

THE REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO.18 (E025) OF 2021

–BETWEEN–

THE JUDICIAL SERVICE COMMISSION.....APPLICANT

–AND–

MICHAEL KIZITO ODUOR.....1ST RESPONDENT

WILSON KABERIA NKUNJA.....2ND RESPONDENT

OKELLO TIMOTHY ODIWUOR.....3RD RESPONDENT

BERNARD JAMES NDEDA.....4TH RESPONDENT

THE JUDGES AND MAGISTRATES

VETTING BOARD.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

(Being an application for stay of the Judgment and Orders of the Court of Appeal in consolidated Civil Appeal Nos. 457, 458, 466 and 475 of 2018 (Okwengu, Kiage & Kantai, JJA) delivered on 22nd October, 2021)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 28th January, 2022 and filed on 21st February, 2022 for stay of execution against the Judgment and Orders of the Court of Appeal of 22nd October, 2021 in consolidated Civil Appeals No. 457, 458,

466 and 475 of 2018 and that the Court be pleased to extend time within which the applicant can file the sealed Order arising from the Court of Appeal Judgment, which application is predicated on the provisions of Articles 1, 2, 159, 163,258 and 259 of the Constitution and Rules 3, 15 and 32 of the Supreme Court Rules, 2020; and

[2] UPON reading the applicant's supporting affidavit sworn by Anne Amadi on 31st January, 2022; and

[3] UPON considering the written submissions by the applicant dated 11th February, 2022 and filed on 21st February, 2022 wherein it is urged that the applicant has met the threshold for the grant of stay of execution by presenting an arguable appeal with high chances of success; that the intended appeal is not frivolous as it raises issues for determination; that the appeal will be rendered nugatory should stay not be granted and that it is in public interest that the stay orders be granted relying in the findings by this Court in *Mary Wambui Munene v. Peter Gichuki Kingara & 2 others*, SC Application No. 12 of 2014; [2014] eKLR and *Lemanken Aramat v. Harun Meitamei Lempanka & 2 others*, SC Civil Application No. 8 of 2014; [2014] eKLR; and

[4] UPON reading the 1st, 2nd and 3rd respondent's replying affidavit sworn by the 3rd respondent on behalf of the respondents dated 15th March, 2022 and written submissions of even date wherein it is contended that the application fails to meet the threshold for grant of stay of execution; and

[5] FURTHER NOTING the written submissions by the 4th respondent dated 17th March, 2022 and filed on 7th April, 2022 opposing the application and submitting that the intended appeal is not arguable, that the appeal will not be rendered nugatory, that there is no likelihood of a constitutional crisis should stay not be granted and that the applicants stands to suffer no damage, prejudice, irreparable loss or suffering if stay is not granted.

[6] WE NOW opine as follows:

- i. The principles for grant of orders for stay were enunciated in ***Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell***, Sup. Ct. Civil Applications Nos.12 and 13 of 2012; [2013] eKLR, the principle objective being to preserve the subject matter of an appeal. The principles were also well established by this Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others***, Sup. Ct. Application No.5 of 2014; [2014] eKLR, (**Gatirau Munya Case**). Those principles require that an applicant must satisfy the Court that the intended appeal is arguable and not frivolous and that unless the stay order sought is granted, the appeal or intended appeal would be rendered nugatory.
- ii. Applying this to the facts, there is no doubt that the applicant's intended appeal is arguable as the applicant seeks to challenge the manner in which the majority in the Court of Appeal arrived at its decision that Section 23(2) of the Sixth Schedule to the Constitution does not oust the jurisdiction of the High Court to review the decisions of the Judges and Magistrates Vetting Board. The issues raised therefore touch on the jurisdiction of the High Court to determine the respondents' petitions. We find this issue to be pertinent and properly before this Court for determination. As for the consideration on whether the appeal will be rendered nugatory, the applicant is apprehensive that there is a high likelihood that the 1st, 2nd, 3rd and 4th respondents may enforce the Court of Appeal order by re-engaging the Judiciary and seek to draw all previous benefits. In our view, such apprehension is valid and we are of the opinion that the appeal will be rendered nugatory if stay is not granted.
- iii. Turning to the prayer for extension of time, it is trite that this Court has jurisdiction to extend time, which exercise of such jurisdiction being an issue of judicial discretion. Rule 15(2) of the Supreme Court Rules, 2020 is

instructive on this. It is our finding that the request for extension of time is merited and warrants exercise of our judicial discretion as the applicant has satisfied the principles set out in ***Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others***, SC Application No.16 of 2014; [2014] eKLR on extension of time by this Court.

[7] **HAVING** therefore considered the application, we make the following Orders:

(i)The execution of the decision of the Court of Appeal (Okwengu, Kiage & Kantai, JJ. A) in consolidated Civil Appeal Nos. 457, 458, 466 and 475 of 2018 delivered on 22nd October, 2021 be and is hereby stayed pending the hearing and determination of the appeal.

(ii)The applicant is granted time to file the sealed Order arising from the Court of Appeal Judgment which time is hereby enlarged for a further seven (7) days from the date of this Ruling.

(iii)The Application dated 28th January, 2022 is hereby allowed in the above terms.

(iv)Each party shall bear its costs of the Application.

[8] It is so ordered.

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

