



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 42 OF 2018 (UR 24 OF 2018)

BETWEEN

DR. OLANGO ONUDI.....APPLICANT

AND

SAMUEL OKURO.....1ST RESPONDENT

SAMWEL ONDOLA.....2ND RESPONDENT

JACOB MUGA.....3RD RESPONDENT

GEORGE AKONGO.....4TH RESPONDENT

CEPHAS KASERA.....5TH RESPONDENT

DEREK OBURA.....6TH RESPONDENT

GEORGE KOYIER.....7TH RESPONDENT

SELINE OBONYO.....8TH RESPONDENT

(Application for stay of execution of the ruling and order of the Employment and Labour

Relations Court of Kenya at Kisumu (Nduma, J.) dated 12th April, 2018

in

ELRC PETITION NO. 5 OF 2018)

RULING OF THE COURT

[1] On 12th April, 2018, the Employment and Labour Relations Court at Kisumu (Nduma, J.) delivered a judgment in favour of **Samuel Okuro, Samwel Ondola, Jacob Muga, George Akongo, Cephass Kasera, Derek Obura, George Koyier and Seline Obonyo** (herein referred to as respondents), who were all chief officers in various departments in the County Government of Kisumu. The judgment was against **Dr. Olango Onudi**, the acting county secretary, Kisumu County (herein the applicant). The orders issued by the Employment and Labour Relations Court included: declarations that the applicant’s action on behalf of the Executive Committee of Kisumu County, to exercise disciplinary control over the respondents through letters of suspension and notices to show cause is *ultra vires* the County Government Act No. 17 of 2012 and therefore unlawful, null and void and that all the Chief Officers continue to hold their offices without loss of any remuneration.

[2] The applicant being aggrieved by that judgment, filed a notice of appeal on 17th April, 2018. Subsequently on 27th April, 2018, the applicant filed a motion before us under **Rule 1(2); Rule 5(2)(b) & Rule 41** of the **Court of Appeal Rules**. The main prayers sought in the

motion is an order of stay of execution of the orders issued by the learned judge on 12th April, 2018. The application was anchored on grounds stated on the motion as well as a supporting affidavit sworn by the applicant to which is annexed the pleadings and the judgment of the Employment and Labour Relations Court. It is the applicant's contention that the intended appeal raises triable issues such as whether the County Secretary being the head of Public Service in the County has powers to suspend any Chief Officers pending investigations and whether the County Secretary can take preliminary steps of a disciplinary nature pending the final determination of the disciplinary forces by the County Public Board and whether the learned judge properly interpreted and applied the law.

[3] During the hearing of the motion, **Mr. Yogo** who appeared for the applicant, submitted that the County Secretary and the head of County Public Service have administrative powers to suspend the respondents pending investigations under section 44(3) of the County Government Act and that the power was an administrative action as distinct from a disciplinary process. In addition, counsel pointed out that the county secretary has a legal duty to communicate the decision of the County Executive Committee and that in doing so he does not usurp the power of the secretary to the County Service Board. Counsel argued that those were issues that they intend to canvass at the hearing of the appeal and therefore the appeal was not frivolous.

[4] Mr. Yogo further argued that unless the order for stay of execution was granted, the applicant's appeal would be rendered nugatory. This was because the applicants are the accounting officers within the County Government and if allowed to remain in office, during the ongoing investigations, the investigations would be hampered as the applicants would have access to all the documents and will also be in a position to interfere with witnesses who all report to them. Counsel stated that although the applicants were not physically in occupation of their offices, they were still holding the positions.

[5] In regard to the 1st and 5th respondents, counsel pointed out that their contracts had ended and it would be difficult to preserve the evidence or get necessary information once they are no longer in employment. The Court was therefore urged to stay the order of the Employment and Labour Relations Court by having the applicants remain on suspension during the pendency of the appeal.

[6] The respondents opposed the applicant's motion through grounds of opposition that were filed on 17th October, 2018. The grounds included that the applicants motion was overtaken by events; that the orders sought cannot be granted under Rule 5(2)(b) of the court of Appeal Rules; that the appeal is not arguable; that the application is misconceived, muddled up and an abuse of the court process and that the respondents and the applicants have reconciled and are in a perfect working relationship.

[7] During the hearing of the motion, **Mr. Nyamweya** appeared for the respondents. He argued that the applicant's motion was overtaken by events because, the 1st and 5th respondents are no longer in employment, their contracts having ended and that the remaining applicants have been redeployed to other places.

[8] In addition, respondents' counsel submitted that the orders made by the Employment and Labour Relations Court have been complied with, except for the declaratory orders that are not capable of being stayed. The respondents maintained that the issue before the learned judge was who was entitled to exercise disciplinary control over the County Officers. According to the respondents, section 59 of the County Government Act gives exclusive control to the County Service Board and yet in their case, the County Service Board was not aware of the action taken by the applicant.

[9] Counsel for the respondents urged that the applicant had not demonstrated that the application was likely to be rendered nugatory. He urged the Court to dismiss the application as the same was misconceived.

[10] This Court has powers under Rule 5(2)(b) of the Court of Appeal Rules, to issue orders of stay of execution pending the hearing of an appeal. This is a discretionary power that the Court exercises taking into account the peculiar circumstances of each case. It has now been long established that in exercising its discretion in considering an application for stay of execution, the Court must satisfy itself that two conditions obtain. First, that the applicant has an arguable appeal, and that the appeal is not frivolous. Secondly, that if the order of stay of execution is not issued, the intended appeal is likely to be rendered nugatory. **Githunguri vs Jimba Credit Corporation Limited (2) (1988) KLR 838; J. K. Industries Limited vs Kenya Commercial Bank Limited [1982-88] 1 KAR 1088; and Reliance Bank Limited vs Norlake Investment Limited [2002] 1 EA 27.** It should be noted that both conditions must be satisfied.

[11] In this case, the applicant has identified several issues that they intend to canvass during the hearing of the appeal. The applicant has also annexed to his supporting affidavit a draft memorandum of appeal which sets out five grounds. At this stage, it is not for us to examine the merit or otherwise of the grounds raised. It is enough that the grounds raise issues that require analysis and determination by the Court, and in this regard one issue is sufficient. In this instance, it is clear to us that there is an arguable issue concerning the powers of the applicant under the County Government Act.

[12] In regard to the question whether the applicant's intended appeal is likely to be rendered nugatory if the order of stay of execution is not granted, the applicant's main prayer is to stay execution of the orders made on 4th August, 2018. A perusal of the judgment, shows that the main order sought is stated in paragraph 26 as follows:

“Accordingly, and in disposal of issue (ii) above the petition has merit and is granted as follows:-

(a) The respondents action on behalf of the Executive Committee to exercise disciplinary control over the petitioners by the letters of suspension dated 29th November, 2017, and the notices to show cause dated 23rd January, 2018 is ultra vires the County Government Act No. 17 of 2012 and is unlawful, null and void ab initio.

(b) All the Chief Officers continue to hold their offices without loss of any remuneration including during the period they were in unlawful suspension.”

[13] In effect, the applicant seeks to have the letters of the respondents' suspension remain effective pending the hearing of this appeal. In Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 others [2013] eKLR, this Court reviewed previous decisions on the nugatory aspect and stated as follows:

“(iv). In considering whether an appeal would be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. (David Morton Silverstein vs Atsango Chesoni, Civil Application No. Nai 9 of 2009 ...

(ix). The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Limited vs Norlake Investments Limited [2002] (1 EA 227) at page 232.

(x). Whether or not an appeal would 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.”

[14] Applying the above principles, we have considered whether the respondents' continued presence at their places of employment will render the applicant's appeal worthless or futile, and whether the respondents' return to work if allowed to happen is not reversible. It was argued that the respondents' presence at their places of work, was detrimental to the on-going investigations, as they were likely to interfere with documents and witnesses. However, the respondents' contention that two of the respondents have already left their employment and that the other six have been transferred to other stations, was not disputed. This means that the respondents are not in a position to access documents or witnesses as alleged by the applicant. Moreover, in regard to the respondents who are still in employment, the suspension letters which have been lifted by the Employment and Labour Relations Court, can be easily restored, if the applicant is successful in his appeal. The applicant has therefore failed to establish that the appeal is likely to be rendered nugatory if the order of stay of execution is not granted.

[15] As it is necessary for the applicant to satisfy both the elements of arguability of his intended appeal and the fact that the appeal may be rendered nugatory unless the order of stay is granted, and the applicant having failed to satisfy the second requirement regarding the nugatory aspect, his application for stay of execution pending appeal fails. The costs of this application shall be costs in the appeal. If the appeal is filed, hearing date to be given on priority basis.

DATED and delivered at Kisumu this 24th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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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.