



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E030 OF 2025

— BETWEEN —

MOI TEACHING AND REFERRAL HOSPITAL.....1ST APPLICANT

DR. PHILIP KITANUI KIRWA.....2ND APPLICANT

-AND-

DR. MAGARE GIKENYI B & 76 OTHERS.....RESPONDENTS

(Being an application for stay of proceedings in the Nakuru High Court Petition No. E011 of 2024 pending the hearing and final determination of this application and the appeal herein.)

Representation:

Katwa and Kemboi for the Applicants

1st to 7th Respondents in person

Odera Obar & Co. Advocates for the 11th and 12th Respondents

Nyameta, Mogaka Magiya & Company Advocates for the 27th Respondent

Munyao, Muthama & Kashindi Advocates for the 13th, 14th, 16th, 18th, 31st, 34th, 57th, 60th, 74th and 75th Respondents

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 11th June 2025 and filed on 23rd June 2025 pursuant to Section 23A of the Supreme Court Act and Rules 3, 31, and 32 of the Supreme Court Rules, 2020, seeking *inter alia*, an order staying all

further proceedings in Nakuru High Court Petition No. E011 of 2024 pending the hearing and determination of this application; and an order staying all further proceedings in Nakuru High Court Petition No. E011 of 2024 pending the hearing and final determination of the appeal herein; and

[2] UPON CONSIDERING the applicant's grounds on the face of the application and affidavit sworn by *Justus Otiso* on 11th June 2025, wherein it is contended that on 20th May 2024, the 1st to 7th respondents filed a constitutional petition in the High Court at Nakuru challenging the recruitment and appointment of four(4) Chief Executive Officers (CEO)/ Managing Directors (MD) of the 1st applicant as well as those of Athi Works Development Agency (26th respondent), Kenya Broadcasting Corporation (28th respondent) and Kenya National Shipping Line (30th respondent); that they also filed an application for conservatory orders suspending any documents or authority appointing the four in the capacities of Chief Executive Officers and Managing Directors; that the statutory instrument creating the four parastatals had lapsed; that on 21st May 2024, the High Court (*Muhochi, J*) issued *ex parte* conservatory orders suspending the issuance of any notice and any other document appointing any persons as CEO or MD of the four parastatals pending hearing and determination of the petition; that a preliminary objection was raised on the ground that the dispute was, in substance, an employment matter; that the High Court lacked jurisdiction to entertain the petition in terms of Articles 162 and 165 of the Constitution, as read together with Sections 5 and 12 of the Employment Act, as well as on account of the court's territorial jurisdiction; that by a ruling dated 20th June 2024, the preliminary objection was dismissed and the main petition set down, heard and judgment reserved for 19th November 2024; and

[3] FURTHER CONSIDERING that the applicants, aggrieved by the said ruling on jurisdiction lodged an appeal before the Court of Appeal and contemporaneously filed an application for stay of proceedings pending in the High Court; that by an order of the Court of Appeal of 25th October 2024, the said

application was allowed; that the appeal was heard and by a judgment dated 23rd May 2025, the Court of Appeal dismissed the appeal in its entirety and upheld the High Court's finding that the High Court had constitutional, statutory and geographical jurisdiction to hear and determine the matter. Being aggrieved by that determination, the applicants lodged this appeal and the instant application; and

[4] UPON CONSIDERING the applicants' submissions dated 11th June 2025 and filed on 23rd June 2025, restating the grounds set out above and in addition urging that the applicants have an arguable appeal in that the Court needs to determine whether it is the High Court or the ELRC that has jurisdiction over pre-employment processes while citing this Court in *Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3 (KLR); that there's an imminent risk that the High Court will issue a determination rendering the instant appeal nugatory, citing this Court in *Mbugua alias George Boniface Nyanja Vs Iqbal (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed)* [2021] KESC 41 (KLR); that the issues raised in the appeal are of substantial public interest, as was held in *Steyn Vs Ruscone* [2013] KESC 11 (KLR); and

[5] TAKING INTO ACCOUNT that the 11th and 12th respondents' replying affidavit sworn by *Sitoyo Lokopoiyot* on 4th July and filed on 11th July 2025, and their submissions dated and filed on even date, the 13th, 14th, 16th, 18th, 31st, 34th, 57th, 60th, 74th and 75th respondents' submissions dated 9th July 2025 and filed on 15th August 2025 and the 27th respondent's submissions dated 16th July 2025 all reiterate the arguments in support of the application; and

[6] HAVING CONSIDERED the 1st to 7th respondents' replying affidavit sworn by *Dr. Magare-Gikenyi B* on 4th July 2025 and filed on 21st July 2025, and submissions dated and filed on even date, to the effect that this Court lacks the

jurisdiction to stay proceedings pending before the High Court and, in any event, cannot purport to stay a negative order, namely, the dismissal issued by the Court of Appeal; that the issues raised by the applicants cannot be determined by stay proceedings but through a substantive appeal once a judgment has been delivered in the High Court; that no imminent prejudice would arise from the delivery of the judgment, as the applicants would, in any event, retain their right of appeal and the appeal will not be rendered nugatory; that the stay of proceedings will be against public interest as the Court stated in ***Munya Vs Kithinji & 2 others*** [2014] KESC 30 (KLR); that the application is an abuse of the court process intended to defeat the course of justice; and

[7] COGNISANT of this Court's inherent power under Section 21(2) and 23A of the Supreme Court Act as well as Rule 3(5) of the Supreme Court Rules 2020, granting this Court jurisdiction to issue any ancillary or interlocutory orders, such as stay of execution, injunction, stay of further proceedings or any other orders as may be necessary for the ends of justice or prevent abuse of the process of the Court as the court may deem fit; and

[8] BEARING IN MIND this Court's guiding principles for grant of stay of execution and conservatory orders in ***Munya (supra)***, and restated in ***Board of Governors, Moi High School, Kabarak & another Vs Bell & 2 others*** [2013] KESC 12 (KLR), to the effect that before this Court grants conservatory orders, an appellant, or intending appellant, must satisfy the court that;

- i. *the appeal or intended appeal is arguable and not frivolous;*
- ii. *unless the order of stay sought is granted, the appeal or intended appeal were it to eventually succeed, would be rendered nugatory; and,*
- iii. *that it is in the public interest that the order of stay be granted.*

[9] HAVING CONSIDERED the totality of the application and submissions put forth by the parties, **WE NOW OPINE** as follows:

- i. The Court of Appeal, in dismissing the appeal, held as follows;

“71. There is no doubt that the High Court had the requisite jurisdiction to issue the conservatory orders. It has not been demonstrated to our satisfaction how the learned judge improperly exercised his discretion or misdirected himself in law. We find that the appellants and the respondents in support of the appeals did not demonstrate how the learned judge in exercise of his discretion misapprehended the facts. The appellants failed to demonstrate that the learned judge took into account irrelevant matters or failed to take account of relevant considerations. Lastly, it was not demonstrated that the learned judge’s exercise of his discretion, is plainly wrong.”

- ii. By Article 163(4)(b) of the Constitution, only decisions of the Court of Appeal can be challenged before this Court, and by necessary and logical reasoning only proceedings and ancillary or interlocutory orders issued by the Court of Appeal can be stayed under Sections 21(2) and 23A of the Supreme Court Act as well as Rule 3(5) of the Supreme Court Rules 2020. This Court cannot leapfrog the Court of Appeal to stay proceedings before the High Court.
- iii. Seeing that the Court of Appeal did not make any positive order when it dismissed the appeal, the applicants ingeniously now invite us to ignore the decision of the Court of Appeal, upon which their appeal to this Court is premised, and to stop proceedings in a matter not before us. We decline the invitation. Even in respect of decisions of the Court of Appeal, we have repeatedly stated that we cannot entertain appeals from all decisions of the Court of Appeal. See the case of ***Njihia Vs Kimani & another*** [2015] KESC 19 (KLR), in a long line of others.
- iv. Based on our analysis above, we find that the motion lacks merit as it not only seeks to set aside a judgement of the Court of Appeal at the

interlocutory stage but also seeks to stay proceedings before the High Court contrary to the limited jurisdiction granted to this Court under Article 163(3)(b) and (4) of the Constitution.

[10] CONSEQUENTLY, and for reasons aforesaid, we make the following **ORDERS**:

a) The Notice of Motion dated 11th June 2025 and filed on 23rd June 2025 is hereby dismissed.

b) The applicants shall bear the costs of this application.

It is so Ordered.

DATED and DELIVERED at NAIROBI this 11th Day of December 2025.

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

.....
M.K. IBRAHIM
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