



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, MUSINGA & MURGOR J.J.A.)

CIVIL APPLICATION NO. 21 OF 2020

BETWEEN

PHILIP ADUNDO.....APPLICANT

AND

CHAIR, KISUMU COUNTY ASSEMBLY SERVICE BOARD...1ST RESPONDENT

KISUMU COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

THE COUNTY SECRETARY – KISUMU COUNTY.....3RD RESPONDENT

BENN OLOO OPIYO.....4TH RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, PLANNING

COUNTY GOVERNMENT OF KISUMU.....5TH RESPONDENT

THE CHIEF FINANCE, COUNTY GOVERNMENT COUNTY GOVERNMENT

OF KISUMU.....6TH RESPONDENT

(An application for injunction and stay of execution against the judgment of the Employment and Labour Relations Court at Kisumu (Nduma- Nderi, J.) dated 7th March 2019 2018 in Kisumu ELRC No. 378 of 2016)

RULING OF THE COURT

This Notice of Motion dated 12th February 2020 made under rules 5 (2) (b) of the Court of Appeal Rules, the applicant, Philip Adundo seeks orders of stay of execution of the judgment of the Employment and Labour Relations Court dated 7th March 2019 and injunction to stop the recruitment of a clerk to the Kisumu County Assembly pending the hearing and determination of the application and appeal and that costs be provided for.

The application was premised on the grounds that following the dismissal of the applicant’s claim by the trial court, the respondents were allowed to recruit a clerk to the position held by the applicant; that in reaching its determination, the court failed to appreciate that at the time the decision was made there was no quorum of the 2nd respondent to enable it carry out its functions, and there was no complaint raised against him to warrant the issuance of a suspension letter; that for this reason, the appeal is arguable, and that in the event the orders sought were not granted the appeal would be rendered nugatory because he would be unable to take up his position, as the respondent would have recruited a county clerk to take up the position. The motion was supported by the applicant’s affidavit sworn on 12th February 2020.

The respondents did not file affidavits in reply, and neither did any of the parties file written submissions.

In determining an application under rule 5 (2) (b) of this Court’s rules, it is well established that, two principles guide the Court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous. Secondly, that

unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory. See the case of Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012. We would also add that when determining applications under rule 5 (2) (b), the court exercises a distinct jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See Ruben & Others vs Nderitu & Another (1989) KLR 459.

In ascertaining whether the appeal is arguable, the applicant has asserted that in arriving at a determination of the dispute, the court failed to take into account that at the time the applicant was suspended, there was no quorum of the 2nd respondent to carry out such function. As to whether or not this was in fact the case would be a matter that we would consider to be arguable.

On the nugatory aspect, the applicant seeks orders to restrain the respondents from recruiting a county clerk into his position. It is however noteworthy that this issue was canvassed before the trial court which had this to say on the issue;

“...The claimant ceased to be an employee of the respondent on 14th July 20117 when he was summarily dismissed and therefore cannot be paid salary and allowance for work done.

That the 3rd respondent replaced the claimant and has been performing the functions of office. The fourth respondent assumed functions of that office and left it and the prayers sought have been overtaken by events”.

This being the case, the orders seeking to restrain recruitment are not capable of being granted as it is apparent that a recruitment to the position of county clerk has already taken place, and the position has been occupied. Clearly, the orders sought have been overtaken by events.

In sum, the applicant having failed to satisfy the second limb, the motion dated 18th June 2020 is unmerited, and is dismissed with costs to the respondent.

It is so ordered.

Dated and Delivered at Nairobi this 4th day of December, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR