



**Kaudo (suing as the Clerk Homa Bay County Assembly) v Speaker Homa Bay County Assembly & 8 others (Civil Application 119 of 2020) [2021] KECA 195 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 195 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION 119 OF 2020  
HM OKWENGU, PO KIAGE & J MOHAMMED, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**DANIEL ODHIAMBO KAUDO (SUING AS THE CLERK HOMA BAY COUNTY ASSEMBLY) ..... APPLICANT**

**AND**

**SPEAKER HOMA BAY COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE HOMA BAY COUNTY ASSEMBLY SERVICE BOARD .. 2<sup>ND</sup> RESPONDENT**

**HON. MICHAEL NYANGI ..... 3<sup>RD</sup> RESPONDENT**

**HON. JUMA OWUORO ..... 4<sup>TH</sup> RESPONDENT**

**COMM. LILIAN OGONO ..... 5<sup>TH</sup> RESPONDENT**

**COMM. JOSEPH OKOTO ..... 6<sup>TH</sup> RESPONDENT**

**VICTOR OMONDI RAKWACH ..... 7<sup>TH</sup> RESPONDENT**

**RAMOS FIDEL ..... 8<sup>TH</sup> RESPONDENT**

**OWUOCHA OMONDI ..... 9<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of part of the conservatory orders pending the hearing and determination of an intended appeal issued in the Employment & Labour Relations Court at Kisumu (Nduma Nderi, J.) made on 2nd October, 2020) in ELRC NO. 27 of 2020 (consolidated with Petition No. 32 of 2020 and Judicial Review No. 12 of 2020)*

**RULING**

**Background**



1. Before us is a notice of motion dated 13th October, 2020 brought under Rule 5(2)(b) of the *Court of Appeal Rules* in which Daniel Odhiambo Kaudo (the applicant) – suing as the Clerk, Homa Bay County Assembly seeks orders in the main: that there be an order of temporary stay of the order made by the ELRC in Kisumu (Nduma Nderi, J.) on 2nd October, 2020 restraining the applicant from assuming his office as the Clerk of the Homabay County Assembly (the Assembly), pending the hearing and determination of the intended appeal; that the applicant be permitted to assume and access his place of work without interference by the respondents in the discharge of the applicant’s functions as the Clerk of Homabay County Assembly pending the hearing and determination of the intended appeal; and that the costs of the application be provided for.
2. The Speaker Homa Bay County Assembly, The Homa Bay County Assembly Service Board, Hon. Michael Nyangi, Hon. Juma Owuoro, Comm. Lilian Ogono, Comm. Joseph Okoto, Victor Omondi Rakwach, Ramos Fidel and Owuocha Omondi are the respondents herein.
3. The application is premised inter alia on the grounds that: on 2nd October, 2020 the ELRC issued an ex-parte order restraining the applicant from assuming his office as the Clerk of Homabay County Assembly; that under Section 19 of the *County Assembly Services Act*, the clerk of a county assembly is the chief administrative officer and is responsible for the day to day running management and functioning of the county assembly; that the effect of the impugned order was to hamper the operations of the Assembly thereby bringing crucial services to a complete halt; that the applicant’s rights to fair administrative action under Article 47 of the Constitution were breached and continue to be breached by the impugned order; and that the applicant’s intended appeal will be rendered nugatory if the orders sought are not granted.
4. The application was supported by the affidavit of the applicant and the annexures thereto. The applicant deposed that he intends to appeal against part of the decision that ordered: “That the suspended clerk should not take office until the consolidated petition is heard and determined.”
5. The 1st respondent opposed the application and filed a replying affidavit sworn by Hon. Elizabeth Ayoo (Ms Ayoo) the Speaker of the Assembly and the 2nd respondent’s Chairperson. Ms Ayoo deposed that the applicant is not and has never been the Clerk of the Assembly and is not and has never been the Secretary to the 2nd respondent; that in her position as Speaker of the Assembly, she did not chair any meeting of the 2nd respondent in which the applicant was appointed as the Clerk of the Assembly; that the applicant does not hold the office of Clerk of the Assembly; that the applicant’s suspension was intended to pave way for the commencement of disciplinary proceedings against him; and that there is an acting Clerk of the Assembly in office.

### **Submissions by Counsel**

6. The application was heard by way of written submissions due to the Covid-19 Pandemic. M/S Makallah, Theuri & Company Advocates who are on record for the applicant submitted that the applicant is currently serving as the Clerk of the Assembly; that the applicant’s intended appeal has high chances of success and raises arguable points of law including inter alia whether the applicant’s rights to fair administrative action under Article 47 of the Constitution were breached and continue to be breached by the impugned order; that the intended appeal will be rendered nugatory, if the orders sought are not granted as the applicant will be removed from office without following the laid down procedures and law; and that the 1st and 2nd respondents will replace the applicant thus rendering the intended appeal nugatory as it would have been overtaken by events.
7. M/S Owiti, Otieno & Ragot Advocates are on record for the 1st respondent and filed written submissions in which they stated that the application is misconceived as the impugned order is



a negative order as the learned Judge ordered that the applicant should not take office until the consolidated petition is heard and determined; that the impugned order did not grant any substantive orders and did not direct that anything be done and is therefore incapable of execution. Counsel cited inter alia the case of *Giant Holdings Limited vs. Kenya Airports Authority* [2010] eKLR in support of this proposition.

8. On the nugatory aspect, counsel submitted that the applicant is out of office only for the duration of the pendency of the petition; that the only loss that he may suffer is purely financial; and that he has not claimed that any loss he may suffer is of the type or extent that the Assembly or the 2nd respondent cannot make good.

### **Determination**

9. We have considered the application, the grounds in support thereof, the submissions, the authorities cited, and the law. The jurisdiction of this Court under Rule 5(2)(b) of this Court's Rules is discretionary and guided by the interests of justice.
10. The principles for granting a stay of execution, injunction or stay of proceedings under Rule 5(2)(b) of this Court's Rules are well settled as was observed by this Court in the case of *Trust Bank Limited and Another v. Investech Bank Limited and 3 Others* [2000] eKLR where the Court delineated the jurisdiction of this Court in such an application as follows:

“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...”

11. On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR this Court described an arguable appeal in the following terms:

- 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.
- 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.”

12. We have carefully considered the grounds set out in the motion and the draft memorandum of appeal. In our view, it is arguable /inter alia// whether the applicant's rights to fair administrative action under Article 47 of the Constitution were breached and continue to be breached by the impugned order. At this stage the issue is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court. Without saying more lest we embarrass the bench that will be seized of the main appeal, we are satisfied that the intended appeal is arguable.



13. On the nugatory aspect, which is whether the appeal, should it succeed, would be rendered nugatory if we decline to grant the orders sought in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) this Court stated that:

“ix). The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

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.”

14. In determining whether or not an appeal will be rendered nugatory the Court has to consider the conflicting claims of both parties and each case has to be considered on its merits. A cursory perusal of the pleadings herein does not show that the intended appeal will be rendered nugatory if the orders sought are not granted. In the impugned decision, the learned Judge simply ordered that the applicant should not take office until the Petition was heard and determined. What was issued by the ELRC was therefore in the nature of a negative order incapable of execution and as such there is nothing to stay.

15. This Court in *Raphael Kakene Muloki & another v Cabinet Secretary of Lands and 2 Others* [2021] eKLR cited with approval the decision of Makhandia, J. (as he then was) in *Raymond M. Omboga v Austin Pyan Maranga* Kisii HCCA No 15 of 2020 where the learned Judge stated as follows:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

16. By parity of reasoning, from the circumstances of this case, it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory, absent stay and this limb has not been established

17. As the applicant has to establish both the arguability and the nugatory aspect, the applicant has therefore failed to establish the twin limbs for consideration in an application under Rule 5(2)(b) of the Court of Appeal Rules.

18. The upshot is that the application dated 13th October, 2020 is without merit and the same is hereby dismissed with costs to the respondents.

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

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**



**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

