



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 161 OF 2019

BETWEEN

CHARLES BARONGO NYAKERI..... APPLICANT

AND

COUNTY GOVERNMENT OF KISII..... 1ST RESPONDENT

KISII COUNTY

PUBLIC SERVICE BOARD..... 2ND RESPONDENT

ROBERT OMBASA ACTING COUNTY SECRETARY/ HEAD OF COUNTY

PUBLIC SERVICE,COUNTY GOVERNMENT OF KISII.....3RD RESPONDENT

JAMES ELVIS OMARIBA ONGWAE

GOVERNOR KISII COUNTY.....4TH RESPONDENT

RAEL MOMANYI..... 5TH RESPONDENT

(Application for an order of conservatory injunctive orders, stay of execution and further proceedings under Rule 5(2) (b) of the Court of Appeal Rules from the Judgment of the Employment and Labour Relations Court of Kenya at Kericho (Mbaru, J.) dated 25th November, 2019

in

ELRC Petition No. 10 OF 2017)

RULING OF THE COURT

1. This is an application brought under **rule 5(2) (b)** of this **Court's Rules**. The applicant seeks stay of execution of the judgment and decree that was delivered by the **Employment and Labour Relations Court (ELRC)** in **KERICHO ELRC PETITION NO. 10 OF 2017** on 25th November 2019, pending hearing and determination of an appeal that he has filed against the said judgment.
2. The application is supported by the applicant's mandated affidavit. In the suit that the applicant had filed before the ELRC, the applicant was challenging, *inter alia*, the summary dismissal from his employment as the Secretary of Kisii County Public Service Board (the 2nd respondent) for gross misconduct. The summary dismissal was effected on 2nd February 2018.
3. The applicant had sought, among other reliefs, a declaration that the termination of his employment was unconstitutional, null and void, since the respondents had contravened the guiding principles of leadership and integrity under **Article 73(2)** of the

Constitution of Kenya.

4. Dismissing the suit, the trial court held that the applicant was issued with two (2) show cause notices but he failed to respond to them; that the termination of employment was for a justifiable cause; and that due process of the law as required under **section 41** as read with **sections 35 and 43** of the **Employment Act, 2007** was complied with. The applicant was ordered to bear the costs of the suit.

5. Being aggrieved by the said judgment, the applicant filed a notice of appeal and applied for certified copies of the proceedings to file an appeal. He argues that the intended appeal is arguable, basing that assertion on a draft memorandum of appeal annexed to his affidavit.

6. In the draft memorandum of appeal, the applicant argues that the learned judge, **Mbaru, J.** erred in law for several reasons, among them being: failing to appreciate that the appointment and removal from office of the applicant is governed by the provisions of **section**

58 of the **County Government Act, 2012, Article 251(1)** for the **Constitution**; and **section 58(5)** of the **County Governments Act, 2012**, and not **sections 41, 43 and 45** of the **Employment Act**; in failing to make a finding that the applicant was not given a chance to be heard; in failing to find that the applicant could only be removed from office after a successful petition to the County Assembly.

7. The applicant contends in his written submissions that the intended appeal has high chances of success but says as to whether the intended appeal shall be rendered nugatory unless the orders sought are granted.

8. The 1st, 2nd, 3rd and 4th respondents opposed the application. They did not say anything regarding arguability of the intended appeal. As to whether the intended appeal would be rendered nugatory unless the orders sought are granted, the respondents stated that the applicant declined to go back to work even after a court order he sought was granted by consent to allow him to go back to work.

9. They further argued that the applicant's contract of service was for a non-renewable term of 6 years from 16th September 2014 to 16th September 2020. For those reasons the respondents urged the Court to dismiss the application.

10. We have considered the application, the affidavits and submissions on record. The principles that guide this Court in considering an application under **rule 5(2) (b)** of its **Rules** are well settled. An applicant must demonstrate that the appeal or intended appeal is arguable, and that unless the orders sought are granted the appeal, if successful, will be rendered nugatory. See **STANLEY KANG'ETHE KINYANJUI V TONY KETTER & OTHERS [2013] eKLR.**

11. This Court has also consistently held that a negative order cannot be executed, and that where the trial court in its judgment has dismissed a suit, that is a negative order that is not amenable to grant of any stay. See **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES v ORANGA & OTHERS [1976] KLR 63.**

12. The applicant's claim was dismissed by the ELRC. What followed was a negative decree that cannot be executed. The order of stay of execution of the trial court's judgment pending hearing and determination of the intended appeal sought by the applicant cannot therefore be granted.

We may further add that the intended appeal, if successful, will not be rendered nugatory. This is because the applicant's fixed contract of employment was scheduled to expire on 16th September 2020. In the event that the appeal succeeds, the applicant remedy would be payment of earnings that he lost when he kept out of employment, which are easily quantifiable.

13. For the aforesaid reasons, this application is without merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of August, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR