



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: G.B.M. KARIUKI, SICHALE, & KANTAI, J.J.A)**

**CIVIL APPLICATION NO. 62 OF 2017 (UR 43/2017)**

**COUNTY GOVERNMENT OF EMBU.....1<sup>ST</sup> APPLICANT**

**HON. MARTIN NYAGAH WAMBORA.....2<sup>ND</sup> APPLICANT**

**AND**

**ERIC CHERUIYOT & 15 OTHERS.....RESPONDENTS**

*(Being an application for stay of execution and stay of further proceedings pending the hearing and determination of an intended appeal from the judgment and orders of The Employment & Labour Relations Court of Kenya at Kericho (D.K. Njagi Marete, J.) dated 29<sup>th</sup> March, 2017*

*In*

*Petition No. 1 of 2017 (as consolidated with*

*Petition No. 2 of 2017)*

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**RULING OF THE COURT**

We are asked in the Motion on Notice said to be brought under Rule 5(2) (b) of the Rules of this Court and other provisions of law to stay execution and enforcement of the judgment and orders of D. K. Njagi Marete, J, made on 29<sup>th</sup> March, 2017 in Employment and Labour Relations Court Petition No. 1 of 2017 (as consolidated with Petition No. 2 of 2017) pending hearing and determination of an intended appeal. We are also asked to make an order restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents from assuming office, resuming work or undertaking any of their former duties as employees or appointees of Embu County Government pending the hearing and determination of the intended appeal.

It is stated in the grounds in support of the Motion and reiterated in an affidavit of Josphat Ndwiga, the County Secretary of Embu County Government *inter alia* that, by various letters, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had given written notices of resignation from positions held in the said Embu County Government; that the resignations were duly accepted and formal clearance undertaken; that positions the said respondents had occupied had been filled by other employees; that the said respondents had thereafter written to the said Government retracting their resignations but had been told that they could

not retract resignations and that the positions had since been filled. It is also stated that the said respondents had filed the said petitions at the Employment and Labour Relations Court at Kericho seeking conservatory orders against the decision of the said Government not to accept the said retraction letters and that the petitions had succeeded, the learned Judge holding Section 43(5) of the Elections Act as unconstitutional and in the event ordering the said Government to allow the said respondents back to the offices they occupied before they offered their resignations. It is stated in the grounds and the said affidavit that the learned Judge erred in not finding that the employer/employee relationship had terminated; that because of the orders issued by the learned Judge the said respondents were interfering with the operations of the said Government and that the applicant had an arguable appeal which it intended to pursue in this Court.

It is not necessary to go into much detail for purposes of this Motion and the following will suffice.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are **Raymond Kinyua, Emily Thaara and Monica Cyombua Gitari**. They occupied the following positions with the 1<sup>st</sup> applicant (**County Government of Embu**): County Secretary; County Executive Committee Youth, Empowerment and Sports and Chief Officer, Livestock & Fisheries. We were told at the hearing of the Motion, and this is borne out in the judgment intended to be appealed, that the 1<sup>st</sup> and 9<sup>th</sup> to 16<sup>th</sup> respondents were either in Petition No. 2 of 2017 or had been allowed into the proceedings in the lower court but had since remained by-standers without participating in the proceedings at all but waiting for outcome of the same.

By letters dated 5<sup>th</sup> January, 2017 and by a letter dated 6<sup>th</sup> January, 2017 the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents (hereafter "**the respondents**") tendered their resignations to the 2<sup>nd</sup> applicant (Hon, Martin Nyagah Wambora). They gave as reasons for resignations an intention to contest various political seats in national elections scheduled for that year. The resignations were accepted by the applicants, handing over and clearance was undertaken and terminal dues paid. The applicants appointed other persons to occupy the 3 positions vacated by the respondents upon their resignations and the issue should have ended there.

Meanwhile the respondents and others had filed 2 Petitions at the Employment and Labour Relations Court at Kericho whose main theme was to question and challenge the constitutionality of Section 43(5) of the Elections Act that required public servants to vacate office 6 months before an election if they intended to participate as candidates in such an election. Justice D.K. Njagi Marete, after issuing temporary orders allowing public servants to continue in office even if they intended to participate in national elections as candidates finally found the said provision of the Elections Act to be unconstitutional meaning that public servants who intended to offer themselves in national elections did not have to resign 6 months before an election or at all.

Armed with the said interim orders issued in Kericho the respondents hastened to the distant Court in Embu and issued letters to the applicants retracting their earlier resignations. The applicants rejected that request arguing, *inter alia*, that employment was governed by laws of contract and that a resignation could not be retracted.

The respondents moved back to the said Employment and Labour Relations Court at Kericho praying, *inter alia*, that the applicants' decision to reject letters revoking resignation be stayed and that the applicants be restrained from offering positions formally occupied by the respondents to any other persons. The learned Judge allowed the application on 22<sup>nd</sup> February, 2017 and as we have stated, in the end allowed the Petition. These are the orders intended to be appealed.

The principles applicable in applications to this Court for stay of execution pending appeal are now well settled. The Court exercises discretionary original jurisdiction and that exercise does not constitute an appeal from the trial judges' discretion to this Court - See the case of **Reuben & 9 Others vs Nderitu & Anor** [1989] KLR 459. For a party to be accorded a protection of stay of execution of a judgment or order of the High Court it is necessary for that party to demonstrate that the appeal, if filed, or the intended appeal, as the case may be, is arguable which is the same as saying that it is not frivolous. That party, if it satisfies that first limb has an additional duty to demonstrate that the appeal or the intended

appeal would be rendered nugatory absent stay – See also, **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others** 2013 eKLR where the twin principles are discussed in full.

We heard the Motion on 19<sup>th</sup> July, 2017 when learned counsel Miss Sharon Liprop appeared for the applicants. Miss G. Mwangi appeared for the 2<sup>nd</sup> to 4<sup>th</sup> respondents; Mr. Simiyu Murambi appeared for the 1<sup>st</sup> respondent while Mr. Kibet appeared for the 5<sup>th</sup> respondent. Learned counsel had filed written submissions on behalf of their respective clients and addressed us in a highlight of those submissions.

In setting the ball rolling Miss Liprop submitted that it was arguable whether the learned Judge of the Employment and Labour Relations Court had jurisdiction to interpret the Constitution, a preserve, according to learned counsel, of the High Court of Kenya. Learned counsel submitted, in addition, that it was arguable whether the said Judge could issue orders which were in direct contradiction of an earlier judgment delivered by the Constitutional and Judicial Review Division of the High Court on the same point.

On the nugatory aspect of the application it was learned counsel's view that it was not in the public interest to allow the respondents back to office when they had been paid terminal benefits upon resigning.

Mr Kibet, learned counsel for the 5<sup>th</sup> respondent was next to go because he supported the motion. Learned counsel submitted that there was need for this Court to make a pronouncement where there were the 2 contradictory judgments, one by the High Court and the other by the Employment and Labour Relations Court on the same point where those Courts took different approaches and reached different decisions.

Mr. Simiyu, learned counsel for the 1<sup>st</sup> respondent opposed the application submitting that the intended appeal was not arguable. According to learned counsel the High Court of Kenya and the Employment and Labour Relations Court had distinct mandate created in the constitution and that the latter Court could interpret the constitution. There being no arguable appeal Mr. Simiyu did not find it necessary to address the nugatory aspect of the matter.

Miss Mwangi, learned counsel for the 2<sup>nd</sup> – 4<sup>th</sup> respondents, in associating herself with the position taken by Mr. Simiyu, submitted that all issues had been canvassed before the learned Judge of the Employment and Labour Relations Court and determinations made which counsel thought could not be raised on appeal. Learned counsel further submitted that the judgment to be appealed had taken effect and the appeal would not be rendered nugatory where the respondents had participated in party nominations for national elections then scheduled to be held on 8<sup>th</sup> August, 2017.

Miss Liprop, in a brief reply, stated that the respondents had commenced contempt of court proceedings against the applicants for failure to comply with orders of the lower court.

We have considered the record, the submissions, and the law and have in addition perused the various authorities produced by the parties for which we are grateful.

As shown in this ruling, the respondents freely resigned from their positions with the applicants and their resignations were duly accepted by the applicants. Their dues were paid and their positions filled by other persons appointed by the applicants. The respondents thereafter wrote letters to revoke or retract the letters of resignation. The applicants submit that it is arguable in the intended appeal whether an employee who has freely resigned from employment can revoke such resignation.

The applicants after accepting resignation of the respondents paid their dues and filled the positions with other appointees or employees. We agree with the applicants that it is arguable whether an employee who resigns in circumstances such as those enumerated in this ruling can walk back to the previous employer and say: ***“Although I resigned my position, you cleared and paid my dues and replaced me with another officer, I have changed my mind and I want my job back”***. That is certainly an arguable point.

It is the applicants' case that upon accepting the respondents' resignations it replaced their positions with other employees. That is to say that implementation of the order of the lower court would have the effect of having 2 sets of employees to perform the same duties and occupying the same offices. That would not be a proper use of public funds at all. It may in any event adversely affect the operations of the County Government of Embu which has a duty to serve the people of that County. Misuse of public funds, which is what paying of 2 sets of employees would happen if the judgment was implemented is not to be encouraged by this Court at all. If the intended appeal were to succeed it would be rendered nugatory if the respondents had been allowed to return to their jobs leading to an adverse effect on the operations of the County. It would appear to us also, at this application stage, that it is against public policy to allow execution of that judgment before the intended appeal, which we have found to be arguable, is heard and determined.

The applicants having satisfied both limbs of the principles we earlier set out in this ruling are entitled to stay of execution pending appeal. We allow prayers 2, 3 and 4 of the Notice of Motion dated 30<sup>th</sup> May, 2017. Costs of the Motion will abide hearing and determination of the intended appeal.

*Dated and given at Nakuru this 27<sup>th</sup> day of September, 2017.*

**G.B.M. KARIUKI SC**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**