



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

JUDICIAL REVIEW NO. 8 OF 2019

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 10;19(2); 20(1), (2), (3) & (4); 21(1); 23(3); 35(1); 40; 41; 47(1) & (2); 50(1), 258(1) and 259(1)

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT 2012

AND

IN THE MATTER OF: THE COUNTY ASSEMBLY SERVICE ACT 2017

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: THE COUNTY ASSEMBLY OF LAIKIPIA STANDING ORDERS

AND

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF: THE LAIKIPIA COUNTY REVENUE BOARD ACT, 2014

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

BETWEEN

BONIFACE MURUGI NDAI.....APPLICANT

VERSUS

COUNTY ASSEMBLY OF LAIKIPIA.....1ST RESPONDENT

SELECT COMMITTEE OF

COUNTY ASSEMBLY OF LAIKIPIA.....2ND RESPONDENT

SPEAKER COUNTY ASSEMBLY OF LAIKIPIA.....3RD RESPONDENT

CLERK COUNTY ASSEMBLY OF LAIKIPIA.....4TH RESPONDENT

RULING

1. The Applicant through the motion dated 27th November 2019 seeks to stay the judgment and decree of this court pending the intended appeal and the Applicant to stay in office till the determination of the said appeal. The motion filed on 28th November 2019 is supported by grounds on the face of it and the Applicant's affidavit sworn on 27th November 2019. The Applicant desirous of appealing the decision of the court seeks to have *status quo* maintained and the stay of the judgment and the decision to impeach him from office.

2. The motion was opposed by the Respondents who filed grounds of opposition and a replying affidavit sworn by the 4th Respondent on his own behalf and on behalf of the other Respondents. In the affidavit sworn on 2nd December 2019 and filed on 4th December 2019, the Respondents assert that the notice of motion is a non-starter, incompetent, frivolous, scandalous and an abuse of the court process and ought to be struck out with costs. The Respondents assert that contrary to the assertions in the Applicant's application the Governor has the power to appoint an acting County Executive Committee member to fill the gap left by the removal of the Applicant. The Respondents assert that it is unreasonable for the Applicant to assert that it is only he and no one else who can execute the office of County Executive Committee Member Finance. The Respondents assert that the Applicant has not met the test of grant of orders of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules 2016.

3. The parties sought to canvas the motion by way of written submissions and the Applicant filed submissions as well as a case digest as did the Respondents. The Applicant submitted that the issues for determination by the court were whether the application for stay had been brought without unreasonable delay and secondly, whether the Applicant stands to suffer irreparable loss should the stay of execution not be granted. Thirdly, whether security for the due performance of the order should be provided. The Applicant submitted that the relief of stay of execution pending the hearing and determination of the appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules 2010 which provide that

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The Applicant submitted that he had demonstrated sufficient cause to warrant the stay of execution of the court's judgment and decree delivered on 26th November 2019 pending the hearing and determination of the appeal against the Judgment and Decree. The Applicant cited the case of **Trattoria Ltd v Joamimah Wanjiku Maina NBI Misc. Appl. No. 431/2013** where the court held that what amounts to unreasonable delay depends on the peculiar circumstances of each case. The Applicant also cited the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another [2014] eKLR** cited with approval in the case of **Gahir Engineering Works Ltd v Rapid Kate Services & Another [2015] eKLR** and submitted that the motion had been brought without unreasonable delay owing to the circumstances of the matter. Citing the case of **Apar Industries Limited v Joe's Freighters Limited [2015] eKLR** the Applicant submitted that the application was made without undue delay and if there was any delay occasioned it was excusable and beyond the control of the Applicant who had taken the earliest and most appropriate steps to ensure immediate filing of the application. The Applicant submitted that as to whether the Applicant stands to suffer irreparable loss should the stay of execution not be granted, he submitted that this limb forms the cornerstone of the application for stay of execution pending the hearing and determination of the appeal herein and relied on the case of **Antoine Ndiaye v African Virtual University [2015] eKLR**. The Applicant contended that execution of the judgment of the court will expose him to loss that can never be adequately compensated in damages. The Applicant submitted that on the question of irreparable loss, it is trite law that in order to show irreparable harm, a party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. The Applicant submitted that being the current Laikipia County Government Finance Minister, his removal from office will occasion the Government and the people of Laikipia irreparable harm and damage in that being the CEC of Finance he is the head of all county entities and his removal will leave a huge gap, that there being an order to pay all pending bills which is a long process it will not happen without the signature of the Applicant, the Applicant is a mandatory signatory of the IFMIS payment, the County will not be able to initiate any new projects, the County will experience financial constraints and all the processes will halt unless the budget process is completed and currently the County staff have threatened a strike due to delayed payment of salaries occasioned by the normally slow budgetary process and that his removal from office will leave a vacuum that cannot be filled within the shortest time. He submitted that the foregoing is without a doubt what amounts to irreparable loss that can never be adequately compensated in damages and to that end submitted that the Applicant had satisfied that he will suffer irreparable injury and loss incapable of compensation by way of damages. He submitted that if replaced and the Court of Appeal finds in his favour he will not be able to get his job back as the position will have been filled. The Applicant submitted that as to whether security for due performance for the order should be furnished, he submitted that the judgment herein was not a monetary one and as such no security was needed for the performance of the same. Notwithstanding that, he

submitted that he was ready and willing to comply with the just terms and directions of the court attendant to the reliefs sought. He submitted that it was only fair and equitable for the grant of the relief sought

4. The Respondents submitted that the issues for determination by the court were whether there is any order/decreed capable of being stayed and secondly, whether the Applicant had satisfied the conditions for grant of stay of execution pending the hearing and determination of the application and the intended appeal, and thirdly, whether the Applicant is entitled to the reliefs sought. The Respondents submit that there is no order capable of being stayed in this dispute. They submitted that the order granted by the Court was that the Applicant's notice of motion be dismissed. The Respondents assert that the Judgment did not order any of the parties to do anything or refrain from doing anything and accordingly there is nothing which is capable of being stayed. The Respondents submitted that the *sui generis* nature of the judicial review proceedings is that there is nothing to be stayed. The Respondents cited the case of **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR** where Kantai JA held *an order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with*

The Respondent submitted that the issue of negative orders had been addressed by the Court of Appeal in the case of **Nairobi Kiru Line Services Limited v Sub-County of Othaya & 2 others [2017] eKLR** where the court held *the High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in any application for stay to enforce or to restrain by injunction.* The Respondents urged the court to find that judicial review applications being *sui generis* there is no order capable of being stayed. As to whether the Applicant has satisfied the conditions of grant of stay of execution, the Respondents submitted that the Applicant had not met the test for the grant of the orders sought. The Respondents submitted that under Order 42 Rule 6 the conditions for grant of stay are set out and a clear reading of the section indicates the conditions cannot be severed and that the 3 conditions must be satisfied simultaneously and cited the case of **G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR** on the issue. As to the substantial loss, the Respondents submitted that the Applicant must demonstrate the substantial loss likely to be suffered. The Respondents cited **Halisbury's Law of England vol. 17 paragraph 14** for the argument that the incidence of the legal burden lay on the applicant to show the loss he was to suffer. The Respondents argued that contrary to the assertions in the Applicant's application the Governor has the power to appoint an acting County Executive Committee member to fill the gap left by the removal of the Applicant. The Respondents assert that it is unreasonable for the Applicant to assert that it is only he and no one else who can execute the office of County Executive Committee Member Finance. The Respondents argue this is not a loss to be suffered by the Applicant as the Governor can appoint a suitable replacement. The Respondents cited the case of **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** and argued that the Respondents being successful litigants are being frustrated by the Applicant trying to restrict this by pursuing the orders sought. The Respondents urge the dismissal of the motion with costs.

5. The motion by the Applicant is for stay of execution of the orders and decree of this court pending the hearing and determination of the intended appeal against my decision. The decision was rendered on 26th November 2019 in a judicial review application. Judicial review is *sui generis* and the decline of the court to issue the orders of *certiorari*, *mandamus* or prohibition results in a negative order incapable of either stay or execution. As such, the motion before me is devoid of merit as there is nothing to stay in my decision. I neither ordered nor directed anyone to do or not do anything. The application dated 27th November 2019 and filed on 28th November 2019 is dismissed with costs to the Respondents.

6. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE