



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPLICATION NO. 25 OF 2017 (UR 16/2017)

BETWEEN

ANDREW KIPLAGAT CHEMARINGO.....APPLICANT

AND

PAUL KIPKORIR KIBET.....RESPONDENT

(Application for stay of execution and any further proceedings arising from the decision of the High Court of Kenya at Kitale, (Chemitei, J.) dated 31st October, 2016 and 14th February, 2017

in

High Court Petition No. 18 of 2015)

RULING OF THE COURT

Background:

[1] The matter before this Court is an application for stay of execution and any proceedings predicated on Rule 5(2)(b) of the Court of Appeal rules seeking orders: of a stay of execution and of any further proceedings arising out of the decisions of Chemitei, J. delivered on 31st October 2016 and 14th February, 2017.

[2] The application is founded on the grounds set out on the face thereof and also on the averments deponed in the supporting affidavit of Andrew **Kiplagat Chemaringo**, (the applicant). The Applicant applied for and was appointed to the position of Chief of Sengwer Location. **Paul Kipkorir Kibet** (the respondent) filed a petition before the High Court, Petition No. 18 of 2015, challenging the applicant's appointment primarily arguing that the applicant had failed to meet one of the qualifications stipulated for the appointment of the Chief's position. The respondent therefore sought that the applicant's appointment be quashed.

[3] The learned Judge, in a judgment dated 31st October 2016, quashed the applicant's appointment finding that the applicant had failed to meet the requisite minimum age of 35 years. The applicant admitted that he was 30 years old at the time of his appointment as opposed to the required 35 years. The learned Judge rejected the purported waiver of the age requirement as not being founded in law or in the

‘Scheme of Service for Chiefs and Assistant Chiefs’. The learned Judge found that Article 232(i)(g)(h) of the Constitution was breached in that the applicant did not meet the stipulated qualification and that other candidates for the position who had attained the required minimum age of 35 had been discriminated against.

[4] After delivery of the impugned judgment, two applications were brought before the Court: an application by the applicant herein for stay pending the hearing and determination of the intended appeal to this Court and an application to strike out the notice of appeal filed by the respondent on the ground that it was filed out of time. The learned Judge in a ruling delivered on 14th February 2017 dismissed the respondent’s application to strike out the notice of appeal, finding that the High Court lacked the jurisdiction to determine the validity or otherwise of the notice of appeal and that it is only the Court of Appeal which is seized of such jurisdiction. The learned Judge also found that the applicant had not made out a case to warrant the grant of stay orders.

[5] Aggrieved by that decision, the applicant filed the instant application supported by his sworn affidavit. The application was opposed by the respondent who filed his replying affidavit sworn on 9th June 2017. Therein, the respondent deponed that the applicant had failed to demonstrate that he has an arguable appeal which will be rendered nugatory if the orders sought are not granted.

Submissions by Counsel:

[6] When the application came up for hearing, both parties were represented by learned counsel: Mr. J.C.K Cheptarus represented the applicant while Mr. R. Nyamu represented the respondent. The Hon. Attorney General is on record as an interested party and was served with the hearing notice. There was however no appearance for the Attorney General.

[7] Counsel for the applicant argued that there was an arguable appeal which would be rendered nugatory; that the applicant had been granted a waiver for the age requirement since the Constitution provided for equal opportunities for all people; that the applicant was a young man with a family who would suffer financially and psychologically if orders sought are not granted. Further, that the applicant was still holding the position of Chief of Sengwer and Acting Assistant Commissioner in charge of Kapcherop Division. Counsel urged the Court to allow the application.

[8] Opposing the application, Mr. Nyamu submitted that the applicant had failed to establish that he had an arguable appeal; that there was no room for waiver of the age requirement, that such waiver was not done in a transparent manner and that the applicant had failed to demonstrate what loss or prejudice he would suffer if the stay sought is not granted. Counsel urged the Court to dismiss the application.

Determination:

[9] We have considered the application, the submissions by counsel and the law.

[10] The jurisdiction of this Court in applications of the nature as the one before us is donated by **rule 5(2)(b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary. In the case of **Stanley Kang’ethe Kinyanjui Vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012**, this Court stated inter alia:

***“That in dealing with Rule 5(2)(b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.*”**

[11] In considering this application, we shall bear in mind these principles. On the issue of arguability, the applicant has set out in his Draft Memorandum of Appeal, several grounds under this limb including;

whether waiver granted by the Deputy County Commissioner Marakwet West Sub County to the applicant dispensing with the minimum age requirement was sufficient to entitle the applicant to be appointed Chief of Sengwer Location.

[12] This Court is minded to avoid going into the merits of the intended appeal, as this will be the preserve of the bench that will hear the main appeal. We are satisfied that the applicant has an arguable appeal *inter alia*, whether the waiver of the minimum age requirement was sufficient to entitle the applicant to be employed as the Chief of Sengwer Location.

[13] On nugatory aspect, as this Court said in **Reliance Bank Ltd vs Norlake Investments Ltd [2002] I EA 227**, the factors which could render an appeal nugatory has to be considered within the circumstances of each particular case and that in doing so, the Court was bound to consider the conflicting claims of both side. In the circumstances of that particular case, the Court said at page 237 paragraph e:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

In **Mukuma vs Abuoga [1988] KLR 645**, this Court held *inter alia*:

“The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory.”

Furthermore, where appropriate, the Court may well consider whether or not granting an application for stay of execution would serve public interest. The Supreme Court considered the public interest element in dispute relating to vacancy of the office of a Governor in **Gitirau Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**.

[14] In the present case, the applicant depones in paragraph 4 (ii) of the supporting affidavit that he would suffer irreparable loss arising from his financial commitments including serving a bank loan.

The purpose of the intended appeal is to preserve the applicant’s appointment to the office of a Chief which is an office in public service. The only reason why the High Court revoked the applicant’s appointment as a Chief is because he had not reached the age of 35 years at the time of the appointment. The applicant had met the other six requirements for appointment. The revocation has nothing to do with integrity issues. The applicant has served as a Chief for over two years.

The petition which led to the removal of the applicant was “*a public interest litigation*”. If the application is not allowed, the applicant will have to be removed from the pay-roll and vacate his office. If his intended appeal succeeds, it is probable that then he would not be paid for the period he had not worked thereby suffering financial loss as this was removal by a decree of the Court and not an interdiction or suspension.

[15] All considered, the applicant will suffer financial loss, loss of office, loss of social status and public humiliation if the application is not allowed which will render the appeal if successful, nugatory. The residents of Sengwer location where he is the Chief will not suffer any harm by continuation of the applicant in office pending the hearing of his appeal. The hardships that the applicant will suffer if the application is not allowed are far out of proportion to any injury that any member of public would suffer.

[16] For the foregoing reasons, the application is allowed. The execution i.e implementation of the judgment of Chemitei, J. delivered on 31st October, 2016 is stayed for 12 months to enable the applicant file and prosecute the intended appeal.

Dated and delivered at Eldoret this 19th day of October, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR