



**Kombo v County Assembly of Kisii & 2 others (Civil Application
072 of 2021) [2021] KECA 327 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 327 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 072 OF 2021
PO KIAGE, J MOHAMMED & M NGUGI, JJA
DECEMBER 17, 2021**

BETWEEN

DAVID ONDIMU KOMBO APPLICANT

AND

COUNTY ASSEMBLY OF KISII 1ST RESPONDENT

COUNTY ASSEMBLY OF KISII SERVICES BOARD 2ND RESPONDENT

SAMUEL ANGASA ONUKOH 3RD RESPONDENT

(Application for stay of execution/injunction pending the hearing and determination of an intended appeal from the judgment and decree of the Employment and Labour Relations Court at Kisumu (Radido, J) dated 28th April, 2021 in ELRC Petition No. 1 of 2021)

RULING

1. The applicant, Hon. David Ondimu Kombo has by the notice of motion dated 10th May, 2021 brought under Rule 5(2)(b) of the Court of Appeal Rules sought, *inter alia*, the following orders;

“4. A conservatory order/injunction do issue restraining and/or prohibiting the respondents by themselves, their servants, employees, agents or any person acting on their behalf or at their behest from interfering with the mandate of the applicant as the Speaker County Assembly of Kisii or otherwise howsoever debating deliberating upon removing from office the applicant as the Speaker of County Assembly of Kisii except in compliance with the law, the Constitution, due process and the 1st respondents standing orders.

5. A conservatory order/injunction do issue restraining and/or prohibiting the 1st & 2nd respondents by themselves, their servants, employees, agents or any person acting on their behalf or at their behest from designating the 3rd respondent or any other person as Acting Speaker/temporary Speaker of the Kisii County Assembly.



6. A conservatory order/injunction do issue restraining and/or prohibiting the 3rd respondent from purporting to act as, holding out, misrepresenting, declaring and or masquerading as the speaker of the Kisii County Assembly excepting compliance with the Constitution and the Law.”
2. In the grounds appearing on the face of the motion, which are also elaborated on in his supporting affidavit sworn on 10th May, 2021, the applicant states that following “an aborted and unsuccessful” attempt to impeach him as Speaker of the County Assembly of Kisii, the 3rd respondent, named as Hon. Samuel Angasa Onukoh, and others engaged in acts of unlawful interference with his lawful discharge of his duties as Speaker, provoking a suit at the Employment and Labour Relations Court at Kisumu. That suit was, however, dismissed on 28th April, 2021 with Radido, J directing the County Assembly of Kisii, named as the 1st Respondent herein, to go back to its standing orders to see if it had reserved residual powers to conclude debate in the removal process.
 3. The applicant further contends that in the County Government Act he is legitimately in office as an elected Speaker the impeachment process having failed and that the 3rd respondent, having been elected temporary Speaker to preside over the impeachment process only, ceased to have any further role in the office of Speaker. He criticizes the decision of the learned Judge for failing to determine the issues raised in the petition filed before him thereby leaving the matter in the hands of the combatants and throwing the legislative business of the County into limbo.
 4. The applicant filed a notice of appeal against the said decision and asserts that he has a highly arguable appeal with good chances of success as he intends to challenge the learned Judge’s interpretation of section 11 of the County Government Act; his failure to determine whether there was a lawful removal of the petitioner, and whether the motion for his removal had lapsed; and for advising the County Assembly to confirm whether it had residual powers to conclude debate in the removal process.
 5. The applicant contends that unless the injunction he seeks is granted, the intended appeal would be rendered nugatory as the respondents are using violence to prevent him from executing the duties of his office and intend to do so for the remainder of his term in office. Moreover, the 3rd respondent in purporting to illegally conduct the business of the Assembly as Acting Speaker continues to generate legal risk in respect of important business of the House over which the applicant holds legal mandate and responsibility. “Moreover, unless an injunction is issues, he may be illegally removed from office.”
 6. Written Submissions along the foregoing lines were filed on behalf of the applicants and were considered to be comprehensive enough not to require highlighting by Mr. Kerongo, learned counsel for the applicant who also drew our attention to a list and bundle of authorities filed on behalf of the applicant. When we reserved the ruling in this matter counsel made a request for interim orders, which we granted.
 7. It is now accepted practice in this Court that interlocutory applications such as the one before us must not be allowed to consume too much of the Court’s scant resources which are better utilized in the hearing and merit determination of appeals, which is the *raison d’etre* of this Court by constitutional command. With that in mind, whereas we do give applications for interim relief due and careful consideration, the applicable principles are so notorious that we must *eschew* any appearance of belaboring them. Our ruling, must therefore be deliberately brief as we should move towards rendering *sua sponte* decisions on such applications.
 8. To succeed on an application under Rule 5(2)(b), it is incumbent upon the applicant to show, first, that he has an arguable appeal. This threshold is quite low as all that needs to be shown is a single *bona fide* point requiring a response from the respondent and consideration by the Court. So long as



the point sought to be argued is not frivolous, trifling, speculative or merely academic, the arguability limb will have been satisfied. The second limb to be satisfied is a showing that the appeal or intended appeal would be rendered nugatory if the relief sought is not granted. That is to say that the applicant would have suffered loss and harm so great as to render any success merely illusory, pyrric and of no consequence. The applicant must satisfy the Court on both limbs. Full elaboration of these principles complete with a listing of some of the notable decisions of this Court thereon, is found in [Stanley Kangethe Kinyanjui -vs- Tony Keter & 5 others \[2013\] eKLR](#).

9. Applying these principles to the motion before us, we note that the applicant raises about ten points in which he faults the decision of the learned Judge. We need not go into the said grounds but they do not seem idle or frivolous raising, as they do, questions about the interpretation and application of section 11 of the County Government (Amended) Act 2020 and a question about the learned Judge's direction for the respondent to seek "*residual powers*" in its standing orders permitting the removal of the Speaker. The first limb is satisfied.
10. Regarding the nugatory aspect, the applicant contends not idly, that the acts of the respondents constitute a flagrant illegality that should not be allowed to continue. He also alludes to the legislative limbo the County Assembly for which he is responsible, has been thrown into with attendant legal risks. Moreover, unless his position is protected by law established, an unlawful removal, as he argues, would mean a premature and irreversible end to his term of office. We think that the appeal would be rendered nugatory absent this Court's intervention by way of the injunctive prayers sought.
11. In the result, this application succeeds and is allowed in terms of prayers 4 to 7 (inclusive) of the motion.
12. The costs shall be in the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

