



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 47 OF 2016

BETWEEN

IDRISS ADEN MUKHTAR 1ST APPLICANT

MUKHTAR BULA 2ND APPLICANT

SALAH YAKUB FARAH 3RD APPLICANT

AND

THE COUNTY GOVERNMENT OF GARISSA 1ST RESPONDENT

THE GOVERNOR – GARISSA COUNTY 2ND RESPONDENT

(Being an application for injunction pending appeal on the Ruling of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) delivered on 27th July, 2015

in

Petition No. 46 of 2015

RULING OF THE COURT

In the Notice of Motion brought under rule 1 (2) and 5(2) (b) of this **Court's Rules** the following prayers are made:

“1.

2. THAT this Honorable Court be pleased to restrain the Respondents form (sic) substantively filling the positions held by the Applicants pending the hearing and determination of the intended Appeal.

3. THAT this Honorable Court be pleased to compel the Respondents to reinstate the Applicants to positions previously held by them as County Executive Committee Members pending the hearing and determination of the intended appeal.

4. THAT this Honorable Court be pleased to compel the Respondents to pay the Applicants

their dues pending the hearing and determination of the intended Appeal.

5. *THAT this Honorable Court be pleased to grant an injunction pending the hearing and final determination of the intended appeal herein.*

6. *THAT the Applicant be at liberty to apply for further Orders and/or Directions as the Honourable Court may deem fit and just to grant.*

7. *THAT the costs of and incidental to this application do abide the outcome of the intended appeal.*”

In the grounds set out in support of the Motion it is said that if the respondents are not restrained they will substantively fill the positions held by the applicants as the respondents have already restructured ministries of the 1st respondent and reduced their number and that this action renders the intended appeal nugatory; that service delivery to the citizens of Garissa County have been greatly affected as the ministries that were held by the applicants are currently occupied by Executive Members who do not know the inner workings of the various ministries to ensure optimum service delivery; that the respondents are holding onto the applicants’ salaries and have not paid the same for five months even after the Employment and Labour Relations Court ordered a stay of the ruling and that this is causing the applicants mental anguish as they are unable to meet their financial obligations; that the applicants have an arguable appeal against the ruling of that court and that their intended appeal will be rendered nugatory if a stay of execution is not granted pending the hearing and determination of the intended appeal.

The motion is also supported by an affidavit of the 1st applicant Idriss Aden Mukhtar sworn on 2nd March, 2016. The deponent depones in addition to the grounds set out *inter alia* that:

“5. *THAT the Honorable Court (Honorable Lady Justice Hellen Wasilwa) in its Rulings dated 27th July 2015 made the following orders in favor of the Respondent herein:*

a. Reinstatement as a remedy should only be granted sparingly after hearing of both parties and the court had at an interlocutory stage ordered reinstatement of the Applicants which is tantamount to deciding the case to a conclusion.

b. The Applicants have not demonstrated that they cannot be compensated adequately in damages if the Respondents are found to have been wrong in re-instatement, re-engagement and compensation in damages in the event the Petition succeeds.

c. The court vacates interim orders granted reinstating the Applicants in the positions previously held before dismissal as Garissa County Executive Committee Members.

d. To preserve the positions previously held by the Applicants however the Respondents are precluded from substantively filing the said positions pending the hearing the final determination of this Petition.

6. *THAT subsequently the Appellants filed an application for stay pending Appeal under Order 40 and Order 42 Rule 6 of the Civil Procedure Rules. The application was allowed when it came up for the ex-parte hearing before Judge Nzioki wa Makau who granted the Applicants an order of status quo ante 27th July 2015.*

7. *THAT substantively, the Honorable Court declined to grant to the Petitioners orders of stay pending Appeal against her previous ruling which orders would have preserved the substratum of Petition No. 46 of 2015 pending hearing and determination of the Appeal in the judge’s ruling delivered on 23rd February 2016.*

8. *THAT I am further advised by my present Advocate on record and I verily believe the said advise to be true that I have an arguable appeal against the Ruling of the Honorable Court*

(Honourable Lady Justice Hellen Wasilwa) dated 27th July 2015 in the Employment and Labour Relations Court Constitutional Petition No. 46 of 2015 IDRISS ADEN MUKHTAR & 2 OTHERS vs THE COUNTY GOVERNMENT OF GARISSA & ANOTHER that raises serious issues of law. I annex herewith a draft Memorandum of Appeal against the said judgment.

9. THAT the Respondents have gone further and reshuffled the various positions held by the Applicants hence substantively filling those positions.

10. THAT the Applicants will suffer irreparable loss and damage as County Executive Committee Members in the event that execution proceeds and the intended appeal succeeds.

11. THAT the Applicants are apprehensive that the intended appeal from the Ruling of the Honorable Court (Honorable Lady Justice Hellen Wasilwa) dated 27th July 2015 in the Employment and Labour Relations Court Constitutional Petition No. 46 of 2015 IDRISS ADEN MUKHTAR & 2 OTHERS VS THE COUNTY GOVERNMENT OF GARISSA & ANOTHER will be rendered nugatory unless a stay of execution is granted pending the hearing and final determination of the intended appeal.

12. THAT the Applicants will suffer irreparable loss and damage as County Executive Committee Members and will not be able to re-instated (sic) in the event that the intended appeal succeeds.

13. THAT I swear this affidavit in support of the Notice of Motion filed herewith.”

A brief background of the matter before the lower court will suffice for purposes of this application. In the petition filed in the then Industrial Court of Kenya as **Constitutional Petition No. 46 of 2015** the applicants **Idriss Aden Mukhtar, Mukhtar Bulale & Salah Yakub Farah** petitioned that court and stated that they were County executive members of the 1st respondent, the County Government of Garissa. They stated that their various rights under the Constitution had been violated by termination of their employment as County executive members by the 2nd respondent, the Governor of Garissa County. The prayers they sought were a declaration that the termination of their employment was a breach of their constitutional rights and that therefore that termination was null and void; a prayer for judicial review of certiorari to quash the decision of the 2nd respondent relieving the applicants of their duties as County executive Committee members, an order of judicial review of prohibition to prohibit the respondents from appointing any fresh nominee for approval by the Garissa County Assembly for appointments as members of Garissa County Assembly. In the alternative the applicants sought an order of payment of all dues to the applicants in the period that they would have served up to the end of term of their employment and any other relief that the court could grant.

All the parties were heard and an initial order of reinstatement to office was issued. The respondents filed a motion praying that that order be vacated. In the ruling that followed Lady Justice Hellen Wasilwa *inter alia* vacated the orders that had reinstated the applicants to office. Those orders did not go down well with the applicants who intend to appeal to this Court.

In submissions made before us when this application came for hearing on 24th May, 2016 **Mr. Charles Kanjama** learned counsel for the applicants gave a long history of the matter submitting that termination of the applicants' employment was unlawful as it, according to counsel, violated various provisions of the Constitution. In particular he took issue with the fact as alleged by the applicants that the termination of their employment was without notice. Learned counsel submitted that termination of employment contrary to the provisions of the Constitution and/or the County Government Act was unlawful and should be quashed. Learned counsel relied on the cases of **County Government of Nyeri and Another v Cecilia Wangechi Ndungu [2015] eKLR** and **Narok County Government and Another vs Richard Bwogo Birir and Another [2015] eKLR** for the proposition that the 2nd respondent did not enjoy authority to dismiss the applicants at pleasure. Learned counsel also faulted the trial judge for placing a very high standard against the applicants to prove a prima facie case which according to counsel run against the principles laid out in **Giella v Cassman Brown & Co. Limited [1973] E.A. 358**. These

according to counsel were arguable points in the intended appeal.

On the nugatory aspect, learned counsel submitted that the applicants were appointed for 4 year terms to end in August 2017. Learned counsel therefore thought that unless the 2nd respondent's decision to dismiss the applicants from employment was quashed immediately a subsequent quashing order would not give a remedy to the applicants. Counsel relied on the English case of **Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448** for the proposition that orders of injunction should be given pending appeal.

Mr. Amana Cohen who with **Mr. Mokuia Ndubi** learned counsel appeared for the respondents thought otherwise. Counsel submitted that the applicants were not entitled to what they sought which amounted to a prayer for reinstatement in an interlocutory application. According to counsel injunction sought was an equitable remedy which had been denied by the lower court. Counsel cited **Mrao Limited v First American Bank of Kenya for the proposition that the trial judge Limited and 2 Others [2003] KLR** for the proposition that the trial judge should only be overturned if was a misdirection on law or facts or an misapprehension of the same. Counsel also cited **Kenya Airways Limited v Aviation proposition and Allied Workers Union Kenya and 3 Others [2014] eKLR** for the proposition that reinstatement of a dismissed employee should only be ordered in exceptional circumstances. Learned counsel thought that there was no arguable appeal. For all these, the motion should be dismissed, he submitted.

In a brief reply, Mr. Kanjama submitted that the application had been brought without delay and on the **Mrao Limited** case (supra), learned counsel thought that the applicants had demonstrated that there were errors of fact and law in the ruling of Lady Justice Wasilwa.

We have considered the motion, the affidavit, the cases cited and the relevant law and having done so we take the following view of the matter.

The principles that we apply on a consideration of applications under **Rule 5(2) (b)** of this **Court's Rules** are now fairly well settled. This Court in deciding such an application exercises unfettered powers but those powers cannot be exercised capriciously or upon the whims of the Judge. The court has to be satisfied that the intended-appeal, or appeal, if already filed, is arguable, which is the same as saying that it is not frivolous. The court must, in addition, be satisfied that should the appeal, or intended appeal, as the case may be, succeed, the success would be rendered nugatory should the court refuse to grant the application – see, for instance, an enunciation of these principles in the case of **Republic v Kenya Anti-Corruption Commission and 2 Others [2009] KLR 31** where the following passage appears:

*“The law as regards the principles that guide the court in such an application brought pursuant to Rule 5(2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [See also this Court's decisions in the case of **RELiance BANK LTD v NORLAKE INVESTMENTS LTD (2002) 1 EA 227 & GITHUNGURI v JIMBA CREDIT CORPORATION LTD & OTHERS (NO. 2) 1988; KLR 828; WARDPA HOLDINGS LTD & OTHERS v EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL NO. 72 OF 2011 [unreported].**”*

In the lead Ruling in **Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others [2013] eKLR**. Onyango Otieno, JA stated on arguability of an appeal or intended appeal:

“I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law one one arguable point suffices for that finding.”

So an applicant who establishes that there is single arguable point and who also satisfies the nugatory aspect of the application before the court is entitled to the protection accorded by **Rule 5(2) (b)** of this **Court's Rules**.

According to Mr. Kanjama learned counsel for the applicants the learned judge of the court misapprehended the principles in **Giella v Cassman Brown** (supra) and laid a higher standard for an applicant to establish a prima facie case. Learned counsel thought in addition that where there is a breach of constitutional rights an applicant is entitled to an immediate quashing order and in a case like this reinstatement. We agree with learned counsel that these are arguable points in the intended appeal.

What about the nugatory aspect which an applicant must satisfy to be accorded the protection of rule **5(2) (b)** of this **Court's Rules**?

In the ruling delivered on 27th July, 2015 where the lower court vacated orders reinstating the applicants to the positions they held previously before their dismissal the court ordered:

“To preserve the position previously held by the Applicants however, the Respondents are precluded from substantially filling the said positions pending the hearing and final determination of this Petition which in any case should be handled on priority basis the final analysis.”

That is to say that the status quo prior to filing of the petition was preserved.

The court however did not find it appropriate or convenient to order the dismissed employees (applicants) to resume their offices pending hearing of the petition.

In the affidavit in support of urgency of the motion before us lawyer **Brian Otieno Odhiambo** for the applicants states inter alia:

“7. THAT subsequent to the substantive hearing of the Application for stay pending appeal before the Employment and Labour Relations Court, the Court dismissed the Application and vacated the orders of status quo originally in place hence comprising (sic) service delivery to the citizens of Garissa County. The Ruling delivered by the Hon. (Lady) Justice Hellen Wasilwa on 23rd February 2016 in effect meant that the substratum of Constitutional Petition No. 46 of 2015 was no longer preserved and in the event that the matter is determined to a conclusion, it will be a mere academic exercise.

8. THAT the Applicants are apprehensive that the Respondents can at any time substantively fill the positions held by the Applicants as it reshuffled the ministries barely hours after the rendering of the ruling and also reduced the number of the ministries and if the application herein is not heard urgently, the Appeal will be rendered nugatory.

9. THAT the Applicants are family men with school going children and have undertaken various financial and related commitments due to their employment with Garissa County Executive and all left well-paying jobs and sources of income to work for the County Government.

10. THAT further, the Applicant's term expires by August 2017 when the next General Elections is to be held hence the matter needs to be heard on priority lest the appeal be an academic exercise.”

We are dealing with a situation where the lower court has ordered that positions previously held by the applicants be preserved and not be filled until the hearing of the petition. The applicants ask us for orders that would amount to a mandatory injunction ordering reinstatement of a dismissed employee. We do not think that it would be appropriate in an application such as this to make such an order. The applicants have not satisfied us that if we do not grant the orders sought the intended appeal will be rendered

nugatory.

Having taken this view the applicants have therefore not satisfied the second limb of the principles that we apply in an application such as this one.

The application therefore fails and is dismissed. Costs shall abide the intended appeal.

Dated and Delivered at Nairobi this 30th day of September, 2016.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR