



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, OUKO & KANTAI, JJA)

CIVIL APPLICATION NO. 80 OF 2014 (UR 58/2014)

BETWEEN

COUNTY GOVERNMENT OF MIGORI 1ST APPLICANT

MIGORI GOVERNOR-ZACHARY OKOTH OBADO 2ND APPLICANT

AND

ERASTUS ONYANGO NYAMORIRESPONDENT

(Application for an Order of Stay of Execution under Rule 5 (2) (b) of the Court of Appeal Rules 2010 pending the hearing and determination of an intended appeal from the Ruling and/or Orders of the Industrial Court of Kenya at Kisumu (Wasilwa, J.) dated 3rd day of December, 2014

in

INDUSTRIAL CAUSE NO. 308 OF 2014)

RULING OF THE COURT

The County Government of Migori and the Governor have brought this application pursuant to Rule 5 (2) (b) of the Court of Appeal Rules to stay execution of the order of the Industrial Court (now Employment & Industrial Relations Court) made on 3rd December 2014 in which they were ordered to retain the respondent, Erastus Onyango Nyamori in office as the County Executive Committee member in charge of Public Works, Roads and Transport until he is subjected to due process or until the final determination of the suit, whichever came earlier. The applicants were also ordered to pay to the respondent withheld salary and any other emoluments that was due to him.

The respondent was appointed and gazetted as the Migori County Executive Committee Member responsible for Public Works Roads and Transport Services with effect from 2nd May, 2013. Barely one year later, things appear to have come to a head from the tone of the letter dated 30th July, 2014 in which the respondent addressed the 2nd applicant thus:-

"Your Excellency, I can justly conclude that the reasons I go through this shit is a rehearsed and sustained effort to frustrate me into resigning my position, so that I am not seen anywhere near where resources and influence are , controlled. Honestly, you can't

stand and watch as your children fight to finish one another. You are so far a biased referee and survival for the fittest is really the law of the jungle and not an organized orderly government system of Migori County.

The Almighty God is watching. Show leadership, your Excellency.

Yours faithfully,

Hon. Erastus Nyamori, HSC,

Maj. (Rtd), Arch

CEM- Public Works, Roads & Transport."

Following this and other events, and pursuant to **section 40** of the county Government Act, on 22nd April 2014, a motion was introduced before the County Assembly for the removal of the respondent on the grounds of incompetency, abuse of office, gross misconduct and gross violation of both the Constitution and the law.

Before the motion could be passed, the 2nd respondent, in an internal memo re-organized the departments of the County Government the effect of which was a reshuffle of County Executive members and chief officers. In the reshuffle, the appellant was left out translating into his summary removal. Aggrieved by the turn of events, the respondent instituted a claim against the applicants as explained earlier. He argued, among other things, that the 2nd applicant had no powers to remove him summarily and that his removal process ought to have gone on before the County Assembly. The applicants, on the other hand, maintained that the 2nd applicant was not precluded from removing the respondent independent of the process in the County Assembly.

After considering the application and the response the learned Judge (Wasilwa, J.) found generally that the removal of a County Executive Committee member starts with a motion under **section 31 (a)** aforesaid in the County Assembly and ends with the 2nd applicant exercising the power vested in him by **section 40**. The learned Judge noted that:-

"The reading of the law therefore shows that the 2 sections must be read together and not exclusively. Further as provided for under S. 30 (2) of the County Government Act, the Governor shall exercise his powers subject to the Constitution. It cannot be submitted that these powers are exercised at his whim without due regard to the law."

The learned Judge then concluded that the respondent was not issued with any letter terminating his services and was, therefore, as a matter of fact not removed from office but remained the County Executive Committee member responsible for Public Works, Roads and Transport with full salary.

The applicants have evinced their intention to challenge this decision on appeal to this Court by filing a notice of appeal. They have annexed to this application a draft memorandum of appeal. In the meantime, they seek, in the present application that the orders issued by the Court together with all subsequent and ancillary proceedings be stayed until the intended appeal is lodged, heard and determined.

Mr. Sagana for the applicants submitted before us that the learned judge misdirected herself in holding that the respondent was still the County Executive Committee member in charge of Public Works, Roads and Transport and that the learned Judge failed to appreciate the import of **section 31 (a)** of the County Government Act and as a result misdirected herself on the construction of **sections 31 (a) and 40**. The applicants also argue that there is already a substantive holder of the office to which the learned Judge has directed the applicants to reinstate the respondent.

The respondent, through Mr. Ogwe, argued that the learned Judge properly found, on evidence and the

pleadings, that the process of removing the respondent was so flawed that it did not amount to removal; that the intended appeal is not arguable; and that it will not be rendered nugatory should we reject this application.

It was common ground that as a result of the applicants' failure to comply with the orders of the High Court an application seeking to commit them to civil jail for contempt of court has been instituted.

The grant of any of the orders provided under **Rule 5 (2) (b)** of the Court's Rules is not a matter of course, though discretionary. The court in exercising this discretion must consider and balance the competing interests and rights of the parties as well as the justice of the case. The effect of an order of stay of execution is to deprive, the successful party, atleast for a given period, the fruits of his judgment. In order to succeed in an application for stay or injunction under the rule, there must therefore be cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The two conditions to be satisfied are old hat and we note that this application has been argued along those conditions. They are, whether or not the applicant's appeal or intended appeal is arguable, and whether or not such an appeal will be rendered nugatory if stay is not granted.

Apart from the grounds enumerated in this application why the applicants believe their intended appeal is arguable, the draft memorandum of appeal also contains seven grounds, all of which appear to us to raise arguable points. But, in our view, the fundamental question to be decided in the intended appeal remains the construction of **sections 31 (a)** and **40** of the County Government Act regarding the procedure for the removal of a County Executive Committee member. From the decisions of the superior court below cited to us there is no unanimity on this question. For instance, Rika, J. in **Tom Luusa Munyasya & Ano. Vs. John K. Muteti** Industrial Cause No. 103 of 2014 decided on 17th September 2014 found that the removal of a County Executive Committee member was vested in the Governor, under **section 31 (a)** who;

"....could wake up in the morning and announce the dismissal of the entire cabinet without exposure to claims of unfair removal from office."

Earlier, on 14th March, 2014 in Industrial Cause Petition No. 1 of 2014, the Court, (Ongaya, J.) found in **Richard Bwogo Birir Vs. Narok County Government** that the two sections are exclusive of each other. On 7th October 2014 in Bungoma High Court Constitution Petition No. 4 of 2014, **Stephen Nendela Vs. The County Assembly of Bungoma & 3 Others**, Mabeya, J. declared **section 40 (3)** of the County Government Act inconsistent with **Article 50 (1)** of the Constitution. This question therefore constitutes an arguable point in the intended appeal.

The applicants are unable to comply with the order directing them to reinstate the respondent to the post from which he had been removed because following that removal, Moses Chamwada was appointed to replace him. As a result of this dilemma and their inability to comply, there are contempt of court proceedings pending before the High Court against them.

In the absence of a stay order, therefore, the contempt proceedings are likely to go on and there is no telling how they will end. Should the applicants be found to be in contempt, the consequences are irreversible; the results of the intended appeal if in their favour would be a futile outcome because harm that the applicants feared would have befallen them.

The applicants having met the two conditions for the grant of execution and stay of further proceedings the application succeeds. It is ordered that, pending the filing, hearing and determination of the intended appeal there shall be an order staying execution of the orders of 3rd December, 2014 and an order staying further proceedings in Industrial Cause No. 308 of 2014.

Costs will be in the intended appeal.

Dated and delivered at Kisumu this 23rd day of April 2015.

D.K.MARAGA

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JUDGE OF APPEAL

W.OUKO

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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