



Masomo v County Government, Taita-Taveta & 2 others (Civil Application 295 of 2015) [2016] KECA 631 (KLR) (22 April 2016) (Ruling)

Stephen Mring'a Masomo v County Government, Taita-Taveta & 2 others [2016] eKLR

Neutral citation: [2016] KECA 631 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 295 OF 2015
MSA MAKHANDIA, W OUKO & K M'INOTI, JJA
APRIL 22, 2016**

BETWEEN

HON STEPHEN MRING'A MASOMO APPLICANT

AND

THE COUNTY GOVERNMENT, TAITA-TAVETA 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF TAITA-TAVETA 2ND RESPONDENT

THE SELECT COMMITTEE, COUNTY ASSEMBLY OF TAITA-TAVETA 3RD RESPONDENT

((Application for injunction pending the lodging, hearing and determination of an intended appeal against the judgment and decree of the High Court of Kenya at Mombasa, (Emukule, J.) dated 10th December 2015 in HCP No. 83 of 2014))

RULING

1. The applicant, Stephen Mring'a Masomo, has taken out the Motion on Notice before us seeking an injunction or conservatory orders to stop the respondents from removing him from the office of County Executive Committee Member of the Country Government of Taita-Taveta, pending the hearing and determination of an intended appeal from the judgment and decree of the High Court at Mombasa (Emukule, J.). By that judgment the learned judge dismissed the applicant's petition for a declaration that the resolution passed by the County Assembly of Taita-Taveta, for his removal from the County Executive Committee, was unlawful null and void and for an order of certiorari to quash the same.
2. By way of background, before the resolution for his removal on 25th June 2015, the applicant was the Taita-Taveta County Executive Committee Member responsible for Trade, Tourism, Social Affairs and



- Community Participation (Subsequently he is referred to as the in charge of Water and Irrigation). Sometimes in December 2014, the Speaker of the Taita-Taveta County Assembly received a petition duly signed by members of the Assembly seeking to discuss the conduct and performance of the applicant and five other members of the County Executive Committee. The Speaker subsequently scheduled special sittings of the County Assembly on 19th and 22nd December 2014 when the Assembly discussed and passed motions setting up, pursuant to section 40(3) of the [County Government Act](#), a 5 member Select Committee of the Assembly to investigate each of the concerned members of the Executive Committee.
3. Before getting down to its business, the Select Committee prepared a list of the allegations against each of the affected members of the County Executive Committee. The allegation against the applicant were incompetence, abuse of office and gross misconduct and the particulars thereof were set out. By a letter dated 30th December 2014, which also forwarded the allegations against him, the applicant was summoned to appear before the Select Committee on 3rd January 2015 at 8.00 am.
 4. The applicant and his five colleagues were aggrieved by the summons. On or about 31st December 2014, they filed in the High Court at Mombasa Petition No. 83 of 2014, seeking, among others, an order of prohibition to stop the Select Committee from proceeding with its inquiry. On the same date they obtained ex parte conservatory orders halting proceedings of the Select Committee. After that the applicants, as it were, went to sleep prompting the respondents, on 8th May 2015, to apply for the conservatory orders to be vacated. By a ruling dated 29th May 2015, the High Court vacated the conservatory orders and directed the petition to be set down for hearing forthwith.
 5. After the lifting of the conservatory orders, the Select Committee got down to business. By a letter dated 9th June 2015, it summoned the applicant to appear before it on 16th June 2015. On the scheduled date, the applicant did not appear but instead sent his advocate to apply for adjournment on the basis that he was attending to other business in Nairobi and also needed time to secure documents to respond to the allegations against him. The adjournment was denied and the hearing proceeded with the applicant being represented by his advocate. By a report dated 24th June 2015, the Select Committee recommended to the County Assembly the removal of the applicant from the office of member of the County Executive. On 25th June 2015, a plenary sitting of the County Assembly considered the report and resolved that the applicant be removed from office. A letter to that effect was sent to the Governor, Taita-Taveta County the same day. The respondents claim that to date the applicant has not in fact been removed from office pursuant the resolution of the County Assembly because he is a relative of the Governor of the County.
 6. Subsequently the applicant amended his petition in the High Court and applied for an order of certiorari to quash the resolution for his removal from office. As already stated, the dismissal of the petition by Emukule, J. provoked an intended appeal as evinced by the Notice of Appeal lodged on 11th December 2015, followed by this application.
 7. Mr. George Kithi, learned counsel for the applicant urged us to grant the application since the appellant had an arguable appeal which would be rendered nugatory if it were to succeed in the absence of the injunction or conservatory orders prayed for. To demonstrate an arguable appeal, counsel submitted that section 40 (3) of the [County Government Act](#), which provides for allegations against a member of the County Executive to be investigated by a Select Committee of the County Assembly was inconsistent with Article 50 (1) of the [Constitution](#) which guarantees an accused person a fair hearing by an independent and impartial tribunal. That view, he contended, was affirmed by a judgment of the High Court in [Stephen Nendela v. County Assembly of Bungoma & 4 Others](#), HCP No. 4 of 2014



- (Bungoma), which has not been stayed or overturned. The learned judge therefore erred, it was further contended, by upholding an investigative process founded on an unconstitutional statutory provision.
8. Secondly, learned counsel submitted that the resolution by the plenary sitting of the County Assembly on 25th June 2015, for the removal of the applicant was conducted in violation of Standing Order No. 3 of the Taita-Taveta County Assembly Standing Orders which require a person, who it is intended to remove from office, to be availed the report of the Select Committee together with any other evidence at least three days before the debate on the Motion for his removal. It was contended that the report was issued on 24th June 2014 and debated the very next day.
 9. Lastly counsel submitted that the learned judge had erred by holding that the only issue in contestation in the petition was the applicant's right to be heard whilst there were several other weighty issues which the judge did not address or resolve.
 10. On whether and how the appeal would be rendered nugatory if we did not grant the orders sought, Mr. Kithi submitted that since the intended appeal raises issues of public interest, the applicant should not be removed from office pending the hearing and determination of the appeal. He relied on the rulings of the Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, Application No. 5 of 2015 and *Nathif Jama Adam v. Abdikhaim Osman Mohamed & 3 Others*, Application No. 18 of 2014 where, on the basis of public interest, the Supreme Court stayed conduct of by-elections pending the hearing and determination of intended appeals, as well as the ruling of this Court in *Martin Nyagah Wambora v. The County Assembly of Embu & 6 Others*, CA No. Nai. 46 of 2015 (UR 40 of 2015).
 11. Mr. Ambrose Weda, learned counsel for the respondent opposed the application contending that the intended appeal was not arguable and that in the event it were somehow successful, it would not be rendered nugatory. Counsel submitted that the judgment of the High Court which declared section 40(3) of the *County Government Act* unconstitutional was not binding on Emukule, J. and that indeed the learned judge considered it and was of a different mind. In any event, it was submitted, absent section 40(3) of the *County Government Act*, Article 185(3) of the *Constitution* vests in the County Assembly the power to exercise oversight over the County Executive Committee and other County executive organs, which is the very power that the Taita-Taveta County Assembly exercised when it passed the resolution for removal of the applicant from office.
 12. On whether the applicant was afforded a fair hearing as required by the *Constitution*, learned counsel submitted that indeed the Select Committee afforded him such opportunity because he was notified in advance the allegations against him, given sufficient time to prepare himself and invited to appear before the Committee and respond to the allegations. Instead of appearing before the Committee, counsel stated, he opted to go to Nairobi but was nevertheless heard by the Committee through his advocate.
 13. Lastly Mr. Weda submitted that even if the intended appeal were to succeed, the same would not be rendered nugatory because all that the Court could find is that the appellant was wrongfully removed from office, which could be adequately compensated by an award of damages. Noting that the applicant had not suggested that the respondents would be unable to pay any damages that may be awarded, counsel asked us to dismiss the appeal, adding that the interests of the County and people of Taita-Taveta would be best served by declining to grant the orders sought by the applicant.
 14. We have anxiously considered the application, the submissions of learned counsel and the authorities that they relied on. At this stage, we cannot delve into the merits of the intended appeal because we have not heard full arguments. We cannot therefore make any definitive findings either way. That will be the task of the Court when the appeal is ultimately presented. (*Royal Media Services v. Attorney General*



- § 2 Others*, CA No. Nai. 44 of 2013). All that is required of us is to form an impression whether there is even a single bona fide issue that the applicant has placed before us for consideration on appeal. That issue need not necessarily be one that will ultimately succeed when the appeal is heard. (*Kenya Railways Corporation v. Edermann Properties Ltd*, CA No. Nai. 176 of 2012).
15. We are satisfied that the applicant's intended appeal is arguable. That the High Court itself is of different mind regarding the constitutionality of section 40(3) of the *County Government Act* is sufficient indication that there is a bona fide issue to be considered on appeal. The question too whether the removal of the applicant was in accordance with the relevant Standing Orders of the Taita-Taveta County Assembly is not an idle issue.
 16. To our minds the crux of this application is whether the intended appeal will be rendered nugatory. Whether or not an intended appeal will be rendered nugatory depends on the circumstances of each case. In *Stanley Kangethe Kinyanjui v. Tony Ketter § 5 Others* CA No 31 Of 2012 this Court explained the concept of an appeal that is rendered nugatory as follows:

“Whether or not an appeal will 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.”
 17. (See also *Reliance Bank Ltd v. Norlake Investments Ltd* [2002] 1 EA 227 and *Kenya Airports Authority v. Mitu-Bell Welfare Society § Another*, CA No.114 of 2013 (UR 77/2013).
 18. In the authorities relied upon by the applicant, in particular *Gatirau Peter Munya v. Dickson Mwenda Kitbinji § 2 Others* (*supra*), *Nathif Jama Adam v. Abdikhaim Osman Mohamed § 3 Others* (*supra*), and *Martin Nyagah Wambora v. The County Assembly of Embu § 6 Others* (*supra*) conservatory orders were issued to forestall imminent expensive gubernatorial by-elections. The Courts in those applications were acutely aware of the public interest involved and of the overriding constitutional duty demanding prudent deployment and use of public resources. In the present application, what is at stake is the applicant's office as a member of the County Executive Committee. Foremost in our minds, taking into account the interests of the applicant and those of the people and the County of Taita-Taveta, is whether a conservatory order would best serve or disrupt the working of the organs of the County Government in the interregnum between now and the hearing and determination of the intended appeal.
 19. In our view, granted the centrality of devolution in our constitutional setup, the overriding need to ensure that it works as seamlessly as possible for the benefit of the people of Kenya, and not in anyway being oblivious or insensitive to the applicant's constitutional rights, a conservatory order would occasion more harm to the County Government than to the applicant, who if he is ultimately successful in his appeal will be adequately compensated by an award of damages. We note that faced with a similar situation in the County Executive of *Kisumu § 2 Others v Kisumu County Assembly Service Board § 5 Others*, CA No. 4 & 5 of 2015 (Kisumu) this Court held in the circumstances of that application that it would not be in the public interest to issue orders whose effect would be to reinstate county officials pending the hearing and determination of their intended appeals.
 20. In the result, we decline to issue the injunction or conservatory orders sought by the applicant and dismiss the Notice of Motion dated 11th December 2015. In the circumstances of this application, we direct that costs of this application shall abide the outcome of the intended appeal. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF APRIL, 2016

ASIKE-MAKHANDIA



.....
JUDGE OF APPEAL

W. OUKO

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR

