



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, OKWENGU & G.B.M. KARIUKI, JJ.A**

**CIVIL APPEAL (APPLICATION) NO. 202 OF 2015**

**BETWEEN**

**THE SECRETARY, COUNTY PUBLIC SERVICE BOARD.....1<sup>ST</sup> APPELLANT**

**THE SECRETARY, WAJIR COUNTY GOVERNMENT.....2<sup>ND</sup> APPELLANT**

**AND**

**HULBHAI GEDI ABDILLE.....RESPONDENT**

*(An Application for stay of execution pending the hearing and determination*

*of the Appeal from the Judgment and Decree of the High Court of Kenya*

*at Nairobi (Odunga, J) delivered on 17<sup>th</sup> July 2015*

*in*

*JR Application No. 271 of 2014)*

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**RULING OF THE COURT**

By the notice of motion dated 18<sup>th</sup> August 2015, the applicants through the firm of Issa & Co. Advocates seek the following orders:-

***“That there be a stay of execution of the order of certiorari granted by the High Court on 17<sup>th</sup> July 2015 quashing the decision of the Wajir County Public Service Board of 6<sup>th</sup> June 2014 appointing Deputy Sub-County Administrators, Deputy Directors Sub-County Administrative Units and Assistant Directors for County Administrative Units, pending the hearing and determination of the appeal herein”***

They have also asked that costs of the application abide the outcome of the appeal.

The application is premised on some fifteen (15) grounds on its face and supported by the affidavit of **Shukri Alasow Mohamed**, sworn on 18<sup>th</sup> day of August 2015. It is opposed by **Hulbhai Gedi Abdille**

(respondent) vide her affidavit deposed on 23<sup>rd</sup>

November, 2015. The application arises from the judgment of the High Court (Odunga, J) in which he allowed a Judicial Review application which sought to quash the decision referred to earlier.

A brief background of the matter is necessary in order to put the matter in proper perspective.

**Wajir County Government** (2<sup>nd</sup> applicant) through the Wajir County Public Service Board placed an advertisement in the local media for recruitment of several officers for various positions in the County Government. The respondent responded to the said advertisement and applied for the position of Sub-County Administrator. She was shortlisted and went through the process but she was unsuccessful. From the documents on record, the respondent managed to garner a score of 85.57% while the top candidate, one Omar K. Daudi is indicated as having attained 90.57% marks. Consequently, the respondent was not recruited. It was the respondent's view that she was better qualified for the said position than the person who got the job. She also realized that the appellants had recruited for positions other than the ones already advertised.

Aggrieved by that decision, she moved to the High Court by way of Judicial Review calling for the quashing of the decision to hire the officers appointed on 9<sup>th</sup> June 2014. The ex-parte chamber summons for leave to apply for orders of certiorari and prohibition was heard by Odunga J, who, on 11<sup>th</sup> July 2014 granted the leave sought and also directed that the leave so granted was *"to operate as a stay of the outcome of the recruitment exercise of the appointed officers pending the hearing and determination of the notice of motion for Judicial Review, which was to be filed within ten (10) days of that date"*.

It is instructive to note that by the time this order was granted, the letters of appointment, some dated 9<sup>th</sup> June 2014, and others dated 17<sup>th</sup> June 2014 had already been sent out to the successful candidates. The notice of motion in question was filed as directed and heard and the judgment, now impugned was delivered on 7<sup>th</sup> July 2015, allowing the motion with costs to the respondent herein.

That is the judgment that is challenged before this Court vide Civil Appeal No. 202 of 2015. Pending the hearing and determination of the appeal, the applicants filed the notice of motion at bar, the subject of this ruling. In support of the application, Shukri Alasow Mohammed, the 1<sup>st</sup> appellant's secretary deposes that failure to stay the impugned decision will cause service delivery in Wajir County to grind to a halt, in the process grossly inconveniencing the residents of Wajir.

He contends further, that the right of fair trial in respect of the duly appointed officers would be violated, yet, they were not served with the pleadings, and they have therefore been condemned unheard.

Furthermore, the deponent states, the learned Judge fell into error when he went beyond the jurisdictional purview of Judicial review, and proceeded to determine the merits of the recruitment exercise, instead of dealing with the recruitment process as by law required. He deposed that a fresh recruitment of the personnel in question would be costly and tedious, given the typographical circumstances pertaining in Wajir County. Any fresh recruitment, he said would render their appeal nugatory.

Mr. Issa, learned counsel for the applicants, reiterated these issues in his oral submission before Court. He submitted that the applicants had satisfied the two principles that must be satisfied before the Court can grant orders of stay of execution like the ones sought.

On arguability, he urged that the respondent went to the High Court prematurely as she ought to have filed her appeal before the Public Service Board as provided for by **Section 77(2) of the County Government Act**. In support of this submission, he called in aid

this Court's decision in **Speaker of the National Assembly vs Karume [1990 – 1994] E.A. 549**. He referred the Court to the applicants' Memorandum of Appeal (already filed) in which they have raised ten grounds of appeal, all of which he submitted are arguable.

On the nugatory aspect, it was learned counsel's submission that if the appointments are revoked, grave injustice will be occasioned to the officers involved who were never made party to the judicial review proceedings. Further, that the County Government will have been forced to do a fresh recruitment at great expense, and if their appeal succeeds, the innocent officers will not be in a position to get back their jobs.

He therefore, urged the Court to allow this application.

In opposing the application, the respondent has deposed that the order granting stay, meant that the recruitment exercise was stayed, and so was the posting of the successful officers. She urged that if the officers had already been posted and taken up their posts, they should not have continued to remain in office. This view was propounded by the respondent's learned counsel, Miss Odiya, in her oral submissions in Court. She emphasised that by failing to revoke the appointments, the appellants fell in the realm of contempt of court, and they should not therefore, be entertained in this Court. She informed the Court that indeed, they had filed contempt of court proceedings against the applicants which proceedings are still pending before the High Court.

We must eschew making any determinations, or observations in this ruling that would impact on those proceedings. However, we can safely point out that the applicants have not been found culpable in the contempt of court proceedings, and we cannot therefore, hold that against them. It will be for the Court seised of those proceedings to interpret the meaning and import of the orders of the High Court and determine if the applicants are in contempt of court or not.

Our duty at this point is to determine whether the applicants have satisfied the criteria required in order for an application under **Rule 5(2) (b) of this Court** to succeed. We have considered the application before us, and indeed the entire record, along with the able submissions of counsel. Having done so, we restate that the law in this area is settled.

In order for an application under **Rule 5(2)(b)** to succeed, the applicant, must establish the twin principles i.e arguability and the nugatory aspect.

On the first principle of arguability, the applicants must prove that their appeal is not frivolous, but one that raises issues that call for the full consideration of the Court. It is therefore, not necessarily one that will succeed. (See this Court's decision in **David Morton Silvestein vs Atsango Chesoni [2002] eklr**).

The appeal does not also have to raise a multiplicity of arguable issues as one issue only would also suffice (see **Damji Pragji Mandaria vs Sara Lee Household & Body Care**

The other limb is on the nugatory aspect, which must be satisfied in conjunction with the first limb. On this limb, an applicant will have to satisfy the Court that if the order of stay of execution is not granted, then the appeal, were it to succeed, will be rendered moot.

We have now to address ourselves as to whether the applicants herein have established both limbs, as establishing only one of them will not suffice. On the issue of arguability, in our view, the applicants have raised several arguable points to invoke the exercise of the Courts appellate jurisdiction. Among such grounds is whether, the learned Judge overstepped his jurisdiction under judicial review by determining the merits rather than the process of the recruitment exercise.

In our view, the issue as to whether the officers who had been successfully recruited, and who were not made parties to the Judicial Review application, could be dispossessed of their jobs without having been given a hearing, is definitely an important issue for determination on appeal.

On the nugatory aspect, will the appeal be rendered nugatory if the order of stay is not granted?

The respondent's quarrel with the applicants is that they have refused/or neglected to revoke the appointments following the judgment of the Court. This is a tacit admission that the successful candidates did indeed take up their positions. On the other hand, the respondent at paragraph 11 of her replying

affidavit deposes as follows:-

***“That further, it is the decision of the appellants which I complained of and not of the recruited persons who were mere participants and did not infringe on my fundamental rights as enshrined in our Bill of Rights and natural justice.”***

In this deposition, the respondent admits that the recruited officers are innocent. In effect, they should not be punished for something they did not do. Revoking their letters of appointment would definitely amount to punishing them and taking away their means of livelihood, for no fault of their own, and also without giving them a hearing.

If the stay orders are not granted, these people will lose their jobs. The appellants may embark on a fresh recruitment exercise at great expense to the county, and if the appeal later succeeds, such public funds would have been wasted. If the Court were to find on appeal, that the other officers had been properly recruited, and their jobs will have been taken up by others, the success of the appeal will not be of any benefit to them. We appreciate that those other people are not parties in this application, but we cannot ignore the fact that they are affected parties and the outcome of this application will definitely impact on them one way or another.

The respondent’s main thrust in this application is that the applicants have failed to comply with the orders of the High Court, and consequently, their hands are tainted and they cannot therefore, benefit from the discretionary powers of this Court which they seek to invoke.

It is true that if the applicants are in contempt of a court order, then they would be debarred from seeking solace from this Court in a bid to validate their contemptuous conduct. On this position, we cite with approval the observation by the **Supreme Court of India in Dalip Singh vs State of U.P. and Others, 2010 (2) Section 114** where the court aptly stated inter alia:-

***“It is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.”***

As stated earlier in this ruling, we cannot in these proceedings determine that the applicants are in contempt of court, as that would be usurping the jurisdiction of the court that is seised of that matter. We cannot therefore, say that they are seeking to draw from the fountain of justice with soiled hands. Those are still allegations until the High Court rules otherwise.

On the other hand, if the appeal fails, and the court finds that the respondent has suffered as a result of a flawed recruitment exercise, she would have recourse in damages. This is one of the cases where in our considered view the Court is called upon to balance the interests of all the parties and determine on which side the scale of justice tilts. (See **Oraro & Rachier Advocates vs Co-operative Bank of Kenya [1999] LLR 1118**).

In sum therefore, we are satisfied that the applicants have established both limbs, and are entitled to a stay of execution of the impugned judgment. We accordingly allow the application and grant the order sought with costs in the appeal.

***Dated and delivered at Nairobi this 13<sup>th</sup> day of May, 2016.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**