



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, VISRAM & MARAGA, JJ.A)

CIVIL APPLICATION NO. NAI. 265 OF 2011 (UR. 175/2011)

BETWEEN

DENNIS MOGAMBI MANG’ARE.....APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS.....2ND RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD.....3RD RESPONDENT

JUDICIAL SERVICE COMMISSION.....4TH RESPONDENT

(Application for stay of execution pending the hearing of the Appeal against the judgment of the High Court of Kenya

at Nairobi (Ngugi, J, Majanja, J. and Odunga, J) delivered on the 18th day of November, 2011)

In

H. C. Petition No. 146 of 2011)

RULING OF THE COURT

This is an application primarily under **Rule 5 (2) (b)** of the Court of Appeal Rules (the Rules) for stay of execution pending the hearing and determination of an intended appeal. The actual prayer is rather queerly worded as follows:-

“2. THAT the Honourable Court be pleased to grant a temporary stay of execution of the Judgment and Decree of the Honourable Ngugi J., Majanja J., and Odunga J. delivered on the 18th day of November 2011 in High Court Petition No. 146 of 2011 by restraining the Respondents by themselves

or their agents, servants or howsoever from proceeding with vetting of Judges and Magistrates pending hearing and determination of the Applicant's intended Appeal."

If the prayer was simply for "*stay of execution*" we would have had no difficulty in rejecting the same on the grounds that the High Court's decision, from which this intended appeal has been preferred, being a "*negative order*", there was indeed nothing to stay. (See, for example, **John Kipkemboi Kilei v. Wilfred Ritho Njeru & Others [2010] eKLR** and **Municipal Council of Mombasa & Another v. Kenya Transport Association [2011] eKLR**).

However, the second limb of the prayer appears to seek an "injunction" under ***Rule 5 (2) (b)***. The prayer for injunction should have been clearly separated. However, we will invoke the provisions of **Article 159** of the Constitution in overlooking that error and omission.

The background to this application is briefly as follows:-

On 29th August, 2011, the applicant, Dennis Mogambi Mang'are, an advocate of the High Court of Kenya, instituted a petition in the High Court seeking several declarations and orders regarding the constitutionality of the Vetting of Judges & Magistrates Act 2011 (the Vetting Act) and for the stoppage of the Vetting process. There were four respondents named in the petition:

Attorney General; Minister for Justice & Constitutional Affairs; the Judges and Magistrates Vetting Board (the Vetting Board) and the Judicial Service Commission (JSC).

Later the High Court granted leave to six interested parties, namely Party of Independent Candidates of Kenya (PICK), the International Commission of Jurists (Kenya Chapter) (ICJ-K), the Law Society of Kenya (LSK), Kenyans for Peace with Truth and Justice (KPTJ), African Centre for Open Governance (AfridCOG) and Kenya Magistrates and Judges Association (KMJA).

After hearing all the parties, the High Court (Ngugi, Manjanja & Odunga, JJ) in a fairly elaborate ruling rejected the petition, concluding as follows:-

"103. We are of the view that this is a matter that was of great public interest, both to the general public who are the consumers of justice, but also to the judicial officers who will be subjected to the vetting process. We therefore make no order as to costs.

104. We appreciate that the vetting process will cause some anxiety to the judicial officers serving before the effective date who will be subjected to the process. However, we believe that the outcome of the process will not only be beneficial to the country and the judiciary, but also to individual judges and magistrates. As a country, we have chosen to be guided by certain values and principles, among them accountability and integrity.

105. This process will help to underpin these values with respect to the judiciary and restore the judiciary to its respected place as the arbiter of justice in Kenya. We believe that rather than undermining judicial independence, the process, which is limited in time, will enable the judiciary operate with confidence in its central role of upholding the rule of law in Kenya, free from the shackles that have reduced it to a timid player in government due to the widespread perceptions of incompetence and corruption."

It is against that decision that the applicant intends to appeal, and in the meantime has filed this application dated 23rd November, 2011 in which it seeks the order stated earlier.

There are eleven (11) grounds on which the application is premised as follows:

"(a) The Applicant being dissatisfied with the Judgment of Honourable Ngugi J., Manjanja J, and Odunga J. has preferred an appeal against the entire Judgment of the superior Court.

- (b) That the intended appeal if successful shall be rendered nugatory and ineffectual unless this Honourable Court be pleased to grant the prayers as sought.**
- (c) The intended appeal is arguable and raises substantial points of law.**
- (d) The intended appeal if successful may be rendered nugatory as the vetting process would have been concluded and the Judges and Magistrates may suffer irreparable prejudice.**
- (e) That the applicant has an arguable appeal with overwhelming chances of success and it is just and equitable in the peculiar circumstances of this case that this Honourable Court be pleased to grant a stay and/or injunction as prayed.**
- (f) That unless the stay and/or injunction herein is granted, the intended appeal by the Applicant would be rendered nugatory.**
- (g) The intended appeal raises exceptional issues of law of universal implications on the independence of the Judiciary.**
- (h) The Applicant has an arguable appeal with chances of success for the reasons;**
- (i) The Learned Judges erred in law and fact by failing to appreciate that Section 23 (1) (2) of the Sixth Schedule did not remove the protection of Judges and Magistrates from the Provisions of article 19, 20, 21, 22, 23, 24, 25, 26, 27, 47, 50 of the Constitution.**
- (i) It is in the interest of justice that this application is allowed.**
- (j) If a stay of execution is not granted, the Judges and Magistrates may suffer irreparable damage as they may be removed in a manner unknown by the Constitution.**
- (k) It is in the interest of justice that a stay of execution be allowed.”**

When this application came up for hearing before us on 18th January, 2012, Dr. Khaminwa and Mr. Ondieki appeared for the applicant, while Ms. Munyi appeared for the Attorney General and the Vetting Board; Mr. Mwenesi for KMJA; Mr. Nderitu for ICJ Kenya; Mr. Anzala for JSC; and Mr. Mutua for LSK.

On that day, that is on 18th January, 2012, the Court heard submissions from Dr. Khaminwa, Mr. Ondieki and Mr. Mwenesi, and then adjourned. The hearing resumed on 31st January, 2012 when a Mr. Wachira, learned counsel purporting to represent the Vetting Board but without having filed a notice of appointment, appeared before us, and sought adjournment to enable his client, the Vetting Board, to engage its own counsel, as it no longer wanted to be represented by the Attorney General. His application for adjournment was strongly supported by the Attorney General and Law Society of Kenya who both felt that to deny him an adjournment would deny the Vetting Board the right to be represented and heard. The application was equally strongly opposed by counsel representing the applicant and KMJA who asked that should the Court be inclined to grant the adjournment, then applicant and KMJA were entitled to a temporary order of stay and injunction. In a ruling delivered on 31st January, 2012, this Court granted the Vetting Board a brief adjournment, and issued a restraining order for a limited period of 21 days, with the caveat that the said order was not subject to renewal. As that restraining order lapses on 22nd February, 2012, and we promised counsel that we would endeavour to deliver our ruling before then.

The hearing then resumed on 14th February, 2012 when the Vetting Board was represented by learned counsel Muturi Kigano, Nzamba Kitonga and Lucy Kambuni, while JSC was represented by Mr. P.K. Muite, in addition to Mr. Issa and Mr. Omwanza represented PICK. The other representations were as before. At the commencement of the hearing, Mr. Mwenesi, for KMJA sought to file a further affidavit. Except for Dr. Khaminwa, all other counsel strongly objected to the same, citing possible prejudice. We

denied Mr. Mwenesi leave to do so and said we would give our reason or reasons in this ruling. The reason for declining that application was that it was made at a very late stage when the applicant and the KMJA had completed submissions; and that it would have inevitably caused further delays in the event other parties sought leave to reply to the same. Finally, Mr. Mwenesi could have made that application at the Court's previous sitting on 31st January, 2012. We were of the view that it was too late in the day to make such an application, given the urgency of concluding this matter on 14th February, 2012.

Now, going on to the main application, briefly, the submissions made before the Court were as follows:

In support of the application, Dr. Khaminwa, Mr. Ondieki and Mr. Mwenesi submitted that the intended appeal was arguable because **section 23** of the **6th Schedule** to the Constitution, and the entire vetting process were unconstitutional as it contradicted the substantive provisions of the Constitution relating to the independence of the Judiciary entrenched in **Article 160** of the Constitution; that the process undermined the security of the tenure of Judges under **Article 167**; that the said **section 23** was discriminatory of the serving Judges; that it offended the doctrine of separation of powers between the three arms of Government; that it violated **Article 25 (a) and (c)** of the Constitution which protects an individual from torture, cruel and inhuman treatment and his right to a fair trial; that **section 23** was in conflict with several substantive provisions of the Constitution, and not being part of the substantive of the Constitution, it ought to be declared null and void; that it contradicted most international instruments such as the Bangalore Principles on judicial independence, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, among others; and finally that the said section and the Act, in denying Judges the right of appeal, offended the constitutional provisions and all international norms of fair trial.

With regard to the nugatory aspect under **Rule 5 (2) (b)**, counsel argued that should the vetting process begin before the main appeal is heard and determined, the applicant and members of KMJA, in particular, would suffer prejudice, in that some members of KMJA risked losing their jobs without due process. Counsel reiterated their earlier submissions that members of KMJA were not opposed to vetting per se; they were simply opposed to an unlawful process, and asked that the application for injunction be allowed pending the hearing and determination of the appeal.

In reply, counsel representing the respondents argued that the applicant had no arguable appeal and called for the dismissal of the application. Mr. Nzamba Kitonga, Senior Counsel, narrated the history leading to the enactment of **section 23** aforesaid, and how the people of Kenya had endorsed the vetting process in the Referendum approving the Constitution. He and Mr. Muite, Senior Counsel, argued that although the said **section 23** prohibited any right of appeal, the Act has nevertheless provided for a "review" of the decision of the Vetting Board before the same tribunal. The other counsel opposing the application echoed similar sentiments.

With regard to the nugatory issue, counsel argued that the Act had provisions for compensation, and any judge was at liberty to opt for the same, with or without the vetting process.

Finally, they argued that it was not in the public interest that the vetting process be stopped or delayed at this late stage, when a huge public investment had already been made, and the process about to begin:

The principles applicable to the determination of applications under **Rule 5 (2) (b)** of the Rules are well settled. As was observed by this Court in the case of **Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd.**, Civil Application No. Nai. 157 of 2006 (unreported):

"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 that 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 that appeal will be rendered nugatory." {See *Githunguri vs. Jimba Credit Corporation Ltd. No. 2 (1988) KLR 838, J.K. Industries Ltd. Vs. Kenya Commercial Bank Ltd. (1982-88)*}."

In addition to the above, the Court is also obligated by statute to consider and apply the overriding objective of civil litigation, that is to say, to facilitate the just, expeditious, proportionate and affordable resolution of the appeal – **sections 3A** and **3B** of the Appellate Jurisdiction Act.

Keeping all those principles in mind, we must ask ourselves two important questions: is this appeal arguable, or in other words, is it a frivolous appeal, and, secondly, will the appeal be rendered nugatory in the event we refuse to grant the injunction sought.

With regard to the first question, clearly we cannot say, at this stage that the appeal is frivolous, and not arguable. An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the Court’s consideration.

Although only one arguable point is sufficient for this Court to exercise its discretion to grant the order sought, we are able to discern several arguable points: Whether **section 23** of the **6th Schedule** to the Constitution contradicts other substantive provisions of the Constitution, and if it does, which prevails; whether it undermines the security of tenure of the serving Judges under **Article 167**; whether it contradicts the Bill of Rights, especially with regard to rights of a fair trial; whether it offends several international instruments which are part of our laws, and so forth. These are clearly arguable issues, as was evidenced by the arguments made by each side before us. We have no hesitation in saying that the appeal is arguable.

The more difficult issue is the one relating to the second limb of **Rule 5 (2) (b)** – whether the appeal will be rendered nugatory should we refuse to grant the injunctive relief sought. It is here that we must think and look outside “**the box**”. There is absolutely no doubt in our collective minds that the issue before us is one of considerable public interest. No one denies that the Kenyan people resoundingly voted for the vetting process by approving the Constitution at the Referendum. The judicial officers themselves have said that they are not opposed to the vetting process – as was clearly evident in submissions before us, and, indeed, before the High Court. Their complaint is essentially with some parts of the Act, which they believe are unlawful, and an infringement of their fundamental rights. They want the process to be fair and lawful. Can that be accomplished by halting indefinitely the process? We think not, given the principles of proportionality and balance vis a vis the public. There is undeniably a great public interest in the implementation of the Constitution that must override the private right or interest to halt possible prejudice to the administration of justice. Here there is a legitimate public expectation that the vetting process must continue, and we must take judicial notice of the fact that the Vetting Board is ready to begin its work; that it has a timeline within which to complete its work; and that considerable public funds have been invested into this process. We simply cannot halt its work. The balance of convenience is not in favour of the applicant. The applicant, and more particularly members of KMJA, are also entitled to their day in court. And the order that best commends itself in the special circumstances of this case, is that we dismiss the application for stay and/or injunction; that we vacate the interim order for injunction given on **31st January, 2012**; and we direct that the intended appeal be heard and determined expeditiously. Those are our orders. We make no orders as to costs.

Dated and delivered at Nairobi this 21st day of February, 2012.

E. O. O’KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VIRSRAM

.....
JUDGE OF APPEAL

D. MARAGA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.