 40% as allowance; misinterpreted the meaning of gross remuneration package as provided for by the SRC gazette notice no. 6518 of 7th July, 2017 vis a vis the 60% basic pay to which the respondents were entitled; directed that gratuity be paid to the respondents and yet the applicants had clearly stated that the gratuity would only be paid upon formal clearance with the County Government of Mandera; failed to consider the principles of transparency, accountability, public interest and good governance when adjudging the dispute; and lastly, erred when he directed that the 4th respondent be paid house allowance for the unexpired employment term at the rate of kshs.40,000.00 per month all of which the applicants contend are not only arguable but also have high chances of succeeding.
7. As for satisfaction of the second limb, both applicants and the 5th respondents have relied on the Supreme Court case of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR* crystallizing the principles for granting stay pending appeal already alluded to above; and *The County Government of Bomet vs. Moi University & 2 Others [2016] eKLR*, *Oraro and Rachier Advocates vs. Co-operative Bank of Kenya [2000] eKLR*, *Butt vs. Rest Restriction Tribunal [1979] eKLR* and *Gatirau*



- Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR all for the holding/propositions inter alia that there is need for the Court to exercise prudence when dealing with public funds and resources in County Governments and urged the Court to grant the relief sought.
8. In rebuttal, the 1st to 4th respondents have relied on the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) eKLR* on the threshold for granting relief under the Rule 5(2)(b) of the Court of Appeal Rules and the case of *Kenya Hotel Properties Ltd vs. Willesden Investments Ltd [2007] eKLR* in which the Court was emphatic that inconsidering an application premised on Rule 5(2)(b) of the Court of Appeal Rules, it is not sufficient for a party to merely allege that it will suffer hardship if the reliefs were not granted. The nature of the hardship must be demonstrated, both in support of their contention that: there is nothing arguable or likelihood of success in the grounds of appeal applicants intend to argue on appeal; the applicants are undeserving of the exercise of the Court's discretion in their favour as they are in contempt of the court orders for their failure to pay the amount adjudged in the respondents favour on or before 29th July, 2020. Secondly, for depositing the computed gratuity with the County Pensions Fund allegedly pending the 1st - 4th respondents' clearance with the County Government instead of paying it as directed by them. They also argue that as the successful parties, they are entitled to the enjoyment of the fruits of their judgment. They are also men and women of means and will be in a position to refund the adjudged amounts should the applicants appeal ultimately succeed. They therefore urged the Court to disallow the application to pave way for the execution process to proceed.
 9. We have considered the record in light of the above rival pleadings and submissions. The threshold for granting relief under Rule 5(2)(b) of the Court is as restated in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others (2013) eKLR*, namely, demonstration that the intended appeal is arguable and secondly, that it will be rendered nugatory if the order of stay sought is not granted.
 10. In law 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 the case of *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, // Civil Application No. 124 of 2008*. A single bona fide arguable ground of appeal is sufficient to satisfy this prerequisite. See the case of *Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004*.
 11. The applicants have relied on the grounds of appeal highlighted above as basis for their argument that the intended appeal is arguable. Upon consideration of the same, we are satisfied that they are arguable, their ultimate success or otherwise notwithstanding.
 12. Turning to the second requirement, the position in law is that this 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. See the case of *Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227*; *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR*; *Kenya Shell Ltd vs. Kibiru & Another (1986 -1989) EA 266* and case of *Kenya Hotel Properties Ltd vs. Willesden Investments Ltd [2007] eKLR (supra)*.
 13. The jurisprudential thread running through the above highlighted case law on this limb enjoins the Court not to lose sight of the fact that amounts adjudged in favour of the 1st to 4th respondents totaling approximately Kshs. 12,000,000.00 or thereabouts is taxpayers' money. It therefore follows that in terms of the holding in the case of *The County Government of Bomet vs. Moi University & 2 Others [2016] eKLR* there is need for the Court to exercise prudence in dealing with public funds and resources in County Governments on the one hand and the case of *Oraro and Rachier Advocates vs. Co-operative Bank of Kenya [2000] eKLR (supra)* on the balance of convenience as additional factors due to the peculiar circumstances prevailing in the application under consideration.



14. Of greater consideration by us is the undisputed position that there are currently two appeals and a cross appeal filed against the impugned orders, with the appeals being proffered by the applicants and the 5th respondent separately while the cross-appeal was proffered by the 1st – 4th respondents, a position not disclosed by them in their responses to the application. Neither was it controverted upon being raised by the 5th respondent in its papers in support of the application. It is therefore our position that the ends of justice herein demand that the status quo prevailing as at the time the application under consideration was filed be maintained pending determination of the now pending appeals and the cross appeal.
15. Moreover, there is evidence of an undisputed partial compliance with the impugned orders of the Court by the applicants conduct of not paying the computed adjudged funds to the 1st – 4th respondents as directed by the court and instead causing the said funds to be deposited with the County Government Pension Scheme. The funds will thus be within reach of the successful party at the conclusion of the hearing of both the appeals and the cross-appeal.
16. In the result, we affirm the interim orders granted on 22nd June, 2021 in the following terms:
 - i. An order of stay of execution of the ruling and order determined on 25th January, 2021 by Hon. Justice O. N. Makau in Nairobi ELRC Petition No. 25 of 2020: Abdiaziz Sheikh Maad & 3 Others vs. The County Government of Mandera & 2 Others be and is hereby affirmed pending hearing and determination of the appeal.
 - ii. Costs of the application to abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

