



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 8 OF 2019

BETWEEN

THE SALARIES REMUNERATION COMMISSION..... APPLICANT

AND

COUNTY GOVERNMENT OF KAKAMEGA 1ST RESPONDENT

KAKAMEGA COUNTY ASSEMBLY

SERVICE BOARD..... 2ND RESPONDENT

KAKAMEGA COUNTY ASSEMBLY FORUM..... 3RD RESPONDENT

COUNTY GOVERNMENT OF MOMBASA..... 4TH RESPONDENT

THE COUNTY ASSEMBLIES FORUM 5TH RESPONDENT

(Being an application for stay of execution of the judgment and decree of the High Court of Kenya at Nairobi (Hon. G. V. Odunga, J.) dated 10th December 2018

in

Nairobi Judicial Review No. 5 of 2018)

RULING OF THE COURT

1. The 1st respondent, *County Government of Kakamega*, filed a constitutional petition against the applicant seeking an order of *certiorari* to quash **Gazette Notice No. 6518** of 7th July 2017.
2. The facts supporting the petition were that in the year 2013, the applicant vide Gazette Notices Nos. 2885, 2886, 2887 and 2889 of that year set the remuneration and benefit structure for State Officers both in National and County Governments. By Gazette Notice No. 6517 of 7th July 2017, the applicant reviewed downwards the salaries and remuneration of State Officers in County Government from the 2013 Gazette Notices.
3. Aggrieved by the downward review, the 1st respondent filed the constitutional petition contending that the review was illegal and unprocedural as the applicant did not invite proposals and comments from affected state officers. It averred that affected state officers were not given an opportunity to be heard contrary to the provisions of **Articles 47 and 50** of the Constitution and **Sections 4 and 5 (1)** of the **Fair Administrative Actions Act, 2015**. It was further contended that the applicant undertook the downward review of salaries and remuneration without causing to be conducted a comprehensive job evaluation; that the applicant acted without transparency and fairness contrary to **Article 230 (5)** of the Constitution; that by fixing the gross remuneration package for state officers in the County Government, the applicant violated the state officer's legitimate expectation for an annual salary increment.

4. On its part and in rebuttal to the allegations in the petition, the applicant stated that it conducted a comprehensive job evaluation for all state offices; that in 2017, it reviewed the remuneration structure for state officers and undertook a study on labour efficiencies and dynamics and generated a report which was the basis of the impugned Gazette Notice No. 6518 of 7th July 2017; that the applicant invited the Forum for County Assemblies to present its proposals prior to review and publication of the impugned Gazette Notice; and that a consultative meeting was held with the Forum for County Assemblies. Before the trial court, the applicant urged due process was followed in promulgating the impugned Gazette Notices.

5. Upon hearing all parties to the constitutional petition, by a judgment dated 10th December 2018, the High Court issued an order of *certiorari* quashing Gazette Notice No. 6518 of 7th July 2017. The learned judge stated that the manner in which the Gazette Notice was promulgated was tainted with procedural impropriety that cannot be sustained.

6. Aggrieved by the order of *certiorari*, the applicant filed a Notice of Appeal dated 13th December 2018. Subsequently the applicant filed before this Court the instant Notice of Motion dated 8th January 2019 seeking an order to stay execution of the judgment and decree of the High Court.

7. During the hearing of the Motion, learned counsel **Mr. Andrew Wandabwa** appeared for the applicant, learned counsel **Mr. Ashitiva** appeared for the 1st and 2nd respondents while learned counsel **Ms. Saina** appeared for the 5th respondent. At the hearing, despite service of the hearing notice, there was no representation for the 3rd and 4th respondents.

APPLICANT'S SUBMISSIONS

8. Counsel for the applicant submitted that the intended appeal is arguable and will be rendered nugatory if a stay order is not granted. Counsel adopted in entirety the submissions made in **Civil Application No. 9 of 2019 (Salaries and Remuneration Commission -v- Parliamentary Service Commission & Others)** which was heard back to back with this application. In its written submissions, the applicant urged that the intended appeal raised several arguable points as per the annexed draft memorandum of appeal. For instance, it is contended that the learned judge erred in finding that the promulgation of Gazette Notice No. 6518 of 7th July 2017 was tainted with procedural impropriety; the judge erred in finding that the 2013 Gazette Notices were valid; the judge erred in failing to appreciate there was extensive consultation with the respondents before the 2017 Gazette Notice was published and the judge erred in failing to find the 2013 Gazette Notice was void and inapplicable as they had lapsed through effluxion of time.

9. On nugatory aspects, the applicant submitted that the effect of the impugned judgment was to increase the public wage bill beyond sustainable levels; that it is in the public interest that a stay order be granted to save the public from losing monies that is being illegally paid to state officers serving in it is in public interest that a stay order should be granted to save the public from losing monies that is being illegally paid to state officers serving in Parliament; that the applicant may not recover the monies paid to the affected state officers and Members of the County Government; that the intended appeal will be rendered nugatory if state officers in the County Government are remunerated as per the 2013 Gazette Notice which lapsed and whose remuneration is higher than the 2017 Gazette Notice.

RESPONDENTS' SUBMISSIONS

10. Counsel for the 1st and 2nd respondents relied on the replying affidavits deposed by **Ms. Jacinta Aluochi Odhiambo** dated 7th February 2019 and **Mr. Laban Maloba Atemba** dated 6th February 2019. In both affidavits, it is averred that the instant application is frivolous and lacks merit; that the intended appeal is not arguable and the applicant has a remedy of deducting amounts already paid to state officers in County Governments from their future payable salaries; that on a balance of convenience, it is easier to deduct any amount found to have been improperly paid to the respondents; that to allow the instant application would be to allow and determine the intended appeal without hearing the parties.

11. The 5th respondent in a replying affidavit deposed by **Hon. Johnson Osoi** averred that an order of *certiorari* cannot be stayed pending appeal but can only be set aside in the appeal itself; that an order of *certiorari* is final and takes effect immediately and if stay is granted, the effect is to reverse a final order without hearing the main appeal. It was submitted that state officers in the County Government have been remunerated under Gazette Notice No. 2888 of 2013 and the applicant has not demonstrated how the intended appeal will be rendered nugatory if an order for stay is not granted.

ANALYSIS and DETERMINATION

12. We have considered the instant application, the grounds in support thereof, the replying affidavits filed, submissions by counsel and the law. The principles for granting a stay of execution under **Rule 5(2) (b)** are well settled as was observed by this Court in the case of **ISHMAEL KAGUNYI THANDE VS. HOUSING FINANCE KENYA LTD., CIVIL APPLN**

NO. NAI 157 OF 2006 (unreported):

“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.”

13. Comparatively, in the persuasive Malawi case of **The Anti-Corruption Bureau - v- Atupele Properties Limited, MSCA Civil Appeal No. 27 of 2005** Tambala, JA gave this important guidance on some of the applicable principles in stay of execution applications:

"I must now revert to the law relating to stay of execution of court judgments. There are clearly four principles. The first is that it lies within the broad discretion of the court to grant or refuse an application for stay of execution. The second principle is that as general rule the court must not interfere with the successful party's right to enjoy fruits of litigation. The third principle is an exception to the general rule and states that where the losing party has appealed and is able to demonstrate that the successful litigant would be unable to pay back the damages...execution of the court's judgment should be stayed. The fourth principle is that even where the party appealing is able to show that the successful party would be unable to pay back the damages...the court may still refuse an application for stay of execution if upon examining the facts of the case, an order of stay of execution would be "utterly unjust." The cases of City of Blantyre v Manda & Others, Civil Cause No. 1131 of 1996, Chilambe & Select and Save v Kavwenje, Civil Cause No. 1645 of 1993, and National Bank of Malawi v Moya, MSCA Civil Appeal No. 25 of 2003 support this position."

14. In **Reliance Bank Ltd (in liquidation) -v- Norlake Investments Ltd**, this Court stated as follows:

"Hitherto this Court has consistently maintained that for an application under Rule 5(2)(b) to succeed, the applicant must satisfy the Court on two matters, namely-

- 1. that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,**
- 2. that if an order of stay or injunction, as the case may be, is not granted, the appeal or the intended appeal were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."**

15. In the instant matter, the applicant has annexed a draft memorandum of appeal itemizing various grounds in the intended appeal. Upon perusing the draft grounds, and as we have stated earlier, we are satisfied that the intended appeal is arguable.

16. We now consider whether the intended appeal shall be rendered nugatory if a stay order is not granted. C.B. Madan JA, as he then was, expounding on **Rule 5(2)(b)** in **M. M. Butt -v- The Rent Restriction Tribunal (Civil Application No. Nai 6 of 1979)** stated as follows:

"... it has been said that the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, L.J. in Wilson v. Church (No 2) 12 Ch.1 [1979], 454 at pg 459" in which Cotton L. J. at pg 458 said -

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory."

17. In the instant application, the core submission by the applicant is that it may not recover any monies paid to the respondents if the intended appeal were to succeed; that the 2013 Gazette Notice has a higher salary and remuneration package and if the high salary is paid, it may be difficult to recover the same; that it is in public interest to grant a stay order to prevent loss of tax payers' monies.

18. Conversely, the respondents contend that the intended appeal shall not be rendered nugatory as any monies paid can be recovered through deductions from future salaries and benefits; and that Gazette Notice of 2013 is legally in force and state officers of the County Government have always been paid pursuant to the 2013 Gazette Notice.

19. We have considered the rival submissions on the nugatory aspects of the intended appeal. The applicant's central theme is that monies paid to state officers serving in the County Government may not be recovered. In **National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & Anor.** - Nairobi Civil Application No. 238 of 2005 this Court expressed itself thus:

"...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."

20. In the instant application, save for bare allegations, there is no evidence by way of affidavit that state officers and Members of County Government and County Assembly will not be in a position to refund any monies paid pursuant to the 2013 Gazette Notices. There is no *prima facie* demonstration that state officers working in the County Government are impecunious. Further, all parties submitted that the state officers working for the County Government are being paid salaries and remuneration under the 2013 Gazette Notice. In our view, granting a stay order in this matter will create confusion and legal lacuna as to what is the existing legal framework for salaries and remuneration for state officers working in the County Government. A stay order should not be a recipe for confusion in any legal regime. In our view, failure to grant a stay order in this matter preserves the *status quo* now existing between the parties. For this reason, the applicant has not satisfied us that the intended appeal shall be rendered nugatory if stay order is not granted.

21. We have considered the issue of public interest as urged by all parties. Indeed, it is in public interest that the instant dispute involving salary and remuneration of state officers and members of the County Assembly be resolved expeditiously. Public interest and apprehension that members of the County Assembly may not refund any monies paid to them can be addressed by fast-tracking the main appeal. Accordingly, we decline to grant an order of stay as prayed. The Notice of Motion dated 8th January 2019 be and is hereby dismissed. We direct that the intended appeal be listed for hearing on priority basis. Each party is to bear its 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

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR