



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CONSTITUTIONAL PETITION NO. 6 OF 2017

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ARTICLES 1(3), 2, 3, 10, 19, 22, 23, 36, 41, 47, 50, 162,

165, 176, 200, 230, AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE MANDATE OF THE SALARIES AND REMUNERATION

COMMISSION AS SET OUT UNDER ARTICLE 230 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 13 AND 14 OF THE SALARIES AND RUMENRATION ACT

AND

IN THE MATTER OF: SECTIONS 12, 13 & 14 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF: THE PARLIAMENTARY SERVICE COMMISSION ACT

BETWEEN

KAMAU AIDI.....1ST PETITIONER

EDWARD LUBENDI.....2ND PETITIONER

SALIM JUMA.....3RD PETITIONER

DENIS MUSYOKA MUTUL.....4TH PETITIONER

MKARE JEFWA.....5TH PETITIONER

MOHAMMD DUBE.....6TH PETITIONER

MBOCHE WANYOIKE.....7TH PETITIONER

MICHAEL NGALA.....8TH PETITIONER

MAHMOUD SANTUR.....	9 TH PETITIONER
OSMAN MOHAMMED.....	10 TH PETITIONER
AHMED SURROW.....	11 TH PETITIONER
MOHAMOUD KAMAYA.....	12 TH PETITIONER
SALAD BORU.....	13 TH PETITIONER
J. K ARITHI.....	14 TH PETITIONER
MARTIN K. KARIUKI.....	15 TH PETITIONER
JIM KAUMA.....	16 TH PETITIONER
ELIJAH MUTAMBUKI.....	17 TH PETITIONER
FELIX MBIUKI.....	18 TH PETITIONER
PURITY KAMURUCHI.....	19 TH PETITIONER
JENARD MWIGGEH.....	20 TH PETITIONER
CHRIS KINYANJUL.....	21 ST PETITIONER
MUTIE JOHN.....	22 ND PETITIONER
LINUS MIINYAN.....	23 RD PETITIONER
JULIUS ARIWAMOI.....	24 TH PETITIONER
PATRICK LESHORE.....	25 TH PETITIONER
AINEA INDAKWA.....	26 TH PETITIONER
RICHARD CHEPKONA.....	27 TH PETITIONER
JANE MUTAI.....	28 TH PETITIONER
BERNABA KOSGEL.....	29 TH PETITIONER
JOSEPH KOECH.....	30 TH PETITIONER
JASPER MUTUIRI.....	31 ST PETITIONER
JOSEPH MALINDA.....	32 ND PETITIONER
SHEDD SIMOTWO.....	33 RD PETITIONER
DANIEL KONYANGO.....	34 TH PETITIONER
MARTIN EPUS.....	35 TH PETITIONER
ISAAC KITUR.....	36 TH PETITIONER
PATRICK KAMWESSAR.....	37 TH PETITIONER
AMBAKA KILINGA.....	38 TH PETITIONER

JOHN MOSONGO.....39TH PETITIONER
ALLA MABUKA.....40TH PETITIONER
ISAAC FELIX OLWERO.....41ST PETITIONER
PHILIP OTIENO.....42ND PETITIONER
BOB OTIENO.....43RD PETITIONER
TOM ONYANGO.....44TH PETITIONER
JAMES NYAOGA.....45TH PETITIONER
DANIEL ORINA.....46TH PETITIONER
JACOB NGWELE.....47TH PETITIONER
THE SOCIETY OF CLERKS AT THE TABLE (SOCCAT)..48TH PETITIONER

VERSUS

SALARIES AND REMUNERATION COMMISSION (SRC).....RESPONDENT

RULING

1. Before me is the Respondent/Applicant's notice of motion application dated 22nd June 2018 seeking stay of the execution of the court judgment of 4th June 2018. The application is supported by the affidavit of Anne Gitau which is relied on by the Respondent/Applicant for its full tenor and effect. In the motion seeking stay, the Respondent/Applicant asserts that the judgment and decree of the court is one whose execution would cause the intended appeal nugatory should the Respondent/Applicant succeed on appeal. The Respondent/Applicant's counsel Miss Wafula argued the motion with the assistance of Mr. Sitienei. They submitted that the motion is based on the following principles of law – that firstly, the fact that a notice of appeal has been filed which premise is that an appeal is now live before the Court of Appeal; secondly, substantial loss would result if no stay is granted since despite the fact the Respondent/Applicant is not the employer it has a duty under Article 230(5)(a) in execution of its mandate to ensure the public wage bill is fiscally sustainable; and thirdly that the motion was filed without undue delay. The Respondent/Applicant argues that the court has discretion to grant or deny the grant of stay and that there were good grounds to grant a stay. Counsel for the Respondent/Applicant argued that relying on the authority of **Amal Hauliers Ltd v Abdinasir Abukar Hassan [2017] eKLR** and **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** as well as the case of **Selestica Ltd v Gold Rock Development Ltd [2015] eKLR** that the Respondent/Applicant had an arguable appeal with a high probability of success. Counsel for the Respondent/Applicant asserted that if the decision is not appealed against the banding and structure of wages will remain distorted and the decision will have a ripple effect within the counties and other similarly placed officers will want their positions re-graded. On exceptional circumstances, counsel for the Respondent/Applicant urged the court to find that the balance tilts in favour of granting the Respondent/Applicant the orders sought as the Respondent represents the ultimate employer *Wanjiku* and that no prejudice would be suffered by the Petitioners if the appeal is unsuccessful as they will be placed in the position the judgment placed them.

2. The Petitioners were opposed to the application by the Respondent/Applicant. They filed a replying affidavit sworn by the 1st Petitioner in which it was deponed that the Respondent had failed to meet the conditions for the grant of stay and that the Respondent was in contempt of court. On his part, Mr. Sigei argued that the Petitioners had not seen any notice of appeal and that what the Respondent/Applicant had filed was a letter dated 14th June 2018 seeking proceedings. He stated that the Petitioners stood to lose if the Court were to grant the stay. He submitted that under Article 230, the Respondent/Applicant had not demonstrated that it stood to suffer any loss should the judgment of the court be enforced. He argued that if the Respondent/Applicant was successful on appeal, any amount paid to the Petitioners would be recovered. He stated that the grant of stay is discretionary and the court is called upon to balance the interest of the Respondent/Applicant and the successful Petitioners who should also be allowed to enjoy the fruits of their judgment. The argument that the Respondent/Applicant has an arguable appeal is unsubstantiated and there are no exceptional circumstances in existence to warrant the grant of the prayers sought in the motion. He argued that the authorities cited by the Applicant did not apply to the circumstances of the case before me as they related to a finding on quantum, the issue of vacant possession, the issue of loss that was unproved in the case of **Muthusi v Gituma Ngomo & Another**. He argued that the court should dismiss the motion with costs.

3. Miss Wafula in her reply submitted that there was proof that the notice of appeal was served as counsel who held brief for Mr. Sigei when the matter came before court indicated that he had been served with the notice of appeal but not the notice of motion leading to the deferment of the hearing of the motion. She submitted that the county officials are paid from Government funds allocated to the counties and that the Respondent/Applicant was the body mandated to ensure the rational application of public funds on wages. She argued that the grading of the county clerk from E1 to E3 is an arguable ground for appeal.

4. The motion seeks grant of stay. As stated by the learned Advocates before me, the factors to consider are well settled. A series of cases was cited on the said factors to consider. These are firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay. The Respondent/Applicant asserts that they have met the threshold for grant of stay pending appeal.

5. There is a valid notice of appeal on record. It was filed on 14th June 2018 and lodged in the Court of Appeal on 18th June 2018. Under Order 42(6)(4), the Court of Appeal is seized of an appeal and there is no requirement under this rule for the actual memorandum of appeal to have been filed for this court to hold that there is an appeal. The Court of Appeal has dealt with what qualifies as an arguable appeal. It has held time without number that the applicant need not show that such an appeal is likely to succeed. It is simply enough to show that there is at least one issue upon which the Court of Appeal should pronounce its verdict. Put another way, it need not be that there is an overwhelming chance of success in the intended appeal for this court to find that there is an arguable appeal. In this case, the Respondent/Applicant argues that the banding of the county clerks in the new band as held by this court is an arguable point for the appellate court. In the circumstances, the intended appeal may be rendered nugatory should the appeal succeed and the order and decree of this court has been executed. The nugatory aspect of the matter commends itself for me to make an order granting stay pending the hearing and determination of the intended appeal. The costs of this motion will abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 28th day of November 2018

Nzioki wa Makau

JUDGE