



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPLICATION NO. 4 & 5 OF 2015 (CONSOLIDATED)

BETWEEN

COUNTY EXECUTIVE OF KISUMU 1ST APPLICANT
COUNTY ASSEMBLY OF KISUMU 2ND APPLICANT
HON. GABRIEL O. OCHIENG 3RD APPLICANT

AND

KISUMU COUNTY ASSEMBLY SERVICE BOARD..... 1ST RESPONDENT
ANN ATIENO ADUL 2ND RESPONDENT
NICHOLAS STEPHEN OKOLA 3RD RESPONDENT
HON. ATTORNEY GENERAL 4TH RESPONDENT
NELCO MASANYA SAGWE 5TH RESPONDENT
PETER ODERO ANDITI 6TH RESPONDENT

(An Application for stay and injunction pending the lodging, hearing and determination of the appeal from the Judgment of the High Court of Kenya, Industrial Court at Kisumu (Wasilwa, J.) dated 12th January, 2015

in

INDUSTRIAL PETITION NO. 297 OF 2014)

RULING OF THE COURT

1. On 15th October 2014, the County Assembly of Kisumu (the County Assembly) passed a resolution in which it suspended the Kisumu County Assembly Service Board (the Service Board) and thereafter caused the redeployment to other duties of **Nelco Masanya Sagwe** and **Peter Odero Onditi**, the interim Clerk and interim Assistant Clerk of the County Assembly respectively. It replaced them with **Eliud Owen Ojuok** and **Nicholas Stephen Okola** respectively as acting Clerk and acting Assistant Clerk to the County Assembly.
2. By its further resolution passed on 21st October 2014, the County Assembly censured and removed from office its Speaker, **Anne Atieno Adul**, (the Speaker) and replaced her by **Gabriel Ochieng** whom it appointed as acting Speaker.
3. Aggrieved by those resolutions, Nelco Masanya Sagwe and Peter Odero Anditi filed a petition in the High Court at Kisumu which has not been heard. The Service Board and the Speaker also filed a joint petition in the High Court at Kisumu in which the interim Clerk and interim Assistant Clerk joined as interested parties.
4. In their petition, the Service Board and the Speaker raised a myriad of allegations and claims including the contentions that in passing the said resolutions, the County Assembly purported to act under **Section 11** of the County Government Act and its **Standing Order No. 58** both of which are unconstitutional; that the County Assembly violated the Speaker's constitutional rights to, *inter alia*, fair administrative action under Article 47 of the Constitution, fair hearing under Article 50 of the Constitution, and the right to personal dignity under Article 28 of the Constitution; that in purporting to constitute offices in the County Government and redeploying county officers to other duties, the County Assembly usurped the powers vested in the County Assembly by **Sections 59, 60, 61, 62, 63, 64, 65, 66** and **69** of the County Governments Act; and that the County Assembly purported to appoint Eliud Owen Ojuok, who lacked the requisite academic qualifications, as acting Speaker of the County Assembly.
5. On those allegations, the Petitioners prayed for declarations that the County Assembly's said resolutions were unconstitutional and unlawful; reinstatement of the Speaker and interim Clerk as well as Assistant interim Clerk; and costs.
6. On 5th November 2014, Maina, J. of the High Court transferred that petition to the Industrial Court on the ground that the High Court lacked jurisdiction to entertain it. After hearing it, in her judgment delivered on 12th January 2015, Wasilwa, J. of the Industrial Court granted literally all the prayers in that petition.
7. Aggrieved by that judgment, the County Executive of Kisumu (the County Executive), the County Assembly and Gabriel Ochieng filed notices of appeal evincing their intentions to appeal against it.
8. Pending the filing, hearing and determination of their intended appeals, the three filed in this Court two applications under **Rule 5(2) (b)** of the Court of Appeal Rules and sought orders of injunction and stay pending appeal.
9. The first application, being Civil Application No. 4 of 2015, was filed by the County Executive of Kisumu. It seeks in the main, an order of injunction to restrain the Speaker "*from resuming office as the Speaker of the Kisumu County Assembly*", an order to stay execution of the Industrial Court decree awarding compensation to the Speaker and a further order to stay further proceedings in the Industrial Court to quantify the compensation payable to the Speaker.
10. The second application, being Civil Application No. 5 of 2015, was filed by the County Assembly of Kisumu and Gabriel Ochieng. It seeks more or less the same orders as those sought in the first application.

11. The two applications first came up for hearing before us on 12th February, 2015. As they arise from the same Judgment and seek more or less the same orders, we granted the plea by counsel for all parties and consolidated them. Following that consolidation, we directed that the County Executive becomes the 1st applicant and the County Assembly and Gabriel Ochieng become the 2nd and 3rd applicants respectively while the Service Board, the Speaker, Nicholas Stephen Okola, the Attorney General, Nelco Masanya Sagwe and Peter Odero Anditi become the 1st, 2nd, 3rd, 4th, 5th and 6th respondents respectively. To expedite the hearing, we directed counsel to file written submissions and we adjourned the hearing to 3rd March 2015 for highlighting of those submissions.
12. At the resumed hearing on 3rd March 2015, Mr. Muite, Senior Counsel teaming up with Mr. Otieno, for the 1st applicant, by way of highlighting their written submissions and also basing his arguments on the averments in the affidavit of Humphrey Okuku Nakitari sworn on 6th February 2015 in support of the first application, submitted that their client has an arguable appeal which will be rendered nugatory if their application is not granted.
13. Citing several authorities counsel, submitted that had the learned Judge appreciated the import of **Sections 12 and 29** of the National Assembly (Powers and Privileges) Act Cap 6 of the Laws of Kenya read together with **Section 17** of the County Governments Act as well as **Article 162(2)(a)** of the Constitution as read together with **Section 12** of the Industrial Court Act, she would have realized that she had no jurisdiction to entertain the petition and accordingly struck it out.
14. The other arguable points counsel said the 1st applicant will raise in its intended appeal are that contrary to the provisions of **Section 106B** of the Evidence Act, the learned Judge admitted and relied on electronic evidence and that she erred in finding that the County Assembly had violated the Speaker's constitutional rights under Article 41, 47 and 236 of the Constitution.
15. On those submissions, counsel asserted that the 1st applicant has several arguable points, although, for purposes of an application such as this, even one point suffices.
16. On the nugatory criterion, counsel argued that following the said judgment of the Industrial Court, the Speaker is now seeking immediate reinstatement despite the fact that the County Assembly has appointed an acting Speaker. Given the sour relationship that now exists between the two, the affairs of the County Assembly will be paralyzed if stay is not granted. Counsel also argued that if stay is not granted, the Industrial Court will assess the quantum of compensation payable to the Speaker and execution will ensue. He said that will not be a prudent utilization of public funds.
17. Counsel added two additional criteria which he said should be considered in these applications. They are public interest and balance of convenience. On public interest, counsel cited the Supreme Court decisions in **Gatiru Peter Munya v. Dickson Mwenda Kithinji & 2 Others, [2014] eKLR** and **Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others - S.C. Civil Application No. 12 of 2014** as well as this Court's decision in **Kenya Hotel Properties Ltd v. Willesden Investments Ltd & 4 Others - Civil Application No. 24 of 2014** and argued that imposing the Speaker upon the County Assembly despite the overwhelming vote of impeachment regularly and constitutionally cast against her will bring the County Assembly's operations to a standstill to the great detriment of the people of Kisumu County. On the balance of convenience, counsel argued that as the affairs of the County Government are running smoothly, the scale tilts to the maintenance of the status quo until the 1st applicant's intended appeal is lodged, heard and determined.
18. Senior counsel Mr. Omogeni teaming up with Mr. Rodi for the County Assembly and Gabriel Ochieng, the 2nd and 3rd applicants, also put up a spirited submission. Highlighting their written submissions and relying on the averments in the affidavit of Gabriel Ochieng sworn on 6th

- February 2015 in support of the second application, Mr. Omogeni submitted that the 2nd and 3rd applicants have an undoubtedly arguable appeal which raises substantial issues that the learned Judge of the Industrial Court had no jurisdiction to entertain the petition in view of the fact that the Speaker was not, *stricto sensu*, an employee but an elected official of the County Assembly; that the learned Judge erred in finding the Speaker was unconstitutionally censured and removed from office; that the learned Judge erred in admitting and relying on electronic evidence contrary to **Section 106B** of the Evidence Act; that the court has no jurisdiction to interfere with decisions of other statutory bodies like, in this case, the County Assembly's resolution constitutionally and regularly passed to impeach the Speaker.
19. On the nugatory criterion, Mr. Omogeni submitted that it will be an affront to the provisions of **Article 201(d)** of the Constitution which demands for proper utilization of public resources to pay salary and the decreed compensation to the Speaker in the absence of evidence of her capability to refund it if the appeal succeeds. He also argued that imposing the Speaker on the County Assembly that had ousted her will hamper the peaceful conduct of the County Assembly's legislative business. On those submissions, counsel urged us to allow the application by the 2nd and 3rd Applicants.
 20. The applications were vigorously opposed by the County Service Board, the Speaker, Nelco Masanya Sagwe and Peter Odero Anditi, the 1st, 2nd, 5th and 6th respondents respectively.
 21. Highlighting the submissions for the 1st and 2nd respondents, their counsel, Mr. Okongo, argued that the applicants have no arguable appeals. In view of the provisions of **Articles 22, 258(1) and 260** of the Constitution, counsel contended that it is a joke for the applicants to claim that the 1st respondent had no *locus standi* to file the petition. Those provisions authorize “any person” including incorporated or unincorporated bodies to challenge any contravention or threatened contravention of their constitutional rights.
 22. On jurisdiction, counsel submitted that the County Service Board and the Speaker filed their petition in the High Court. On a preliminary objection raised by the applicants, on 5th November 2014, Maina, J. found that there is an employer/employee relationship between the County Government and the Speaker and transferred the petition to the Industrial Court. That decision having not been challenged, counsel said the issue is *res judicata* and the applicants should not be allowed to resurrect that issue in these applications.
 23. Counsel further argued that the judgment of the Industrial Court is not capable of being stayed as the Industrial Court did not order reinstatement and the decree arising from its judgment does not require the applicants to do or refrain from doing anything. What would be stayed is payment of compensation to the Speaker and costs both of which have not been quantified.
 24. In its judgment, the Industrial Court simply declared the rights of the County Service Board and the Speaker. Those declarations in effect confirmed the conservatory orders the County Service Board and the Speaker had obtained. It follows, counsel further argued, that the *status quo ante* that is that, the County Assembly, the Speaker and the 5th and 6th respondents remain in office and operate as before until the judgment of the Industrial Court is set aside on appeal. They cited the case of **Rift Valley Water Services Board v. Asanyo & 2 Others, [2014] eKLR** in support of that argument. Granting either or both the applications will therefore be akin to granting a mandatory injunction to remove the 1st, 2nd, 5th and 6th respondents from office.
 25. On the removal of the Speaker, counsel submitted that as the learned Judge of the Industrial Court found, the applicants flagrantly flouted the due process envisaged by Section 11 of the County Governments Act and Standing Orders No. 58 and 63 as well as an express order of the High court restraining the impeachment proceeding.
 26. On the nugatory aspect of the applications, Mr. Okongo submitted that the County Service

- Boards established under the County Governments Act are statutory bodies independent of the County Governments. Under the doctrine of separation of powers, the powers and functions of those Boards cannot be exercised, performed or supervised by the County Government and yet that is what the applicants herein have purported to do. He said to grant these applications will therefore be sanctioning an illegality. At any rate, in counsel's view, it has not been demonstrated how the applicants intended appeals will be rendered nugatory if the 1st, 2nd, 5th and 6th respondents are allowed to continue performing their statutory duties.
27. On those submissions, counsel for the 1st and 2nd respondents urged us to dismiss these applications with costs.
 28. Nicholas Stephen Okola, the 3rd respondent, and the Attorney General, the 4th respondent, did not oppose these applications but Nelco Masanya Sagwe, the 5th respondent, and Peter Odero Anditi, the 6th respondent, did.
 29. In their written and oral submissions, counsel for the 5th respondent argued that the 5th and 6th respondents were unlawfully removed from office. To make matters worse, the County Secretary of Kisumu County, on the advice of the County Assembly, appointed Eliud Owen Ojuok who did not have the requisite qualification as the acting Clerk of the County Assembly. As is clear from **Section 13** of the County Governments Act, the clerk is the Chief Executive of a county assembly. Undermining the office of the clerk of a county assembly limits the capacity of such assembly to discharge its oversight role thus defeating one of the tenets of the devolved system of government.
 30. Counsel further argued that as the Industrial Court correctly found, the County Assembly has no power to remove from office the clerk or assistant clerk of the County Assembly. It is the County Service Board, as the appointing authority, which has that power. To make matters worse, contrary to Articles 41 and 236(b) of the Constitution, due process and the rules of natural justice were flouted in the removal of the 5th and 6th respondents. They were not given notice of the accusations, if any, leveled against them or an opportunity to be heard before they were removed.
 31. Counsel further submitted that the Industrial Court granted the 5th and 6th respondents conservatory orders in Petition No. 286 of 2014 the effect of which was to reinstate them. The applicants, however, restrained them from going to their offices to discharge their duties. In that regard, the acting Clerk of the County Assembly was found to be in contempt of court and fined Kes. 200,000/=. Granting these applications, counsel argued, will not only perpetuate an illegality by aiding a contemnor to continue disregarding a lawful court order but will also in effect set aside the conservatory orders which are not the subject of the intended appeal in this matter.
 32. On the nugatory aspect of the applications, counsel argued that for over two years, the 2nd, 5th and 6th respondents have been in office performing their duties as required. Their personal integrity and professional competence have not been impeached. Their ouster was hinged on political differences and not on any demonstrable wrong doing. The Industrial Court having declared that impeachment unconstitutional and reinstated them, the operations of the two arms of the County Government, that is, the County Executive and the County Assembly, will not be hampered as alleged if the *status quo ante* is maintained. If the intended appeals succeed, the three will simply be replaced with no disruption of the affairs of the County Government. On the other hand if stay is granted, the respondents will be severely and irreparably prejudiced. Besides loss of income, their careers will be disrupted midstream and they will suffer odium and disruption of their lives.
 33. On those submissions, counsel for the 5th respondent also urged us to dismiss these applications with costs.
 34. No submissions were filed on behalf of Peter Odero Anditi, the 6th respondent but we have his

- replying affidavit sworn on 27th February, 2015 in opposition to the two applications. In that affidavit, the 6th respondent also contended that the county assembly service boards established under **Section 12** of the County Governments Act are statutory bodies independent of county assemblies and county executives. As such the purported suspension of the Kisumu County Assembly Service Board by the Kisumu County Assembly on 14th October, 2014 in unprocedural proceedings was null and void and so was his deployment by the Kisumu County Secretary to the non-existent position of Assistant Sub-County Administrator.
35. The 6th respondent further averred that as an employee of the Kisumu County Assembly Service Board, he enjoys labour relation rights under Article 41 and constitutional protection under Article 236(b). He is also entitled to fair administrative action under Article 47 and a fair hearing under Article 50 of the Constitution. In violation of those rights and without advising him of accusations, if any, made against him, he was condemned unheard, removed from his position as Assistant Clerk to the Kisumu County Assembly and redeployed to a non-existent position of Assistant Sub-County Administrator.
36. On those averments and the contention that save for costs which have not been quantified, he concluded that the impugned judgment is a declaratory judgment incapable of being stayed and urged us to dismiss these applications with costs.
37. We have perused the two applications together with the affidavits sworn in support and in opposition to them. We have also considered the rival submissions by counsel for the parties as summarized above and the authorities cited.
38. It is trite law, as counsel on both sides appreciate, that this Court has a limited original jurisdiction in applications brought under **Rule 5(2) (b)** of the Court of Appeal Rules and although it has unfettered discretion in the discharge of that jurisdiction, it has to exercise that discretion judicially. In other words this Court's discharge of that jurisdiction and the exercise of its discretion have to be within the confines of the law. What then is the law or what are the principles that govern applications under this provision?
39. An application under **Rule 5(2) (b)** of the Court of Appeal Rules is not an appeal. It is an application for an interlocutory relief, call it a transient relief if you like. As this Court stated in **Royal Media Services v. The Attorney General & 2 Others, Civil Application No. Nai. 44 of 2013** “[a]t this juncture the court cannot go into the merits of the appeal” or the intended appeal. Having not heard arguments on the intended appeals, at this juncture the court cannot and should not make any definitive findings on the issues raised or to be raised in the intended appeal. At this juncture the court's jurisdiction is limited to the consideration of the established principles that guide the determination of such applications.
40. The principles that guide the determination of applications under **Rule 5(2) (b)** of the Court of Appeal Rules are now well settled. The applicant for such orders has to demonstrate that he has an arguable appeal and that if the orders sought are not granted, his appeal or intended appeal will be rendered nugatory.
41. There is no doubt as to what an arguable appeal is. Counsel on both sides cited to us several authorities on what an arguable appeal is. “*An arguable appeal is not one that must necessarily succeed...*” - **Dennis Mogambi Mongare v. Attorney General & 3 Others - Civil Application No. Nai 265 of 2011 (Ur. 175/11)**. An arguable appeal is one which raises substantial issues of fact, where an appeal lies on matters of fact, and or law “*deserving of the court's consideration.*” - See the **Dennis Mongare case** (supra). In other words an arguable appeal is one that is “*not frivolous*” - **Republic v. Kenya Anti-Corruption Commission & 2 Others, [2009] KLR 31**. And it is not necessary that several substantial issues should be raised. Even one arguable point suffices. See **Chris Munga Bichage v. Richard Nyagaka Tongi & 2 Others, Civil Application No. 39 of 2013 (CA Kisumu)**
42. How do these principles play out in this appeal?

43. The applicants contend that the Speaker being an elected member of the County Assembly the relationship between her and the County Assembly is not, *stricto sensu*, a contractual employer/employee relationship which falls under labour relations law. In the circumstances, the applicants contended, the dispute between the Speaker and the County Assembly does not fall within the purview of the Industrial Court Jurisdiction.
44. We are of course alive to the respondents' contention that the applicants are approbating and reprobating on the issue of jurisdiction. In the High Court Maina, J. upheld their preliminary objection that it is the Industrial Court and not the High Court that had jurisdiction to determine the issues in the petition giving rise to these applications and transferred it to the Industrial Court. Having lost in the Industrial Court, they have now engaged a reverse gear and are arguing that that court had, after all, no jurisdiction to entertain the petition. Although this raises the court's antenna as to the applicants' bona fides which will no doubt be dealt with in the intended appeal, the determination of the issue of the nature of the relationship between the speaker and a county assembly remains outstanding. In the circumstances, we find that this is an issue worthy of the court's consideration.
45. The other issues worthy consideration are whether, in view of the provisions of **Section 106B** of the Evidence Act, the learned Judge misdirected herself on the admission of and reliance on electronic evidence and whether or not she erred in finding that the applicants trampled upon the respondents' constitutional rights under Articles 47 and 236(b) of the Constitution.
46. Taking all these factors into account, we find that the applicants have an arguable appeal.
47. Will the success of the applicants' intended appeals be mere philic victories if the orders of injunction and/or stay pending appeal sought in the applications are not granted? The applicants contend they will while the respondents argue otherwise.
48. The term "nugatory" was defined in this Court's decision in **Reliance Bank Ltd v. Norlake Investments Ltd, [2002] 1 EA 227** as not only meaning "*worthless, futile or invalid,*" but also "*trifling.*" What would render the success of an appeal worthless, futile, invalid and or trifling if stay is not granted is dependent on the substratum of the appeal and circumstances of each case.
49. In this case, the applicants contend that pursuant to **Article 178(3)** of the Constitution as read with **Section 11** of the County Governments Act, the Kisumu County Assembly regularly impeached the Speaker. They also contend that by a further resolution of the County Assembly the County Executive re-deployed the 5th and 6th respondents. They therefore argue that it will not only render their appeals nugatory but it will also be against public interest to reinstate the three before the appeals are heard. The respondents on the other hand seriously dispute the regularity and propriety of those resolutions. We find that the applicants intended appeals will be rendered nugatory if stay is not granted.
50. We agree with counsel for the respondents that the applicants' action has and is no doubt affecting the 2nd, 5th and 6th respondents' lives. In this regard, we endorse the US Supreme Court decision in the said case of **Nken v. Holder, US SC No. 08-681(2009)** that substantial injury to the other parties' interests when stay is granted should also be considered. To balance the parties' competing interests, we grant the orders of injunction and stay pending appeal sought in the two applications for a period of sixty (60) days within which the applicants should lodge their appeals and have them determined. The costs of these applications shall be in the intended appeals.

DATED and delivered at Kisumu this 25th day of March, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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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