IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPLICATION NO. 24 OF 2014 (UR 16/2014)

BETWEEN

MATHEW OUMA OSEKO …..... APPLICANT

AND

THE GOVERNOR, HOMABAY COUNTY

GOVERNMENT, CYPRIAN OTIENO AWITI &

7 OTHERS. ….....RESPONDENTS

AND

GODRFREY ODENY ALI & 9 OTHERS …..... INTERESTED PARTIES

(An Application for stay of any further proceedings under Rule 5 (2) (b) of the Court of Appeal Rules 2010 in Constitutional Petition No. 9 of 2013 in the High Court of Kenya at Homa Bay pending the lodging, hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Homa Bay (Maina, J.) dated 27th January, 2014

in

H.C. CONST. PET. NO. 9 OF 2013)

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RULING OF THE COURT

The appellant in this Notice of Motion dated 10th April 2014, ***Mathew Ouma Oseko***, is the Chairman Homa Bay County Public Service Board, having been appointed and sworn to that position on 16th July, 2013. In a petition filed by him together with one ***Henry Otieno Oginga*** in the High Court of Kenya at Homa Bay dated 30th October, 2013, which was subsequently amended when Henry Otieno Oginga withdrew from the same petition, the applicant sought fifteen orders in the form of redress for alleged

breaches made by the respondents who were The Governor, Homa Bay County Government, ***Cyprian Otieno Awiti***; The Deputy Governor, Homa Bay County Government, ***Hamilton Orata, Isaya Ogwe***, ***Steve Biko Odidi***, ***Joseph Odongo Manyala***, ***Christopher Odero Lesso, Florence A. Ouma, and Damaris Atieno Amolo***, the first, second, third, fourth, fifth, sixth, seventh, and eighth respondents respectively. Later, that petition was amended and some interested parties were joined into the petition whereas Henry Otieno Oginga who had withdrawn from being a party to the petition withdrew. The interested parties were ten and were namely ***Godfrey Odeny Ali, Elly Okeyo Obote, Francis Odhiambo Ndiege, Hon. Otieno Kajwang, Hon. Gladys N. Wanga, Hon. John Mbadi, Hon. James Rege, Hon. Silvance Osele, Hon. Peter Kaluma and Hon. Millie Grace Odhiambo*** being first to ten interested parties respectively. The orders sought in the Amended Petition were in brief that the first, 4th, 5th, 6th, 7th and 8th respondents be restrained by injunctive orders from conducting or continuing to conduct interviews for the position of Chief Officers at Lake Victoria Safari Village, in Mbita or at any other place in the Republic of Kenya; that the exercise being carried out by the 4th, 5th, 6th, 7th and 8th respondents at the behest of the 1st respondent without the involvement of the applicant is illegal, null and

void as it offends Articles 10 and 232 of the Constitution and the County Government Act 2012; that it be declared that Homa Bay County Public Service Board is an independent entity, which does not take instructions from the Governor and is only answerable to the County Assembly; that it is the County Public Service Board that has the mandate to fill any vacant public office; that it be declared that the Governor shall only with the approval of the County Assembly nominate only the officers competitively sourced by the County Public Service Board and not by the Governor nor by the Deputy Governor; that interim order be issued against Isaiah Ogwe restraining him from performing or continuing to perform the role of a County Secretary; that the advertisements for post of County Secretary placed by the second respondent in the Standard and Daily Nation Newspapers on 14th October and 15th October respectively be declared null and void as the same can only be advertised by County Public Service Board; a declaration that the decisions, actions and omissions of the first and second respondents in respect of appointment of the County Secretary are a violation of the County Government Act, 2012 and the Constitution; that the decision of the Governor contained in his letter dated 3rd June, 2013, appointing County Secretary be brought into the court and be quashed pursuant to an order of certiorari; that document signed by the 4th, 5th, 6th, 7th and 8th respondents in collusion with the first and third respondents and advertised in Standard Newspapers on 7th October, 2013 and in the Daily Nation and Star Newspapers on 8th and 9th October, 2013 respectively be quashed pursuant to an order of certiorari for being in contravention of the County Government Act, 2012 and the Constitution; that the Governor be compelled by an order of mandamus to allocate sufficient and adequate funds to the County Public Service Board and execute the necessary documents and instructions to table the Board's Budget before the County Assembly for approval in compliance with the County Government Act 2012; that a permanent injunction be issued to restrain the Governor from interfering with the applicant's exercise of his functions as chairman of the Public Service Board and with the services of the Board; that any person in violation of the provisions of the constitution and of the County Government Act should be declared unfit to hold public office and lastly that the respondents and any interested party who opposes the petition be condemned to pay costs of the petition and of the petitioner.

Together with the petition, the applicant also filed Notice of Motion dated 30th October, 2013 in the same Court, in which he sought seven orders but the one relevant to this application before us was the fourth prayer which was seeking orders:

"4. That pending the hearing and determination of this Petition, this Honourable Court issues orders in the nature of an injunction to restrain the 4th to 8th respondentsnamely, Joseph Manyala, Christopher Lesso, Florence Ouma, Damaris Amolo and Steve B. Odidi by themselves,or individually or by their agents, servants and any person acting through them or their authority from conducting or continuing to conduct interviews for the positions of Chief Officer at Lake Victoria Safari Village in Mbita or at any other place within the county or elsewhere within the Republic of Kenya."

Several grounds were advanced in support of that application and in support of the prayers. We will not delve into them as we do not think that would be necessary at this stage of the matter. However, for clarity, we state that according to the amended petition, particularly at paragraph 5 of the petition, the

fourth, fifth, sixth, seventh and eighth respondents are described as:

"Kenyan citizens and residents within Homa Bay county and members of the Homa Bay County Public Service Board."

In short, they are members of the board, the appellant is its chairman and thus our understanding of the order sought at prayer 4, we have reproduced above is that the applicant does not want his Board members to carry out interviews for appointments of certain applicants to certain positions in the County of Homa Bay perhaps because this was being done in his absence whereas he is the chairman of the Board.

Court at Homa Bay, E.M. Maina J. who according to the record, first granted exparte interim orders but after full hearing of the application, in a ruling dated and delivered on 27th January, 2014 dismissed it stating in doing so as follows i*nter alia:*

"The Petitioners/Applicants contention is that the interviews are irregular and flawed because whereas he is the chairman of the Public Service Board he has not participated in the process. However evidence has been adduced on oath that as the chairman he ought to be the one spearheading the process; that he indeed participated in the initial stages but suddenly failed to show up hence forcing the other members to continue as they felt they had a quorum. Whether they were right to do so is a question to be determined in the petition.For now the issue for determination is whether he has established a prima facie case sufficiently to warrant the grant of a conservatory order. Given the criteria in the already decided cases my finding is that he has not. He has not demonstrated that he is likely to suffer irreparable loss were this court to decline the order. He has made no effort at all to state what loss he stands to suffer. It is financial loss we are told that the substantial part of the interviews had already been conducted so financial loss. ….....

It is also instructive that although he claims to bring this petition/application on behalf of others who were short-listed but were not invited for the interviews and also on behalf of the wider public only three individuals have applied to be enjoined to the petition even after leave was granted to advertise the proceedings in the media."

The learned Judge also vacated the earlier interim conservatory orders. After the above, the learned Judge considered the decision of the High Court in the case of **Joshua Kakianjahi Waiganjo vs AG NBI Petition No. 42 of 2013** and having considered it stated further:-

"Like in the instant case it has not been shown that those people whose names were omitted could not bring the petition in their own names. The Petitioner's locus standi is therefore doubtful."

The applicant was not amused by the ruling. He intends to appeal against it and to that effect he filed notice of appeal dated 31st January, 2014 on the same date. He has also moved to this Court vide this Notice of Motion dated 10th April, 2014 in which he is seeking three substantive orders namely:

"2. That the Honourable Court be pleased to grant an order of stay of any further proceedings in ConstitutionalPetition No. 9 of 2013 in the High Court of Kenya at Homa Bay now schedule to be heard on the 12th May,2014 pending the lodging, hearing and determination of the applicant's intended appeal.

3. That the court do issue any and other orders which will serve the best interests of justice in the circumstances of this matter.

That the costs and incidentals of this application abide the result of the application's intended appeal."

The application is brought pursuant to Rules 5 (2) (b) and 47 of the Court of Appeal Rules 2010. Several grounds are adduced in support of the application. In brief these are that the respondents, pursuant to the ruling of the learned Judge have further perpetrated their illegality by making appointments that are

aggravating the matter and rendering the petition moot; that the County Assembly vetted and approved the list of nominees sent to it by the Governor, based on illegalities and irregularities and thus the applicant stands to suffer prejudice as a result of violations of his constitutional rights and those of the people of Homa Bay County; that the first, second and third interested parties retain legitimate expectations that proper recruitment will be done as advertised; that the applicant has an arguable appeal with good prospects of success on the basis that as the orders sought in the application before the High Court were the backbone of the entire petition, dismissing the application for conservatory order of injunction renders the petition futile; that the applicant's raised *prima facie* case in this application and the learned Judge erred in holding that no *prima facie* case was raised; that the learned Judge failed to consider several pertinent issues raised in the application including the plight of the first to third interested parties who stand to suffer serious losses not financial loss only; that the learned Judge erred in her view that the remedy to the entire matter lay in an early hearing of the petition whereas that may take place after the flawed exercise complained of will have been undertaken; that the learned Judge failed to understand the role of the petitioner, being the chairman of the Board; that the learned Judge failed to understand the principle underlying the provisions of Article 22 of the Constitution particularly as regards those who cannot act in their own name without considering that some were omitted from the interview list and that gave way to ostensible discrimination suffered by them; that the learned Judge failed to apply the principles that guide courts when considering an application such as was before her which was for conservatory injunction. He further contended in support of the application that the success of the appeal, should it succeed, will be rendered nugatory in that the illegal interviews and interference with Boards mandate will continue and result in occurrence of harm and prejudice which the applicant is seeking to prevent; that the exercise for the position of nominated Chief Officers was concluded by the County Assembly and said officers were subsequently appointed by the Governor, and thus the application should be heard urgently to avoid prejudice to the applicant and the county; that it would be greater prejudice if the appointments are allowed to stand only for the appeal to eventually succeed; that the the third respondent, having been illegally appointed through single sourcing, should not be allowed to continue working; that the applicant's rights and freedoms and those of the people of Homa Bay County under the constitution stand to be severely abrogated and compromised if a stay is not granted.

The application was supported by an affidavit sworn by the applicant to which several exhibits were annexed.

The respondents opposed the application. The third respondent, Isaiah Ogwe, did swear and file an affidavit on 2nd May, 2014 in which he deponed *inter alia* at paragraph 11 (b) that following the ruling of the court on 27th January 2014, all the actions sought to be restrained by the injunction sought had been performed as the interviewees have since been employed and he had also been formally sworn in as County Secretary. He also alleged in that replying affidavit that the applicant had inordinately delayed in filing the application as the subject ruling was delivered on 27th January 2014 and this application was lodged on 11th April 2014 some 74 days later. He stated further that as the interviewees are already working, the intended appeal has already been rendered nugatory. On behalf of the fifth, sixth, seventh and eighth respondents and on his own behalf the fourth respondent, Steve Biko Odidi, swore an affidavit and filed it on 5th May 2014 in which he deponed that by the time the petition and the application in the High Court, dismissed on 27th January 2014, were lodged they, members of the Board, had completed interviews for eight (8) out of ten (10) positions advertised and only interviews for two (2) positions were on-going; that after the ruling and pursuant to the ruling, the Board proceeded with the interview for the remaining positions, concluded the same and made recommendations to the appointing authority who has with the approval of the County Assembly made the appointments and the same appointees have since taken their positions and are on duty; that as a result of the applicant's delay in filing the application, the interviews have been completed at great public expense both in terms of time and finances; that the petition in the High Court is already partly heard as the applicant has filed his submissions in support of the petition and other parties have done the same leaving only highlighting to be done and that was to be done on 12th May 2014; that the application is not brought in good faith as the applicant is never present on duty as chairman of the Board; that as the interviews sought to be stopped have been concluded, and appointments made, nothing remains to be stayed and the remedy remaining to the applicant is to get the petition heard and determined conclusively, and lastly that the principles guiding the grant of stay have not been satisfied.

We need to add that the applicant, filed together with the application, draft Memorandum of Appeal in which seventeen (17) grounds were preferred.

In his submissions before us, Mr. Adere, the learned counsel for the applicant raised as an arguable point, the learned Judge's finding that the applicant's locus standi in the entire suit was doubtful and referred us to Article 22 (a) and (b) of the Constitution of Kenya 2010 contending that pursuant to that Article, the learned Judge was plainly wrong and that finding will make it difficult for her to avoid being biased if the proceedings continued before her before this Court deliberates on that aspect. He submitted further that it was also an arguable point whether or not the learned Judge should have dismissed the applicant's application notwithstanding that the third respondent was hired through single and non-competitive sourcing, and his name was not forwarded to the Governor after vigorous vetting. On nugatory aspects, Mr. Adere submitted that the action of the respondents to ensure that those interviewed under the flawed procedure commenced working immediately after the orders of the court delivered on 27th January 2014, was a demonstration of bad faith by the respondents. He thus refereed us to the case of **Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** and maintained that the respondents' acts could not be cured and thus he asked us to grant any orders that would meet the ends of justice as is prayed for in the last substantive prayer in the application.

Mr. Odera Obar, the learned counsel for the first and second respondents, submitted that the applicant has failed to demonstrate any arguable points as all they had done and were doing was attacking the decision of the court and not the merits. He contended that the court had not been shown the manner in which the court exercised its discretion wrongly and thus no arguable points were raised in favour of the intended appeal. In his view, as the applicant is the chairman of the County Public Service Board, a body corporate, he should have had the Board raising any complaints in court and not himself. On the issue of nugatory aspect, Mr. Obar referred us to the case of **David Morton Silverstein vs Atsango Chesoni Civil Application No. NAI 189 of 2001** and submitted that the success of the intended appeal, if it succeeds, will not be rendered nugatory as if the hearing proceeds and unfavourable decision is made, on the success of the appeal, such a decision will be of no effect.

Mr. G.S. Okoth was the learned counsel for the third respondent. He submitted that the third respondent is a Government employee seconded to the County of Homa Bay and that being the case interlocutory injunction could not be ordered against him as that would amount to injuncting the Government. On the second limb, Mr. Okoth's contention was that the appointments sought to be injuncted had been done and the third respondent is currently performing his duties. Further, the suit in the superior court is already done and all that remained is highlighting the written submissions. That being so, the orders sought would be futile.

Mr. Okoth held brief for Mr. Nyauke for the 4th to 10th interested parties who also opposed the application.

Mr. Otieno for the fourth, fifth, sixth, seventh and eighth respondents referred us to the affidavit of Steve Biko Odidi, the fourth respondent and submitted that as at the time the matter was being heard in Homa Bay court, the third respondent was working and applicants for eight positions had been interviewed leaving only two to be interviewed so that by 6th March, 2014 Chief Officers had been appointed. The orders sought under Rule 5 (2) (b) are equitable orders and must be sought without delay. The applicant delayed as the *"horse has bolted."* He added that no arguable appeal has been demonstrated as the learned Judge of the High Court considered all aspects.

Mr. Oronga, was the learned counsel for the 1st, 2nd and 3rd interested parties. He supported the application contending that the application that was before the High Court required the court to exercise discretionary powers, but the learned Judge failed to do so in that she failed to consider relevant issues. The interested parties were thus affected in that they were not listed for interview. He asked us to allow the application as interested parties were prejudiced.

This application, as we have stated above, is brought pursuant to rule 5 (2) (b) of the courts Rules. The applicant seeks both a discretionary and an equitable remedy. The principles upon which the court

exercises its unfettered discretion when considering such an application are now well settled. The applicant who seeks the same remedies under Rule 5 (2) (b) must satisfy the court on two limbs. First, he must demonstrate that the appeal or the intended appeal, as is the case here, is arguable, that is to say that it is not frivolous. Secondly he must show that if the orders he is seeking, such as being sought in this application which is the order of stay of any further proceedings, is not granted, the success of the appeal or of the intended appeal will be rendered nugatory. See the cases of **Githunguri v Jimba Credit Corporation Ltd (No 2) (1988) KLR 838, Madhupaper International Limited vs Kerr (1985) KLR 840,** and **J.K. Industries vs Kenya Commercial Bank Ltd & another (1987) KLR 506.** These two limbs must be satisfied before the applicant can be granted the orders sought. Of course, the court also retains the jurisdiction to always ensure that justice is done and seen to be done in considering whether the two principles have been satisfied. This is a constitutional requirement spelt out in Article 159 of the Constitution of Kenya 2010.

In this Notice of Motion, we do agree with Mr. Odera Obar that the applicant has on the main attacked the decision of the learned Judge of the High Court but has not brought out clearly the arguable points that arise from the same decision. We have however perused and considered the draft memorandum of appeal annexed to the record, and we are of the view that one issue is arguable although we feel, with respect, that the learned Judge cannot be held to have tied her hands or the hands of whoever hears the petition on the issue. That issue is whether or not the applicant could sue on behalf of others as happened here when Article 22 is fully considered. We say that the learned Judge cannot be said to have tied her hands on that issue as Mr. Adere asserted because all the learned Judge said was that whether the applicant could sue on behalf of other people was still a doubtful issue, meaning that the court could still be persuaded otherwise. Further, and in any event, at the interlocutory level a court cannot be said to have made any final decisions on an issue. It is clear that at that level the facts before the court are limited and as such the court reserves the right to make a final decision only after hearing full facts at the full hearing. In short the court could still reach a different conclusion from that made at interlocutory stage. All that notwithstanding, we are prepared to accept that that issue is an arguable issue. The law does not require more than one arguable issue to be demonstrated and thus one arguable issue as shown would suffice.

The next limb to consider is of greater concern, and that is whether if we do not stay the proceedings at Homa Bay High Court, and the intended appeal eventually succeeds, that success would be rendered nugatory. In considering this limb, we note that all parties do agree that by the time the applicant went to court to challenge the appointment of the third respondent, the same respondent was already appointed and was working. In the same vain by the time he moved to court to stop the members of the Board he chairs from interviewing the applicants for the advertised posts in the County of Homa Bay, interviews to fill eight posts had been concluded and only interviews for two posts remained. When the High Court granted interim conservatory injunction orders, those two were not filled, but when on 27th January 2014, the entire application was dismissed and that interim injunction order lifted, the applicant did not move to this Court till 11th April 2014. In the meantime, the fourth, fifth, sixth, seventh and eighth respondents proceeded during the intervening period to complete the interviews and to make their recommendations on the appointments to the County Assembly which made the appointments and the appointees are now working or were working by the time this application was heard. Mr. Adere sees that as an indication that the respondents acted in bad faith and thus calls upon us to accept that the appointments cannot be validated as they were done in bad faith. With respect, we take a different view on that aspect. We see it as an action that was prompted by the delay by the applicant from 27th January 2014 to 11th April 2014 to take any precipitatory action to forestall what action the respondents intended to take on the matter. It would have been unfair to the County Government, the public and the candidates being interviewed to be expected to fail to proceed after the court had lifted the interim conservatory order on 27th January 2014.
In short, by the time we were being asked to stay proceedings in the High Court, the people affected by the continuance of the proceedings were already working. The orders that the learned Judge refused to grant were that the fourth, fifth, sixth, seventh and eighth respondents be injuncted from conducting or continuing to conduct interviews for the positions of Chief Officers at Lake Victoria Safari Village, in Mbita or at any other place in the Republic of Kenya. If that refusal by the High Court is set aside by this Court on the intended appeal against that refusal then they would be stopped only from interviewing the candidates but that will be long after the same interviews will have been completed and those interviewed

had long taken their respective positions. We note that the applicant did not seek mandatory injunctive orders for if that was the order refused them on the appeal being allowed those sought to be mandatorily injuncted would be stopped from working by the success of the appeal against such refusal by the High Court.

The second aspect we need to consider is the extent to which the proceedings we are being asked to stay have gone. All parties again agree that all parties have made submissions in the High Court at Homa Bay such that only the highlighting of those submissions now remain. In such a case one would ask how the success of the intended appeal against the orders of 17th January 2014 will be rendered nugatory if we do not allow this application. The orders of 27th January, 2014 were made in the application for injunction. If the appeal against that order succeeds, the injunction orders would be made. These injunction orders would be made pending the hearing of the petition. If the petition is already almost fully heard, then would the orders made on appeal be orders in futility or orders made in vain? We think so. Indeed, had the proceedings gone on on 12th May, 2014 the date that Steve Biko Odidi swears the highlighting was to be done, the entire matter could be behind us. In our view, it would not be in the interest of the people of Homa Bay to stop proceedings that are just about to be completed all because the learned Judge did not grant conservatory injunctive order as sought by the applicant. The people of the County of Homa Bay need services to be rendered to them by their county leaders including the chief officers and the entire Assembly. It is their right and justice and the constitution demand that they be accorded that right. If at the hearing of the appeal, this Court will find that the orders of the learned Judge should have been set aside then the same will be so set aside but the members of the public in Homa Bay will not have suffered so much.

We have anxiously considered the several authorities to which we were referred, and we have prepared this ruling with the same authorities in mind. In law, the two limbs cited above being the principles that guide this Court in considering an application brought pursuant to Rule 5 (2) (b) must both be demonstrated by the applicant before the stay, injunction, or stay of proceedings can be granted. In this case, as we have indicated above, we are far from being persuaded that on our refusal to grant the orders sought, the intended appeal, if successful would be rendered nugatory. Indeed, if the record reflects the true position of the entire case, then by the time this matter moved to this Court even if the appeal was allowed, all would have happened would have been that the injunction granted would have been granted long after the interviews sought to be stopped would have been fully completed and thus such an order would have been in vain. The above reasons make it difficult for us to exercise our discretion in favour of the applicant.

The application cannot succeed. It is dismissed with costs to the respondents and to the 4th, 5th, 6th, 7th, 8th, 9th and 10th interested parties.

Dated and Delivered at Kisumu this 11th day of July, 2014.

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR