



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO (P), KOOME & ASIKE - MAKHANDIA, J.J.A)

CIVIL APPLICATION NO. E305 OF 2020

BETWEEN

EDWARD OMBWORI GICHANAAPPLICANT

AND

THE CLERK, NAIROBI CITY

COUNTY ASSEMBLY..... 1ST RESPONDENT

THE SPEAKER, NAIROBI CITY

COUNTY ASSEMBLY.....2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY

SERVICE BOARD.....3RD RESPONDENT

(Being an application for stay pending appeal from the directions of Hon. Lady Justice Maureen Onyango in Nairobi Employment and Labour Relations Court delivered on 5th August, 2020

in

Petition No. 194 of 2019)

RULING OF THE COURT

This dispute involves the filling of the position of the office of the Clerk, Nairobi City Government. A petition claiming violations of Constitutional rights and fundamental freedoms against the respondents was filed in the Employment and Labour Relations Court by Muvengei Jacob Ngwele, but named in the petition only as the Clerk, Nairobi City County Assembly. While the hearing of the petition was pending Makau J. issued an interlocutory ruling dated 20th December 2019 in which at paragraph 51 thereof, he stated as follows –

“51. Finally, parties are directed to comply with the consent orders issued on 30.10.2019 which reinstated the petitioner as the Clerk, Nairobi City County Assembly pending the hearing and determination of the petition herein.”

The petitioner alluded to in this passage was the said Muvengei Jacob Ngwele. In the meantime, the applicant in the instant application Edward Ombwori Gichana and the Nairobi City County Assembly applied to be made parties to the petition.

In the course of giving directions on the hearing of the petition Onyango, J. rendered the following guidelines in so far as the hearing of the petition was concerned.

“There are no orders setting aside the said ruling (Makau, J). These orders are therefore confirmed and parties directed to comply. The foregoing settles the application dated 30th July 2020 by the Nairobi City County Assembly and Edward Ombwori Gichana to be enjoined as interested parties to this petition. This is because Gichana’s appointment was in

violation of the court orders of 30th October 2019 and therefore null and void.

This also settles the application dated 26th July 2020 by the Petitioner which seeks to enforce orders of this court confirming him as Clerk of the Nairobi City County Assembly pending determination of the petition herein.

Since the issues relating to all the other persons/positions have been settled, the only issue left for determination is the preservation of the position of Clerk who as I have already stated above is Muvengei Jacob Ngwele, pending determination of this petition”.

By this, the applicant and the Nairobi City County Assembly were effectively left out of the proceedings. Specifically, the court found that, since the appointment of the applicant was in violation of some court orders, that appointment was of no consequence, null and void; and that he had no *locus* to participate in the proceedings.

It was further confirmed in the directions that Muvengei Jacob Ngwele, and not the applicant, was the Clerk, Nairobi City County Assembly.

The applicant intends to challenge those directions by way of an appeal. In the meantime, he has taken out an application under **Rule 5(2)(b)** of the Court of Appeal Rules to restrain by an order of injunction the respondents from enforcing the above orders; that *status quo* as of that date be maintained; that proceedings in ELRC No. 194 of 2019 be stayed until the appeal is filed, heard and determined; that the judgment coming for delivery on the 16th November, 2020 be arrested. We note that this application has been brought by the applicant alone even though the application for joinder was brought with the County Assembly as third parties.

To satisfy the traditional twin principles under **Rule 5(2)(b)** the applicant explained that, having participated in the recruitment process and having been regularly appointed as the Clerk and Secretary to the County Assembly it was in error for the learned Judge to hold that his appointment was irregular without hearing him; that the main question in the intended appeal will be a determination of the question of the legitimate Clerk of the Assembly; and that the judge was biased against him for failing to consider his case.

On the second limb the applicant argued that the appeal will be rendered nugatory if the orders sought are not granted and should it succeed as the dispute will be determined without the applicant’s participation, rendering the outcome of the appeal academic.

Apart from filing the replying affidavit, the 1st respondent has also taken out a motion to strike out the notice of appeal. In the replying affidavit, just like in the motion for striking out, the 1st respondent argued that the notice of appeal was defective for it was filed more than 35 days from the date of the impugned directions of the court below; that no leave to enlarge time was granted; that the notice of appeal, according to **Rule 75** ought to have been filed with 14 days; that in view of the defect the notice of appeal could not form the foundation of the instant application; and that the application to strike out has been brought in compliance with **Rule 84**, in that it was lodged within 30 days of the service with the notice of appeal.

Has the applicant demonstrated that the intended appeal is arguable; and in addition that should the court reject the application relief the intended appeal if successful will be rendered worthless?

We do not think that issues like failure of the learned Judge to hear the applicant and who the bona fide Clerk to the Assembly is, are idle.

We, however do not have any basis to hold that the appeal will be rendered nugatory considering that upto this point we do not have the outcome of the judgment that was slated for delivery on 16th November 2020. That decision, we were told, was going to have a direct impact on this application hence the prayer that it be arrested. It was however not arrested due to lack of time between the time the application was filed and when it was canvassed.

But the more compelling reason for our declining to grant the orders prayed for is the incompetence of the notice of appeal. It was filed nearly one month after the decision sought to be challenged. By **Rule 75**, a person who desires to appeal to the Court must give a notice in writing within 14 days of the date of the decision against which it is desired to appeal.

It is uncontroverted that the notice of appeal was not lodged as prescribed. By **Rule 84** an application to strike out any notice of appeal on the ground that it was not lodged within the prescribed time, must itself be filed within 30 days from the date of service of the notice of appeal on the opposite side.

The respondent has demonstrated that this requirement has not been complied with.

For these reasons, this application must fail. It is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 18th day of December, 2020.

W. OUKO, (P)

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR