



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 12 OF 2017

(Before D. K. N. Marete)

DR. MOSES KIPROTICH LANGAT.....PETITIONER

VERSUS

THE KERICHO COUNTY ASSEMBLY

COMMITTEE ON APPOINTMENTS.....1ST RESPONDENT

THE SPEAKER OF THE KERICHO

COUNTY ASSEMBLY.....2ND RESPONDENT

KERICHO COUNTY ASSEMBLY.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

This is an application by the respondents/applicants dated 21st August, 2018 seeking the following orders of court;

- a) *THAT this application be certified as urgent.*
- b) *THAT service of this Application be dispensed with in the first instance.*
- c) *THAT this honourable court be pleased to grant a temporary order of stay of execution of the decree and/or judgement herein pending the hearing and determination of this Application inter-partes and/or further orders of the court.*
- d) *THAT this honourable court be pleased to grant an order of stay of execution of the decree and/or judgement herein pending the hearing and determination of Appeal filed against the said decree and/or judgement.*

It is grounded as follows;

1. *THAT the Applicants have lodged an Appeal against the decree and or/judgment herein in the Court Appeal.*
2. *THAT the Applicants have an arguable appeal.*
3. *THAT this Application has been brought expeditiously and without unreasonable delay.*
4. *THAT the Applicant will suffer irreparable loss and damage if an order of the stay of execution is not granted.*
5. *THAT this Application will be rendered nugatory if an interim Orders of Stay of Execution pending the inter partes hearing hereof is not granted and this Application succeeds thereafter.*
6. *THAT the filed Appeal will also be rendered nugatory if an order of stay of execution is not granted and the said Appeal succeeds*

thereafter.

7. *THAT the Application is made in good faith.*

8. *THAT the Respondent will not suffer any prejudice if the orders sought are granted.*

The petitioner/respondent vide his Grounds of Opposition dated 25th May, 2018 opposes the application. These are as follows;

1. *The application has been brought to court in bad faith, is incompetent, misconceived, bad in law and a waste of precious judicial time and resources as the applicant's representative, to wit, the speaker has committed perjury in paragraph 2 of his affidavit of 21st May 2018 by falsely alleging that he had been duly authorized by the assembly to bring the application and swear the affidavit.*

2. *The assembly as a respondent herein has never been formally informed about the outcome this petition nor has it taken a position with regard to whether or not to appeal.*

3. *The application has been overtaken by events as the Petitioner/Respondent was duly sworn in on 25th day of May 2018 at 10.00AM.*

4. *The orders sought in this application are prejudicial to the functions of the executive arm of the county government and an affront to the public interest.*

5. *No deposit has been made in court and the assembly's relevant committee has not sanctioned any expenditure towards making a deposit as security for costs.*

6. *No prejudice will be suffered by the applicants' herein if the orders are not granted*

7. *Leave has not been sought and obtained by the applicant to challenge the decision of this Honourable court.*

8. *The applicant has not laid sufficient basis on which the court can grant the orders sought.*

9. *The court's decision was true, just and legally sound and that the court properly directed itself and used correct principles.*

10. *The application does not serve any public interest.*

The application came for hearing on 30th May, 2018 with Mr. Ochieng, counsel for the respondents/applicants introducing it as an application for stay of execution of the decree of court as annexed in her supporting affidavit.

The applicants further submitted that her only duty herein is to establish that the appeal is arguable and this had been done through the filing of a Notice of Appeal on 18th May, 2018. Further, there is need to preserve the *status quo* so that the appeal is not rendered nugatory in the event it is upheld. The applicant further submitted that the application was brought out in good faith and that she was ready to abide by only conditions set out by court.

The applicants also faulted the Grounds of Opposition by the petitioner/respondent for being issues of fact which should have come out in an affidavit. She prayed that these be expunged from record and the respondent be left with issues of law alone. He concluded by praying that the application be allowed as prayed.

The petitioner on the other hand submitted that this application is in bad faith and a waste of precious judicial time. He further submitted that the supporting affidavit of David Rono is perjury in that he is not authorized to do this by the County Assembly. Mr. Ochieng objected to this line of submissions on grounds that this is an issue of fact and that counsel was adducing evidence from the bar. He further objected to paragraph 1, 2 and 3 of the Grounds of Opposition for being issues of fact.

The court overruled the objection and chose to deal with the matter at a later stage of this application.

Mr. Kemboi for the respondent further submitted that paragraph 2 of the supporting affidavit of Dominic Rono, the resolutions of the County Assembly, must be only on a formal session of the Assembly and not the dictates of the speakers. The speaker cannot arrogate himself the authority to do this for the assembly. The application is therefore unmerited for lack of leave to challenge the decision of court or even an application for stay of execution from the onset: the date of pronouncement of judgement in court.

In the penultimate, the respondent submitted that the court directed itself and used the correct principles of law in arriving at its decision and therefore the application should be dismissed.

In rebuttal and answer, Mr. Ochieng submitted that this application is brought out under rule 32 of the Protection of Rights and Fundamental Freedom (Practice and Procedure) Rules, 2013. These allow the application notwithstanding their absence at the time of judgement. Further, leave is not necessary for this nature of appeals: it is of right.

He reiterated his earlier submission that Grounds of Opposition only convey issues of law and not facts. Facts should be adduced by way of

affidavit. He in the penultimate argued and submitted that the Speaker is the Chief Executive Officer (CEO) of the 1st Respondent and carries authority to swear affidavits on her behalf.

This is an application for stay of execution. The prerequisites for such stay of execution are;

- Offer of security by the applicant
- Timeliness of the application for stay
- Nugatory, the possibility of a negation of the appeal in the event of success.
- Arguable/probable case

The applicants submitted an emphasis on the last limb. I however note that the application substantially satisfies all the requirements for stay of execution except the one on negation. The essence of an order of stay of execution is to preserve the subject matter so as to avail recourse to the same by a successful appellant. In the circumstances of this case, the respondent/applicant's has not demonstrated a case of negation of their interests in the event of not granting the order of stay.

Having recited the respective cases of the parties, it is timely that we scrutinize the objection by counsel for the respondent. Mr. Ochieng objected to the petitioner/respondent's Grounds of Objection for being fact laden instead of law laden as is required of the law. It is not in dispute that grounds of opposition should be a citation of the law whereas an affidavit would be necessary as a repository of the factual basis – evidence, in pleadings. However, the border line of the two can be thin indeed.

What would be the consequences of ridding the Grounds of Opposition by the petitioner/respondent of their factual content? To me, this would partially disable the petitioner/respondent's case. Perhaps one should relook at the submissions of the respondent/applicant on this to find respite. This was to the extent that this motion was brought out in pursuance of the respondent's fundamental rights under the Protection of Rights and Fundamental Freedoms (Practice and Procedure) Rules, 2013. If this be so, certain endowments come hand in hand with this process. Foremost of this is the absence of form in such proceedings. Agreeably, the petitioner/respondent should have filed a replying affidavit in support of his case. This is, however, not fatal. He must therefore be allowed to enjoy the benefits of the constitution and constitutionalism. This is so granted.

Again, Article 159 (2) (d) and (e) of the Constitution of Kenya, 2010 dictates that justice shall be administered without undue regard to unprocedural technicalities and also that the purpose and principles of this constitution shall be protected and promoted in the exercise of judicial authority by courts and tribunals. It is my feeling that any pursuance of the submissions by counsel for the respondent/applicant in support of this objection are tantamount to a call for subservience to procedural technicalities and also a disregard to the purpose and principles of the constitution as is illustrated earlier in this piece.

I agree with the submissions by the petitioner/respondent that no prejudice would be suffered by the respondents/applicants if the orders sought herein were not granted. In the event of upholding of the appeal as set out, the appeal court would set out the parameters for attainment of relief by the respondents. This would be the easier option bearing in mind the consequences of staying the judgment and orders of court as made. The people of Kericho, Kenya and the entire global community would continue to suffer injustice arising out of any grant of stay of execution. This would call for a continued vacancy in lieu of appointment to this critical office and service delivery sector. So you see.

In the circumstances, I deem this a case for disallowing the application.

I am therefore inclined to dismiss the application with costs to the petitioner/respondent.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Ochieng instructed by Sila Munyao & Company Advocates for the petitioner/respondents.
2. Mr. Kemboi holding brief for Langat instructed by Onesmus Langat & Company Advocates for the petitioner/respondent.