



REPUBLIC OF KENYA



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Parliamentary Service Commission & 4 others v Salaries and Remuneration Commission & 7 others (Civil Application E409 of 2020) [2021] KECA 234 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KECA 234 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E409 OF 2020
W KARANJA, SG KAIRU & J MOHAMMED, JJA
DECEMBER 3, 2021**

BETWEEN

**PARLIAMENTARY SERVICE COMMISSION 1ST APPLICANT
CLERK OF THE SENATE 2ND APPLICANT
CLERK OF THE NATIONAL ASSEMBLY 3RD APPLICANT
PARLIAMENT 4TH APPLICANT
MEMBERS OF PARLIAMENT 5TH APPLICANT**

AND

**SALARIES AND REMUNERATION COMMISSION 1ST RESPONDENT
OKIYA OMTATAH OKITI 2ND RESPONDENT
CONTROLLER OF BUDGET 3RD RESPONDENT
NATIONAL TREASURY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
TRANSPARENCY INTERNATIONAL-KENYA 6TH RESPONDENT
KATIBA INSTITUTE 7TH RESPONDENT
LAW SOCIETY 8TH RESPONDENT**

(An Application for stay of execution pending the determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Nyamweya, Korir & Mativo, JJ) dated 10th December, 2020 in Petition No. 208 of 2019 Consolidated with Petition Nos. 185 of 2019 & 339 of 2019)



RULING

1. The Parliamentary Service Commission (PSC) (the 1st applicant) is an independent constitutional Commission established under Article 248 (2) of the *Constitution of Kenya 2010* to cater for the wellbeing of Members of Parliament pursuant to Article 127 of the Constitution, including providing services and facilities to ensure efficient, effective and optimal performance by the members of Parliament (the 5th applicant). The second applicant (the Clerk of the Senate) is by dint of Article 127 (3) of the Constitution the secretary of the first applicant. The third applicant (the Clerk of the National Assembly) is appointed under Article 128 (1) of the Constitution and sued in his capacity as the accounting officer of the National Assembly.
2. On the other hand, the Salaries and Remuneration Commission (SRC) (the 1st respondent) is also an independent constitutional Commission whose functions include inquiring into and advising on the salaries to be paid out of public funds; to keep under review all matters relating to salaries and any remuneration of Public Officers. The 5th applicant, the Members of Parliament are indisputably Public Officers and it, therefore, follows that the first respondent has the mandate to inquire and advise on the salaries and remuneration of the 5th applicant.
3. The second respondent Mr. Okiya Omtatah Okoiti, is a Kenyan citizen resident in Nairobi, a human rights defender and also the executive director of an outfit called Kenyans for Justice and Development (KEJUDE) and is a common feature on the court corridors as he pursues justice for the common Mwananchi and keeps the Government on its toes where violation of the Rule of law is suspected to have taken place.
4. The third respondent (the Controller of Budget) is appointed under Article 228 of the Constitution of Kenya and has the constitutional mandate to oversee the implementation of the budget of the National and County Governments to ensure that all withdrawals from public funds are authorised by law.
5. The 5th respondent (the Honourable Attorney General) was sued as the chief legal adviser of the Government by virtue of Article 156 (4) of the Constitution and represents the Government in Civil proceedings. The 6th and 7th respondents are institutions which, inter alia, fight for human rights and also keep the government on its toes to ensure the law is followed and human rights of the citizens are respected. Lastly the Law Society of Kenya (8th respondent) is a statutory body established under Section 3 of the *Law Society of Kenya Act* and its functions are articulated therein.
6. Three petitions namely, Petition Nos. 185 of 2019, 208 of 2019 and 339 of 2019 were filed before the Constitutional and Human Rights Division at Nairobi by the 1st and 2nd respondents herein. The Petitions were consolidated and heard together and the judgment was rendered on 10th of December, 2020. In the said judgment, the court granted the following orders;
 - i. That the prayers sought in Petition number 339/2019 by the first respondent are hereby declined and the Petition is dismissed with no order as to costs.
 - ii. A declaration be and is hereby granted that the setting and approval of the payment of an accommodation or house allowance of members of Parliament is a function that is exclusively vested in the Salaries and Remuneration Commission by Article 230 (4) and (5) of the Constitution.
 - iii. A declaration be and is hereby granted that the decision of the Parliamentary Service Commission to set, and approve the payment of accommodation or



house allowance to members of Parliament contrary to the structure and benefits of all State officers in Parliament that is set and communicated by the Salaries and Remuneration Commission is in violation of Article 230 (4) and (5) of the Constitution.

- iv. A declaration is hereby granted that the decision of the Parliamentary Service Commission to set, and approve the payment of accommodation or house allowance to members of Parliament contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the Salaries and Remuneration Commission, and without approval of the Salaries and Remuneration Commission, the functions that are exclusively vested in the SRC is ultra vires the prescribed constitutional powers of PSC contained in Article 127(6)of the Constitution.
- v. That Declaration be and is hereby granted that the decision of the Parliamentary Service Commission to set and approve the payment of an accommodation or house allowance to members of Parliament contrary to the structure of remuneration and benefits of all State officers in Parliament that is set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission is in violation of Articles 259 (11) of the Constitution and required the prior approval of the Salaries and Remunerations Commission.
- vi. That Declaration be and is hereby granted that the decision of the Parliamentary Service Commission to set and approve the payment of an accommodation or house allowance to members of Parliament contrary to the structure of remuneration and benefits of all State officers in Parliament that is set and communicated by the Salaries and Remuneration Commission, the functions that are exclusively vested to the SRC was in violation of the provisions of Article 73(1) of the Constitution which provides that any State authority assigned to a State Officer is a public trust that ought to be exercised in a manner that is consistent with the purposes and objects of the Constitution.
- vii. A declaration be an is hereby granted that the decision of the Parliamentary Service Commission, to set and approve the payment of an accommodation or house allowance to members of Parliament contrary to the structure of remuneration and benefit of all State Officers in Parliament that is set and communicated by the Salaries and Remunerations Commission, and without the approval of the Salaries and Remunerations Commission, the functions that are exclusively vested to the SRC was in violation of the binding national values and principles of governance prescribed in Article 10 of the Constitution on the rule of law, transparency and accountability.
- viii. An order of Certiorari be and is hereby issued to quash the decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance of members of Parliament contrary to the structure of Remuneration and Benefits of all States Officers in Parliament that is set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission in disregard of Article 230 (4) (a) of the Constitution.



- ix. An order of Mandamus is hereby issued directing the clerk of the Senate and the clerk of the National Assembly to, within a period of 12 calendar months from the date of this order, recover in full from the salaries and allowances of each member of Parliament the entire amount of money paid as accommodation and/or house allowance to the members of Parliament, pursuant to the illegal and unconstitutional decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to members of Parliament contrary to the structure of remuneration and benefits of all State Officers in Parliament that is set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission.
- x. An order of Mandamus is hereby issued directing the clerk of the Senate and the clerk of the National Assembly to, within a period of 12 calendar months from the date of this order, recover in full from the salaries and allowances of each member of Parliament the entire amount of money paid as accommodation and/or house allowance to the members of Parliament, pursuant to the illegal and unconstitutional decision of the Parliamentary Service Commission to set, and approve the payment of an accommodation or house allowance to members of Parliament contrary to the structure of remuneration and benefits of all State officers in Parliament that is set and communicated by the Salaries and Remuneration Commission, and without the approval of the Salaries and Remuneration Commission.
- xi. ...”

7. Being aggrieved by the above orders the applicants herein filed a Notice of appeal dated 11th December, 2020 in which they challenge the entire judgement of the High Court. They have proffered 15 grounds of appeal in the memorandum of appeal dated 17th December, 2020, which grounds we shall not repeat for purposes of this application.
8. Meanwhile pending the hearing of the appeal the applicants filed the application now before us which is the subject of this ruling. In the Notice of Motion, dated 17th December, 2020 and pronounced to be premised on Rule 5(2)b of the [Court of Appeal Rules](#), the five applicants seek in the main an order as follows:-

“ There be a stay of execution of the judgement and decree dated December 2020 delivered in Constitutional and Human Rights Division, Petition No. 208 of 2019 (Consolidated with petition numbers 185 of 2019 and 339 of 2019 Salaries and Remuneration Commission and another versus Parliamentary Service Commission and others... pending the hearing and determination of the appeal.”

They also pray that the costs of the application be in the cause.

9. The application is predicated on a raft of grounds which basically set out what appears to be a recapitulation of the issues before the High Court and also the grounds of the intended appeal. The application is also supported by the affidavit of Jeremiah Nyegenye who doubles up as the Clerk of the Senate as well as the Secretary to the Public Service Commission sworn on 17th December, 2020. The affidavit essentially repeats the grounds on the face of the application and gives the history of the matter and also brings on board contents of the memorandum of appeal.



10. The gist of the grounds of appeal and the depositions in the supporting affidavit is that the Judges of the High Court misinterpreted the Constitution in as far as the roles of the Salaries and Remuneration Commission viz a viz those of the Parliamentary Service Commission are concerned. According to the applicants, the role of the SRC concerns the remuneration and benefits payable to all State Officers, whereas the Parliamentary Service Commission deals with facilitation of members of Parliament pursuant to Article 127 (6) (a) and (e) of the Constitution. The applicants therefore fault the learned Judges for issuing the declarations that they did and for ordering a refund of the money that had already been paid out.
11. The applicants hold the view that the Public Service Commission is mandated to facilitate the Members of Parliament to enable them carry out their constitutional and parliamentary duties of serving the electorate. The applicants depose that the Parliamentary Service Commission is an independent constitutional body just like the Salaries and Remuneration Commission, albeit with different mandates. From the sum total of the grounds on the face of the application and the depositions in the supporting affidavit the applicants state that they have an arguable appeal which merits to be heard by this Court and they, therefore, urge the Court to allow the application and set aside the entire judgment of the High Court.
12. The application is opposed through the replying affidavit of Anne R. Gitau, the Chief Executive Officer of the 1st respondent dated 4th January, 2021. The first respondent maintains that the decision by the Public Service Commission to pay the said allowances to the members of Parliament was illegal and the same should not be allowed to continue. Ms Gitau deposes that it is in the public interest that the amounts paid out from public funds be returned or be recovered from the members of Parliament. At paragraph five of her affidavit, Ms Gitau deposes that the 1st applicant has not approved payment of house allowance to members of Parliament and she gives reasons for that position, saying that the only housing benefit approved by the SRC is the benefit to a selected group of State Officers who include the President, Deputy President, the Chief Justice, Deputy Chief Justice, County Governors, County Deputy Governors and Speakers of the County Assemblies. She was categorical that members of Parliament do not fall in this category and she, therefore, maintains that the court's decision interpreted the law correctly and that the appeal before this Court is not arguable.
13. The application was also opposed by the second respondent who adopted the position taken by the first respondent. At the plenary hearing the applicants were represented by learned counsel Professor Ojienda SC, the first respondent was represented by Mr Wanyama, Mr Omtatah appeared in person while the 7th respondent was represented by Mr Ochiel Dudley; the Attorney General was represented by Mr Thande and the Law Society of Kenya was represented by Mr Mutemi.
14. Counsel for the applicants filed written submissions along with lists of authorities. The first and second respondents also filed written submissions. The other parties did not file submissions but made oral submissions in support of their stand. Learned counsel for the applicants and the first and second respondents also highlighted their submissions. The rest of the respondents did not actively participate in the Petitions before the High Court and did not file responses to this application.
15. The stand taken by the respondents is that even assuming the appeal raises constitutional issues which would require this Court to address its mind to, the appeal would not be rendered nugatory in the event the stay orders sought are not granted. They maintain that any money already paid can be recovered from the Members of Parliament in the event the appeal does not succeed, and if the appeal succeeds, the allowances can be paid in arrears.
16. We have considered the application along with the rival affidavits and submissions by the parties and the relevant law. What we need to do now is subject these facts to the applicable test in order to determine



whether this application passes the threshold required of applications predicated on Rule 5 (2) (b) of the Rules of this Court. The test is set out in what has come to be referred to as the twin principles of arguability and the nugatory aspect. There is also the third principle recently added by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR* which is, the public interest aspect.

17. To entitle the applicants to the order of stay of execution that it has sought, the applicants are obliged to satisfy us that the intended appeal is arguable and that if we do not grant stay of execution and the appeal succeeds, it will be rendered nugatory. (See *Jaribu Holdings Ltd vs Kenya Commercial Bank Ltd., CA No. 314 of 2007*). To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues. (See *Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union, CA. No. Nai. 72 of 2001*).

On the first principle on arguability, in our view there is no doubt that the appeal is arguable. From the contents of the application and the memorandum of appeal, it is apparent to us that there are some important issues raised that call for determination by this Court. For instance, the issue raised as to the overlap of the role of the 1st applicant vis a vis that of the 1st respondent in determining the allowances and benefits of the members of Parliament is a germane one that will constructively engage the Court's mind. As stated earlier the applicant does not need to demonstrate a multiplicity of arguable points for the application to pass the test on arguability. (See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others (2013) eKLR*). We have no hesitation making a finding that the applicants' appeal is arguable.

18. 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 reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. (See: *Reliance Bank (in liquidation) vs Norlake Investments Ltd, [2002] 1 EA 227*.)

Mr. Ochiel informed us that the disputed payments were stopped and in our view, if there will be any recoveries to be made in the event the appeal fails, it would not be a burdensome amount.

19. On the other hand, if the appeal succeeds, all that will happen is that the 1st appellant will pay the arrears which will be owed to the 5th respondent.

Either way, we fail to see how the appeal will be rendered nugatory if stay orders are not granted. Our conclusion therefore is that the applicants have failed to demonstrate the nugatory aspect, and the two principles being conjunctive, then establishing only one of them does not aid the applicants.

Accordingly, we are not persuaded that this application meets the threshold discussed earlier. Our conclusion is that the application is for dismissal. We dismiss it with costs in the appeal. We also order that the substantive appeal be fixed for hearing on priority basis.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

