

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram; Mwilu (DCJ & VP), Wanjala & Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. E026 OF 2021

BETWEEN

THE PARLIAMENTARY SERVICE COMMISSION1ST APPLICANT
THE CLERK OF THE SENATE.....2ND APPLICANT
THE CLERK OF THE NATIONAL ASSEMBLY.....3RD APPLICANT
PARLIAMENT OF KENYA.....4TH APPLICANT
MEMBERS OF PARLIAMENT.....5TH APPLICANT

AND

THE SALARIES AND REMUNERATION
COMMISSION.....1ST RESPONDENT
OKIYA OMTATAH OKOITI.....2ND RESPONDENT
CONTROLLER BUDGET.....3RD RESPONDENT
CABINET SECRETARY, NATIONAL TREASURY.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT
TRANSPARENCY INTERNATIONAL.....6TH RESPONDENT
KATIBA INSTITUTE.....7TH RESPONDENT
LAW SOCIETY OF KENYA.....8TH RESPONDENT

(Being an application for stay of Execution/Conservatory orders pending Appeal from Ruling and Order of the Court of Appeal delivered at Nairobi on 3rd December 2021 in Civil Application No. E 409 of 2020)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion Application by the Applicants dated 21st December 2021 and filed on 26th January 2022 and the Supporting Affidavit sworn by Jeremiah Nyegenye, the Clerk of the Senate of the Republic Kenya and Secretary to the Parliamentary Service Commission; and

[2] UPON considering the Applicant's Notice of Motion Application together with its written submissions dated 28th February 2022 in response to the 1st and 7th respondents' preliminary objections, wherein the applicants contended that this Court has jurisdiction to consider the application and the petition of appeal as the Court has previously held that it has limited jurisdiction in so far as considering appeals arising from Rule 5(2) (b) of the Court of Appeal Rules.

[3] FURTHER, noting the applicants' submission, where the applicants argued that their right to a fair hearing as provided for under Articles 48 and 50 of the Constitution was violated by the Court of Appeal in failing to grant stay to protect the substratum of the appeal before it. Furthermore, that in declining to grant the stay application and giving the applicants only 7 days to recover Kshs. 1.2 Billion which monies had been paid out to the MPs as accommodation facilitative allowance rendered the appeal nugatory.

[5] NOTING that the 1st respondent's notice of preliminary objection dated on 16th February 2022 and submissions dated on 22nd February 2022 and the 7th respondent's notice of preliminary objection filed online on 18th February 2022 together with submissions filed online on 2nd March 2022 where they oppose the applicant's application for stay of execution pending appeal, on *inter alia* that the Court lacks jurisdiction because an appeal against the Court of Appeal's dismissal

of a matter under Rule 5(2) (b) is not a matter falling under the Court's jurisdiction under Article 163(4) (a) of the Constitution on the basis that the substantive appeal challenging similar issues as those raised in the instant application are still pending before the Court of Appeal in **Nairobi Civil Appeal No. E017 of 2021: Parliamentary Service Commission & 4 Others vs. Salaries and Remuneration Commission & 7th others.**

[6] **NOTING** that the Court of Appeal declined to grant conservatory orders for the reasons that some of the important issues raised in the application call for determination by the court, for instance, the issue of overlap of the role of the Parliamentary Service Commission vis a vis the role of the Salaries and Remuneration Commission and that the applications failed to demonstrate the nugatory aspect of the appeal.

[7] **AND** bearing in mind that on 9th February 2022 a single Judge on behalf of the Court declined to certify this application as urgent on *inter alia* that **Civil Appeal No. No. E017 of 2021: Parliamentary Service Commission & 4 Others vs. Salaries and Remuneration Commission & 7th others** is still pending hearing and determination before the Court of Appeal and that the applicants' right to a fair hearing under Article 50 of the Constitution was not a substantive issue for determination either by the High Court or the Court of Appeal.

[8] **AWARE** that parties had been invited to appear before the Deputy Registrar of the Court on 14th February 2022 for mention to confirm compliance.

[9] **WE NOW DETERMINE** as follows:

- i. That the substantive appeal is still pending before the Court of Appeal for hearing and determination; there is no determination of any constitutional

question by the Court of Appeal so far; and recalling that this appeal emanates from an interlocutory Ruling and having considered the application, preliminary objections and submissions;

- ii. This Court settled with finality the question of its jurisdiction to hear and entertain appeals arising from interlocutory orders of the Court of Appeal made pursuant to Rule 5(2) (b) in the case of **Teachers Service Commission v Kenya National Union of Teachers & 3 others** SC Application No. 16 of 2015 [2015] eKLR where it stated:

“The application before us contests the exercise of discretion by the Appellate Court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of Article 163 (4) (a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date of 22nd September, 2015 has already been assigned. Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court’s Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court”

[10] Applying the above, we find that the Notice of Motion dated 21st December 2021 challenging the exercise of discretion by the Court of Appeal under Rule 5(2)

(b) of the Court of Appeal Rules, in the absence of a substantive judgment of the Court of Appeal, this application is premature and does not meet the threshold under Article 163 (4) (a) of the Constitution.

[11] HAVING carefully considered the Application, responses and submissions by the respective parties herein, we find no merit in the Application, and we accordingly dismiss it.

[12] There shall be no order as to costs.

[13] It is so ordered.

DATED and DELIVERED AT NAIROBI this 19th Day of May, 2022.



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P.M MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

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S.C WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W.OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA