IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO NAI 3 OF 2015 (UR 3/2015)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPLICANT

NYAKINA WYCLIFFE GISEBE ……...2ND APPLICANT

AND

ANNE WAIGURU, THE CABINET SECRETARY,

DEVOLUTION AND PLANNING.....1ST RESPONDENT

JOSEPH KINYUA, THE STATE HOUSE CHIEF OF STAFF, AND

HEAD OF PUBLIC SERVICE.....2ND RESPONDENT

PETER O MANGITI, THE PRINCIPAL SECRETARY,

DEVOLUTION AND PLANNING.....3RD RESPONDENT

MARGARET KOBIA,CHAIRPERSON,

THE PUBLIC SERVICE COMMISSION….....….4th RESPONDENT

(application for stay of proceedings pending the lodging, hearing and determination of an intended appeal from the ruling of the Industrial Court of Kenya at Nairobi (Nduma, J.) delivered on the 15th day of October 2014

in

Nairobi Constitutional Petition No 42 of 2014)

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RULING OF THE COURT

On 23 June 2014, Okiya Omtatah Okoiti and Nyakina Wycliffe Gisebe, hereinafter referred to as the applicants, filed a constitutional petition in which they charged the respondents with various constitutional violations. The 1st respondent, Anne Waiguru is the cabinet secretary in charge of the Ministry of Devolution and Planning. The applicants allege in the petition that she has on occasion acted beyond her powers and unconstitutionally appointed and dismissed officers from the public service, and that she has created policies which undermine the rule of law and constitutionalism. In particular, it is alleged that the 1st respondent has created the *Policy on the Decentralisation of Human Resource Management in the Civil Service*, which is unconstitutional and creates tyranny on civil servants by Cabinet Secretaries. The 2nd respondent, Joseph Kinyua, is the Chief of Staff at State House and the Head of the Public Service. It is said that he breached the Constitution and the Public Service Act by signing letters to dismiss and appoint officers in the public service, and also for meddling in affairs that are the preserve of the Public Service Commission. Peter Mangiti, the 3rd respondent is the Principal Secretary in the Ministry of Planning, while Margaret Kobia, the 4th respondent, is the Chairperson of the Public Service Commission. The 3rd and 4th respondents were sued for gross incompetence, and for allowing the 1st and 2nd respondents to interfere with the smooth and professional running of the public service.

Contemporaneously with the application, the applicants also filed an application in which they sought inter alia, ***"that the Honourable Court be pleased to certify that the Petitioner herein raises a substantial question of law and forthwith refer the case to His Lordship the Chief Justice for appointment of a bench of three to five judges pursuant to Article 165 (4) of the Constitution of Kenya, 2010."***

In addition, the applicant sought an order of stay to temporarily suspend the implementation roadmap of the Policy on Decentralisation of Human Resource in the civil service.

A temporary order of stay was granted by the court (Onyango, J.) when the matter came up for hearing in the first instance, and pending the *inter partes* hearing of that application. The application was eventually heard and determined by Nduma J. On the first issue, the learned judge observed that the matter concerned irregular appointments and transfers which it was alleged constituted a violation of the existing scheme of service in the civil service. The learned judge in his ruling stated that:

> ***"matters of appointments, transfers and removals are routine at the Industrial Court… the matters raised in this Petition cannot be said to be novel nor are they extremely complex as to amount to 'substantial questions' of law …. Furthermore, a determination by one judge of a superior court has the same judicial value as that by a bench of uneven number of judges."***

The court therefore declined to refer the matter back to the Honourable Chief Justice in terms of Article 165 (4) of the Constitution, and ordered that the matter be heard and determined by a single judge of the Industrial Court (now the Employment and Labour Relations Court). In addition, the court refused to grant the order for temporary injunction, finding that the applicants had failed to demonstrate to the court that failure to grant the interim relief sought would occasion them irreparable injury which would not adequately be compensated by an award of damages. The application was therefore dismissed with costs to the respondents.

The applicants are aggrieved with that decision, and have filed a notice of appeal and a memorandum of appeal in which they fault it on several grounds. They have also filed this application under Rule 5(2) (b) of this Court's rules, seeking the following main orders:

> ***"1. The ruling orders and directions made by the Industrial Court (Nduma, J.) on 15th October 2014 be stayed; and***
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> *2.* ***The proceedings in the Industrial Court in Constitutional Petition No 42 of 2014 which is set for hearing on the 10th November 2014 be stayed pending the inter partes hearing and determination of the appeal herein."***

The 1st applicant, Mr Omtatah also swore an affidavit in support of the application. The salient points raised in that affidavit are that the appeal is arguable and raises substantial issues of law, and has overwhelming chances of success; and that should the proceedings in the Industrial Court not be stayed, then the petition will be determined in an unjust manner, thus locking the applicants from attaining justice. These are the grounds that Mr Omtatah argued during hearing of the present application. He submitted that the issues to be raised in the petition are a fundamental importance and therefore would require a bench of at least three judges. He further submitted that in the appeal the applicants will be asking the court to determine the standard of a 'substantial question of law' under Article 165 (4) of the Constitution. As the word used in that enactment is '*shall'* Mr Omtatah submitted that this Court will be required to determine what constitutes a 'matter that raises a substantial question of law.' He further prayed for an order staying the proceedings before the Employment and Labour Relations Court as failure to stay them will render his intended appeal nugatory.

The 1st respondent opposed the application by way of a replying affidavit sworn on 21st January 2015. In that affidavit, the 1st respondent refuted all of Mr Omtatah's claims and deponed that the 1st applicant was guilty of withholding information from the Court; that the applicants had proceeded on the false assumption that they were entitled as of right to an indefinite ex-parte injunction and that in the circumstances, the orders sought should not be granted by this Court.

During hearing the 1st respondent was represented by learned counsel Mr Ngatia, who argued in opposition to the application. Counsel submitted that the appeal is not arguable as there is no legal entitlement of parties to have their constitutional petitions heard by a bench of three or more judges. He submitted that in this case, there was nothing before the Court to show that a decision of a single judge would not be just as efficacious as a decision of three judges. For this reason, counsel contended that the applicants cannot claim to have been deprived of a right, and neither have they demonstrated that there was a nugatory aspect.

Mr Mutinda, learned counsel for the 2nd, 3rd and 4th respondents, associated himself with the submissions of Mr Ngatia, and further argued that from the memorandum of appeal filed by the applicants, there were no arguable issues raised, and on this ground alone, the application ought to be dismissed.

The jurisdiction of this Court under Rule 5(2)(b) of the rules follows a well beaten path. That jurisdiction is original and discretionary. Githinji JA reiterated this fact in ***Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR (Civil Application No. Nai 78 of 2011***) wherein he stated that:

> ***"It is trite law in dealing with 5(2)(b) applications the Court exercises discretion as a court of first instance. …***
>
> ***It is clear that rule 5(2)(b) is a procedural innovation designed to empower the Court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals."***

There are twin principles that the applicants must satisfy before they can be granted an order of stay of proceedings. The first is that the applicants must satisfy the Court that the appeal, if successful, would be rendered nugatory should the orders of stay not be granted; the second aspect is that the applicants must demonstrate that they have a good and arguable appeal that is deserving of ventilation before this Court. These principles are well settled and have been restated in several decisions of this Court, in the line of ***Patel v Transworld Safaris Ltd [2004] eKLR (Civil Application No. Nai. 197 of 2003)*** when the Court stated that:

> ***"In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously, squarely falls on the applicant to place such evidence before the court hearing his application."***

See also ***Githinji v Amrit & Another [2004] eKLR*** where the Court held that:

"The principles applicable in an application under rule 5(2)(b) of the Court of Appeal Rules are now well settled. The applicant must demonstrate that he has an arguable appeal which is not frivolous. Secondly, he also needs to show that the result of such appeal, if successful, would be rendered nugatory if the application for stay was refused."

Even in ***Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd (supra)*** this Court stated that:

"The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

We have considered the pleadings filed before this Court as well as the rival submissions of the parties. In considering whether this is an issue that constitutes an appeal that is arguable, we remind ourselves that an arguable appeal is not necessarily one that will succeed, but one that raises an issue that should be argued before the Court. This was the holding of the Court in ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR (Civil Application 31 of 2012)*** where it rendered itself in the following manner:

"vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...;

vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...;"

Mr Omtatah is of the view that the petition before the Court raises issues of such great importance; that these are anchored on constitutional provisions and as such the petition ought to have been referred back to the Chief Justice for the purpose of empanelling a bench of judges of uneven number. He based this argument on Article 165 (4) of the Constitution which provides as follows:

"(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

By Article 165 (4) of the Constitution, the High Court can certify a matter as one that raises a substantial question of law if there is a question as to ***"whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened"*** or where it involves a question regarding ***"the interpretation of this Constitution including the determination of: (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution…."***

Mr Ngatia correctly pointed out that no party is entitled to have each and every petition so certified as raising a substantial question of law. It is the Court that will identify the issues which in its view raise substantial questions of law. In the persuasive authority of the High Court in ***Philip K Tunoi & another v Judicial Service Commission & another [2015] eKLR (Petition No. 244 of 2014)*** Odunga J., framed this duty as follows:

"My view is informed by the fact that the mere fact that a numerically superior bench is empanelled whose decision differs from that of a single Judge does not necessarily overturn the single judge's decision. To overturn a decision of a single Judge one would have to appeal to the Court of Appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal….it is clear that the only constitutional provision that expressly permits the constitution of a bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law…."

We agree with the learned judge of the High Court that this is the correct approach to Article 165 (4), and add that in actual fact, the Constitution itself is the one that requires the court to certify whether or not an issue raises a substantial question of law at Article 165 (4) which states that:

> ***"(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice." (emphasis ours)***

In the present application, the applicants decry the failure of the High Court to certify the matter as one that raises substantial points of law, yet, in their view, the questions raised by their petition, being anchored on constitutional provisions are grave.

The issue of what constitutes a 'substantial question of law' has fallen for interrogation before the High Court on several occasions. In ***Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR (Petition No 78 of 2011)*** Majanja J, observed that when determining what the term means the court:

> ***"must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court."***

As was the position in ***Community Advocacy Awareness Trust & Others vs. The Attorney General & Others (2012) eKLR (Petition No. 243 of 2011)*** where it was observed that:

> ***"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."***

In these decisions, the courts have adopted with approval the persuasive authority of the Supreme Court of India in ***Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314*** wherein the court held that:

> ***"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."***

We are aware that the matter before the court revolves around the Policy on Decentralisation of Human Resource in the Civil Service as well as an alleged usurpation of the duties of the Public Service Commission by the 1st and 2nd respondent, as well as their alleged derogation from the Constitution, the Public Service Act and the Employment Act. While these are matters, that at a first glance would seem to touch on only employment law, we find them to raise important constitutional questions in line with Article 27, on equality and freedom from discrimination, and Article 47 on the right to fair administrative action. We find that the matters raised in the petition could be described to those akin to those heard by the Court in ***Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR (Civil Appeal No. 290 of 2012***) or the earlier decision of the High Court in ***Federation of Women Lawyers - Kenya (FIDA-K) & 5 Others v Attorney General & Another [2011] eKLR (Petition 102 Of 2011)*** . In the former case, the matter in issue was the appointment of the Chairperson of the Ethics and Anti-Corruption Commission, and it was alleged that the requirements of chapter six of the Constitution had not been complied with, while in the latter case, the matter concerned the appointment of the judges of the Supreme Court, and therein was alleged a breach of section 27 of the Constitution by the Judicial

Service Commission.

In addition to raising constitutional questions, we find that the outcome of the petition before the Employment and Labour Relations Court will affect the entire civil service. The petition therefore has far reaching implications and could well be considered to be a matter of law that is substantial.

As we have observed above, the empanelling of a bench of more than three judges to determine a matter of substantial importance of the law is limited to matters that concern a (threatened) breach of the bill of rights, or a matter relating to the interpretation of the Constitution. In the intended appeal, the Court that will eventually hear the matter will be tasked with considering whether issues surrounding the appointment of persons to the public service can be considered an issue of general public importance. In addition the court will be tasked to consider whether the creation of a human resource policy would be within the purview of a matter that raises a substantial issue of law as alleged by the applicants. While the matter has come up before the High Court several times, with varying degrees of success, we do not think that the matter has been conclusively determined.

One matter that is associated to the determination of 'a substantial question of law' is the fact that once the court certifies it as such is that the Constitution requires that it be adjudicated over by a bench of not less than three judges. In its various determinations, the High Court has expressed the view that "***notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."*** Majanja J., in the ***Harrison Kinyanjui v Attorney General Case*** (supra).

The question therefore arises as to whether the jurisprudence arising from a determination of a question of law by a court comprising three or more judges would be of equal weight as a question of law that is determined by a court comprising of just one judge.

Our preliminary view in answer to this question is that while both the courts envisaged would be exercising the same jurisdiction, the decision of three or more judges would have more jurisprudential weight than the decision of a single judge. To our minds, the inclusion of Article 165 (4) of the Constitution, requiring that a matter of substantial importance be heard by a bench of more than three judges, infers that a substantial question will yield a substantial decision, and as such, that decision would bear more weight.

Our Constitution, though promulgated five years ago, is still nascent, and many of the progressive provisions are yet to be fully realised, and have yet to be appropriately and conclusively construed. This, of course, also applies to the matter now at hand, and we think that it is now time that this Court does so. Having read the ruling that has given rise to the present application, it is our humble view that there was no proper, adequate, appropriate or sufficient exposition of the parameters of what would amount to a substantial question of law, and as such, the barometer of the arguability of the appeal is raised. In our preliminary view, the Hon. Judge took a simplistic attitude to a very important issue, and we therefore agree with Mr Omtatah that the appeal raises *bona fide* and substantial issues which warrant further investigation by this Court.

The applicants argue that there is a possibility that the appeal would be rendered nugatory should this application fail. Mr Omtatah contended that a continuation of the proceedings of the Industrial Court will result in irreversible damage. Referring us to the decision of this Court in ***David Morton Silverstein v Atsango Chesoni [2002] eKLR (Civil Application No Nai 189 of 2001)*** Mr Ngatia urged us not to stay the proceedings. In that application, the Court refused to grant a stay of proceedings before the High Court. The Court reasoning was that:

> ***"what will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard and determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an order for costs can be made to remedy that.***

However, the appeal in this Court would not have been rendered nugatory."

In that application, the Court borrowed from its previous decision in ***Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another LLR No. 5426 (CAK)*** where the Court expressed itself in a similar manner.

In determining whether an appeal would be rendered nugatory, we remind ourselves that we must carefully weigh the competing claims of both parties and each case must be determined on its own peculiar facts. See ***Reliance Bank Ltd v Norlake Investments Limited (2000) 1 EA 227.***

Mr Omtatah did not particularise the damage he perceives would occur but we agree that should the order staying the proceedings not be granted, there is a real possibility that the appeal herein, if successful, would be rendered nugatory as it is possible that hearing of the main petition would go on as directed, and as such his appeal on this issue would be overtaken by events. For this reason, we find that the applicants have demonstrated the nugatory aspect of this appeal.

The upshot of what we have stated is that this application has merit.

We allow it and make the following orders:

The proceedings in Constitutional Petition No 42 of 2014 are hereby stayed pending the determination of the appeal from the ruling and orders dated 19th June 2014;

a. ***The costs of this application shall abide the outcome of the appeal.***

Dated and delivered at Nairobi this 8th day of May 2015

P. WAKI

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JUDGE OF APPEAL

M. WARSAME

……..

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR