



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & OTIENO-ODEK, JJA)

CIVIL APPLICATION No. 9 of 2019 (UR. 8/2019)

BETWEEN

THE SALARIES REMUNERATION COMMISSION.....APPLICANT

AND

THE PARLIAMENTARY SERVICE COMMISSION.....1ST RESPONDENT

HON. ATTORNEY GENERAL2ND RESPONDENT

LAW SOCIETY OF KENYA.....3RD RESPONDENT

HON. BENSON MUTURA.....4TH RESPONDENT

OKIYA OMTATAH OKOITI.....5TH RESPONDENT

(Being an application for stay of execution of the judgment and decree of the High Court

at Nairobi (Hon. G. V. Odunga J) delivered on 10th December 2018

in

Nairobi Judicial Review Misc. Appl. No. 686 of 2017)

RULING OF THE COURT

1. By **Gazette Notice No. 6517** dated 7th July 2017, the applicant, **Salaries Remuneration Commission**, published review of remuneration and benefits for State Officers working in Senate and National Assembly and serving in the 12th Parliament. The overall effect of the Gazette Notice is *inter alia* to reduce the salaries, remuneration and benefits for state officers below the remuneration and benefits of those who served in the 11th Parliament and below those of coordinate state officers serving in the Executive, Constitutional Commissions and Independent Offices. It is alleged a further effect of the Notice is to take away the state officer's right to annual salary increment; the review abolished Special Parliamentary Duty Allowance to Members of Parliament who have additional responsibilities; it also abolished allowances to the Leader of Majority Party, Leader of Minority Party, Chairpersons of Committees, Members of the Speakers Panel, the Chief Whip and Minority Whip.

2. Aggrieved by the reduction of salaries, allowances and other remuneration benefits, the 1st respondent, **The Parliamentary Service Commission**, filed a Constitutional Petition before the High Court seeking an order of *certiorari* to quash the Gazette Notice. In a judgment delivered on 10th December 2018, the High Court issued an order of *certiorari* quashing Gazette Notice No. 6517 published on 7th July 2017. In issuing the *certiorari*, the learned judge expressed himself as follows:

“I am satisfied the manner in which Gazette Notice No. 6517 published on 7th July 2017 was promulgated was tainted with procedural impropriety. It cannot be sustained. In the premises, I hereby issue an order of certiorari bringing into this Court the decision by the respondent contained in Gazette Notice No.6517 published on 7th July 2017 for purposes of being quashed and

the same is hereby quashed....”

3. Aggrieved by the judgment, the applicant filed a Notice of Appeal dated 13th December 2018 and further filed a Notice of Motion dated 8th January 2019 seeking an order to stay the judgment of the High Court pending hearing and determination of the intended appeal.
4. The Motion is supported by an affidavit deposed by **Ms. Grace Ogembo** dated 8th January 2019. The grounds in support as specified on the face of the Motion and supporting affidavit is that the intended appeal raises arguable issues and the appeal will be rendered nugatory if a stay order is not granted; it is averred the applicant is apprehensive if stay is not granted, the respondent will pay the Members of Parliament using a 2013 Gazette Notice which is no longer in force and which will raise the public wage bill to unsustainable levels.
5. At the hearing of the instant application, learned counsel **Mr. Andrew Wandabwa** appeared for the applicant; learned counsels **Hon. P. Kaluma, Hon. T.J. Kajwang** and **Mr. G. B. Miyare** appeared for the 1st respondent. Learned counsel **Mr. Thande Kuria** appeared for the 2nd respondent; Senior Counsel **Nzamba Kitonga** appeared for the 3rd respondent and learned counsel **Mr. Njoba** appeared for the 4th respondent. At the hearing, despite service of the hearing notice, there was no representation for the 5th respondent.
6. While the 1st respondent opposed the application for stay, the 2nd, 3rd and 4th respondents supported it.

APPLICANT’S SUBMISSION

7. The applicant submitted the judge erred in holding that there was procedural impropriety in the promulgation of the 2017 Gazette Notice; in legitimizing the 2013 Gazette Notice that had lapsed; in raising the remuneration of state officers serving in Parliament at a level the public wage bill cannot sustain; in ignoring the constitutional mandate of the **Salary and Remuneration Commission (SRC)** of fixing salaries and remuneration of state officers as set out in **Article 230 (4) of the Constitution**. It is arguable whether the SRC extensively engaged the respondent in arriving at the 2017 Gazetted remuneration structure; whether the 2013 Gazette Notices have lapsed and whether the public stands to lose if state officers are remunerated as per the 2013 salary structure.

8. On nugatory aspects, the applicant submitted *inter alia* the effect of quashing of Gazette Notice No. 6517 is to have remuneration of state officers serving in Parliament governed by Gazette Notice No. 2886 published in 2013; that the said 2013 Gazette Notice lapsed in 2017 and cannot be extended; that the intended appeal shall be rendered nugatory because the respondent will be forced to pay salaries and remuneration under the 2013 Gazette Notice which has lapsed; that should state officers serving in Parliament receive salaries as set out in the 2013 Gazette Notice, recovery of the same will be at best tenuous, impractical, time consuming and costly taking into account the fact that Members of Parliament serve for a term of five years which may or may not be renewed by public mandate in an election. The applicant concluded its submission urging that it is public interest for a stay order to be granted to prevent tax payers from losing money in an unsustainable wage bill.

1st RESPONDENT’S SUBMISSIONS

9. The 1st respondent opposed the application. Learned counsel Hon. Kaluma submitted the order sought to be stayed is a certiorari order, it is a negative order that cannot be stayed; if stay is granted, the quashed Gazette Notice will be revived, and such revival would be unlawful at this stage as it only the main appeal that can revive the Gazette Notice. On nugatory aspect, the 1st respondent submitted the intended appeal shall not be rendered nugatory because since 2013, state officers and Members of Parliament have all along been paid salaries and remuneration based on the 2013 Gazette Notice. It was further submitted that if the intended appeal were to succeed, the Hon. Members of Parliament are in a position to refund any monies found to have been erroneously paid; and that the applicant has not presented *prima facie* evidence showing that Members of the 12th Parliament are impecunious and unable to refund any monies paid to them. **2nd, 3rd and 4th RESPONDENT’S SUBMISSION**

10. Learned counsel Mr. Thande for the 2nd respondent supported the application. He submitted reverting to the 2013 Gazette Notice will have negative repercussion and raise the wage bill by approximately 1.713 billion per annum.

11. Senior Counsel Nzamba Kitonga for the 3rd respondent supported the application and submitted that public interest dictates that a stay order should be granted; that the quashing of the 2017 Gazette Notice has a great impact on public finance and tax payer’s money; that it is in public interest the 2013 Gazette Notice should not be utilized to pay salaries and remuneration of state officers serving in Parliament; that the 2013 Gazette Notice has lapsed; and that the learned judge erred in arriving at a decision whose effect was to that extend the life of the 2013 Gazette Notice.

12. Learned counsel Mr. Njoba for the 4th respondent supported the application for stay urging that recovery of any monies paid to Members of Parliament is not certain as there is no guarantee the members shall be re-elected in the next Parliament.

ANALYSIS AND DETERMINATION

13. We have considered the instant application for stay dated 8th January 2019 and the supporting affidavit thereof. We have also considered submission by all counsel. The principles for granting a stay of execution under **Rule 5(2) (b)** of the Rules of this Court are well settled. In **Ishmael Kagunyi Thande vs. Housing Finance Kenya Ltd., Civil Appln No. Nai 157 Of 2006 (unreported)** it was stated:

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction

or stay as the case may be, the success of that appeal will be rendered nugatory.”

14. In an application under **Rule 5 (2) (b)**, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**. The existence of even one arguable point suffices in favour of the applicant. (See **Kenya Railways Corporation v. Edermann Properties Ltd., Civil Appeal No. NAI 176 of 2012** and **Ahmed Musa Ismael v. Kumba Ole Ntamorua & 4 others, Civil Appeal No.NAI.256 of 2013**).

15. In the instant application, the applicant has annexed a draft memorandum of appeal. Several grounds have been pointed out as errors on the part of the learned judge. It is contended the judge erred in holding that there was procedural impropriety on the part of SRC in promulgating the 2017 Gazette Notice; that the judge erred in reviving the 2013 Gazette Notice on salaries and remuneration of state officers; the judge erred in legitimizing payment of salaries and allowances to a level that cannot be sustained by the public wage bill.

16. Upon our considering submission of counsel and the draft memorandum of appeal attached to the application we are satisfied the intended appeal is arguable.

17. On the second limb, the applicant submitted the intended appeal shall be rendered nugatory if Members of Parliament are remunerated according to the 2013 Gazette Notice No. 2886 which has lapsed and which remuneration is higher than that provided in the quashed 2017 Gazette Notice; that public interest dictates a stay order should be granted to prevent the wage bill being rising to unsustainable levels; that it would be difficult to recover any monies in excess paid to Members of Parliament; that it will cost the tax payer an additional 1.713 billion per year as remuneration and benefits for state officers in Parliament; that if no stay order is granted, Members of Parliament will be remunerated illegally under the lapsed 2013 Gazette Notice and this will be against all tenets of public finance management.

18. Conversely, the 1st respondent submitted the intended appeal shall not be rendered nugatory as it has not been demonstrated Members of Parliament will not be in a position to reimburse any monies paid if the intended appeal were to succeed; it has not been demonstrated that even if a Member of Parliament were to lose his seat in the next election such a member will be impecunious and unable to refund any monies paid; that since 2013, state officers and Members of Parliament have been paid pursuant to the 2013 Gazette Notice and there is nothing illegal in continuing to pay the state officers under the 2013 Gazette Notice until the intended appeal is heard and determined.

19. This Court in **National Industrial Credit Bank Ltd –Vs- Aquinas Francis Wasike & Anor (UR), Nairobi Civil Application No. 238 of 2005** expressed as follows:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden.”

20. In the instant matter, save for bare allegations, there is no evidence by way of affidavit that state officers and Members of Parliament will not be in a position to refund any monies paid. When we consider the facts as placed before us, the applicant has not shown why it alleges that the Members of Parliament will be incapable of refunding the sums paid.

21. One of the key objectives in granting an order of stay is to preserve status quo pending hearing and determination of an intended appeal. In this matter, the current status quo is that Members of Parliament have always been paid using the 2013 Gazette Notice. Granting a stay order will reverse the status quo. It is in the interest of justice that a stay order should not be granted in this matter in order to preserve and maintain the status quo. To this extent, the applicant has not satisfied us the intended appeal shall be rendered nugatory if stay order is not granted.

22. We have also considered the issue of public interest as urged by all parties. Indeed, it is in public interest the instant dispute involving salary and remuneration of state officers and Members of Parliament be resolved expeditiously. Public interest and the apprehension that Members of Parliament may not be re-elected can be addressed by fast-tracking the main appeal in this matter.

23. For the foregoing reasons, we decline to grant an order of stay as prayed. We order that the Notice of Motion dated 8th January 2019 be and is hereby dismissed. We direct the intended appeal be listed for hearing on priority basis. Each party is to bear its/his own costs in this application.

Dated and delivered at Nairobi this 24th day of May, 2019

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR