



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAL, JJA)**

**CIVIL APPLICATION NO. 71 OF 2020**

**BETWEEN**

**HON. MARITA MMOJI AGUFANA.....APPLICANT**

**AND**

**THE SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....1<sup>ST</sup> RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF VIHIGA.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF VIHIGA.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY SECRETARY, VIHIGA COUNTY.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY SERVICE BOARD, VIHIGA COUNTY.....5<sup>TH</sup> RESPONDENT**

**THE GOVERNOR, VIHIGA COUNTY.....6<sup>TH</sup> RESPONDENT**

*(Being an application for injunction to restrain the respondents from dismissing the applicant from her position as a member of the County Executive pursuant to the judgment and decree of the Employment And Labour Relations Court at Kisumu, pending the hearing and determination of the intended appeal against the said judgment (M.N Nduma, J.) dated 25<sup>th</sup> June 2020*

**in**

**ELRC Petition No. 53 of 2018)**

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**RULING OF THE COURT**

**[1] UPON** considering the application before us which is by way of a notice of motion dated 2<sup>nd</sup> July , 2020 by the applicant and noting that it is principally predicated upon the provisions of **Rule 5 (2) (b)** of this Court's Rules among other statutory enactments cited, the applicant in the main seeks an order of injunction to restrain the 6th respondent from dismissing her from her position as a Member of the County Executive responsible for sports, youth and gender pursuant to the judgment delivered on the 25th June 2020 by **Nduma, J.** and all consequential orders thereto until the intended appeal is heard and determined.

**[2] UPON** reading the supporting affidavit sworn on 2<sup>nd</sup> July, 2020 by **Marita Mmoji Agufana**, the applicant and grounds in support of the application which allude to the fact that the trial court dismissed the applicant's petition and failed to grant the prayers sought therein, that she intends to appeal against the said judgment and decree, that the intended appeal is arguable and has high chances of success as demonstrated in the grounds in support of the application that are robust, meritorious and demonstrates that the impugned judgment violated the law, there was breach of the rules of natural justice among other grounds; that unless the order of injunction is granted, the appeal will be rendered nugatory since the applicant stands to lose her position as a Member of the County Executive Committee.

**[3]** Noting that none of the respondents filed papers in opposition to the application and noting further that none of the parties filed

submissions in support of or in opposition to the application.

[4] UPON considering the application which gives a detailed account of the dispute before the trial court and also the intended grounds of appeal which includes; that the learned judge failed to appreciate that the County Assembly violated its own Standing Orders in dealing with the complaint against the applicant and that the applicant was denied a chance to be heard before the 3rd respondent which amounted to a breach of the applicant's right to fair administrative action as envisaged in Article 47 of the constitution as well as the plea that the intended appeal will be rendered nugatory if the injunction is not granted.

[5] COGNIZANT of the guiding principles that the jurisdiction of this Court under **Rule 5(2)(b)** is discretionary, but is exercised judiciously and with reason not whimsically; that for the applicant to succeed, it is trite that she must show that she has an arguable appeal hence it is not frivolous and also demonstrate that the intended appeal, if successful would be rendered nugatory in the absence of an order of injunction; that in the case of **Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR**, this Court stated *inter alia*:-

**“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”**

[6] NOTING FURTHER that in determining whether the appeal is arguable or not, it should be appreciated that an arguable appeal, does not necessarily mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. In **Dennis Mogambi Mang’are vs. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** this Court held that: -

**“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”**

[7] HAVING CONSIDERED the instant application within the above parameters, we are satisfied that the intended appeal raises arguable issue(s) of whether the decision against the applicant violated the law and particular the Standing Orders of 3rd respondent and whether the applicant was subjected to fair administrative action.

[8] In considering the nugatory aspect, we note that the applicant was an employee. Should she succeed in her intended appeal she would definitely be awarded compensatory damages. Alternatively she could be reinstated in her previous job without loss of salary and or benefits. This being the case we are not satisfied that the intended appeal would be rendered nugatory if we do not grant the injunction

[9] The applicant having failed to satisfy the twin limbs as required by **Rule 5(2)** of this Court’s rules, the application must fail and is accordingly dismissed with costs to the respondent.

*Dated and delivered at Nairobi this 4<sup>th</sup> day of December, 2020.*

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**